J-8-14

THE

REPORTS

OF

Sir Edward Coke, Kt.

LATE

Lord Chief Justice

OF

ENGLAND.

OF

Divers Resolutions and Judgments given upon solemn Arguments, and with great Deliberation, and Conference of the most Reverend Judges, and Sages of the LAW; of Cases in Law which never were Resolved or Adjudged before; And the Reasons and Causes of the said Resolutions and Judgments.

The Second Edition carefully Compared with the French, *and purged from former Errors.*

With a TABLE to the Whole.

LONDON,

Printed for *H. Twyford, T. Collins, T. Basset, J. Wright, S. Heyrick, T. Sawbridge, M. Pitt, C. Harper,* and *J. Place.* MDCLXXX.

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1444:10

TO THE READER.

SHould I take upon me to give my Lord *Coke* ſtrange and unheard-of Complements, or Commend the Original Work, I ſhould either Injure his Lordſhip, in doing too Little, or put an affront upon the World, to Suppoſe, they neither knew him nor his Work: All know, how Exact and Compleat the *French Copy* is, and I dare not ſay, It is refined by this Tranſlation, though now in its Own Country Dialect; You have only an Ancient body of Law in A New Dreſs: I'll aſſure you, you have all the Caſes, with their Arguments: for certainly, none would Aſſume that Impudence, (that took upon them ſuch a Work as this) to diminiſh the leaſt *Iota* from ſo great an Authority as the ſame hath meritoriouſly got in the World. The Reaſon you have it not in the ſame Letter as the *French* was, is, becauſe it would have obſtructed that Curteſie (intended by the *Stationers* to the World) as the Lowneſs of the price, and a more Commodious Volume; You will find, looking in the Margin of the *Engliſh*, an Exact Reference to the Original Page: And you may further take notice, That there is an Acurate Table unto this Tranſlation, never printed with it before.

THE

THE REPORTS OF Sir Edward Coke Kt. &c.

PART I.

Paſchæ 40 Eliz. *in the Chancery.*

The Lord *Buckhurſt's* Caſe.

IN the Chancery in the great Caſe betwixt the Lord *Buckhurſt* Plaintiff, and Juſtice *Fenner* and others the Executors of the Lady *Dacres* Defendants; it was reſolved by the two Chief Juſtices, *Popham* and *Anderſon*, and Juſtice *Gawdy*, whom the Lord Keeper called to him for his aſſiſtance, after many Arguments before them in the Court of Chancery, and upon Conſideration and Conference amongſt themſelves:

1. That if a man for him and his heirs do warrant lands unto another and his heirs, it is a general warranty, for as much as it is not reſtrained against any perſon certain.

2. If a man ſeiſed of lands in fee ſimple, and having divers Evidences and Charters, (ſome containing warranty and ſome not) do convey the land over unto another without any warranty upon which he may be vouched, the purchaſor ſhall have all the Charters and Evidences, as well thoſe which comprehend the warranty as the others, for in as much as the feoffor hath conveyed over all his eſtate in the land abſolutely, and is not bound to warrant the land, ſo as he cannot be vouched to warranty, and to render in value, but the feoffee is for to defend the land at his peril: For that cauſe it is reaſon that the feoffee for his better defence, ſhall have all the Charters and Evidences as incidents to the land, although they be not granted unto him by expreſs words, and that the feoffor ſhall not have them, becauſe he cannot reap any benefit by them; and by the not having of them, he cannot ſuffer any loſs.

3. If the feoffor in the Caſe before do make a feoffment over with warranty, ſo as he is tied to render in value, in that Caſe, (without expreſs grant) the feoffee ſhall not have any Charters which do comprehend warranty, upon which the feoffor may have his warranty paramount: Alſo the feoffor ſhall have ſuch Charters, or Evidences, which ſhall ſerve him for to dereign the warranty paramount. As if *A.* enfeoffe *B.* in fee with warranty to him, his heirs and aſſignees; and *B.* by deed enfeoffeth *C.* without warranty, who enfeoffeth *D.* with warranty, yet *C.* ſhall have the firſt and ſecond Charter. Alſo in the ſame Caſe, the feoffor ſhall have all Charters and Evidences which are material for the maintenance of the title of the land, and which are the chief ſtrength of the title of the land; for in ſo much as the feoffor is bounden to render in value, it ſtands with good reaſon, that he have all the Evidences which are material or requiſite to defend the title of the land; Otherwiſe if the feoffee ſhould have ſuch Evidences, the feoffor ſhould be tied to render in value, and yet he ſhould be diſarmed of the means to defend the title of the land. And on the other part, it is not reaſon that the feoffee ſhould have them, becauſe he hath truſted to his warranty, and by reaſon thereof he cannot have any loſs, but hath aſſured himſelf of recompence, and he hath not relied upon the title, nor hath taken upon him the defence of the title of the land, but he relieth upon his warranty by which he voucheth his feoffor, and the loſs falleth upon him if he cannot defend the title. But in the ſame caſe, the feoffee ſhall have ſuch Evi-

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dences which do concern the poſſeſſion, and not the title of the land, as Court Rolls, &c. as concomitants and incidents to the poſſeſſion.

4. If *A.* enfeoffe *B.* with warranty to him, his heirs, and aſſignes, and *B.* enfeoffeth *C.* with warranty, although *C.* may vouch *A.* as aſſignee, yet he ſhall not have the firſt deed; for *B.* hath made a warranty to him, and he may be vouched, and therefore he ſhall have the firſt deed to have his voucher over.

5. If *A.* be ſeiſed of a Seigniory, Rent, Advowſon, or other thing which lieth in grant, and granteth the ſame over to *B.* with warranty, and *B.* grants the ſame to *C.* with warranty, in that Caſe *C.* ſhall have the firſt Deed, although *B.* be bound to warranty, for it is neceſſary to make his title by, and without it he cannot make defence againſt *A.* or any claiming by him. And when *B.* grants the Rent, or Advowſon unto *C.* *C.* ought to have the effect of his grant, and *B.* in derogation of his grant cannot detain any thing which is of neceſſity, and of the eſſence of his grant.

6. If a man make a feoffement with warranty, and dieth, the heir of the feoffor ſhall have all Charters which the feoffor himſelf might detain, although the heir have nothing by deſcent, for the poſſibi-
[2] lity of deſcent after: And upon theſe diverſites all the Books (as *Popham* Chief Juſtice ſaid) which ſeem to be *pro & contra*, are reconciled: And the reaſon of the ſaid Books prove the ſaid diverſities; and therefore it appeareth by 44 E. 3. 11. *b.* 19 H. 6. 65. *b.* 39 E. 3. 17. *a.* and 18 E. 4. 14 & 15. and 10 E. 4. 9. *b.* that the feoffor ſhall have the Deeds to have the benefit of the warranty paramount; by which it is proved, that if the feoffor be not bound to warranty, he ſhall not have the Deeds, for he ſhall have them to the purpoſe to have the vouchee paramount: And 7 E. 4. 26. *a.* accorded by *Moile*, where alſo it is agreed that the feoffee ſhall recover the Deeds againſt a ſtranger. And note well 10 E. 4. 14. *b.* by *Moile*, the Lord by Eſcheat ſhall have all the Charters which do concern the ſame land, and the reaſon thereof is, (as *Popham* Chief Juſtice ſaid) becauſe that the Lord by Eſcheat is in the *Poſt*, and cannot vouch, and therefore the feoffor ſhall not detain the Evidences, for he cannot be at any prejudice. And therefore he ſaith, If *A.* enfeoffeth *B.* with warranty, *B.* ſhall not have the Deeds which do contain warranty, or which make, or perfect his title, as is aforeſaid; but if *B.* dieth without heir, then the warranty made to *B.* is loſt, and *A.* cannot be vouched. And therefore the Lord by Eſcheat ſhall have the Charters. And ſee 10 E. 4. 9. *b.* if I be enfeoffed to me and my heirs, and I enfeoffe another and his heirs with warranty, my heir ſhall have Detinue for the Deed by which I am enfeoffed, and ſhall make a ſpecial Count, *viz.* upon the ſpecial matter, in reſpect of the ſpecial loſs and prejudice that he may have: *Ergo*, without ſpecial prejudice, that is to ſay, if his Anceſtor were not bound to warranty, the heir of the feoffor ſhall not have the Charters: And it is there ſaid in the principal Caſe that the heir ſhall not have the Charters *ratione terræ*; which ſee *Brook Charters* 58. ſo as there appeareth in ſome Caſe a man ſhall have Charters *ratione terræ*, and that is when the feoffor is not bound to warranty. And ſee 34 H. 6. 1. *a.* a notable Caſe; For there it is agreed, if a man enfeoffe two, and to the heirs of one of them by Deed, and the Deed, and the other Evidences concerning the ſame lands are delivered by the feoffor to him who hath the fee, and afterwards he who hath the fee dieth, he who ſurviveth ſhall have the Deed by which he was infeoffed, becauſe it maketh his eſtate, but the ancient Charters he ſhall not have, for they were delivered unto the other Joyntenant for the ſafeguard of his inheritance. And if two Joyntenants be enfeoffed to one in fee, and to the other for life, afterwards the feoffor doth releaſe to them, and delivereth the Deed to him who hath the fee, the other ſhall not have the ſame, for his eſtate was perfect before without that Deed: But by the Reporter, if one releaſe unto two, who have a joynt eſtate by defeaſable
[b] title, and delivereth the Deed to one, there the other who ſurviveth ſhall have the ſame, becauſe it perfecteth his eſtate. See 6 H. 7. 3. *b.* & 21 H. 7. 33. *a.* agreeth to the reaſon of that Caſe.

And it was ſaid, if a man enfeoffeth two to them and their heirs, and giveth the ancient Charters to one of them, and he dieth, the ſurvivor ſhall have all the Charters, and not his heir to whom the gift was, for he cannot ſuſtain loſs if he have them not, nor have any benefit by them if he have them; but contrary it is of the ſurvivor, and he ſhall have them as things which go with the land. And Sir *Thomas Egerton* Lord Keeper of the great Seal of *England*, upon conſideration of the ſaid points, did agree in opinion with the ſaid Juſtices; and he ſaid, that that ancient Queſtion, which as he ſaid was (*vexata Quæſtio*) in our Books, was now well explained, and all the Books upon good and pregnant reaſon reconciled. Note, this Reſolution was by four of the moſt grave, and learned in the Law. Note hereby, If a man doth enfeoffe *B.* with warranty, and *B.* enfeoffeth *C.* by *Dedi*, that *B.* during his life ſhall have the Charters which comprehend warranty, and which ſerve for the neceſſary defence of the title, but his heir ſhall not have them, but the feoffee, for the cauſe aforeſaid.

Yelverton *the Queens Serjeant, Attorney General, and others of the Councel with the Lord* Buckhurſt: *And* Fleming *Solicitor General,* Francis Moore *and others, were of Councel with the Defendants.*

Hill. Term 32 Eliz. *betwixt* Page *and* Griffyn.

Sir *William Pelham's Caſe.*

IN this Term a Writ of Error was depending in the Exchequer Chamber, betwixt *Edward Griffyn* Plaintiff, and *Henry Page* Defendant, upon a Judgment given in the Exchequer, and the effect of the Caſe was ſuch. *Henry Page* before, *viz. Hill.* 30 *Eliz.* brought an *Ejectione firmæ* in the Exchequer againſt

againſt *Edward Griffyn*, and declared of a Leaſe made by *Thomas Bowes* Maſter of Art, 10 *Januarii*, 29 *Eliz.* to the ſaid *Page*, of a Capital meſuage in *Lombard-ſtreet*, in the Pariſh of S. *Mary Wolnoth*, &c. in *London*, called the ſign of the *White-Lion* for ſix years, and that the ſaid *Griffyn* did eject him; and upon Not-guilty pleaded, the Jurors in *London* by *Niſi Prius* gave a ſpecial Verdict to this effect: They find that Sir *Martin Bowes* Knight, was ſeiſed of the ſaid Houſe in fee, and had iſſue one *Thomas Bowes*, and that the ſaid *Thomas* had iſſue *Martin Bowes*, and the ſaid *Thomas Bowes* Maſter of Art now leſſor, and one *George Bowes*; and that the ſaid Sir *Martin* 29 *Julii*, 8 *Eliz.* by his Will in writing, did deviſe unto the ſaid *Thomas Bowes* his ſon, the ſaid Houſe for his life, without impeachment of waſte, the remainder unto the ſaid *Martin* his ſon, and to the heirs males of his body begotten, the remainder to the ſaid *Thom. Bowes* Maſter of Art in tail, the remainder to the ſaid *George Bowes* in tail, the remainder unto the ſaid *Thomas* ſon of Sir *Martin* in tail, with divers remainders over: and afterwards, *anno* 8 *Eliz.* the ſaid Sir *Martin* died, after whoſe deceaſe, the ſaid *Thomas* his ſon entred, and was ſeiſed of the ſaid Houſe for life, with the remainders over as aforeſaid, and after 19 *December*, *anno* 14 *Eliz.* the ſaid *Thomas*, ſon of *Martyn*, by deed indented and enrolled in the Chancery, according to the Statute, did bargain and ſell the ſaid Houſe unto Sir *William Pelham* and his heirs, who ſuffered a common Recovery, in which *Thomas*, ſon of Sir *Martin*, who was Tenant for life, was vouched, and that was before the Statute of 14 *Eliz. c.* 8. and execution was ſued upon the ſame Recovery; and if that common Recovery ſhould bar the remainder, or the entry of him in the remainder in tail, was the Queſtion. And in the Exchequer before the firſt Judgment was given, the Counſel of the Defendant did argue, that Judgment might be given againſt the Plaintiff in the *Ejectione firmæ* for two cauſes; firſt, becauſe the remainder of *Thomas Bowes* the Leſſor was barred by that Recovery, for that Recovery was out of the Statute of 32 *H.* 8. *cap.* 31. becauſe that in that Caſe, although that Sir *William Pelham* was but a particular Tenant, yet he in that Recovery doth not vouch the common vouchee, but he voucheth him who was Tenant for life, and ſo he is particular Tenant in Law, but not in deed. And therefore it is agreed in 19 *E.* 3. *tit. Age. pl.* 2. *in Fitzherbert*, if the vouchee who is Tenant in Law, vouch the heir of the Husband in a *Cui in vita*, the *parol* ſhall demur by the Statute of *Weſt.* 2. *cap.* 40. for although that the words of the Statute are general, yet they are intended when the Tenant in *fait* voucheth the heir of the Husband, and not when the Tenant in Law voucheth the heir of the Husband. And 16 *H.* 7. 5. *a.* Tenant by receit ſhall vouch out of the degrees in a Writ of Entry in the *Per*, for he is but a Tenant in Law, and not a Tenant in *fait*. And it ſeemeth upon the letter of the Act of 32 *H.* 8. that this Caſe is not within the Statute, for in the body of the Act it is ſaid, All ſuch recoveries, &c. againſt ſuch particular Tenants of Lands, &c. whereof the ſame particular Tenant is, or ſhall be ſeiſed, as Tenant by the Curteſie, &c. or otherwiſe for life, ſhall be void, &c. againſt ſuch perſons to whom the reverſion or remainder ſhall then appertain, &c. And becauſe the vouchee in our Caſe was not ſeiſed for life, but came in as vouchee, for that cauſe he was out of the letter of that Statute: And that that Act ſhall not be taken by Equity, it was holden as Serjeant *Bendloes* Reports, *Trin.* 5 *Eliz.* That if Tenant for life, the remainder to his eldeſt ſon in fee be diſſeiſed by Covin, and after the diſſeiſor is impleaded in a Writ of Entre in the *Poſt*, and voucheth the Tenant for life, who voucheth over the common vouchee, that that was out of the Statute of 32 *H.* 8. becauſe that the Tenant for life came in as vouchee, and the *Præcipe* was not brought againſt him: And the ſon being an infant was not remedied by the Statute of 32 *H.* 8. And he reports alſo that it was ſo holden in the Caſe of one *Lee* for lands in the County of *Cornwal*, *anno* 15 *Eliz.* by the Juſtices of the Common Pleas: And the Court ſaid that thoſe Caſes were not to be compared to the Caſe at the Bar, for there, by the diſſeiſin, all the remainders were deveſted, ſo as they had but a right, and then that perhaps might be out of the Statute of 32 *H.* 8. by reaſon the words of the Act are (to whom the Reverſion or remainder ſhall then appertain.) The ſecond point was, that the Recovery being executed, did take away the Entry of him in the Remainder, and put him to a Writ of Entry *in conſimili caſu*; and to that purpoſe the Caſes in 15 *E.* 3. *tit. Age* 95. 41 *E.* 3. 18. *b.* by *Finchden*, 22 *E.* 3. 2. *b.* and the preamble of the Statute of 32 *H.* 8. *cap.* 31. was cited. But the Court did reſolve for the Plaintiff, becauſe they conceived, that that Recovery was a forfeiture of the eſtate of Sir *William Pelham*, for in as much as a common Recovery by aſſent, was at that day by common uſage, in manner as a common aſſurance and conveyance, upon which an uſe may be limited and added, as well as upon a fine or feoffment; for that cauſe Sir *Roger Manwood*, Baron *Clark*, and all other the Barons of the Exchequer upon great deliberation did reſolve, That the ſaid Recovery was a forfeiture, and done to the diſ-inheritance of him in the remainder in tail, and was as much in Law, as if the ſaid Sir *William Pelham* had levied a fine, or made a feoffment. And diverſity was taken between a Recovery by aſſent, which is in the nature of a common conveyance, and a Recovery without aſſent of the parties, although it be without title. And it was alſo adjudged by the whole Court, that the entry of him in the remainder in tail was congeable as well after the Execution, as after the Judgment; for the ſame being a forfeiture for the cauſe aforeſaid, the ſuing of the Execution ſhall not take away the entry of him in the remainder. And the Court ſaid, it ſhall be miſcheivous if before the Statute of 14 *Eliz. cap.* 8. it ſhould be in the power of Tenant for life, by ſuffering of a common Recovery, to take away the entry of him in the reverſion, or remainder, and to put them to their real Actions, and ſo in danger to be diſinherited or delayed. And to prove the ſame to be a forfeiture, the Book is adjudged in 5 *Aſſ. p.* 3. & *Paſch.* 5. *E.* 3. *tit. Entre congeable* 42. That where the Plaintiff had demiſed the land to one *A.* for term of his life, which *A.* procured his ſon to bring a Writ of Entry upon the Statute of *Glouceſter*, ſuppoſing that he held of his demiſe for term of his life by colluſion, to ouſt the Plaintiff of his Reverſion; to which Writ *A.* appeared, and could not deny the Action, for which the ſon had Judgment, and before execution, the Plaintiff entred upon *A.* and the ſon ſued execution, upon which the Plaintiff brought an Aſſiſe, and had Judgment to recover. And it is to be noted, that the Entry of the Plaintiff before execution, was no cauſe of the Judgment, for there *Chauntrel* with the aſſent of

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Herle, declares the reaſon of the Judgment; that is to ſay, Becauſe it is found, that the Writ was brought by colluſion, and that the recovery was by confeſſion, which thing we hold but an alienation in Law to the diſ-inheritance of him who is Plaintiff; for which cauſe the Court did adjudge that he
[16] ſhould recover his ſeiſin. By which Judgment it appeareth, that the ſuing of Execution was not material, for as much as the Recovery it ſelf was adjudged a forfeiture. So if in a Writ of Right brought againſt Tenant for life, he joyn the miſe upon the meer right, it is a forfeiture as it is holden in 9 *H.* 5. 14. *a.* & 22 *aſſ. pl.* 31. So 14 *E.* 3. *tit. Receit* 135. That in a *Præcipe* the Tenant (being Tenant for life) plead to iſſue the firſt day, without taking delay by aſſent betwixt the Tenant and the Demandant, the Demandant did recover, and there holden, the entry of him in the remainder was lawful. See 18 E. 3. 28. *b.* And in 25 *E.* 3. 48. *a.* it is holden, that a Recovery by aſſent without title ſhall not deveſt a reverſion or remainder out of the King, becauſe the ſame being ſuffered by aſſent of the parties without title, is but a conveyance. And 33 *E.* 3. *Avowry* 255. by *Seton*, recovery without title doth countervail a demiſe. And the Plaintiff in the Writ of Error in the Exchequer Chamber, perceiving the opinion of the Court to encline againſt him, did releaſe his Writ of Error.

Mich. 34 & 35 Eliz. *between the Queen and* Porter.

Porter's Caſe.

[*b*] IN an Information of intruſion in the Exchequer againſt *John Porter* and others, for intruding in a Wharf, and a Houſe called the *Woll-key* in *London*; and upon iſſue joyned upon *Non intruſit*, the Jurors gave a ſpecial Verdict to this effect: *Nicholas Gibſon* was ſeiſed of the Wharf and Houſe aforeſaid, and held them in free Burgage. And 24 *Sept.* 32 *H.* 8. by his laſt Will in writing, deviſed the Wharf and Houſe aforeſaid to *Avice* his Wife and her heirs, upon the Condition following, *viz.* Upon Condition, that where it hath pleaſed God to put me the ſaid *Nicholas Gibſon* in mind to build divers Houſes convenient for a Free-ſchool, the Maſter of the ſame, certain Beadmen and Beadwomen: And that the ſame cannot be eſtabliſhed to continue without great charges to be employed and beſtowed upon the ſame; and alſo Lands and Tenements, or other Hereditaments to be aſſured for the continuance of the ſame. I will and declare by this my laſt Will and Teſtament, that the ſaid gift of my Lands and Tenements ſhall enure, and take effect to my ſaid Wife upon condition following; That is to ſay, that my ſaid Wife upon advice of learned Counſel, in all convenient ſpeed after my deceaſe, ſhall aſſure, give, and grant, all my ſaid Lands and Tenements for the maintenance and continuance of the ſaid Free-School, Almſmen, and Almſwomen for ever, as it ſhall pleaſe God. And that my ſaid Wife *Avice Gibſon* ſhall have all the iſſues and profits yearly comming of the premiſes during her life, bearing the charges of the ſaid School, &c. as the ſame is now kept and maintained. And made the ſaid *Avice* his Wife his Executrix, and died 6 *October* 32. *Hen.* 8. after whoſe death *Avice* entred into the Wharf
[23] and Houſe, and was thereof ſeiſed accordingly. And afterwards 13 *Aprilis anno* 3 E. 6. the ſaid *Avice* did demiſe the ſaid Wharf and Houſe to one *Bartholomew Gibbes* from the feaſt of *Chriſtmas*, which ſhould be in the year 1566. for forty years; which term was by divers mean conveyances conveyed to the ſaid *John Porter*; and afterwards *John Gibſon* couſin and heir unto the ſaid *Nicholas Gibſon* 24 *Januarii anno* 34 *Eliz.* entred into the ſaid Wharf and Houſe aforeſaid, *prætextu foriſfact', & conditionis in dicto teſtamento ſpecificat' per præd' Avice in vita ſua foriſfact' & fract'*, and after 25 *Januarii* in the 34 year of *Elizabeth* by deed indented and enrolled in the Chancery did bargain, grant, and ſell the ſaid Wharf and Houſe to our Soveraign Lady the Queen her heirs and Succeſſors: By force whereof the Queen was thereof ſeiſed in fee, and ſo ſeiſed, the ſaid *John Porter* did enter upon her claiming his term aforeſaid. And if the entry of the ſaid *John Porter* were lawful or not was the doubt; which was referred to the conſideration of the Court. And *Mich.* 34 & 35 *Eliz.* at *Hertford* this Caſe was argued by *Egerton* then Attorney General, and *Coke* Solicitor for the Queen, and by *Atkinſon* and others for the Defendant. And on the Defendants part it was ſaid, Firſt, that the ſaid Condition mentioned in the ſaid Will was againſt the Law, and ſo the eſtate of *Avice* abſolute. Secondly, that if her eſtate were Conditional, yet it doth not appear by any thing found by the Verdict that the Condition was broken. And as to the firſt, *viz.* That the Condition was againſt Law, it was ſaid by the Defendants Counſel, that that point reſts only upon the conſtruction of the Statute of 23 *H.* 8. *cap.* 10. the letter of which Act, as to this purpoſe, is as followeth: That by reaſon of feoffments, &c. made of truſt, of Mannors, &c. to the uſe of Pariſh-Churches, Chappels, Churchwardens, Guilds, Fraternities, Comminalties, Companies, or Brotherhoods erected and made, of devotion, or by common aſſent of the people without any Corporation, &c. And to the uſes and intents to have Obits perpetual, or any continual ſervice of a Prieſt for ever, &c. or to any other like uſes, or intents, there groweth and iſſueth to the King our Soveraign Lord, and to other Lords and Subjects of the Realm, the ſame like loſſes and inconveniences, and is as much prejudicial to them, as doth and is in caſe when Lands be aliened in Mortmain. Be it therefore enacted, That all and every ſuch uſes, intents, and purpoſes, of what name, nature, or quality the ſame ſhall be called, &c. ſhall be utterly void; and if any perſon in defraud of this Statute do bind, &c. That then every ſuch pain, penalty, craft, colour, and every other thing and things, &c. ſhall be utterly void. And that this Statute ſhall be always interpreted, &c. moſt
[*b*] beneficially to the deſtruction of ſuch uſes, &c. and of all other like uſes and intents. Provided that this Act, &c. ſhall not extend to hinder the uſes as ſhall be declared in writing by the Executors of

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Robert Jammes, and *John Terrey* late Aldermen of *Norwich*, &c. to be imployed for the diſcharge of Tolls and Cuſtoms within the ſaid City, at the gates of the ſame, for the diſcharge of Tolls and Cuſtoms within the ſaid City, at the gates of the ſame, for the diſcharge of poor people within the ſame City of taxes and tallages, &c. or for the cleanſing of the ſtreets, &c. or for any of the ſaid good purpoſes, ſo that the ſame Odinance, &c. be had, &c. within two years next enſuing. And it was objected, That the miſchief before the making of this Statute was, that when feoffements were made upon truſt and confidence, that certain companies erected by aſſent, without any Corporation, ſhall take the profits, &c. the ſame was as prejudicial to Lords, as alienations in Mortmain. For the Statute of 15 *R.* 2. *c.* 5. hath provided for feoffments made unto the uſe of any Body incorporate, as well Spiritual as Temporal; That ſuch feoffments ſhall be as purchaſes made by themſelves. But as appeareth by the preamble of the ſaid Statute of 23 *H.* 8. feoffments made unto the uſe of Companies not incorporate, were as prejudicial to Lords as alienations in Mortmain. And for that cauſe the ſaid Act of 23 *H.* 8. made proviſion againſt them. And although that the erection of a Grammar School to inſtruct youth, as well in good learning as in good manners, was a work of charity, and good in it ſelf; and ſo to maintain and relieve poor men and women; yet when feoffments were made to a great number of perſons unto ſuch good uſes, the ſame was as prejudicial to Lords for their Wards, Reliefs, Eſcheats, &c. as if the feoffment had been made to the uſe of a Body corporate, Spiritual or Temporal, for any good intent or purpoſe. And becauſe the benefit of Lords was reſpected by the Statute, and it is for his benefit to take away all ſuch uſes, for that cauſe, it was ſaid that the ſaid uſes and intents mentioned in the ſaid Will were void by the ſaid Act of 23 *H.* 8. 2. This Statute ſaith, ſuch uſes, and all other like uſes, intents, &c. 3. The intent of that Act was to include good uſes, for at the time of the making of the ſaid Act, the finding of an Obit, and the ſervice of a Prieſt, &c. mentioned in the ſaid Act were accounted good uſes. 4. It is provided, That the ſaid Act ſhall be conſtrued as beneficial as may be, for the deſtroying of the ſaid uſes, and all the like uſes. 5. The ſaid laſt Proviſo containing an Exception of certain good uſes, as to diſcharge poor Citizens of *Norwich* of Tolls, Cuſtoms, Taxes and Tallages out of the ſaid Act, but not ſimply and abſolutely to except them, but to except them *ſub modo*; that is to ſay, If the ſaid Ordinance be made within two years following, or otherwiſe to leave the ſaid good uſes to be within the general purview of the ſaid Act, ſtrongly prove (as it was urged) that ſuch good uſes were included within the ſaid Act; and by conſequence the ſaid Condition being a penalty added by the Teſtator for the maintenance of the ſaid uſes, was void by the expreſs words of the Statute; and then the entry of the heir of the Teſtator not lawful. Unto which it was anſwered by the Queens Counſel, That our Caſe was out of the intent and meaning of the ſaid Act of 23 *H.* 8. for two cauſes: Firſt, becauſe it was not the intention of the ſaid Act to extend to ſuch good and charitable uſes, as the uſes in our caſe are. For *diſtinguenda ſunt tempora*, and the time of the making of this Act is to be conſidered. And as to that, firſt, it is to know, that before that time all the Clergy of *England* had acknowledged King *Henry* the eighth, to be ſupreme Head of the Church of *England*; and before that time, divers ſuperſtitions and and errors in Chriſtian Religion, which had a pretence and ſemblance of charity and devotion, were diſcovered by the ſight of Gods word. For that cauſe, to take away ſuch ſuperſtitious uſes, as to pray for ſouls ſuppoſed to be in Purgatory, and the like, that Statute was made, and not to take away the erecting of Grammar Schools, and relief for poor men. For no time was ſo barbarous to take away learning, and knowledge, nor no time ſo uncharitable to take away maintenance for the poor. Beſides, it is to be noted, That that Statute doth not make the feoffment or other conveyance void, nor giveth any title to the Lord to enter for Mortmain (as the Statute of 15 *R.* 2. *cap.* 5. doth) but only maketh the uſe void; ſo as the feoffees ſhall be, notwithſtanding the declaration of ſuch uſes, ſeiſed unto the uſe of the feoffor and his heirs; and then it cannot be intended, that the intent of the makers of the ſaid Act, was to make good and charitable uſes and intents void: And the rather, becauſe if the feoffor had reſerved but a penny rent, or had taken a penny in conſideration of the feoffment, then although the Statute make the uſe expreſſed void, yet the feoffees ſhall be ſeiſed to their own uſe, and not unto the uſe of the feoffor; in which caſe alſo as great loſs ſhall be unto Lords of their Wards, Reliefs, Eſcheats, &c. as if the good uſes had continued: And notwithſtanding the ſaid Act, the feoffees in ſuch Caſe might have maintained the good uſes without any penalty or danger; and therefore it ſeemed to them that the ſaid Act of 23 *H.* 8. in making the uſe only void, was of little or no effect. Moreover he ſaid, That the ſaid Act of 23 *H.* 8. was the firſt Act that was made againſt ſuperſtitious uſes; and then were the Acts of 25, 26 & 28 *H.* 8. made for the aboliſhing of the uſurped authority of the Pope; and then the Acts of 27 *H.* 8. & 31 *H.* 8. were made for the ſuppreſſion of Abbies, Priories, Nunneries, &c. And afterwards the Statutes of 37 *H.* 8. & 1 *E.* 6. for Chauntries, Colleges, &c. Obits and all ſuch ſuperſtitious uſes were made, but by none of theſe Acts, good and charitable uſes (as the uſes in our Caſes) are taken away, aboliſhed or made void, but rather by the Act of 1 *E.* 6. they are intended to be maintained, as appeareth by the preamble thereof, *viz.* For the education of youth in virtue and piety at Grammar Schools, for the augmentation of the Univerſities, and the better proviſion of the poor and needy, which by the ſaid Act of 1 *E.* 6. are called good and godly uſes; and therefore it ſhall not be intended that ſuch good and godly uſes were made void by the Statute of 23 *H.* 8. And as to the ſaid Proviſo for excepting of certain good uſes out of the Statute of 23 *H.* 8. the ſame was rather to ſatisfie ſome Burgeſſes of the Parliament, who were ignorant in the Laws, then for any neceſſity. As in the Statute of 5 *E.* 6. *cap.* 16. the body of the Act extends only to Offices concerning the adminiſtration of Juſtice, or the Kings Revenue, as Receiver, Controller, Treaſurer, Aulneger, Auditor, and Surveyor, and yet the Keeper of a Park is excepted out of the ſame, more for the ſatisfaction of ſome ignorant Burgeſſes, then for any neceſſity. And ſo he concluded, that good and charitable uſes (not ſavouring of any ſuperſtition) as to find Grammar Schools, to relieve poor men, or any ſuch good uſe, is not void by the ſaid Act of 23 *H.* 8. but only

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ſuperſtitious uſes, and ſo hath the Statute in common opinion been always taken. For almoſt all Lords appertaining to Towns or Boroughs not incorporate, for the defraying of the Tax of the Towns, or the repairing of High-ways, or for reparations of the Church, or the maintenance of the poor of the Pariſh, or the bearing of other charges of the Pariſh, are conveyed to divers Inhabitants of the Pariſh and their heirs, upon truſt and confidence to imploy the profits to ſuch good uſes, and no ſuch uſes (although they are common almoſt in every Town) ever made void by the Statute of 23 *H.* 8. And it ſhall be a diſhonourable thing to the Law of the land, to make ſuch good uſes void, and to reſtrain men to give their lands to ſuch good uſes. And a Caſe reported by *Bendlowes* Serjeant at Law was cited, by which it appeareth, that it was holden in the Common Pleas in 5 & 6 *E.* 6. That a feoffment unto the uſe of poor people was not within the ſaid Act of 23 *H.* 8. The ſecond reaſon that the Queens Counſel gave, was, admitting that good and charitable uſes were void by the ſaid Act of 23 *H.* 8. yet as our Caſe is, the Condition is not void. For he hath deviſed, that his Wife ſhall have the Lands and
[25] Tenements upon condition that ſhe by the advice of learned Counſel in convenient time after his death, ſhall aſſure all his Lands and Tenements for the maintenance and continuance of the ſaid Free School, and Almſmen and Almſwomen for ever; ſo that although the ſaid uſes were prohibited by the ſaid Act, yet the Teſtator hath deviſed, that Counſel learned ſhall deviſe how the ſaid Lands and Tenements ſhall be aſſured for the maintenance and continuance, &c. and that may be deviſed lawfully, *viz.* Firſt to make a Corporation of them by the Kings Letters Patents, and afterwards, by Licence to aſſure the Lands and Tenements to them. So if a man deviſe that his Executors ſhall aſſure by the advice of learned Counſel his Lands to any Corporation Spiritual or Temporal; the ſame is not againſt any Act of Parliament, becauſe it may be lawfully done by Licence, &c. And ſo without queſtion was the intent of the Teſtator, for he would have the Land aſſured for the maintenance and continuance of the Free School and poor for ever, which cannot be done without incorporation and Licence as is aforeſaid; For which cauſe, as this Caſe is, this Condition is not againſt Law, but in as much as it might be lawfully deviſed and done (although that the uſe had been prohibited, as in truth it was not) the Wife was bound to perform the ſame: which was agreed *per Curiam.* Thirdly, admitting the uſe were prohibited by the ſaid Act, and that the reference to Counſel learned would not exempt the ſame out of the Act, yet it ſeemeth the Statutes of 32 & 34 *H.* 8. of Wills, have taken away the force of the ſaid Act of 23 *H.* 8. for the words of the Statutes of 32 & 34 *H.* 8. are, That all and every perſon having a ſole eſtate in fee-ſimple of any Mannors, &c. ſhall have full and free liberty, power, and authority, to give, diſpoſe, will, or deviſe to any perſon or perſons (except bodies Politick and Corporate, by his laſt Will and Teſtament in writing, or otherwiſe by any other acts lawfully executed in his life time, all his Mannors, &c. at his own free will and pleaſure, any Law, Statute, Cuſtome, or other thing heretofore had, made, or uſed to the contrary notwithſtanding.) So for as much as bodies Politick and Corporate are only excepted; and the rather, becauſe it is ſaid in the end of the clauſe (any Law, Statute, &c. to the contrary notwithſtanding.) And there is not any Statute which hath any colour to reſtrain conveyances or deviſes to theſe good uſes, but the Statute of 23 *H.* 8. and therefore that Statute is taken away by the ſaid Acts of 32 & 34 *H.* 8. And theſe Acts of 32 *H.* 8. & 34 *H.* 8.
[*b*] as to that purpoſe will have a fair and favourable conſtruction for maintenance of Learning, and good and charitable uſes. And upon the ſame reaſon it was agreed in *Mich.* 8. & 9 *Eliz.* reported by the Lord *Dyer*, *fol.* 255. *b.* That the Statute of 1 & 2 *Phil.* & *Mar.* ſhall be favourably expounded. For where a deviſe was made to the Maſter, Fellows, and Scholars of *Trinity* Colledge in *Cambridge* for finding of certain Grammar Scholars, and poor Scholars, &c. that deviſe was held good by the equity of the ſaid Act, for it was out of the letter thereof, and that for maintenance of learning, and good and charitable uſes. But the ſaid Acts of 32 & 34 *H.* 8. have ſufficient words to take away the ſaid Act of 23 *H.* 8. (as to the preſervation of good uſes) & *leges poſteriores priores contrarias abrogant*; but as to that the Barons did not deliver their opinions, becauſe they reſolved upon the two firſt points. And to that which was ſaid, That the Condition, if it was good, is not found to be broken, it was ſaid by the Queens Counſel, that it was clearly broken by matter apparent in the Verdict: for when the Wife had the eſtate upon condition, that ſhe by the advice of Counſel learned, in all convenient time ſhall aſſure, &c. and the Jury find that ſhe continued ſeiſin until 3 of *E.* 6. and then made the Leaſe for 40 years, as above: here appeareth a double breach of the Condition: 1. That ſhe hath not made the aſſurance within convenient time, for in effect, the Jury have found that ſhe hath not made it within 8 years. 2. By the making of the Leaſe ſhe hath diſabled her ſelf to perform the Condition, as *Littleton* 83. If feoffee upon Condition take a Wife, or charge the Lands, or bind her ſelf in a Statute Merchant or Staple, theſe are breaches of the Condition, and 44 *E.* 3. 9. *b.* & 26 *E.* 3. 73. accordingly *a fortiori* in this Caſe, the Wife by making of the ſaid Leaſe hath broken the Condition, and the heir of the Teſtator hath lawful cauſe to enter therefore. And afterwards in that term upon a motion made, the Barons ſaid that they were reſolved, firſt, That the Statute of 23 *H.* 8. did not extend to take away the good and charitable uſes in the Caſe at the Bar: and ſecondly, That the Condition for the cauſes aforeſaid was broken; and thereupon they commanded the laſt *Munday* of the Term, that Judgment ſhould be entred for the Queen. And the ſame day Judgment was given in the Kings Bench in the like Caſe upon the ſaid Statute of 23 *H.* 8. So the Law in this Caſe was reſolved by Sir *Roger Manwood* and all the Barons of the Exchequer, and by Sir *John Popham* and all the Juſtices of the Kings Bench, betwixt *John Gibbons* Plaintiff, and *Thomas Maltywade* and *John Marſton* Defendants in an *Ejectione firmæ* of Lands in *E.* in the County of *Suffolk*, and Judgment there given accordingly.

[26] *Note Reader*, Any man at this day, may give Lands, Tenements, or Hereditaments to any perſon or perſons and their heirs, for the finding of a Preacher, maintenance of a School, relief and comfort of maimed

maimed Souldiers, ſuſtenance of poor people, reparation of Churches, High-ways, Bridges, Cawſies, diſcharging of poor inhabitants of Towns of common charges; for making of a ſtock for poor labourers in Husbandry, and poor Apprentices; and for the marriage of poor Virgins, or for any other charitable uſes. And it is good policy upon every ſuch feoffment or eſtate to reſerve a ſmall Rent to the feoffor and his heirs, or to expreſs ſome ſuch conſideration of ſome ſmall ſum for the cauſe before rehearced.

Trinity Term 42 Eliz. *between the Queen and* Richard Buſhop.

The Caſe of *Alton Woods.*

IN an Information of Entruſion, which began *Trinit.* 37 *Eliz. Rot.* 199. in the Exchequer againſt *Richard Buſhop* for entruſion in a Wood called *Alton Woods*, in *Alton* alias *Alvington* and *Rock* in the County of *Worceſter*, &c. The Defendant pleaded, that before the entruſion, one *Anne* Counteſs of *Warwick*, who was the Wife of *Richard* Earl of *Warwick*, was ſeiſed of the Mannor of *Abbotesley*, alias *Abberley*, in the County aforeſaid; whereof the ſaid Wood was parcel in her demeſne as of fee, and ſo ſeiſed *quindena Hillarii anno* 3 *H.* 7. did levy a fine of the ſaid Mannor whereof, &c. unto King *Henry* the ſeventh, to have and to hold to him and to the heirs males of his body, ſaving the reverſion unto the ſaid Counteſs and her heirs; and afterwards the ſaid Counteſs died ſeiſed of the ſaid reverſion in fee, after whoſe death the ſame deſcended unto *Edward* Earl of *Warwick* her couſin and heir, that is to ſay, ſon and heir of *Iſabel*, daughter and heir of the ſaid Counteſs; and afterwards, by Act of Parliament 25 *Januarii anno* 19 *H.* 7. the ſaid *Edward* Earl of *Warwick* was attainted of Treaſon; and further it was enacted by the ſame Act, that he ſhall forfeit to the ſaid King and his heirs, all his Lands, Tenements and Hereditaments, which he had the ſecond day of *Auguſt*, *anno* 14 *H.* 7. *Quarum quidem convictionis & attincturæ prætextu, prædict' nuper Rex H.* 7. *fuit ſeiſitus de reverſione Manerii prædict', unde &c. ut de feodo & jure, in jure Coronæ ſuæ Angliæ, & ſic inde ſeiſitus exiſtens, ac de manerio prædicto cum pertinentiis, ſic ut præfertur ſeiſit' exiſten', idem nuper Rex apud Weſtmonaſter' in comitatu Mid. obiit de Manerio prædict' cum pertinentiis, unde &c. ac de reverſione prædict' in forma præd' ſeiſitus, poſt cujus mortem:* The Mannor and Reverſion did deſcend unto *Hen.* 8. by force whereof he was of [41] the ſaid Mannor and Reverſion ſeiſed, &c. and ſo being thereof ſeiſed, it was found before the Eſcheator, *virtute officii*, 5 *Julii*, *anno* 23 *H.* 8. That the ſaid Counteſs of *Warwick* did levy the ſaid fine, and that ſhe died ſeiſed of the aforeſaid Reverſion; and that the ſame deſcended to the ſaid *Edward* Earl of *Warwick*; and that he being of the ſaid Reverſion ſeiſed, the ſaid Earl was by the ſaid Act in 19 *H.* 7. attainted of high Treaſon; and by the ſame Act it was ordained that he ſhould forfeit, *ut ſupra:* by force of which King *Hen.* 7. was ſeiſed of the Reverſion in fee; and that the ſaid eſtate tail, and the Reverſion alſo after the death of *Hen.* 7. deſcended to *Hen.* 8. by force of which King *Hen.* 8. was ſeiſed, *viz.* of the Mannor in tail, and of the Reverſion in fee, *prout per Inquiſitionem præd' in Cur. Cancellar. dominæ Reginæ apud Weſtm. præd' debito modo retornat', & ibidem de recordo remanen', plenius apparet.* And King *H.* 8. ſo ſeiſed, that is to ſay, of an eſtate tail in poſſeſſion, and of the Reverſion in fee by his Letters Patents bearing date 3 *Nov. anno* 33 *H.* 8. *recitan' quod cum idem Henricus* 8. 20 *die Octobris, anno regni ſui decimo nono per literas ſuas Patentes dediſſet, & conceſſiſſet Waltero Walſhe uni Gromett' privatæ Cameræ ſuæ, manerium ſuum de Grafton Fleuord in comitatu Wigorniæ, habendum ſibi pro termino vitæ ſuæ. Cumque etiam prædictus Henricus octavus ſexto die Decembris, anno regni ſui viceſimo primo, per alias ſuas literas Patentes dediſſet, & conceſſiſſet præfato Waltero Walſhe, & cuidam Elizabethæ adtunc uxori ejus, manerium de Charleton, in com' Somerſet. Habendum & tenendum manerium illud eiſdem Waltero, & Elizabethæ pro termino vitæ eorundem Walteri & Elizabethæ, & alterius eorum diutius vivent', prædictus nuper Rex Henricus octavus adtunc in conſideratione veri, & laudabilis ſervicii, eidem domino Regi, per præfatum Walterum Walſhe adtunc impenſ. & adtunc impoſterum impendend'. Ac pro eo quod idem Walterus prædictas literas Patentes de manerio de Grafton Fleuord, ac quod iidem Walterus & Elizabetha, prædictas alias literas Patentes eis de prædicto manerio de Charleton in forma prædicta confectas, dicto nuper Regi Henrico octavo reſtituiſſent cancelland', ad intentionem quod idem nuper Rex prædictum manerium de Grafton Fleuord, necnon prædictum manerium de Abbotteſley, per alias literas Patentes ejuſdem nuper Regis, eiſdem Waltero & Elizebathæ concedere dignaretur, quæ quidem ſeparales priores literæ Patentes, in Cur' Cancellar' prædict', ad eandem intentionem* [b] *tempore confectionis prædictarum literarum patentium hic in Cur' prolat', reſtitut', & cancellat' fuerunt, de gratia ipſius Regis ſpeciali ac ex certa ſcientia, & mero motu ſuis, per eaſdem literas Patentes hic in Curia prolat' dedit, & conceſſit eiſdem Waltero Walſhe, & Elizabethæ uxori ejus, prædict' maneria de Grafton Fleuord, & Abbotteſley. Habend' & tenend' prædicta maneria cum pertinentiis prædicto Waltero Walſhe, & Elizabethæ uxori ejus, & hæredibus maſculis de corpore ipſius Walteri procreat'.* And avers that he was one of the Grooms of the Privy Chamber to King *Hen.* 8. and that he hath done ſervice, &c. And avers alſo, that he had ſurrendred the ſaid letters Patents of *Grafton Fleuorde*, and that he and his Wife had ſurrendred the ſaid letters Patents of *Charleton*, and that afterwards *Elizabeth* died, and that the ſaid *Walter* ſurvived. And afterwards it was enacted and ordained by Parliament holden 8 *Junii*, *anno* 28 *H.* 8. reciting by the ſaid Act, that where the ſaid Counteſs of *Warwick* by the ſaid fine, *anno* 3 *H.* 7. had given and granted the ſaid Mannor of *Abbotesley* with the appurtenances (*inter alia*) to have to the ſaid *Hen.* 7. and to the

the heirs males of his body; and reciting the diſcent of the Reverſion of the ſaid Mannor from the ſaid Counteſs unto the ſaid *Edward* Earl, and his Attainder of high Treaſon, by which the Reverſion in fee of the ſaid Mannor (*inter alia*) eſcheated unto the ſaid King *Hen.* 7. and came to his hands, and reciting the diſcent from King *Hen.* 7. to King *Hen.* 8. by force of which King *Hen.* 8. was thereof ſeiſed. Et *quia prædict'* maneria & cætera præmiſſa fuerunt magni valoris & habuerunt multa, magna, & ampla libertates, præheminenc', commoditates, & delectamenta, ad eadem ſpectant'. Ideo tunc, & ibidem inactitatum fuit, authoritate ejuſdem Parliamenti, quod prædict' nuper Rex Henricus octavus hæredes & ſucceſſores ſui, extunc impoſterum haberent, tenerent & gauderent omnia & ſingula prædicta maneria, &c. ac quod eadem maneria, &c. adjudicarentur authoritate ejuſdem Parliamenti, in prædict' nuper Rege Henrico octavo hæredibus & ſucceſſoribus ſuis in feodo ſimplici imperpetuum, ſine prædict', ſeu aliquibus aliis rebus, ante tunc habitis, factis, uſitatis, ſeu allocatis, in contrarium non obſtantibus: ſalvis ſemper omnibus & ſingulis perſonæ, & perſonis, corporibus politicis, & corporatis, hæredibus, & ſucceſſoribus ſuis, aliis quam prædictæ nuper Comitiſſæ Warwick, & hæredibus ſuis, & hæredibus Richardi nuper Comitis Warwick, patris prædictæ nuper Comitiſſæ, omnibus talibus juribus, titulis, &c. in talibus modo, & forma, prout prædictus actus nunquam habitus ſeu
[42] editus fuiſſet. By force of which King *Henry* 8. was ſeiſed of the Reverſion of the ſaid Mannor in fee ſimple, and conveyed the eſtate unto *William Walſhe*, and the Reverſion unto the Queen that now is: And that the ſaid *William Walſhe* by his Deed indented enrolled in the Chancery, &c. bearing date the third day of *July anno* 30 *Reginæ Elizabethæ*, did bargain and ſell unto the Earl of *Leiceſter* and his heirs, the ſaid Wood, which after his deceaſe deſcended to *Ambroſe* Earl of *Warwick* his brother and heir, who conveyed the ſame unto *Anne* now Counteſs of *Warwick* and her heirs, and died: And *Buſhop* the Defendant did juſtifie as ſervant to the ſaid now Counteſs, and by her commandment, &c. upon which Plea *Coke* the Queens Attorney did demur in Law. And this Caſe was argued at the Bar by the Attorney General, and *Fleming* Solicitor General for the Queen; and by Serjeant *Heron* and *Thomas Stephens* for the Defendant And afterwards was argued by the Barons, *viz. Periam* chief Baron, *Clark* and *Ewens*; and *Clark* argued for the Queen, but *Periam* and *Ewens* contrary, and Judgment was given againſt the Queen: And thereupon the Attorney General did cauſe a Writ of Error to be brought for the Queen; and becauſe the Caſe was notable, he argued in the Exchequer Chamber upon the Writ of Error. I have omitted all the Arguments before the Judgment given in the Exchequer, and the rather becauſe I did not hear the whole Arguments of Baron *Clark* and Baron *Ewens*. And four Exceptions were taken by the Attorney General unto the pleading.

Firſt, the pleading that King *Henry* the ſeventh was ſeiſed in fee of the Reverſion by the ſaid Act of Attainder, by which it is enacted, that the ſaid Earl of *Warwick* ſhall forfeit all his lands, &c. and that King *Henry* the ſeventh died ſeiſed of the ſaid Reverſion; and that that did deſcend to King *Henry* the eighth is repugnant and inſufficient; for in as much as it doth not appear when *Edward* Earl of *Warwick*, who was attainted, died, it is clear that until his death or Office found nothing veſted in King *Henry* the ſeventh. And this point hath oftentimes been reſolved and adjudged, 27 *H.* 8. *tit. Office. Br.* 17. *Sayes Caſe*, 15 *Eliz. Dyer* 325. *Nichols Caſe*, *Plowdens Comm.* 483. *b.* & 486. *a.* And the Statute of 26 *H.* 8. *cap.* 13. by which lands in tail are forfeit. And 33 *H.* 8. *cap.* 20. by which land forfeit for Treaſon is by the ſaid Act veſted in the King without Office, prove that this word (ſhall forfeit) veſt nothing in the King until Office, or death, at the Common Law, and all was affirmed *per Curiam*: But it ſeemed to them that the pleading notwithſtanding that was ſufficient in ſubſtance, for King *Henry* the ſeventh did not make the grant to *Walſhe*, for then the Exception had been material. But after Office found King *Henry* the eighth granted unto *Walſhe*; and therefore the ſeiſin alledged in
[b] King *Henry* the ſeventh, and the deſcent to King *Henry* the eighth was but a trifle, and not material.

The ſecond Exception was unto the Return of the ſaid Office found 23 *H.* 8. becauſe it was found *virtute officii* before the Eſcheator, which ought to be returned in the Exchequer, and not in the Chancery; bnt Offices found *virtute officii* before the Eſcheator ought to be returned into the Chancery; for Offices found *virtute brevis* returnable in the Chancery ought to be returned into the Exchequer, to which Court he is properly attendant, and ſo is the Book in 4 *E.* 4. 24. *a. Stanford prærog. fol.* 70. *b.* But the Exception was diſallowed by the Court upon the view of infinite preſidents of offices found before the Eſcheator *virtute officii*, and returned into the Chancery. And it was holden by the two chief Juſtices *Popham* and *Anderſon*, and *Gawdy* Juſtice (whom the Lord Keeper of the great Seal, and the Lord Treaſurer called unto them according to the Statute) that the Office was ſufficient for to entitle the King, although it were never returned; for it appeareth in the Book of Aſſiſes, that upon examination of the Eſcheator, if it appeareth that he hath ſeiſed the land into the King's hands, it is ſufficient. See 30 *Aſſ. pl.* 5. *&c.*

The third Exception was, that the Office doth entitle King *Henry* the ſeventh after his death, and found ſeiſin in *Henry* the ſeventh, and deſcent to King *Henry* the eighth, ſo that the Office which was found 23 *H.* 8. doth not entitle King *Henry* the eighth by force of the Office, and attainder, but entitleth King *Henry* the ſeventh, and King *Henry* the eighth as heir to him, and that is the title which the Office found for King *Henry* the eighth, and therefore the Office is not ſufficient; but the Exception was not allowed: For in as much as it was found by Office that the ſaid Earl of *Warwick* was ſeiſed of the ſaid Reverſion at the time of his attainder, it was ſufficient for to entitle King *Henry* the eighth, without finding the reſidue of the matter, which was but ſurpluſage, and more then needed.

The fourth Exception was, That the pleading of the grant made unto *Walter Walſhe* by King *Henry* the eighth, as to the Conſideration, was inſufficient, and that for two cauſes: 1. Becauſe it was not added, that the King had demiſed the Mannors of *Grafton Fleuord* and *Charleton* as he had recited; for if in *rei veritate* there were not ſuch Leaſes, then the King was deceived; and the King was induced to grant the Mannor of *Grafton Fleuord* in tail the rather, becauſe that he thought that he had granted the ſame (as he recites) unto *Walſhe* for term of his life, and was induced to grant the Mannor of *Abbotteſley*

bottesley in tail the rather because that the Mannor of *Charleton* which (as he recites) he had granted unto [43]
Walshe and his wife for term of their lives shall be surrendred; but if in *rei veritate*, there were not any such Leases for life, then the King was deceived in the consideration which was of Record, and valuable; and if the Defendant had pleaded, that the King had made such Leases, the same had been issuable and traversable, and in proof thereof the Cases in 21 E.4.48. & 49. and Sir *Thomas Wrothes* Case, *Plowdens Commentaries* 455. aforecited. But the Exception was not allowed, for the Consideration was, that *Walter Walshe* shall surrender the Letters Patents of the Mannor of *Grafton*, and that he and his Wife surrender the Lettes Patents of the Mannor of *Charleton*, and all that he hath added, that is to say, the surrender of the Letters Patents, and that is the Consideration, and not the surrender of the estate demised: And it was agreed, that it needeth not to aver more then is contained within the Consideration it self: and although that the King doth recite the demises, yet that is not the Consideration of the new grant; and false recital in that case of a thing which was not parcel of the Consideration, made not the grant void. And it was said by some, that the recital shall conclude the King according to the opinion in 9 *H.* 7.2. But the two Chief Justices did deny that, for the King shall not be concluded to shew, or to say the truth, but the Law shall adjudge him rather to be deceived. The other Objection against the Consideration was, that the King was deceived in the Law in this Case; for he intended to have his former demises of *Grafton Fleuord*, and of *Charleton* to be surrendred, and the surrender of them was the motive of the new grant; but here the King was deceived in that, for by the surrender of the Letters Patents, the estate demised was not surrendred, namely, of the Mannor of *Charleton*, in which the Wife of *Walshe* had a joynt estate with him: And it was said, that the King ought for to have the effect and full benefit of that which is intended to be done unto him, and not the shadow and outward shew thereof, which consists only in words, and not in effect: As in 18 *Eliz. Dier* 352. where a term in shew, and not in effect was surrendred, and in consideration thereof, another Lease made, the new Leases is holden to be void, and yet the grant was *ex certa scientia, & mere motu*, which Case in effect was, that one Abbot made a Lease for 60 years unto another Abbot, the Abbot who was Lessee with the assent of his Covent made a Lease for 80 years, the Reversion came unto the Queen, the first term of 60 years expired, the assignee of the term of 80 years doth surrender unto the Queen *ea intentione*, that the Queen would make a new Lease unto him for 20 years; the Queen reciting the demise for 80 years, and surrender in consideration thereof *ex certa scientia, & mero motu*, doth demise for 20 years, and it was [b]
holden that the demise was void, for the Queen was deceived, for in truth nothing was surrendred but only in shew and appearance. And the same Case proves directly, that the recital of a demise shall not conclude the King, but contrary if the same be false, it shall avoid his grant. So also was it adjudged in the Case of *Barwick* in an Information of Entrusion, *Trin.* 39 *Eliz.* where the Case in effect was, The Queen in *anno* 14 of her Reign, demised the Mannor of *Sutton* in *Galtres* in the County of *York* unto *Humphrey Barwick* for 21 years, who demised divers petit parcels thereof to others for years; and afterwards the Queen by her Letters Patents, *anno* 23 *Eliz.* reciting the said demise unto *Humphrey Barwick*, *pro & in consideratione sursum redditionis totius status, & termin' annorum, de, & in præmiss. per prædict' literas Patentes, eidem Humphrido concess.* doth demise and grant the said Mannor unto the said *Humphrey Barwick* for 21 years; and it was adjudged that this second Lease was void, for all the estate and term demised to the said *Humphrey Barwick* by the said Letters Patents in *anno* 14. (in respect of the said petty Leases) were not surrendred according to the effect of the Consideration. And in that Case the King was deceived in Law, in that he thought that the surrender of the Pattent was also a surrender of the Lease and estate demised; and when the King is deceived, or mistaketh the Law, the grant is void. As in 18 *H.* 8. *tit. Patents, Br.* 104. where the King gave lands unto the Lord *Lovel* to have and to hold to him and to his heirs males, and that was *ex certa scientia, & mero motu*, and yet adjudged void; for he cannot grant such estate of inheritance in fee-simple, to make the heirs males to be inheritable, and exclude the females, and because his intent did not agree with the Law, his grant was adjudged void. And 1 *Ma. Dier* 94. King *Edward* 3. did grant land to the Duke of *Cornwall, & hæredibus suis Regibus Angliæ*, and it was holden void for the cause aboveseid: But this Exception was not allowed, for it is not apparent that the King did intend to have more surrendred then the former Letters Patents only; and it doth not appear by any expres matter within the Letters Patents, that he did intend to have the former estates surrendred, and it shall be very perilous to make the Kings grants void upon inferences and arguments, without direct and expres matter contained in the Letters Patents, and the rather in this Case, because that the grant is *ex certa scientia, & mero motu*, in which Case other intent shall not be collected by construction then is expressed in the Patent; and all this was affirmed by the whole Court.

As to the matter in Law, two points were moved: One, that the Letters Patents were void, the other admitting that the Letters Patents at the first were good; yet all the estate which *Walshe* had, was given unto the King by the Act of 28 *H.* 8. As to the first, the Case is no other, but, The King being Tenant in tail of the Mannor of *Abbottesley*, to him and his heirs males of his body, by force of the said fine of 3 *H.* 7. with the Reversion to him, his heirs, and Successors, by force of the said Attainder [44]
and Office, gives by his Letters Patents the said Mannor unto *Walter Walshe*, and to the heirs males of his body; whether this gift be good or not, was the first Question: and to decide the same, first it is to be considered, if the grant shall be good if the King had been Tenant in tail only, without any Reversion in fee expectant to him. And in that Case the Kings Attorney said, that the grant was void, for the intent and purpose of the King which appeareth in his grant cannot take effect, for he did intend to grant an estate tail, and that he cannot, for he hath but an estate tail himself; and the largest estate that Tenant in tail may lawfully grant, is but for his own life, as *Littleton* saith; for he who hath land in tail to him and to the heirs of his body, hath such estate so appropriate and incorporate to him and to the heirs which shall issue out of his loins, that he cannot lawfully grant the same to a stranger, and

to the heirs males of his body, for that ſhould be againſt the form of the gift, and againſt the Statute, *De donis conditionalibus*. So if the King be Tenant for life, and the King grants the land to another and his heirs, the grant is void, for the King taketh upon him to grant a greater eſtate then he lawfully can grant. And becauſe that his grant cannot take effect according to his intent expreſſed in his grant, for that cauſe his grant is void, and ſhall not be conſtrued to paſs other eſtate then he intended to grant; as to paſs an eſtate for life, when the King intends and purpoſeth to grant an eſtate of Inheritance. And therefore the Book is in 7 *H.* 4. 42. & 21 *E.* 3. 47. the Earl of *Kents* Caſe. If the King hath the cuſtody of land, or a Leaſe of land for years, and by his Letters Patents granteth the land unto another and to his heirs, the grant is void and by conſtruction ſhall not amount unto a grant of his eſtate or intereſt; and ſo it is agreed in 21 *Aſſ.* 15. The King licenceth his Tenant to alien to two Chaplains and their heirs, and in truth as it appeareth by a fine in the Treaſury, he who aliened had but an eſtate in tail, the Reverſion unto the King: And it was adjudged, that the Licence was void, and ſhall not enure to a Licence to alien ſo much as he might lawfully alien, *ſcilicet*, to them and their heirs during his life, for longer he cannot alien, for as much as the Reverſion was in the King; But becauſe that the King was deceived, when he gave the Licence to alien, to them and their heirs, in as much as he was not conuſant of his eſtate, for that cauſe the Licence was utterly vóid, and the land ſeiſed in the Kings hand. So in the Caſe at the Bar, the King not knowing of his eſtate, granteth a greater eſtate then he may lawfully grant, and therefore his grant is void. And ſee 40 *Aſſ. pl.* 36. accordingly with 21 *Aſſ.* 15. in all, and no Caſe in the whole Law can be found, which impugneth this,
[b] that is to ſay, That the Kings grant ſhall be good when he taketh upon him to grant a larger eſtate then he lawfully may, but the contrary is proved by the Books aforeſaid. Moreover it was ſaid, that it was a ground in Law, that the Kings Patents cannot do wrong: And therefore it is agreed in 38 *H.* 8. *Br. Diſcontinuance* 35. between the King and *Anthony Lee* Knight, *& tit. Pat.* 101. *& tit. Taile* 39. That if the King be Tenant in tail, and grant the land by Patent for years, or for life and die, the Patent is void, for a grant without livery doth not make a Diſcontinuance, nor ſhall it bind but during the life of the Grantor; and the ſame Law of ſuch grant in fee, for a grant in fee doth not make a diſcontinuance without warranty, and if the Kings grant ſhould make a diſcontinuance, it ſhould do wrong, which the King by grant cannot do, but rather his grant ſhall be void. And that Book makes not againſt the Queen in the principal Caſe; for firſt it is to be noted, that no queſtion in theſe Caſes is made but after the death of the King who granteth, and then without queſtion the grant is void, ſo as it never came there in queſtion of what validity the grant of the King was in the life of the King. Secondly, in 38 *H.* 8. it was not reſolved, whether the King being Tenant in tail, were bound by the Statute of *Donis conditionalibus*: But afterwards *Trin.* 4. *Eliz.* it was adjudged in the Lord *Berklies* Caſe, that he was bound by the Statute. Thirdly, theſe words (grant without livery doth not make a diſcontinuance) is the general rule of Law in the Caſes of common perſons; and the ſame is proved by the words ſubſequent (a grant in fee without warranty doth not make a diſcontinuance) for without queſtion the ſame is intended in the Caſe of a common perſon, and not of the King, for his grant in fee with warranty is void, and doth not make a diſcontinuance. And it is ſaid in the Lord *Barklies* Caſe, *Pl. Com.* 246. *b.* that if the land had been given to the King, and to the heirs of his body, he before the Statute of *Weſtminſt.* 2. could not have aliened in fee before iſſue, for ſuch alienation by another ſhould be a wrong, ſo ſhall it be in the King, if it ſhall be adjudged an alienation in fee, and that it cannot be, for the King cannot do wrong, nor his prerogative would not be any warrant to him to do injury to another; and the eſtate which the King had, would not lawfully ſuffer ſuch alienation, for his eſtate was not large and full enough to make ſuch alienation, and his prerogative will not alter his eſtate, nor make it greater then the donor gave unto him; and a little after, *ſcil. fol.* 247. *a.* it is ſaid, That the alienation was to the diſenherizen of the iſſue, *ergo*, it was *tortious*, for to diſenherit one is not lawful, and if it were *contra voluntatem donatoris* it is ill done, for men ought to obſerve the intents of others in things which are
[45] lawful, and to break the ſame is ill, and theſe are the words of the ſaid book; *a fortiori* in our Caſe, the Kings grant being reſtrained by the Statute is void. If the King make a leaſe for years, or for life, and afterwards grants the land unto another in fee, or in tail, without reciting of the leaſe, the laſt grant is void; firſt, becauſe the King grants an eſtate in poſſeſſion, where he had but a reverſion, and ſo is deceived in his grant; and the ſubject had a means to come to the knowledge of the ſaid Leaſes, for every Patent ought to be enrolled in the Chancery, to which all Subjects may have acceſs, otherwiſe is it of leaſes not of Record, as it is agreed *tempore H.* 8. *& E.* 6. *Br. tit. Patents* 93. Secondly, in this Caſe it is not honourable for the King to grant the ſame poſſeſſion to one, which he or his progenitors have granted to another, for by the Civil Law, *Vendens eandem rem duobus falſarius eſt*; and in our Caſe *Walſhe* might well have knowledge of the Kings eſtate, for his eſtate tail was created by fine 3 *Hen.* 7. and his title to the Reverſion of the fee was by Attainder and Office, all of Record. If a man bargain, ſell, and grant by deed indented and enrolled lands unto a common perſon for life, the remainder to the King in fee, and afterwards the King makes a leaſe for life or years, &c. without reciting the particular eſtate, the leaſe is void, for the Subject is tied to take notice of this enrolment, as well as of the enrolment of Letters Patents, and the rather becauſe by the ſame deed enrolled, the Kings eſtate is created: Then couple the Reverſion in fee with the eſtate tail; and firſt if the grant in tail unto *Walſhe* be void, as unto the Kings eſtate tail, it cannot be a grant of the Reverſion after the Kings eſtate in tail is determined, for the ſame ſhould be againſt the Kings intent and purpoſe, which was to grant an eſtate tail in poſſeſſion; and *Walſhe* might by reaſonable means have notice of the Kings eſtate being upon Record as aforeſaid. And to that which was objected by Serjeant *Heron*, and *Thomas Stephens*, that it ſhall enure as it may lawfully enure, as in 21 *E.* 4. 44. & 2 *Ric.* 3. 4. where it is holden by *Starkie* and others, that if the Kings Patent may be taken good to two intents, then it ſhall be taken moſt beneficial for the King, but if it may be taken to one intent good, and to another intent void, then it ſhall

be

be taken to that intent which makes the grant good, and not to the intent that makes it void, and therefore there in the principal Caſe where the King grants unto the Abbot of *Waltham* to be diſcharged of the collection of Tenths granted *per Clerum Angliæ*, it ſhall be taken in the ſence that the grant may be good, *viz.* of Tenths granted by the Clergie ſeverally, for they never joyn in one Convocation, *quod Jenny, Choke, Fairefax, Brian, & Huſſie Juſtices conceſſerunt*; ſo in the Caſe at the Bar, it ſhall enure and ſhall be conſtrued in ſuch ſence that the grant may be good, and that is, that the grant ſhall be good unto *Walſhe* in poſſeſſion during the Kings life, and ſhall be a good grant of the Reverſion in tail; for that by means may the King lawfully grant, and therefore *ut res magis valeat quam pereat*, in ſuch ſence the grant ſhall be taken. For put the Caſe the King had rented his eſtate in tail, and his reverſion, and had granted the land unto *Walſhe* for the life of the King, and the reverſion to him, and the heirs males of his body, that without queſtion had been good. And it was ſaid, that the Caſe at the Bar is as ſtrong, for the grant is *ex certa ſcientia, ex gratia ſpeciali, & mero motu*, and therefore the King took conuſance and knowledge of his eſtate, for this cauſe his grant ſhall enure as it may lawfully enure; And many Caſes were cited by them, where the Kings grants *ex certa ſcientia, & mero motu*, ſhall be taken ſtrongly againſt the King, 1 *H.* 7. 13. *a.* The King pardons *B. omnia debita ex certa ſcientia, & mero motu*, all debts which he owed as Sheriff are pardoned, 37 *H.* 6. 21. *b.* A pardon *ex mero motu, &c.* ſhall be taken ſtrong againſt the King, in *Quatermains* Caſe, 41 *Aſſ.* 19. a Licence, *ex ſpeciali gratia*, to alien a houſe in Mortmain is good, although it were holden of the King, and many other Caſes were put upon this ground. And it was further ſaid, that the Kings grant *ex certa ſcientia, & mero motu*, ſhall be taken as ſtrong againſt the King, as if a common perſon had made the grant. And if in our Caſe a common perſon had made the grant in tail, without queſtion it had been good, and ſhall not be avoided by any, but only by the iſſue in tail, and after the eſtate tail determined, the reverſion in fee ſhall be bound therewith. Laſtly, it was ſaid, that no Caſe can be found in the Law, that the King ſhall be driven to recite his own eſtate, but the eſtate of others in ſome Caſes he ought for to recite, but no eſtate which is in himſelf. To which was anſwered, That in as much as the Kings grant cannot do wrong, or make a diſcontinuance, as hath been agreed; and that the King being Tenant in tail, he cannot lawfully grant a greater eſtate then for his own life, and that the King intended to grant, an intire eſtate tail in poſſeſſion; it ſhall be a hard and violent conſtruction to make this grant to enure by ſuch fractions of eſtates; *viz.* in poſſeſſion to *Walſhe* and his heirs males of his body for the life of the King, which in Law is but an eſtate *pur auter vie*, and to relinquiſh the reverſion of an eſtate tail in the King, and to grant his reverſion to *Walſhe* and the heirs males of his body, upon which the King ſhall have the reverſion in fee expectant, for that ſhould be againſt the Kings intent, for his intent was to grant an intire eſtate tail in poſſeſſiion, which is an eſtate of inheritance not ſubject to waſte, or forfeitures, and ſuch an eſtate whereof the King may have Wardſhip, and *primer ſeiſin* of the poſſeſſion: But if the grantee ſhall have but an eſtate for the life of the King in poſſeſſion, then that eſtate ſhall be ſubject to forfeiture, and waſte, and of that the King ſhould not have Wardſhip nor *primer ſeiſin*, ſo that when the King intends to grant an intire and undivided eſtate, the Patentee ſhall have two ſeveral divided eſtates, *ſcil.* an eſtate in poſſeſſion to him and his heirs males of his body during the Kings life, and the King ſhall have a reverſion of an eſtate tail, and upon that the Patentee ſhall have the eſtate to him and his heirs males of his body, which was never intended by the King. And ſuch general grant of the King ſhall not put the eſtate tail in abeyance; neither if the King being Tenant in tail grant *totum ſtatum ſuum*, the ſame ſhall not put the eſtate tail in abeyance, for the poſſeſſions of the King are ſo preſerved and protected by the Law, that they cannot be deveſted by diſſeiſin, abatement, &c. and that which the King cannot by Law transfer unto another, ſhall remain in himſelf; and in the ſame Caſe if the King grant *totum ſtatum ſuum*, the grant is void, for none can have the eſtate of the land in tail, and becauſe his grant cannot take effect according to his intent, the grant is void. 40 *Aſſ. p.* 28. one cannot plead *Que eſtate* of an eſtate in tail, becauſe that none can have his eſtate; and the Books in 5 *H.* 7. 39. *a.* 7 *E.* 6. *que eſtate Br.* 31. 14 *E.* 4. 16. 2 *H.* 4. 20. are to be agreed upon this difference, *ſcil.* If a common perſon being Tenant in tail grant *totum ſtatum ſuum*, it is good during his life, for his grant ſhall be taken ſtrong againſt him, and ſuch grantee may plead the ſame, and aver the life of Tenant in tail, but he cannot plead by a *Que eſtate*.

[*b*]

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As to the rule put by *Starkey*, That the Kings Patents ſhall be taken in ſuch ſence, and to ſuch intent, as that they ſhall be good; and as to the ground alſo, that the Kings Patent *ex certa ſcientia, & mero motu*, ſhall be taken as ſtrong againſt the King, as if a common perſon had made the grant, it was anſwered, That there is another ground in Law, that when the King is deceived in his grant, the grant is void; And that the Kings Letters Patents ſhall be conſtrued *ſecundum intentionem domini Regis, & non in deceptione domini Regis*, as *Brian* ſaith, 1 *H.* 7. 13. *a.* So the beſt expoſition is to make all theſe rules to agree together, and therefore both the ſaid rules put by the other party are true with this limitation, *viz.* if not that the King be deceived, ſo that his grant cannot take effect as he intended by his expreſs grant. And therefore in the Lord *Lovels* Caſe, *anno* 18 *H.* 8. *Br. Patents* 104. where the King *ex certa ſcientia, & mero motu*, grants land unto one and his heirs males, the grant was void, for he was deceived in his grant, in as much as his grant could not take effect according to his intent expreſſed in his Letters Patents. Alſo it was adjudged in the Exchequer, *anno* 29 *Eliz.* That where King *Henry* the ſeventh was ſeiſed of two Mannors, *viz.* of *Ryton* and *Condor* in the County of *Salop*, and granted *ex certa ſcientia & mero motu, totum illud manerium de Ryton & Condor, cum pertinentiis in Com' Salopiæ*; that the grant was void, for the King was deceived in his grant; and yet in both the ſaid Caſes, if a common perſon make ſuch grants, in the firſt Caſe the grantee ſhall have fee ſimple, and in the later Caſe he ſhall have both the Mannors.

[*b*]

And the like Caſe was reſolved in the Exchequer, *Trin.* 39 *Eliz.* That whereas the Queen was ſeiſed of the Mannors of *Milborne* and *Sapperton* in the County of *Lincoln*, and the Queen did grant *ex certa*

ſcientia & mero motu, totum illud manerium de Milborn cum Sapperton in Com' Lincoln'; that none of them did paſs. Another Caſe was adjudged in the Exchequer Chamber, *anno* 15 *Eliz.* King *E.* 6. by his Letters Patents *ex certa ſcientia & mero motu*, did grant unto *Crowch*, *omnes terras dominicales manerii de Wellowe*. And it was adjudged that the Cuſtomary lands holden by Copy parcel of the Mannor did not paſs, and yet they are in Law parcel of the demeſns of the Mannor, but the Kings grant notwithſtanding the ſaid words, *ex certa ſcientia & mero motu*, ſhall not be conſtrued to paſs any thing againſt the Kings intent and purpoſe expreſſed in his grant; and yet without doubt, in all thoſe Caſes, in a common perſons Caſe, they will paſs. And it is well ſaid in *Plowd. Com. fol.* 333. which is true, That when the Patent is, *ex gratia ſpeciali, certa ſcientia & mero motu*, that it ſhall be favourably taken for the Patentee; but that is as to the thing expreſſed in the Patent, which the words ſhew to be intended to paſs, but the ſame will not make another thing to paſs which is not expreſſed, nor ouſt that which the words of the Patent ſhew to be intended: And for that reaſon there in the principal Caſe, where Queen *Mary*, *de gratia ſua ſpeciali, & certa ſcientia & mero motu ſuis*, did grant to *Thomas* Earl of *Northumberland*, *ſolum & magnum vaſtum* called *Darwentfelles*, by that grant the Mine of gold within it did not paſs. And it is alſo there adjudged, That by the grant of all Mines in ſuch a ſoil, although the grant be *ex certa ſcientia & mero motu*, Mines royal of gold or ſilver ſhall not paſs, but the words (ſoil and mines) ſhall be taken in a common ſence, and to a common intent, but to have them paſs, it behoveth to have ſpecial words. So in the Caſe at the Bar, if the King had granted the land for his life, and after his deceaſe, without heir male of his body, had granted the Reverſion, it had been good, but in as much as he grants an eſtate tail in poſſeſſion, which cannot take effect according to his intent, and cannot paſs by ſuch fractions of eſtates, as before is ſaid, the grant unto *Walſhe* is void. But admitting that the grant were good, it ſeems the Act of 28 *H.* 8. hath given the ſame to the King again; and for that the point is no other. But *J. S.* is Tenant in fee ſimple of the Mannor of *Dale*, or Tenant in tail thereof, the Reverſion to the King, and afterwards this Mannor is by expreſs name given by Act of Parliament to the King, ſaving the right, by the intereſt, &c. of all perſon and perſons, &c. whether the
[47] eſtate of *J. S.* be ſaved or no; and it is conceived not, for the *ſavant* as to the owner of the land is repugnant, in as much as the Mannor is by expreſs name given to the King: For if the general ſaving ſhall extend to the owner of the land, then the Act ſhould be made in vain. And therefore, if it be recited by an Act of Parliament, That whereas *J. S.* is ſeiſed of certain lands in fee, the ſame lands by the ſame Act is given to the King in fee, ſaving the eſtates rights, &c. of all perſons, the eſtate of *J. S.* is not ſaved thereby, for that ſhall be repugnant, and ſhould make the expreſs gift void. And it appeareth in our Books, that a ſaving in an Act of Parliament which is repugnant to the body of the Act is void, as in *Plow. Com.* 563. *b.* where the ſuppoſed Attainder of the Duke of *Norfolk* was by Act of Parliament 1 *Marie*, declared to be void and null *ab initio*, ſaving the eſtates and Leaſes made by King *Edw.* 6. &c. that ſaving was void; for when the Attainder was declared to be void, the ſaid ſaving was againſt the body of the Act, and therefore void. So in the Caſe *M.* 6 & 7 *Eliz. Dier* 231. it is enacted by the Statute of 31 *H.* 8. *cap.* 13. that all Religious houſes and their poſſeſſions, then or after to be diſſolved, ſhall be unto the King in the ſame eſtate and condition as they were at the time of the making of the ſaid Act, ſaving to all ſtrangers their intereſts, &c. After the ſaid Act, the Abbot of *Ramſey* grants the next avoidance of a Church of his Patronage, and afterwards the Abby was diſſolved; and it was adjudged that the grant was void, and the *ſavant* repugnant to the body of the Act, for if the Advowſon ſhall be in the King in the ſame eſtate and condition as it was at the time of the making of the ſaid Act, then a grant afterwards made cannot be ſaved. So the Caſe 27 *H.* 8. *titul. Parliament' & Statut' Brook* 77. If land eſcheat to the King for forfeiture of Treaſon, and afterwards that land is given to another by Act of Parliament, ſaving to all others their rents ſervices, &c. that ſaving is repugnant and void, for they were extinct by the forfeiture. So by the Statute of 1 *E.* 6. of Chauntries, all Rents, Services, &c. are ſaved, yet that ſaving as to the ſervices is void and repugnant, for the King cannot hold of any perſon, as it is holden 14 *Eliz. Dier* 313. *a.* So in our Caſe when the Mannor of *Abbotteſley* is expreſly given to the King, the general ſaving cannot extend to ſave the eſtate, &c. of him who was ſeiſed of the land, for that ſhall be repugnant to the body of the Act, and ſhall make all the Act vain and idle: But the Caſe at the Bar is ſtronger then the Caſe before put for the explanation of the point. For it is recited by the Preamble of the Act of 28 *H.* 8. that where there were
[*b*] divers liberties, preheminences, commodities, and delights appertaining to it, therefore it was enacted, that King *Henry* the eighth ſhould have it; ſo as the delight and pleaſure of the King, and not only his commodity was intended to be provided for by the ſaid Act; but what delight may the King expect after *Walſhe* and his Wife ſhall die without heir male of their body? Further it was enacted, That the King *extunc impoſterum haberet & teneret manerium prædictum*, ſo that the ſaving of the eſtate of *Walſhe*, which peradventure may continue for ever, is repugnant to theſe words. Again, thirdly, the words of the Act are, *& quod idem manerium adjudicaretur authoritate ejuſdem Parliamenti in prædict' nuper Rege H.* 8. *hæredibus & ſucceſſoribus ſuis*; ſo that be the Act in the nature of a Conveyance, or in the nature of a Judgment, the ſaving is repugnant as to him who makes the Conveyance, or againſt whom the Judgment is given, or from whom the eſtate of the land is to paſs. For although that all are parties to an Act, yet in Judgmen of Law, the land moves from him who is ſeiſed of the land; as if a man make a feoffment in fee unto the uſe of another in tail, the uſe is transferred into poſſeſſion by the Statute of 27 *H.* 8. yet he who was owner of the land, and from whom the land moveth, ſhall be ſuppoſed the donor, 7 *E.* 3. *tit. Formedon Br.* 46. & 2 *E.* 6. & 1 *Mar. ibid.* 49. & 20 *Eliz. Dier* 362. *b.* And it is ſaid in *Plow. Comm.* in *Talbois* Caſe, that it ſhall be the gift of the terre-tenant (for there the feoffment to the uſe was before the Statute of 27 *H.* 8. *cap.* 10. which made the difference) and the confirmation of all others who aſſent to the Act; for there it is ſaid, that if it ſhould be adjudged the gift of any other, then the Parliament ſhould do wrong to the terre-Tenant, in taking his land from him, and to

make

make another donee thereof. And the concluſion of the purview of this Act is (the ſaid fine of 3 *H* 7. or any other thing to the contrary notwithſtanding) and the ſaid grant to *Walſhe* is ſomething; wherefore for all theſe cauſes it was concluded that the Judgment ought to be reverſed. And becauſe that *Periam* chief Baron ſhewed the reaſon and cauſes of the firſt Judgment, and argued in maintenance thereof, therefore I ſhall here make a brief and ſummary Report of his Argument: He ſaid that this grant to *Walſhe* ſhall take its effect out of both the eſtates of the King, *ſcil.* his eſtate tail, and his reverſion, becauſe by ſome means ſuch grant may be made: for if the King had recited his eſtate, and had made a ſpecial grant (*viz.*) to *Walſhe* for the life of the King, and after the Kings death without iſſue male to *Walſhe* in tail, it had without queſtion been good. And he ſaid, that if the King had been Tenant in tail only, and had made ſuch a grant in tail or in fee, it had been good during his life. So if the King be Tenant for life, and grant the land unto another in fee or in tail, it is good to paſs the eſtate which the King hath, and he cited the Caſe before reported by *Brook* in 38 *H.* 8. and he collected upon that Book, that the grant was good during the Kings life, for the Book ſaith, that the Patent was void by his death, and that his grant did not make diſcontinuance. So he cited the principal Caſe of the Lord *Berkley*, *Plow. Comment.* 233. *a.* where in effect the Caſe was, That King *H.* 8. being ſeiſed of the Mannor of *Weſton* near *Baldock* in the County of *Hertford*, to him and to the heirs males of his body, *anno* 35. of his reign, did grant the ſame to Queen *Katherine* for her life, and having iſſue King *E.* 6. died, and King *E.* 6. granted the ſame to the Earl of *Pembroke* in fee, and died without iſſue male, &c. and it was adjudged that the King was bound by the Statute of *Donis Conditionalibus*, and none of thoſe who argued, held that the grant of King *Henry* the eighth, or the grant of King *E.* 6. were void *ab initio*, but that they were determined by the death of the King which granted them; and that ſuch grants do not make diſcontinuances, which proveth (as he collected) that the grants were not preſently void, but were good during the Kings life who granted, and determined by his death. And he cited the Book in 33 *Aſſ.* 10. where he collected upon the Book, that if the Husband ſeiſed in the right of his Wife, be attainted of felony, and the King upon office thereof found ſeiſeth the land, and grants the ſame to another in fee, that the ſame is good to paſs the eſtate during the coverture which the King hath gained by his forfeiture, for there ſuch Patentee had aid. And he put the Rule before put by *Starkey*, and further he ſaid, that for as much as the Patent was *ex certa ſcientia & mero motu*, it ſhall be taken as ſtrong as if the grant were made by a common perſon, and put the Caſes before cited of 41 *Aſſ. pl.* 19. 1 *H.* 7. 13. *a.* & 37 *H.* 6. 21. *b.* all which you ſhall find in *Plowdens* Commentaries 331 & 332. and in the Caſe of Mines. So that for as much as the grant is *ex certa ſcientia*, the King is Conuſant of his title, and it is as much as if he had recited his eſtate, and had granted the land unto *Walſhe* in tail, in which Caſe the grant without queſtion had been good; and (*ex certa ſcientia*) ſupplieth the means, that is to ſay, the Recital: but he ſaid, that the King needeth not to recite his own eſtate in any Caſe that may be found in the Law; Alſo he ſaid it ſhould be miſcheivous to many men, and the inheritance of a great number of the Subjects ſhould be drawn in queſtion, if this grant of the King ſhall be adjudged void; for *Norton* and many other Rebels in the North and elſewhere were Tenants in tail with remainders over, and were attainted of Treaſon, by which, and by the Statute of 33 *H.* 8. *cap.* 20. the Queen had an eſtate to her, her heirs and Succeſſors as long as the Traytor had heir of his body, and the Queen hath granted the ſame over to many of her Subjects and their heirs generally, without any recital or mention of her eſtate, and it ſhall be very hard to avoid all ſuch grants; but he held all ſuch grants good, and that the Queen never needeth to recite her own eſtate: So he concluded this point, That the Kings grant is as ſtrong in this Caſe, as if a common perſon had been Tenant in tail with the reverſion expectant, and had bargained and ſold the land unto another in fee, or in tail, by deed indented and enrolled, in which Caſe, the eſtate which paſſeth by the bargain and ſale ſhall be derived out of both his eſtates, and none ſhall avoid the ſame, but the iſſue in tail.

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Then as to the Act of 28 *H.* 8. he conceived, That where the grant in tail was avoidable by the iſſue in tail, now the ſame is become unavoidable; for now by this Act, the eſtate tail is utterly extinguiſhed and barred for ever. As if Tenant in tail grant a rent in fee, it is determinable by the death of Tenant in tail, but if the Tenant in tail levy a fine, or ſuffer a Recovery, by which the eſtate tail is barred, then it is unavoidable. And he recited the opinion of *Englefield* Juſtice, 29 *H.* 8. *tit. Remitter Br.* 49. That he who taketh a gift by Act of Parliament of any land, he nor his heirs ſhall be remitted, for where land is expreſly given to any perſon by Act of Parliament, which is a Judgment, he nor his heirs ſhall not have other eſtate then is given by the Act. But in his Argument he ſpake nothing unto the point moved touching the repugnancy of the ſaving of the ſaid Act: After which Argument of the chief Baron, the ſaid chief Juſtices, and Juſtice *Gawdy*, heard again the Counſel on both parties at Serjants Inn in *Fleetſtreet*, and had conſiderarion of the Books, which had been cited of the one ſide and the other; and afterwards had conference amongſt themſelves, and upon great Deliberation they were unanimouſly agreed. And afterwards in the ſame Term in the Exchequer Chamber, the chief Juſtice of *England* being demanded by the Lord Keeper, and the Lord Treaſurer if they were agreed, and ready to ſhew their opinions in the ſaid Caſe, he anſwered, That they were all agreed, that the ſaid grant unto *Walſhe* and his Wife in tail were utterly void. And the chief Juſtice did openly declare the reaſons of their Reſolutions, and ſeveral Anſwers to the Objections which had been made. Firſt, the King in this Caſe hath an eſtate tail in poſſeſſion, and as to that he may lawfully grant an eſtate for his own life, and he hath alſo the Reverſion in fee, and as to that, he might lawfully grant an eſtate in tail; ſo that in reſpect of theſe two eſtates, he might by ſome means, as it hath been ſaid by the Lord chief Baron, derive lawful eſtates out of both, that is to ſay, an eſtate for his own life out of one, and an eſtate tail out of the other, and that may be by ſpecial grant; then if by any means it

may

[49] may be done, it hath been ſaid that the grant ſhall enure to ſuch effect in the Caſe at the Bar for two cauſes: 1. Becauſe that the grant was *ex gratia ſpeciali, & ex certa ſcientia, & mero motu.* 2. That ſuch grant is as ſtrong againſt the King as if a common perſon had made ſuch a gift. As to the firſt it was agreed, That in many Caſes the Kings grant *ex certa ſcientia, & mero motu,* ſhall be conſtrued beneficially for the Patentee, but ſuch words ſhall never produce a violent or ſtrainable conſtruction, or any conſtruction which is againſt the intent and purpoſe of the King in his grant, but the grant notwithſtanding thoſe words ſhall be taken in an uſual and common ſenſe and underſtanding. *Secundum intentionem domini Regis,* as *Brian* ſaith in 1 *H.* 7. 13. *a.* And therefore if the King *de gratia ſua ſpeciali, & ex certa ſcientia & mero motu,* grant land unto one, and to his heirs males, the grant is void, as it was adjudged in 18 *H.* 8. cited before by Maſter Attorney; and yet if a common perſon hath made ſuch grant, the grant ſhall be good, but if it ſhould be good in the Kings Caſe, it ſhould be a general eſtate in fee ſimple, deſcendable as well to females as to males, in courſe and order of deſcent, which ſhall be againſt the intent and purpoſe of the Kings grant, for he intended to grant an eſtate in fee ſimple deſcendable only to heirs males: but the Book in 1 *H.* 7. 13. *a.* is good Law, where the King pardons *A. B ex certa ſcientia omnia debita,* all debts which he oweth as Sheriff ſhall be pardoned, for the ſame is not any ſtrainable conſtruction, nor doth impugne the intent and purpoſe of the Kings grant: and *Popham* chief Juſtice cited the Caſe of *Torrington* (which is not fully reported by the Lord *Dier*) with which he was of Counſel; and the Caſe was ſuch, King *Henry* the eighth was ſeiſed of the Mannor of *Torrington* in the County of *Devon.* and of a Market within the ſaid Mannor every week, and of a Fair holden there in *Virgilia, feſto, & Craſtino ſancti Michaelis*; and Queen *Mary* did incorporate the Town of *Torrington,* by the name of Mayor, Aldermen and Burgeſſes, and doth not grant to them *feriam ſuam,* or *nundinas ſuas,* but grants unto them *de gratia ſpeciali ex certa ſcientia & mero motu, quod ipſi & ſucceſſores ſui poſſint habere & tenere extunc unum mercatum quolibet die Sabbati &c. & duas nundinas ibidem annuatim,* viz. *unam in vigilia feſto & Craſtino ſancti Michaelis Archangeli & aliam in feſto ſancti Georgii martyris, niſi mercatum & nundinæ ill' eſſent ad nocumentum vicinorum mercatorum & vicinarum nundinarum,* and it was adjudged, that this grant was void, becauſe the Queen was not well informed of her own eſtate, for when her intent appeareth by her grant to create a Fair in *vigilia feſto & Craſtino*
[b] *Michaelis, niſi ſit ad nocumentum &c.* which are the uſual words to create a new Fair. And in the creation of a new Fair, theſe words are always added, that is to ſay, *Niſi ſit ad nocumentum &c.* But there it was ſaid, that the Patent being *de gratia ſpeciali, certa ſcientia, & mero motu,* ſhould paſs the ancient Fair; but it was adjudged contrary, for that ſhould be againſt the intent and purpoſe of his grant, which was to create a new Fair, and not to grant one which was in being; and yet if the ſame were in the Caſe of a common perſon, without queſtion the ancient Fair would paſs. And to this purpoſe the Caſe of 18 *Eliz. Dier* 352. and the other Caſes put by Maſter Attorney are to be applied. And to the inconveniences which have been ſuppoſed, it was agreed, that there was not any ſuch inconvenience as hath been objected, for it was agreed by them, that if the Queen hath a qualified fee ſimple in certain land, that is to ſay, as long as a perſon attainted hath heir of his body, and ſhe grant the land unto another and his heirs, the grant is good: So if the Queen hath an eſtate in fee ſimple conditional, and grants the land to one and his heirs abſolutely it is good, for in both Caſes the Queen hath a fee ſimple, and grants a fee ſimple, and her grant ſtands well with her eſtate; otherwiſe is it in the Caſe at Bar, for the eſtate of *Hen.* 8. in our Caſe doth not permit ſuch an eſtate as he hath granted; and it was not intended by the Queens Counſel, the grant of King *H.* 8. was void, becauſe he did not recite his own eſtate, but becauſe he granted ſuch an eſtate which could not ſtand with his own eſtate, and ſo was deceived in the intent and purpoſe of his grant. And it was adjudged in the Caſe of *Huſſey, Hill.* 40 *Eliz. in Communi B.* and the Caſe was thus: *Charles* Duke of *Suffolk* was ſeiſed of the Advowſon of *Welborn,* in the County of *Lincoln* in tail, the Reverſion to the King; the ſaid Duke *anno* 30 *H.* 8. by Deed indented granted the Advowſon unto the King his Heirs and Succeſſors, and afterwards the Statute of 34 *H.* 8. *c.* 21. was made, by which the ſaid eſtate tail was barred, and afterwards King *H.* 8. granted the Advowſon to another in fee, and it was adjudged that the grant was good, for the King had but one fee conjoyned and conſolidate in him, and not two diſtinct fees; and if he had two fees in him, yet his grant is good, for the entire fee ſimple was in him, and he doth not grant more then he may lawfully grant, which was the Kings intent and purpoſe to grant, and the grant did take effect according to his intent and purpoſe.

[50] And as to the Lord *Barklie*'s Caſe in *Plowden*'s *Commentaries,* the Judges grounded their judgment upon a point which was clear, that is to ſay, That after the King's death the grant was void, and it was a great conſideration in them not to diſpute of that which was not in judgment before them, *viz.* Whether the grant were void in the life of the King, when it was clear it could not be good the King being dead. And Reporters do wiſely to omit opinions which are delivered accidentally, and which do not conclude to the point in queſtion. In 1 & 2 *Phil. & Mar.* 107. *b.* the Archbiſhop of *Canterbury* had *Catalla felonum de ſe infra manerium de D.* he commits Treaſon, afterwards the King makes a general grant in the uſual form unto the Almoner of Felons goods *de ſe* to diſpoſe in Alms, &c. the Archbiſhop is attainted; *Hales* who had a Leaſe for years is there *felo de ſe,* the King grants the term to another, the grantee ſhall have the ſame and not the Almoner, for the Almoner hath not any intereſt, but is a miniſter, and hath the diſpoſition of the Queens Alms (*durante bene placito.*) And it appeareth by the Book, that the Queen ſhall not have the forfeiture for the Archbiſhops Treaſon but during his life; yet it is clear that the Queen may grant the ſame at will without recital, for the ſame is a leſs eſtate then ſhe hath. And if the Queen do grant the goods and chattels of felons *de ſe,* ſhe need not recite the grant of them made to the Almoner, nor to determine her will as to them *cauſa qua ſupra.* And as to the Caſe of 33 *Aſſ.* 10. the ſame doth not prove the collection which hath been made thereof. For firſt, be the Patent good or void, yet the Patentee ſhall have aid, as it is agreed in 21 E. 3.

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47. & 7 H. 4. 41. Secondly, the party who was heir to the Wife was put to his Petition, which proves, that an office upon the attainder of the Husband for felony (for in such Case the King could not be entitled without Office) was found, that the Husband was seised in fee at the time of his attainder, and then without question the King had a fee simple which he might grant, but if a special Office were found, that the Husband had nothing but in the right of his Wife, then after his death the heir was not put to his Petition. And when the King maketh a Lease for life or years, and afterwards without recital of them, grants the land in fee or in tail, the same is void by the Common Law, although the grant be *ex certa scientia, & mero motu*, and it is no Case of special prerogative, for before the Statute of *Prærogativa Regis*, by general grant of the King, Knights fees, Dowers, and Advowsons have passed; but the Statute of *Prærogativa Regis, cap.* 15. doth restrain them if they be not granted by expres words; but the said grant without recital is void by the reason of the Common Law, because the King is deceived in his grant, when he intends to grant in possession, which cannot take the effect which the King doth purpose and intend, and the subject hath a mean to come to the knowledge of the same. Also when [b] the immediate possession is granted to two several persons, the same begets suits and troubles, which the Common Law will not suffer in the Kings grants under the great Seal, 2 R. 3. 7. a. J. S. had been Sheriff to King E. 4. and afterwards was Sheriff to King R. 3. and King R. 3. *ex certa scientia & mero motu*, did pardon him *omnia debita & comput' ratione officii sui*, it was void for the incertainty: So if the Queen recite that whereas J. S. is indebted to her as Executor to J. N. and pardons J. S. *ex certa scientia & mero motu omnia debita*, the same doth not discharge him of his own debt, for the Queens recital doth declare her intent and meaning, which always is the best direction for construction of her grant. The King Tenant in tail grants land for his own life, and afterwards he reciting the grant for his life, grants the reversion to another and his heirs, this grant is meerly void, for the estate for life was all which he might lawfully grant; then if he cannot grant it in such manner, he cannot at one time grant that in tail by the same Letters Patents, which he cannot grant by several grants. The King Tenant in tail makes a gift in tail to another, the gift is void, and shall not be good for his own life, for that was not the Kings intent; and for as much as the King cannot grant that which he intended to grant, he was deceived: And because that estate which he intended to grant (*scil.*) the estate tail cannot take effect, that which he intended not to grant, *scil.* (estate for his own life) by any constrained construction shall not take effect. And there is no Case in Law which is against their opinion. And the Books in 7 H. 4. 41. & 21 E. 3. 47. before cited by Master Attorney prove the reason of their Resolution: And the estate tail shall not pass out of the reversion in fee only, for the King intended to pass it in possession, and without question it shall not pass by such fractions of estates, as hath been objected on the other side: If the King be Tenant in tail, the remainder in fee by the gift of a common person, the King maketh a Lease for his own life, and afterwards by other Letters Patents reciting the estate for life, grants the reversion unto another and to his heirs, or in tail, the same is utterly void and shall not take effect out of the remainder in fee, for the Kings intent was to grant the immediate reversion expectant upon the estate for life, and not a Reversion expectant upon an estate tail, which was remote, and mediate. Also the Chief Justice said, that it was agreed by them, That if the King be Tenant for life, and granteth the land unto another and his heirs, or unto the heirs of his body, it is void, and shall not pass his estate for life; but if the King be Tenant for life, and lease the lands for years, it is good, as it was holden in *Englefield*'s Case; because an estate for years is less in [51] the Judgment of Law then an estate for life. As unto the Act of Parliament of 28 H. 8. it was also agreed by them, That if the grant be void, the same without doubt doth not make it good; and admit it were voidable, yet the Act of Parliament shall not make it voidable, as the Case of 16 *Eliz. Dier* 337. b. A Parson makes a Lease for life of land, the land is given to the King by Parliament, the King shall have the same in the same right as he had who made the Lease, and therefore after the death of the Parson, the King shall avoid the Lease, as the successor might have done, and the gift by Act of Parliament, doth not make the Lease unavoidable. And all that which *Popham* Chief Justice delivered was agreed and resolved by *Anderson* and *Gawdy*, but because they were not agreed of the point moved by the Attorney General concerning the Act of 28 H. 8. admitting that the grant in tail was good, and because they were agreed that the grant it self was void; As to the point of the Act of 28 H. 8. they did not deliver their opinions, but the Chief Justice told me his opinion was, that if the estate tail were good, that the Act of 28 H. 8. had given the same to the King, and that *Walshe* was not within the saving. And after their Resolutions thus delivered, Sir *Thomas Egerton* Lord Keeper of the Great Seal, demanded two Questions of the Justices: First, admitting that King H. 8. had recited that he was seised of the estate tail, with the Reversion expectant to him in fee, and had granted the land in tail, if then the said grant in tail had been good; and in the same Case if the same shall not enure as by Law it might enure: And Justice *Gawdy* answered, That although the same shall be a stronger Case then the Case at Bar, yet he conceived that in such Case the grant shall not be good; for although that the King recite his estate, and he be informed thereof, yet the estate which he intends to grant cannot stand with his estate, for neither the estate in tail in possession, nor his reversion will enable him to make a grant in tail in possession, no more if the King grant an Office unto one for life, and after the King will recite his former grant, and the same to another for life, to take effect presently, this grant is void, for it cannot take effect according to his intent, and if he will have the same to be effectual, he ought to grant the same as the Law requireth, and as it may take effect, that is to say to take being after the death of the first grantee: so in the Case at Bar, notwithstanding that he recite his estate, yet if his grant cannot by Law take effect according to his intent, his grant is void, which was granted by the two Chief Justices, for the recital of his estate is not material when the King is deceived in his grant.

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[*b*] The ſecond Queſtion that the Lord Keeper of the Great Seal demanded was, what their opinion was upon the Act of 28 *H.* 8. admitting the eſtate tail were good. To which the Lord Chief Juſtice anſwered, that they were not reſolved of the ſame. And thereupon the Lord Keeper and the Lord Treaſurer, becauſe the Caſe was of great importance, required to have the principal reaſons of the Judges delivered ſhortly to them in writing, upon which they would adviſe, which were delivered to them accordingly; and afterwards at another day the ſame Term the Lord Keeper and the Lord Treaſurer did argue the Caſe openly in Court. And firſt the Lord Keeper ſaid, That although it were ſufficient for him to rely upon the opinion of the ſaid grave and reverend Judges, without which he could not proceed to judgment, yet it is convenient to every Judge openly to ſhew the reaſon and cauſe of his judgment. This grant to *Walſhe* and his Wife is made *de gratia ſpeciali* (which implieth bounty) *ex certa ſcientia* (which imports ſcience and knowledge) and *ex mero motu* (which manifeſteth that it was not made upon ſuggeſtion or ſuit of the party) but all theſe are not of any effect or operation if the King be deceived, or if the intent or purpoſe of his grant cannot by the Law take effect. The King ought to be informed of his own eſtate if it be in poſſeſſion or reverſion (for if it be in Leaſe for life or years of Record, whereof the Subject may take notice, there although he got it *ex certa ſcientia*, &c. in poſſeſſion without recital, &c. it is void; ſo the King ought to be truly informed of the eſtate which he paſſeth, for if he intend to paſs a new faſhioned eſtate not warranted by the Law, as in the Lord *Lovel*'s Caſe, the grant is void, although it be *ex certa ſcientia & mero motu*, but if the ſame had been in the Caſe of a common perſon, the grant ſhall be good. And he remembred the Caſes of 7 *H.* 4. 41. & 21 *E.* 3. 47. put before; and he ſaid, that although in the Books a *Scire facias* was brought to have the Letters Patents repealed of Record, and to be cancelled, yet in Law the grants were void *ab initio*. And in the Caſe of *Torrington* the King was not well appriſed of his eſtate in the old Fair, for then he would never have intended to grant to another a new Fair, to be holden at the ſame days, and the ſame place, ſo that two ſeveral perſons ſhould have two ſeveral Fairs at the ſame days and in one place, upon which confuſion would follow. So in our Caſe the King was not appriſed of his own eſtate, for then he never would have granted an eſtate which could not take effect according to his intent and purpoſe. And he put the Caſe *M.* 3 *H.* 7. 6. where the King writ to the Prior of *Norwich* to admit his *Vadelet* to a *Corody*; and the Prior returned that the Priory was of the foundation of the Biſhop of *Norwich*, and not
[52] of the King, and that *R.* and *B.* and others had obtained a *Corody* at the requeſt of Kings, and returned the Letters Patents of King *E.* 4. *reciting* the ſame matter, *idem Rex ob devotionem quam habuit ad ſanct' Trinit' ac cauſ' præmiſſorum de gratia ſpeciali, ac certa ſcientia, & mero motu ſuis relaxavit eidem Priori, &c. & exoneravit de Recordo*, and becauſe he had not returned all the names of thoſe in certainty who had the *Corody*, and by what Kings, the King was not well enformed of his own title, and for that cauſe it was holden in the Book, that the King was deceived, and the Charter was not allowed; and that Caſe was truly cited as it is reported *M.* 3 *H.* 7. but ſee the roll *M.* 3 *H.* 7. *rot.* 10. *in Scaccario*, the Charter at length was allowed by the Judgment of the Court, and the ſame appeareth alſo in *Plowden*'s Commentaries in the Caſe of Mines, 331. *b.* and he cited the opinion of *Jen.* in 9 *H.* 6. 28. *b.* If the King grant the Mannor of *D.* which he hath by the attainder of *A.* and in truth he hath not the ſame by his attainder, the grant is void, for the King was not well enformed of his own title, and with his opinion *Huſſey* agreeth, 21 *E.* 4. 48. *a.* 16 *E.* 4. 7. *a.* And, he ſaid, he hath ſeen a Report in the time of *H.* 7. that if the King having an eſtate for life in certain land, grant the ſame in fee, that the grant was holden to be void. So if he hath an eſtate for life, or in tail, and grant *totum ſtatum ſuum*, the grant is void, for it is the duty of Subjects to ſee that the King be truly enformed, for the King hath the charge of the Commonwealth, and therefore cannot intend his private buſineſſes, and the grants which he maketh he maketh as King, and therefore as King he ought to be ſo inſtructed, that his purpoſe and intent ſhall take effect. And the Kings grants ſhall not enure to a double intent; and therefore if the King grant lands to a Villain, or an Alien, it ſhall not amount to an Enfranchiſement, or a Denization, although the grant be *ex certa ſcientia & mero motu*. And as to the Caſes of 38 *H.* 8. and the Lord *Berkley*'s Caſe, the Queſtion was not, If the grant were void, but if it were of force after the King's death: And he ſaid, that in the Reports and Arguments of mattnrs in Law, the point adjudged is principally to be obſerved, and not matters of diſcourſe which do not tend to the point adjudged. And he ſaid, that Judges in their judgments have great regard unto the generality of the Caſes of Subjects, and to inconveniences which may enſue by one way or other, *talis interpretatio ſemper eſt fienda, ut evitetur abſurdum, & inconveniens, & ne judicium ſit illuſorium*, but in this Caſe an abſurdity will follow, if there ſhall be ſuch fraction of eſtates, for *Walſhe* ſhould have an eſtate to him and his heirs males of his body during the King's life, and upon that the King ſhall have an eſtate in tail, and after expectant upon that the Patentee ſhall have an eſtate tail, where the King intended to grant an eſtate tail in poſſeſſion upon which a Tenure ſhould bereſerved, by which he ſhould have Wardſhip or *primer ſeiſin*; and no inconvenience nor peril to eſtates in general will follow to
[*b*] adjudge this grant void; for he agreed when the King hath a fee ſimple determinable upon an eſtate tail, that his grant over is good, for the King hath a fee ſimple to grant, ſo as the King is not deceived in his eſtate.

As to the Act of 28 *H.* 8. he held that the ſaving did not extend to *Walſhe*, for *Walſhe* (admitting the eſtate tail were good as hath been ſaid) was the donor, and then the ſaving cannot extend to him. Alſo the Mannor is given by expreſs name, and therefore the ſaving as to *Walſhe* repugnant; and he remembred the Caſes cited before by Maſter Attorney, when *ſavings* in Acts of Parliament ſhall be void: And he ſaid, that the intent of the Act was to give it to the King for two reſpects: One for commodity, the other for delight, and the ſame ſhall be well performed if the King ſhall have it in poſſeſſion, and not to expect for his commodity and delight after the determination of an eſtate tail, which peradventure might continue for ever: But without queſtion the Act of 28 *H.* 8. cannot avail

the

the defendant who pleads it, for if the gift were void, the Act makes it not good, but for his opinion he held, that admitting the eſtate to be good, the ſaid Act gave the ſame to the King.

As to the pleading he held the ſame for the form groſs and ignorant, but he agreed that in ſubſtance it is good. Alſo he agreed clearly, that the Office found in the Chancery was ſufficient. The Lord Treaſurer briefly and effectually argued to the ſame purpoſe, and ſaid there were divers grounds in the Law upon which he grounds his opinion: Firſt, a Rule put by Maſter Attorney, that the King by his grant, ought to grant that which he may lawfully grant; and his grant cannot make a diſcontinuance or wrong; and the King being tenant in tail, cannot lawfully grant but during his life; but in our Caſe he granteth an eſtate tail, and never intended to grant for the term of his life. Secondly, no violent or ſtrainable conſtruction is to be made of the King's grant, but his grant ſhall be taken in a uſual and common ſence, according to his intent and meaning, and not in his deceit, although the grant be *ex certa ſcientia, & mero motu*; upon this ground he conſidered two things: One, what was the King's intent; the other, if his intent might take effect, and if the grant may take any effect, if not by a violent and ſtrained conſtruction againſt the King's intent: As to the firſt, he intended to grant an eſtate of inheritance and not for term of his life. Secondly, he intended to grant one entire eſtate and not two ſeveral eſtates. Thirdly, he intended to grant an eſtate tail in poſſeſſion, and not part in poſſeſſion and part in reverſion. Fourthly, the King intended to grant ſuch eſtate of the Mannor, ſo that the King might have the Ward or primer ſeiſin of the land in poſſeſſion, and that the King cannot have, if *Walſhe* ſhall have it but for the King's life, and therefore he ſaid that the King was deceived in his grant, [53] and he did not intend to have ſuch fractions and diviſions of eſtates as hath been imagined, and becauſe the ſame cannot be without a violent and ſtrained conſtruction, for this cauſe he ſaid, the grant although it were *ex certa ſcientia, & mero motu* was void; he agreed that theſe words *de gratia ſpeciali, certa ſcientia, & mero motu* are words of bounty and of great effect, if the King be not deceived in the intent and purpoſe of his grant, and ſuch words ſhall never be of force to maintain a grant in deceit of the King. And he took a difference between matter in fact and matter in Law, as in matters in fact it is true, that theſe words ſhall imply that the King ſhall not be miſconuſant of any matter in fact concerning his grant, but not of matters of Law, as appeareth by many Caſes cited by Maſter Attorney, That if it appeareth to the Court, (that notwithſtanding theſe words) that the King was deceived in Law in the purpoſe and intent of his grant, his grant is void; and the ſame agreeth with a text of the Civil Law upon theſe words, *De gratia ſpeciali, certa ſcientia & mero motu, quod talis clauſula non valet in his in quibus præſumitur Principem eſſe ignorantem.* And therefore in our Caſe, the King grants ſuch eſtate as by the Law he cannot grant, for he grants an eſtate in tail in poſſeſſion, where he cannot by the Law grant an eſtate in poſſeſſion, but for the term of his own life, and for as much as the King is deceived in Law, for this cauſe notwithſtanding the words *certa ſcientia, &c.* his grant is void. And as to the Rule which hath been taken, that the King's Letters Patents ſhall not be void, if by any reaſonable conſtruction they may be maintained to be good, the ſame is true if the King's intent and purpoſe in his grant may take effect, and when the King is not deceived in his grant. As to the Act of 28 *Hen.* 8. the ſame doth not make the grant good for two cauſes; Firſt, this Act was made five years after the grant, and the Act is that the King *extunc & impoſterum*, (that is to ſay, from the time of the making of the Act) ſhall have the Mannor in fee; ſo as by the Act, the King had not fee at the time of his grant but five years after. Secondly, the Act doth not amend it.

And as to the miſchief which hath been ſuppoſed if this grant ſhould be adjudged void, he ſaid, That no Caſe can be adjudged but it is miſchievous to ſome; but he ſaid, that a miſchief is rather to be ſuffered then an inconvenience, and great inconvenience would follow on the other part, if this grant (for as much as the King is deceived in his grant) ſhall be adjudged good; for which cauſe he concluded, that the Judgment ought to be reverſed. Upon which the Attorney moved, that now ſuch [b] Judgment be given for the Queen as the Barons of the Exchequer ought to have adjudged. Upon which the Court commanded Judgment to be entred accordingly, and ſo it was. And I demanded of Baron *Savill*, who had heard all the Arguments in the Exchequer Chamber, what his opinion was in the Caſe; and he ſaid, That he conceived, that the Judgment given in the Exchequer ought to be reverſed. And he agreed alſo, that the Act of 28 *H.* 8. hath given the eſtate of *Walſhe* to the King, admitting the eſtate tail to be good. I demanded alſo of Baron *Clark*, who was ever againſt the Judgment in the Exchequer, and had argued very learnedly in the Exchequer, if he held to his opinion; and he ſaid, that he ſtrongly continued of his firſt opinion for both the points in Law.

Between John Hunt *Plaintiff, and* Thomas Gatley *Defendant in a Replevin*, Paſch. 23 Eliz. *in the Common Pleas* Rot. 1160. *The Caſe in effect was ſuch.*

Capel's Caſe.

[61] [b] THomas *Capel* Eſquire being ſeiſed of the Mannor of *Howcaple* in the County of *Hereford* in fee, after the Statute of 27 *H.* 8. of transferring uſes to poſſeſſions, did thereof enfeoffe *John Warcombe*, and others in fee, unto the uſe of the ſaid *Thomas Capel*, and the heirs males of his body lawfully iſſuing; and for default of ſuch iſſue, unto the uſe of *Edward Capel*, and the heirs males of his body lawfully iſſuing: and for default of ſuch iſſue, to the uſe of *Richard Capel*, and the heirs of his body lawfully iſſuing; and for default of ſuch iſſue, to the uſe of *William Capell*, and to the heirs males of his body lawfully iſſuing: and for default of ſuch iſſue, to the uſe of *Giles Capel* for term of his life, and after his deceaſe, unto the uſe of the right heirs of the ſaid *Thomas Capel* for ever. By force whereof, and of the ſaid Statute *Thomas Capel* was ſeiſed of the ſaid Mannor in tail, the remainder to the ſaid *Edward Capel* in tail, the remainder to the ſaid *Richard Capel* in tail, the remainder to the ſaid *William Capel* in tail, the remainder to the ſaid *Giles Capel* for life, the reverſion expectant to the ſaid *Thomas Capel* and his heirs: and afterwards the ſaid *Thomas Capel* died, after whoſe death the ſaid Mannor deſcended to *William Capel* his ſon and heir of his body; and afterwards the ſaid *Edward Capel* died, and his remainder of the ſaid Mannor deſcended to *Richard Capel* his ſon and heir, who by his deed bearing date 2 *Novemb.* 18. of the Queen granted to *Anthony Capel* his ſon and his heirs, a rent
[62] charge of 50 *l. per ann.* iſſuing out of the ſaid Mannor; the ſaid *William Capel* ſon of the ſaid *Thomas Capel*, being Tenant in tail in poſſeſſion *Octab. Hill.* 19 *Eliz.* levied a fine of the ſaid Mannor to *Richard Wotton*, and *John Shrawley*, and to the heirs of the ſaid *Richard Wotton*, which fine was to the uſe of the ſaid *John Hunt* and his heirs. And afterwards the ſame *Hill.* Term, *Thomas Spenceley*, and *Baldwine Caſtleton* did recover the ſaid Mannor againſt the ſaid *John Hunt*, who vouched the ſaid *William Capel* ſon of the ſaid *Thomas*, who vouched the common vouchee, which was executed accordingly; and afterwards the ſaid *William Capel* ſon of the ſaid *Thomas* 10 *Nov.* 19 *Eliz.* died without iſſue male of his body; *Thomas Gatley* as Bailiff to *Anthony Capel* diſtrained for the rent being behind at the feaſt of S. *Michael* the Archangel *anno* 20 *Eliz.* and the ſaid *John Hunt* brought a *Replevin.* And this Caſe was often argued in the Common Pleas and afterwards in the Exchequer Chamber before all the Juſtices of *England*; and after divers conferences between all the Juſtices of *England*, it was reſolved by them all, That in this Caſe, the Recoverors, nor any who came in under their eſtate ſhall be ſubject unto the charge of him in the remainder. And afterwards *Ter. Mich.* 34 & 35 *Eliz.* the Juſtices of the Common Pleas openly declared the reaſons of their Reſolution, which I heard, and they were in effect as followeth:

Becauſe the Recoverer is in an eſtate which he hath gained under the Tenant in tail in poſſeſſion, which eſtate is not ſubject to the charge of him in the remainder: for if Tenant in tail in poſſeſſion in the Caſe at the Bar had only made a feoffment in fee, yet the poſſeſſion of the feoffee (ſo long as the feoffment remains in force) ſhall not be charged with the rent, becauſe he is in of the poſſeſſion which Tenant in tail gave to him, and was not ſubject to paiment of rent; and if he in the remainder had made a Leaſe for a hundred years, and afterwards Tenant in tail in poſſeſſion, had made a Leaſe for a hundred years, both to commence preſently, and afterwards tenant in tail had made a feoffment, or ſuffered a common recovery, and died without iſſue, they all clearly reſolved, that the leſſee of Tenant in tail in poſſeſſion ſhould enjoy the land againſt the leſſee of him in the remainder, although that the Leaſe of him in the remainder were firſt made, for as long as the eſtate of the feoffee or recoverer derived under the eſtate of Tenant in tail in poſſeſſion continueth, ſo long the Leaſe of Tenant in
[b] tail ſhall ſtand; and if the Leaſe of Tenant in tail ſhall be preferred, by the ſame reaſon every other eſtate or intereſt derived out of his eſtate, ſo long as the feoffment or recovery doth remain in force, ſhall be alſo preferred before any eſtate or intereſt derived out of the eſtate of him in the remainder. So if he in the remainder had acknowledged a Recogniſance, and afterwards Tenant in tail had acknowledged a Recognizance, and after ſuffered a recovery, and died without iſſue, the land ſhall be ſubject unto the Recognizance of Tenant in tail, and not to the Recognizance of him in the remainder, and the land in none of theſe Caſes can be ſubject to both the Recognizances, nor unto both the Leaſes, nor unto the Charges of both, *ſimul & ſemel*, for then confuſion and great inconvenience would follow; and it ſhould alſo be aſſured, that the Leaſes, Recognizances and Charges being made at ſeveral times ſhould be leviable upon the land at one time; and therefore without queſtion in all thoſe Caſes the land is ſubject to the Leaſes, Recognizances and Charges of the Tenant in tail: from this it followeth, that it cannot alſo be ſubject to the Leaſes, Recognizances and Charges of him in the remainder. *Nota hoc, quia optima ratio ut mihi videtur.* Another reaſon was added, becauſe that the Charge of him in the remainder is good in Law, by reaſon of the poſſibility that the land ſhall come into poſſeſſion, and then the poſſeſſion ſhall be charged; for the remainder in it ſelf is not a thing manurable, nor in which a diſtreſs can be taken, but the ſame ought to be taken upon the land it ſelf, and therefore there is a condition *tacite* annexed to the Charge of him in the remainder, that is to ſay, to take effect, or to commence in poſſeſſion, when the remainder cometh in poſſeſſion, for the remainder cannot be charged with

with any diſtreſs, but in reſpect that the ſame by poſſibility may come in poſſeſſion: But when the Tenant in tail ſuffereth a common recovery, the condition which is *tacite* annexed to the grant is deſtroyed, for the remainder can never come in poſſeſſion, and by conſequence the rent charge can never commence, for the poſſeſſion is only ſubject to diſtreſs.

Another reaſon was added, that the grantee of him in the remainder cannot falſifie in this Caſe, becauſe that the recovery was not ſuffered by him who was chargeable with the rent, but by one who was diſcharged of the rent, and the Recovery barred the remainder, ſo as he in the remainder ſhall never faulſifie. And ſo it was reſolved, that no Leaſe, nor Rent, nor Common, nor Recognizance, nor any other charge, intereſt, or eſtate made by him in the remainder, ſhall charge the poſſeſſion of the Recoveror. And it was alſo reſolved by all the Juſtices aforeſaid, *nullo contradicente*, that a common recovery had againſt Tenant in tail, ſhall bind not only the remainder, and all Leaſes, Charges, &c. granted [63] or made by him in the remainder, but alſo the Reverſion, and all Leaſes, Charges, &c. granted by him in the Reverſion, and no difference between a Reverſion and remainder expectant upon an eſtate in tail to this purpoſe. And this Caſe was reſolved by Lord *John Popham*, Chief Juſtice of *England*, Lord *Edmund Anderſon* Chief Juſtice of the Common Pleas, Sir *Roger Manwood*, Chief Baron of the Exchequer, and by *Periam*, *Clenche*, *Gawdie*, *Walmeſley*, and *Fenner* Juſtices, Juſtice *Windham* being dead, and by *Gent*, and *Clark*, Barons of the Exchequer.

Mich. 39 & 40 Eliz. *between* Baldwin *and* Smith.

Archer's Caſe.

BEtween *Baldwyn* and *Smith* in the Common Pleas, which began *Trinit.* 36 *Eliz. rot.* 1676. in a [66] [b] *Replevin*; upon a ſpecial Verdict the Caſe was ſuch: *Francis Archer* was ſeiſed of land in fee, and held the ſame in Socage, and by his will in writing deviſed the land unto *Robert Archer* the Father for his life, and after to the next heir male of *Robert*, and to the heirs males of the body of ſuch next heir male. *Robert* hath iſſue *John*, *Francis* died, *Robert* enfeoffed *Kent* with warranty, upon whom *John* entred, and *Kent* re-entred, and *Robert* died, &c. And firſt it was agreed by *Anderſon*, *Walmeſley*, and the whole Court, that *Robert* had but an eſtate for life, becauſe *Robert* had expreſs eſtate for life deviſed to him, and the remainder is limited to the next heir male of *Robert* in the ſingular number; and the right heir male of *Robert*, cannot enter for the forfeiture in the life of *Robert*, for he cannot be heir as long as *Robert* liveth. Secondly, that the remainder unto the right heir male of *Robert* is good, although he cannot have right heir during his life, but it is ſufficient the remainder do veſt *eo inſtante* that the particular eſtate determineth. And ſo it is agreed in 7 *H.* 4. 6. *b.* and *Cranmer's* Caſe 14 *Eliz. Dier* 309. *a.* Thirdly, (which was the principal point of the Caſe) it was agreed by the whole Court, that by the feoffment of the Tenant for life the remainder was deſtroyed, for every contingent remainder ought to veſt, either during the particular eſtate, or at leaſt, *eo inſtante* that the ſame determineth: for if the particular eſtate be ended, or determined in fact, or in Law before the contingency fall, the remainder is void. And in this Caſe, in as much as by the feoffment of *Robert* his eſtate for life was determined by a condition in Law annexed to the ſame, and the ſame cannot after by any poſſibility be revived; for this cauſe the contingent remainder is deſtroyed againſt the opinion of *Gaſcoigne* in 7 *H.* 4. 23. *b.* But if the Tenant for life had been diſſeiſed, and died, yet the remainder is good, for there [67] the particular eſtate doth remain in right, and might have been revived as it is ſaid in 32 *H.* 6. But otherwiſe is it in the Caſe at the Bar, for by his feoffment no right of the particular eſtate doth remain. And it was ſaid it was ſo agreed by *Popham* Chief Juſtice, and divers Juſtices in the Argument of the Caſe between *Dillon* and *Frein*, and denied by none. See 11 *R.* 2. *tit. Detinue* 46. And note the judgment of the Book, and the reaſon thereof, which Caſe there adjudged is a ſtronger Caſe then the Caſe at the Bar. But note Reader, that after the feoffment, the eſtate for life to ſome purpoſe had continuance; for all Leaſes, Charges, &c. made by the Tenant for life ſhall ſtand during his life, but the eſtate is ſuppoſed to continue as to thoſe only who claim by the Tenant for life before the forfeiture, but as to all others who do not claim by the Tenant for life himſelf, the particular eſtate is determined: And by the better opinion the warranty ſhall bind the remainder, although the warranty was created before the remainder attached or veſted, and although that the remainder were in the conſideration of the Law, and he who ſhall be bound by the ſame, never could have avoided the ſame by entry or otherwiſe; yet for as much as the remainder did commence and had his being by force of the deviſe which was before the warranty, for this cauſe it ſhall bind the remainder, but the ſame was not fully agreed; And as well as the feoffment of the Tenant for life ſhall deſtroy the remainder, ſo well *a fortiori*, the warranty of his Anceſtor (by whom he is intended to be advanced) ſhall bind him. And in many Caſes one ſhall be bound, and barred of his right by a warranty, who could never have defeated it by any means, as in 44 *E.* 3. 30. & 44 *Aſſ. p.* 35. Leſſee for life is diſſeiſed, to whom a collateral anceſtor of the Leſſor releaſeth and dieth, he ſhall be barred, *vide* 3 *H.* 7. 9. *a.* & 33 *H.* 8. *Br. Garranty* 84. A feme covert who cannot enter nor avoid the warranty ſhall be barred. So if Tenant for life, the remainder to the right heirs of *J. S.* had been diſſeiſed, and the diſſeiſor levied a fine at the Common Law, the right heir

of *J. S.* ſhall be bound, and yet he cannot enter nor make claim. But the point adjudged was, That by the feoffment of the Tenant for life, the remainder was deſtroyed.

Mich. 39 Eliz. *between* Gardiner *and* Bredon.

Bredon's Caſe.

[76] BEtween *Gardiner* and *Bredon*, in a Replevin in the Common Pleas, which began *Trin.* 38 *Eliz. Rot.* 1831. the Caſe was: Tenant for life of Land, the remainder in tail, the remainder in tail; Tenant for life and he in the firſt remainder in tail joyned in a fine *ſur conuſans de droit come ceo, &c.* to another in fee, who rendred a rent charge of 40 *l.* unto Tenant for life, he in the firſt remainder died without iſſue, he in the ſecond remainder entred, Tenant for term of life diſtrained for the rent, the other ſued a Replevin, and the Tenant for life avowed for the rent; and if the avowry were maintainable or not was the Queſtion. And in this Caſe, firſt it was agreed by *Anderſon*, *Walmeſley*, *Owen*, and *Glanvill* Juſtices of the Common Pleas, that the ſaid fine levied by Tenant for life, and him in the remainder was no diſcontinuance, either of the firſt remainder in tail, or of the ſecond, becauſe each of them gave only but that which he might lawfully give, *viz.* The Tenant for life gave his eſtate, and he in the remainder a fee ſimple determinable upon his eſtate tail, and the ſecond remainder is not diſcontinued or deveſted thereby. As if Husband and Wife do levy a fine of the Wives land, all the eſtate paſſeth from the Wife, ſo as each of them giveth that which they may lawfully give; and therefore it was adjudged in the King's Bench, That the charge of the Husband did determine by his death notwithſtanding ſuch fine levied after the charge: And that it ſhall be the grant of both, of their ſeveral eſtates: See 27 *H.* 8. 13. *a.* 12 *H.* 7. 14. *b.* 2 *H.* 5. 7. *M.* 16 & 17 *Eliz. Dier* 339. *a.* & 14 *E.* 4. 14. *a.* and from thence it followeth, that it was not any forfeiture of the eſtate of the Tenant for life, for as much as each gave that which he might lawfully give. And it was ſaid, that it cannot be a forfeiture, for the Law (which abhorreth wrong) ſhall conſtrue it, firſt to be the grant of him in the remainder in tail, and
[*b*] afterwards the grant of the Tenant for life, as in many Caſes, *ut res magis valeat quam pereat*, the Law ſhall make conſtruction; and therefore in the Caſe of a fine, if Tenant in tail and one *A.* levy a fine to a ſtranger, who granteth and rendreth to *A.* for years rendring rent, and by the ſame fine grant the reverſion to Tenant in tail and his heirs, this is good, and although that all be by one fine at one inſtant, yet in judgment of Law, the leaſe doth precede the grant of the reverſion, as it is holden in 36 *H.* 8. *Br. Fines* 118. And ſo was it adjudged upon demurrer between *White* and *White M.* 41 & 42 *Eliz.* in the Common Pleas, *Rot.* 366. So in the Caſe at the Bar, the grant of the Tenant in tail ſhall precede in the judgment of the Law the grant of the Tenant for life, although that all be by one fine. And note the difference between this Caſe and the Caſe in 41 *E.* 3. 21. *a.* & 41 *Aſſ.* 2. for there, in as much as the Wife ſurvived, it is upon the matter a feoffment made by her, for ſhe is in by her feoffor, and the ſecond remainder in tail was deveſted thereby; and that he in the firſt remainder with his Wife (betwixt whom are no moities) accepted a feoffment of the Tenant for life; but here in the Caſe at the Bar, he in the firſt remainder doth joyn with the Tenant for life in making of an eſtate, and this joyning doth alter the nature of the Act, for by this joyning the eſtate given paſſeth from both, ſo that each giveth his eſtate; but in the Caſe in 41 *E.* 3. 21. all the eſtate doth paſs from the Tenant for life, and that was fee ſimple which of neceſſity ought to be a forfeiture of all the remainders, for it cannot be a forfeiture but ought to give cauſe of entry to each in remainder for his time. But the Caſe in *Mich.* 16 & 17 *Eliz. Dier* 339. *a.* was agreed for good Law, for there both the feoffors had but an eſtate for life, and therefore their feoffment did deveſt the remainder in tail, and ſo a forfeiture; but here the Tenant for life, and he in the remainder in tail joyn in the fine, &c. And it was ſaid, it was adjudged in the King's Bench in the Caſe of one *Engliſh*, that if there be Tenant for life, the remainder in fee to an Infant, and they both levy a fine, and afterwards the fine is reverſed as to the Infant, yet the conuſee ſhall have the land for the life of the Tenant for life, for each gave that which he might lawfully give. But it was ſaid, if Tenant for life be, the remainder unto the Queen for life, the remainder to another in fee, if the firſt Tenant for life maketh a feoffment, the ſame is a forfeiture, and yet nothing paſſeth but his own eſtate, but in as much as he hath made a livery in fee, it is a forfeiture, although that none of the remainders are diverted. See 30 *Aſſ.* 47. if Tenant for life enfeoffeth him in the remainder for life with warranty, the ſame ſhall enure by way of ſurrender, and is no forfeiture, *quod nota.* And it ſeemeth by them, if Tenant for life, and he in the firſt remainder in tail make a
[77] feoffment by deed, that it is not a diſcontinuance, nor a deveſting of the ſecond remainder, for each giveth that which he may lawfully give; and although he in the firſt remainder dieth without iſſue, the feoffee ſhall enjoy the land during the life of the Tenant for life, and no forfeiture in the Caſe for the cauſes beforeſaid. But if a feoffment be made by word, then it is a ſurrender of the Tenant for life, and the feoffment of him in the remainder, *ut res magis valeat quam pereat.* See 27 *Aſſ.* 46. *Plow. Commentaries* 541. *a.* 14 *H.* 7. 4. *a.* And afterwards Judgment was given that the Avowant ſhould have return of the Cattel, and that it was not any forfeiture, but that the rent did remain after the death of the firſt Tenant in tail without iſſue.

Term.

Term. Paſchæ 42 Eliz. *in the Common Pleas, which began Hill.* 41 Eliz. *Rot.* 1049.

Corbet's Caſe adjudged.

Chriſtopher Corbet being ſeiſed of the Mannor of *S.* had iſſue *Rowland* and *Arthur*, and 30 *Eliz.* upon good conſiderations by his deed indented, did covenant with *R. S.* and others, that he and his heirs would ſtand ſeiſed of the ſaid Mannor of *S.* unto the uſe of the ſaid *Chriſtopher* for his life, and after his deceaſe, to the uſe of the ſaid *Rowland* and his heirs males of his body, and for default of ſuch iſſue, to the uſe of the ſaid *Arthur* and his heirs males of his body; and for default of ſuch iſſue, to the uſe of divers others of his blood in tail, and at laſt to the uſe of the right heirs of the ſaid *Chriſtopher*. And it was provided, covenanted, and agreed by the ſame indenture between the parties, That if the ſaid *Rowland*, &c. or any of his heirs males of his body ſhall be reſolved and determine, or adviſedly ſhall attempt, or procure any Act or thing concerning any alienation, of, or for the ſaid Mannor, &c. by which any eſtate tail thereof limited before ſhould be undone, barred, or determined, or by which the ſame ſhould not come, remain, or be in manner and form as is limited by the ſame Indenture: That then after that, and before any ſuch act done by which, &c. before any ſuch bargain, diſcontinuance, &c. had or executed, &c. the uſes and eſtates to him limited who ſo ſhall do, &c. ſhall ceaſe only in reſpect, and having regard to ſuch perſon ſo attempting in the ſame manner, quality, degree, and condition, as if ſuch perſon ſo attempting were naturally dead, and not otherwiſe. And that then immediately in all ſuch Caſes, the uſes of the ſaid Mannor ſhall be to ſuch perſons to whom the uſes ſhall come by the intent of the ſame Indenture, if ſuch perſon ſo attempting were naturally dead, of ſuch and the like eſtate, and in the ſame manner and form, and with ſuch remainders over, and under ſuch limitations, and conditions, as if ſuch perſon ſo attempting were naturally dead, and not otherwiſe. The ſaid *Chriſtopher Corbet* died, and afterwards *Rowland* ſuffered a common Recovery to his uſe, &c. and the ſaid *Arthur* entred into the land, upon whom *Rowland* reentred, and *Arthur* brought an action of Treſpas; and if the entry of *Arthur* were lawful or no was the Queſtion. In this Caſe divers matters were moved at the Bar, which were not agreed by the Juſtices at the Bench, and divers matters were moved by the Juſtices in their Arguments concerning the general Caſe of Perpetuities; but I ſhall make a ſummary Report only of the principal reaſons and cauſes of their Judgment, in which all the Juſtices of the Common Pleas were unanimouſly agreed. It was reſolved by the Lord *Anderſon*, *Walmeſley*, *Glanvill*, and *Kingſmill* Juſtices. That this *Proviſo* to ceaſe an eſtate limited to one and his heirs males of his body, as if the Tenant in tail were dead, was repugnant, impoſſible, and againſt the Law; for the death of Tenant in tail is not a *ceſſer* of the eſtate in tail, but the death of the Tenant in tail without iſſue of his body is the determination thereof. And therefore if the *Proviſo* had been that the eſtate tail ſhould ceaſe, ſo ſoon as he had granted a rent charge, or made a Leaſe for years to another, that ſame had been repugnant, for ſuch acts do not make any determination of an eſtate tail; and if the eſtate tail ſhall ceaſe as if he were dead, his iſſue inheritable to the eſtate tail ſhall have the ſame by deſcent in the life of his father, and he in the remainder or reverſion ſhould have the ſame in the life of the Tenant in tail, which is not poſſible; for to every deſcent reverſion or remainder upon the determination of the eſtate tail, death, either civil, as entry into Religion, or natural, as diſſolution of the ſoul from the body is requiſite. And as to that, which ſome have objected, that although it be granted, that when Tenant in tail hath iſſue inheritable to the eſtate tail, that there is repugnancy and impoſſibility that the iſſue ſhall inherit, or the land ſhall remain or revert, for deſcend it cannot, becauſe the Father is living and revert or remain over it cannot becauſe Tenant in tail hath iſſue; yet it was ſaid, that there was not any ſuch repugnancy or impoſſibility at the time of the breaking of the *Proviſo* by the Tenant in tail in the Caſe at the Bar, becauſe that the Tenant in tail had not any iſſue at the time of the breaking of the *Proviſo*. To that it was anſwered, that the having of iſſue is not material; for when land is limited to one and the heirs males of his body, with *Proviſo* annexed to it in the ſame conveyance, that if he do ſuch an act that his eſtate ſhall ceaſe as if he were dead, this is repugnant at the beginning; for by the expreſs limitation he hath an eſtate of inheritance, which by poſſibility may continue for ever, and his eſtate of inheritance doth not begin by the having of iſſue, but preſently before any iſſue he hath eſtate of inheritance. And therefore before iſſue his feoffment is a diſcontinuance and no forfeiture, neither ſhall he in the reverſion be received upon his default in a *Præcipe*. And therefore if a man maketh a gift in tail upon condition that if he dieth, his eſtate ſhall ceaſe, and the donor reenter, this condition is void: And in ſuch Caſe if Tenant in tail be diſſeiſed, and a deſcent is caſt, or if Tenant in tail make a diſcontinuance, and afterwards Tenant in tail dieth without iſſue, the donor ſhall not enter for this condition broken; for although that the eſtate in tail by accident afterwards by his death ceaſeth, yet the condition was repugnant at the time of the creation of the eſtate tail; For if a man make a Leaſe for life, in the judgment of the Law at the beginning death is the determination of that eſtate by expreſs limitation; but if a man give lands in tail, *viz.* to one, to have to him and his heirs of his body, there appeareth by expreſs limitation, that in judgment of Law death is not the determination thereof, but death without iſſue of his body. Alſo it is repugnant that land ſhall revert, or remain during the life of Tenant in tail himſelf, as it hath been ſaid.

[83] [b] [84] [a]

And

And *Anderſon* Chief Juſtice put the Caſe in 8 *Aſſ.* 33. where a man gave Lands to one *Mary* and *Johan* her ſiſter *& hæredibus de corporibus earum legitime procreatis* (by which they had a joynt eſtate for life and ſeveral inheritances, and the donor intending that none of them ſhould break the Joynture, but that the ſurvivor ſhould have all by *jus accreſcendi*, addeth this clauſe) *ſub hac forma quod illa quæ illarum diutius vixerit tenebit terram illarum integram*, but for as much as his intent is contrary to the Law, for this cauſe if the Joynture be ſevered by a Fine levied, the ſurvivor ſhall not have the part ſo ſevered by the ſaid clauſe which he hath inſerted of his conceit and imagination repugnant unto Law and Reaſon. So here the intent of *Chriſtopher* was that the eſtate tail ſhould ceaſe, as if Tenant in tail were dead, which intent is repugnant unto the rules of Law, and againſt ſenſe and reaſon. And he cited alſo the Caſe of *Pleſington*, which ſee title, *Quid juris clamat*, 20. A man makes a Leaſe upon condition that if the Leſſor grant the Reverſion, that the Leſſee ſhall have fee; if the Leſſor grant the Reverſion by Fine, he ſhall not have fee, for the condition is repugnant and void. And further, he held that
[85] this Proviſo was utterly void for the incertainty, for Judges ought to know the intention of the parties by certain and ſenſible words, which are agreeable and conſonant to the rules of Law. And therefore if Land be given by deed to two, to have and to hold to them *& hæredibus*, it is void for the inſenſibility and incertainty, and although he add clauſe of Warranty to them and their Heirs, the ſame ſhall not make the firſt words which are incertain and inſenſible to be of force and effect in Law, although that his intent appeareth, but his intent ought to be declared by words certain and conſonant to Law. And he cited two Caſes adjudged in the point, one in the caſe of a Will, and the other in caſe of an Uſe. And the caſe of the Will was in an action of Waſte between *John Jermin* and *Arthur Arſcot* in the Common Pleas *Hill* 37. *Eliz. Rot.* 1758. and the Caſe was in effect thus, *Thomas Cary* was ſeized in fee of the Mannor or Farm of *Cary* in the Pariſh of St. *Giles in the Heath* in the County of *Devon*, and held the ſame in Socage, and had iſſue ſix Sons and one Daughter, *viz. Peter*, *Henry*, *Fulforde*, *Richard*, *Andrew* and *Gregory*, and *Mary*, and 14 *Martii*, 25 *Eliz.* did deviſe the Mannor or Farm aforeſaid unto the ſaid *Arthur* for 90 years, if the ſaid *Arthur Arſcot* and *Grace Arſcot*, or any of them ſhould ſo long live; and afterwards by his laſt Will in writing deviſed the ſaid Mannor or Farm unto the ſaid *Peter* and his Heirs Males of his body, the remainder in the ſame Farm to his other ſons, the remainder unto the ſaid *Mary* his Daughter, Wife of *Henry Pruſt*, and the Heirs of his body for ever, in which Will were theſe Proviſoes and Clauſes, contained in theſe words following: *viz.* Provided that if the ſaid *Peter Cary*, his ſon, or any of the ſons of the ſaid *Thomas*, or any of the Heirs Males of their bodies to be begotten at any time or times hereafter, wittingly, willingly, or adviſedly ſhould attempt or endeavour by any act or acts, way or means to ſell, alien, bargain, diſcontinue, &c. And ſuch attempt endeavour, act or acts ſhould execute, &c. by any covert or notorious act or acts whatſoever, &c. That then immediately after every time or times of ſuch attempt, &c. and before any ſuch bargain, ſale, alienation, &c. were, had, made or executed, the aforeſaid eſtate and eſtates of every ſuch perſon, ſon or heir, doing or attempting, &c. any act or thing aforeſaid contrary to the intent and meaning of this his laſt Will and Teſtament, &c. ſhall ceaſe and determine in ſuch manner and form to all intents, conſtructions and purpoſes, and as though ſuch perſon ſo attempting, &c. were naturally dead indeed, and
[b] not otherwiſe, and that ſuch perſon, &c. to whom the Premiſſes ſhould deſcend, remain, or come, if ſuch perſon ſo attempting &c. were naturally dead indeed, ſhould have and injoy the Premiſſes, during the life of ſuch perſon ſo attempting, &c. with like remainders and limitations over, &c. as if ſuch perſons ſo attempting, &c. were naturally dead; and after the deceaſe of ſuch perſon ſo attempting, &c. that then the Premiſſes ſhould deſcend, remain, come, or be to ſuch perſon unto whom the ſame ought or ſhould next deſcend to, accrue, or be by the true intent and meaning of his Teſtament aforeſaid, with ſuch remainders and limitations of eſtate and eſtates over, and in ſuch ſort to all intents conſtructions and purpoſes in all things, as though no ſuch attempt had been committed. And afterwards the ſaid *Thomas Cary* died, and after, that is to ſay, *Quindena Paſch.* 27. *Eliz. Peter Cary* levied a Fine of the ſaid Mannor or Farm to *John Germin*, and the ſaid *Henry Cary* came to the ſaid Tenements and claimed a Reverſion by force of the ſaid deviſe, and if upon all this matter *John Germin* the Plaintiff, notwithſtanding the ſaid Proviſoes and Claimes aforeſaid, had the ſame Reverſion continuing in him or not, ſo that he might maintain the action of Waſte or not, was the Queſtion: And upon ſolemn Argument it was adjudged by all the Juſtices of the Common Pleas, that the action of Waſte was maintainable, and that the ſaid Proviſoe of Reſtraint was void for two principal cauſes: One, becauſe it was againſt the Law, the other, that it was repugnant and contrariant in it ſelf: Againſt the Law for two cauſes, for be the the ſame Proviſo a condition or limitation, the whole eſtate ought to be defeated by it, and it cannot determine the eſtate in part, and continue the ſame for the reſidue; and an eſtate in Land cannot ceaſe for a time, and revive and reveſt afterwards: The other, when a man giveth Lands to one, and his Heirs Males with remainders over, he cannot by the rules of the Law determine this eſtate in tail as to one perſon, and diſpoſe the ſame eſtate unto another perſon. And therefore they agreed the Caſe in 28. 29 *H.* 8. *Dier* 33. *a.* that a man cannot deviſe an eſtate in fee ſimple to one, and if he do not ſuch an act, that his eſtate ſhall ceaſe, and that another ſhall have the ſame infee-ſimple; for when he hath diſpoſed the eſtate in fee to one, he hath not power after in the ſame Will to diſpoſe the ſame to another. And for conſtruction of Wills, this rule was taken by the Juſtices in their Arguments, That ſuch an eſtate which cannot by the rules of the Common Law be conveyed by act executed in his life by advice of his Counſel learned in the Law, ſuch eſtate cannot be deviſed by the Will of a man, who is intended in Law to be void of Counſel: As if a man by his Will deviſe Lands to one for ever, there he hath a fee, for ſuch
[86] eſtate might be conveyed by act executed. But if he deviſe further, that if the Deviſee do not ſuch an act that another ſhall have the Land to him and his heirs, the ſame is void, as is aforeſaid, for that ſuch limitation if it were by act executed were void, *& ſic de cæteris.*

And

And it was reſolved, that the ſaid Proviſo was repugnant for two cauſes, one becauſe that when he had deviſed the Land to one and the Heirs Males of his Body, which is an eſtate of inheritance and determinable by death without iſſue Male of his Body by expreſs limitation, ſuch Proviſo to ceaſe it as if he were dead is repugnant, for the death of Tenant in tail is not determination of it, but death without iſſue. Secondly, It was repugnant, for the firſt part of the Proviſo was, That if he ſhall attempt, or go about to diſcontinue, bar, &c. and ſhall accompliſh and effect the ſame, and before ſuch alienation; in which was agreed there was manifeſt repugnancy, for by the firſt part the eſtate ſhould not ceaſe until attempt and accompliſhment, and by the latter part it ſhould ceaſe after attempt and before accompliſhment. And theſe were the reaſons of their judgment in the ſaid Caſe between *Germin* and *Arſcot*, which being in the Caſe of a Will which receiveth a benign interpretation according to the Teſtators intent, is ſtronger as the Lord *Anderſon* ſaid then the Caſe at the Bar.

The other Caſe which the Lord *Anderſon* cited was adjudged *Hil.* 37 *Eliz.* between *Cholmley* Plaintiff, and *Humble* Defendant in the Common Pleas, and was ſuch, Sr. *Richard Cholmley* ſeiſed in fee of the Manor of *Thornton* upon the hill, &c. by his Deed Indented, Covenanted with *William Bapthorp*, *Philip Conſtable*, *John Huſſey* and others, and their Heirs, That in conſideration that the ſaid Manor ſhould continue in his name and poſterity, and in conſideration of natural love, and blood, &c. that he would enfeoff them and their Heirs within one year following, unto the uſes intents and purpoſes following, and declared in the Indentures, *viz.* unto the uſe of himſelf for the term of his life, and after to the uſe of *Francis Cholmeley* for life, and after to the uſe of *Henry Cholmeley* and the Heirs Males of his body with divers remainders over. And further covenanted by the ſame Deed, that if he failed to execute the eſtates within the ſaid year, that then he and his Heirs for the conſiderations aforeſaid, would ſtand ſeiſed unto the uſes and intents aforeſaid, and to no other uſes. And in the ſame Indenture after the ſaid Covenant was a Proviſo, that if the ſaid *Henry Cholmeley* or any of the Heirs Males of his Body, ſhould attempt or make any Feoffment, &c. that his eſtate ſhould ceaſe, as if he were dead, [b] and that then the ſaid *William Bapthorp* and the other feoffees and their Heirs ſhould ſtand ſeiſed unto the uſe of ſuch perſon to whom the ſame ought to deſcend, or remain as aforeſaid: And no feoffment was made within the year, and afterwards Sir *Richard* and *Frances* died, *Henry* had iſſue the Plaintiff, who levied a Fine to *Humble* the Defendant; the Plaintiff entred by colour of the aforeſaid Proviſo, the Defendant entred upon him, and he brought an Action of Treſpaſs. And it was adjudged againſt the Plaintiff. And the principal cauſe of the Judgment, as the Lord *Anderſon* ſaid was, becauſe the ſaid Proviſo to ceaſe an eſtate eſtate tail as if Tenant in taile were dead, was utterly againſt Law, impoſſible and repugnant at the beginnig at the time of the delivery of the Indenture. And in the ſame caſe it was agreed, that if a man limit an uſe in tail with Proviſo that if he do ſuch an act, that his eſtate ſhall ceaſe during his life, that ſuch Proviſo is utterly void. And it was agreed, that if a man limit an uſe in tail that if he do ſuch an act that his eſtate ſhall ceaſe during his natural life, that this Proviſo is repugnant and againſt the Law, for he cannot by Proviſo or Condition determine the eſtate in Land to which the ſame is annexed in part. For now, when the Statute of 27 *H.* 8. hath transferred the uſe into poſſeſſion and eſtate of the Land, he cannot make a fraction in that eſtate in caſe of limitation of uſe, which he cannot do in a gift in tail by livery in poſſeſſion, for the Statute hath not transferred the poſſeſſion to the uſe, but hath transferred and incorporated the uſe in the eſtate of the Land, which is proved by the uſual form of pleading, that is to ſay, *de uſibus in poſſeſſion' transferend'*, and therefore as to this purpoſe, it is as much as if a man had made a gift in tail with Proviſo, or upon condition, that if the donee do ſuch an act that his eſtate ſhall ceaſe during his life; or if a feoffment in fee be made with Proviſo, or upon condition that his eſtate ſhould ceaſe during his life; ſuch Proviſoes and Conditions are utterly void and againſt Law; for a Condition or Limitation annexed unto an eſtate of Land, ought to deſtroy all the eſtate to which it is annexed, and not part of it; and he who entreth for a Condition broken ought to have the ſame eſtate that he had when he made the eſtate Conditional.

And *Walmeſley* Juſtice ſaid, that when an eſtate is given to one, the ſame may be avoided in all by a Condition or Limitation, but the ſame eſtate in ſome part thereof cannot be determined as to one, and given in part or in all to another, for that is repugnant to the Rules of Law. As if a man make a Leaſe for Life upon Conditon, that if he do not pay twenty pound, that another ſhall have the Land, this future limitation is void; and in the Caſe at the Bar the donor might Plo. Com. have annexed a Condition or Limitation to determine his eſtate; but in this Caſe the donor intended 25. *a.* to continue the eſtate tail, and to ceaſe it as to one, and in his life to transfer it to another. If af- [87] ter the Statute of 1 *R.* 3. and before the Statute of 27 *H.* 8. a man had made a feoffment unto the uſe of one for life, and after unto the uſe of another for life, or in tail, and after unto the uſe of another in fee, thoſe in the remainder could not make a feoffment or grant by the general words of the Act of 1 *R.* 3. for then there ſhould be a fraction and diviſion of eſtates in Law, which the Law will not ſuffer: And further he ſaid, that the Caſe in 5 *E.* 2. *tit. Dower.* 143. of a Rent new created is not againſt his Opinion, for there the Condition is, that if the grantee die his heir within age, that during that time the terre-tenant ſhould be quit of the Rent, which he ſaid is good and parcel of the quality of the Inheritance of this new thing: As in 9 *H.* 6. 36. *a.* a man grants Common newly created *quandocunque averia ſua ierint*, the ſame is *modus donationis*, and the grantee ſhall not have common there, but in that manner: but if a man make a feoffment in fee upon condition, that if the feoffee die his heir within age, that his eſtate ſhall ceaſe during the minority of the heir, the ſame is utterly void, for an eſtate of Land cannot ſo ceaſe for the reaſons aforeſaid: and alſo becauſe if an eſtate of Land ſhould ſo ceaſe, veſt, and reveſt, it ſhould be dangerous to the *Præcipe* of a ſtranger, which inconvenience is not in the Caſe of the Rent or Common newly created. And *Glanvile* Juſtice ſaid, that the Caſe of the Rent is not to be reſembled to Land, for a Rent newly created may ceaſe, but Land cannot.

But

But note Reader, and well obſerve the ſaid Book of 5 *E.* 2. for there during the minority of the heir, the Writ of Dower was brought againſt the Terre-tenant, and not againſt the heir, which proveth that the eſtate of the Rent was not divided, for then the Writ of Dower ſhould be brought againſt the heir, although the eſtate of the Rent during his minority ceaſe; but the Writ of Dower was brought againſt the Terre-tenant, which proveth (as I conceive) that for the time the Rent newly created *per modum conceſſionis* ſhall ceaſe: And note, in the ſame Caſe when the heir came of full age, the demandant had execution againſt him. And Juſtice *Walmeſley* ſaid, that if a man make a feoffment in fee of land to the uſe of *A.* and his heirs every *Munday*, and to the uſe of *B.* and his heirs every *Tueſday*, and to the uſe of *C.* and his heirs every *Wedneſday*, theſe limitations are void, for we do not find ſuch fractions of eſtates in Law. And if Coparceners do agree to preſent by turns, this is a partition as to the poſſeſſion, but notwithſtanding that they ſhall joyn in a Writ of Right. So a Partition that one ſhall have the Land from *Eaſter* to the firſt of *Auguſt* in ſeveralty, and that the other ſhall have the ſame from the firſt of *Auguſt* until *Eaſter* in ſeveralty, the ſame is good as to the poſſeſſion and taking of the profits, but it is no ſeverance of the eſtate of Inheritance. And he the ſaid, that it ſhould be ſtrange and againſt reaſon, that this eſtate in the Caſe at Bar ſhould end in regard of one, and continue in regard of another, and that *Rowland* ſhould be dead when one ſaw him, and be alive when another ſaw him. An Act of Parliament, or the Common Law may make an eſtate void as to one, and good as to another, but a man by his words, and breath of his mouth cannot ſo do. As if land be given to Husband and Wife, and to the heirs of their two bodies begotten, and the Husband levieth a fine with Proclamation, and hath iſſue, and dieth; now this fine by force of the Act of Parliament of 32 *H.* 8. *c.* 36. ſhall bar the iſſue in tail, but ſhall not bind the Wife; and ſo in reſpect of one a bar, and in reſpect of the other no bar. So in a *Præcipe* if one be vouched, now having regard unto the demandant, the vouchee is Tenant, and a Releaſe unto him is good, but having regard to a ſtranger he is not Tenant, and a Releaſe unto him by a ſtranger is void: So if one hath lands for years as Executor, and ſurrendreth the ſame, now to one reſpect the term is extinct, and to another reſpect it is in being. So as an Act of Parliament, or an Act of the Law may do that in divers Caſes to ſeveral reſpects; but a man by his words cannot do the ſame, and namely, an eſtate to ceaſe as to one, and to continue as to another, to make a man half alive, and half dead as he ſaid. If one might limit eſtates in lands to ceaſe during the minoritie of his heirs, and other perſons to have the lands during that time, then all Wardſhips may be defeated, and great inconveniences would follow, and therefore he ſaid this manner of ceaſing of eſtates, and to carry one and the ſame eſtate or part thereof from one into another without determination, and namely from one alive to another alive is impoſſible, and againſt Law and reaſon, and inconvenient. And he ſaid, that if a man before the Statute of 27 *H.* 8. had bargained his land for money generally, without theſe words (his heirs) the Chancellor would compel him according to conſcience and the intent of the parties in regard of the value, to have executed an eſtate in fee, and the ſame was ſo long as uſes were things meerly in truſt and confidence, but the uſes after the Statute are transferred and made in an eſtate in the land: And therefore he ſaid, that if after the Statute he bargain and ſell for money the land to one generally, he hath but an eſtate for life.

20 Ed. 3. Q. I. 63, 65. F. N. B. 36. [b] 18 Eliz. Dier 351. b.

And *Glanvill* Juſtice ſaid, that betwixt the making of the Statute of 13 *E.* 1. of *Donis condicionalibus*, and 27 *H.* 8. ſuch *Proviſo* annexed to an eſtate in tail, that the ſame ſhould ceaſe as if the Tenant in tail were dead, was never ſeen or heard of; and therefore he concluded that it cannot be done by the Law. And ſo *Littleton* concludeth *fol.* 23. in the like caſe, that if any Action might have been taken or brought upon the Statute of *Merton, cap.* 6. *de Dominis qui maritaverint illos, &c. ſi parentes conqueruntur, &c.* it ſhould be intended ſome time to have been put in ure, and therefore he ſaid no action can be brought upon that Statute, for as much as it was never ſeen or heard that any Action was brought upon that Statute. And he ſaid, that uſes were not within the letter of the Statute of *Donis, &c.* which ſpeaketh only of lands and tenements, but are taken within the equity, and therefore ought to follow the nature of the land. And before the Statute of 27 *H.* 8. in the Caſe of a uſe, the Chancellor did judge by way of imitation of the Rules of the Common Law, and according to the nature and quality of the land, as in Caſe *de poſſeſſione fratris*, Borough Engliſh, Gavelkind on the part of the mother, &c. and ſo his judgment was by way of imitation; And the makers of all the Statutes concerning uſes, as 1 *R.* 3. *cap.* 5. 4 *H.* 7. *cap.* 17. 9 *H.* 7. *cap.* 15. and all other Statutes have made uſes to imitate and reſemble eſtates in poſſeſſion, and to be guided and directed according to the rules and reaſon of the Common Law. And he ſaid, that *Richill* who was a Judge in the time of *R.* 2. and *Thirning* who was Chief Juſtice of the Common Pleas in the time of *H.* 4. intended to have made Perpetuities, and upon forfeiture of the eſtate tail of one of their ſons to have given the remainder and entry unto another, but the remainders were utterly void, and againſt the Law. And for theſe cauſes it was reſolved by the whole Court (*nullo contradicente*) that Judgment ſhould be given againſt the Plaintiff, and ſo it was as appeareth by the Record.

[88]

Term.

Term. Trin. 32 Eliz.

Shelley's Caſe.

Nicholas Woulfe brought an *Ejectione firmæ* of certain land in *B.* in the County of *Eſſex*, againſt *Henry Shelley* Eſquire Defendant, and declared upon a Leaſe by *Richard Shelley* Eſquire, to which the Defendant pleaded, Not guilty. And a ſpecial verdict was found to the effect following, *viz.* That *Edward Shelley* and *Joanne* his Wife were ſeiſed of the Mannor of *Barhamuile*, whereof the land wherein the Ejectment was and is parcel, in ſpecial tail, that is to ſay, to them and to the heirs of their two bodies lawfully begotten; the remainder unto the ſaid *Edward* and his heirs; and further found that the ſaid *Edward* and *Joanne* had iſſue *Henry* their eldeſt ſon, and *Richard* their youngeſt ſon, and afterwards the ſaid *Joanne* died, and the ſaid *Henry*, having iſſue *Mary* yet living, died in the life of the ſaid *Edward*, his Wife then young with child with the now Defendant. And afterwards the ſaid *Edward Shelley* by Indenture bearing date the 25 of *Septemb.* in the firſt and ſecond year of the late King *Philip* and Queen *Mary*, and firſt delivered the ſixth day of *October* then following, did covenant with *Cowper* and *Martin* to ſuffer a Recovery of the ſaid Mannor amongſt other things; and that the ſaid Recovery ſhould be unto the uſe of the ſaid *Edward Shelley* for the terme of his life without impeachment of Waſte; and after his deceaſe unto the uſe of Mr. *Carill* and others for 24 years, and after the ſaid 24 years ended then to the uſe of the heirs males of the body of the ſaid *Edward Shelley* lawfully begotten, and of the heirs males of the body of ſuch heirs males lawfully begotten. And for default of ſuch iſſue, to the uſe of the heirs males of the body of *John Shelley* of *Michelgrove, &c.* And found alſo, that the ſaid *Edward Shelley* the ninth day of *October*, being the firſt day of the Term, between the hours of five and ſix in the morning died, and after the Recovery paſſed the ſame day with a voucher over, and immediately after judgment given, an *Habere facias ſeiſinam* was awarded, the Wife of the ſaid *Henry Shelley* being at this time great with child with the Defendant. And afterwards, that is to ſay, the ninth day of *October* next following the Recovery was executed; and after the fourth day of *December* then next following the Wife of the ſaid *Henry Shelley* was delivered of the ſaid *Henry* now Defendant. And further found that the ſaid Mannor was in Leaſe for years at the time of the ſaid Judgment and Recovery, by force of a Leaſe made long before the Original Writ purchaſed, upon which the ſaid Recovery was had: And that the ſaid *Richard Shelley*, ſecond ſon of the ſaid *Edward Shelley*, and Uncle to the Defendant, entred, and made a Leaſe to the ſaid *Nicholas Woulfe* now Plaintiff in the *Ejectione firmæ*; and that the ſaid *Henry Shelley* the Defendant entred upon the ſaid *Nicholas Woulfe* and did eject him. And upon the whole matter aforeſaid the Jurors pray the advice and judgment of the Court, if the entry of the ſaid *Henry* the Defendant were lawful or not; And if by the judgment of the Court, the entry of the ſaid *Henry* were thought unlawful, then the Jury found that the Defendant was guilty, and aſſeſſed damages: And if the entry of the Defendant ſhall be thought by the Court to be lawful, then they found for the Defendant that he was not guilty, &c. [93] [b] [94]

This Caſe was divided into four principal Queſtions: whereof the firſt was,

1. If Tenant in tail ſuffer a common Recovery with a voucher over, and die before execution, if execution may be ſued againſt the iſſue in tail.

2. If Tenant in tail make a Leaſe for years, and after ſuffer a common Recovery, if the reverſion be preſently by judgment of Law in the Recoveree before execution ſued

3. If Tenant in tail having iſſue two Sons, and the eldeſt dieth in the life time of his Father, his Wife young with Child, and then Tenant in tail ſuffereth a common Recovery unto the uſe of himſelf for term of his life, and after his death to the uſe of *A.* and *C.* for 24 years, and after to the uſe of the heirs of his body lawfully begotten, and of the heirs males of the body of ſuch heirs males lawfully begotten and preſently after judgment an *Habere facias ſeiſinam* is awarded, and before the execution, that is to ſay, between five and ſix in the morning of the ſame day, in which the recovery was ſuffered, Tenant in tail dieth, and after his death and before the birth of the Son of the eldeſt Son, the recovery is executed, by force whereof *Richard* the Uncle entreth, and after the Son of the eldeſt Son is born, if his entry upon the Uncle be lawful or not. [b]

4. If the Uncle in this Caſe may take as a purchaſor, for as much as the eldeſt Son had a Daughter which was heir general and right heir of *Edward* at the time of the execution of the Recovery. And this Caſe was argued by *Anderſon* the Queens Serjant, *Gawdy* and *Fenner* Serjants, for the Plaintiff, and by *Popham* Sollicitor general, *Cowper* and *Coke* for the Defendants.

And as to the firſt Point, the Plaintiffs Counſel argued, that judgment might be ſued againſt the iſſue in tail, and their principal reaſon was, becauſe the judgment given againſt the Tenant in tail, and the judgment for the Tenant in tail to have in value againſt the vouchee doth bind the right of the eſtate tail, and the iſſue in tail ſhall not avoid the ſame by the Statute of *Donis condicionalibus*, becauſe that the Law adjudgeth that in reſpect of the intended recompence the iſſue in tail was not prejudiced: As if Tenant in tail grant a Rent for releaſe of a right unto the land, the ſame ſhall bind the iſſue in tail, and ſo not reſtrained by the ſaid Act, as it is agreed in 44 *E.* 3. 21. *Octavian Lumbard*'s Caſe. And if the recovery ſhall not be a bar to the iſſue, upon which execution is in the life of Tenant in tail, it ſhall be miſchievous and a great impeachment unto common aſſurances. And further it was ſaid, that the right of the eſtate tail was bound by the Judgment and not by the Execution; for if the right of the eſtate tail were not bound by the Judgment, it could not be barred by the Execution after ſued. 1 *Point.*

As to the ſecond Point, they conceived, that it was not any Queſtion, but that the Recoverors ſhall not have the reverſion preſently by the Judgment, notwithſtanding that the lands were in leaſe for years; for they ſaid that the Judgment was, that the demandant ſhould recover ſeiſin of the land which was but executory, and could not be executed until execution, entry, or claim. As if a Common or a Reverſion, or any other thing which lieth in grant be granted upon Condition, if the Condition be broken, the thing granted is not in the grantor before claim, for it was ſaid, that when a man may enter, or claim, the Law will not adjudge him in poſſeſſion until entry or claim.

To the third Point, which was the great doubt of the Caſe they argued, that *Richard* the Uncle was in by purchace, and by conſequent the entry of the Defendant upon him was not lawful; and this in effect was their principal reaſon:

[95] *Argument, viz.* That which originally veſts in the heir, and was not in the anceſtor, veſts in the heir by purchace.

But this uſe originally veſts in *Richard Shelley*, and never was in *Edward Shelley*;
And therefore the uſe veſts in *Richard Shelley* by purchace.

And they ſaid, that it was manifeſt that the uſe never veſted in *Edward Shelley*. For before the Recovery executed no uſe could be raiſed, for the uſe ought to be raiſed out of the eſtate of the Recoverors, but the recovery was not executed in the life of *Edward Shelley*, and therefore no uſe could riſe during his life. And Serjant *Anderſon* ſaid, that it was impoſſible that *Richard Shelley* ſhould be in by deſcent, becauſe that no right, title, action, uſe, or other thing touching the uſes limited by the ſaid Indentures did deſcend to *Richard*, but only a thing intended to him, which intention in his life received no perfection: and therefore this Caſe was not like any Caſe where a right, title, action, uſe, or other thing deſcendeth from the anceſtor to the heir, but is like to the Caſe in 5 *E.* 4. 6. where the Wife conſents to a raviſhor, having iſſue a daughter, the daughter entreth by the Statute of 6 *R.* 2. after a ſon is born, he ſhall never deveſt the ſame, for that it veſted in the daughter by purchace; ſo is the Caſe agreed in 9 *H.* 7. 25. If a Leaſe be made to one for life, the remainder to the right heirs of *J. S.* if *J. S.* die having a daughter, his Wife with child with a ſon, the daughter claims the ſame by purchace, and therefore the ſon born after ſhall never deveſt the ſame; but they relied principally upon the Caſe in 9 *H.* 7. 25. that if the Condition deſcend to the daughter, and ſhe entreth for the Condition broken, the ſon after born ſhall never enter upon her, and yet there ſhe is in by deſcent, and the title of her entry, that is to ſay, the Condition ſhe hath as heir: and yet becauſe ſhe was the firſt in whom it veſted, the ſon born after ſhall not deveſt the ſame, which is a ſtronger Caſe then our Caſe at the Bar.

And further it was ſaid by the Plaintiffs Counſil, that although the recovery had been executed in the life of *Edward Shelley*, yet ought the heir male to take by purchace, for they ſaid, that the manner of the limitation of the uſes is to be obſerved in this Caſe, this which is firſt to *Edward Shelley* for the term of
[b] his life, and after his death to the uſe of others for 24 years, and after the 24 years ended then to the uſe of the heirs males of the body of the ſaid *Edw. Shelley* lawfully begotten, and of the heirs males of the body of the ſaid heirs males lawfully begotten; in which Caſe they ſaid, that if the heirs males of the body of *Edw. Shelley* ſhould be words of limitation, then the ſubſequent words, *viz.* and of the heirs males of the body of the ſaid heirs males lawfully begotten ſhould be void: for words of limitation cannot be added and limited to words of limitation, but to words of purchaſe. And they ſaid, that foraſmuch as thoſe words, heirs males of the body of *Edward Shelley* might be words of purchace, that in this Caſe the Law ſhall conſtrue and take them as words of purchace, for otherwiſe the ſaid ſubſequent words, (and of the heirs males of their bodies) ſhould be void. And ſuch conſtruction is always to be made that all the words (if it may be) in congruity of reaſon and conformity of Law may take effect according to the intent of the parties without rejecting of any, or by any conſtruction to make them void. And therefore *Anderſon* put this Caſe, If a man make a feoffment in fee, to the uſe of himſelf for life, and after his deceaſe to the uſe of his heirs, in this Caſe the fee ſimple is executed; but in the ſame Caſe, if the limitation be to the uſe of himſelf for life, and after his deceaſe to the uſe of his heirs, and of their heirs females of their bodies, in this Caſe theſe words (his heirs) are words of purchace, and not of limitation, for then the ſubſequent words (and of their heirs females of their bodies) ſhould be void. So they concluded this point, firſt that no uſe could riſe until execution ſued, no execution was ſued in the life of *Edward Shelley*, and then the ſame firſt veſted in *Richard* as a purchace before the ſon of the eldeſt ſon was born: And for the latter reaſon, admitting that the recovery had been executed, notwithſtanding the heirs males of the body of *Edward Shelley* ſhall take by purchace, and ſo *quacunque via data*, they concluded, that the uſe firſt ſettles in *Edward Shelley* as a meer purchaſor. And as to the latter point which in effect (admitting as hath been ſaid that the words were words of purchace) was, that a leaſe for life is made to *A.* the remainder unto the heirs males of the body of *Edward Shelley*, if in this Caſe *Richard* may take this eſtate tail by purchace as heir male, notwithſtanding that his elder brother had iſſue a daughter which is yet living, and who was heir general; they ſaid that it was no difference as to that where an eſtate is limited by gift executed, and when by way of remainder, nor when the heir male of
[96] the body claimeth by deſcent, nor when by purchaſe, for if an eſtate had been made to *Edward Shelley*, and to the heirs males of his body, in that Caſe *Richard Shelley* without doubt ſhould have the land by deſcent, and that by the meaning of the Statute of *Donis Condicionalibus* to fulfil the will and intent of the donor.

And ſo it is if I give lands to a man and to his heirs females, and the donee hath iſſue male and female, although the female be not heir general, yet ſhe is a ſpecial heir to claim *per formam doni*. And the ſame was in effect the ſubſtance of the three arguments publiſhed and delivered at large on the Plaintiffs part before the Juſtices of the King's Bench in *Hill.* and *Eaſter* Terms, in the 23 year of the reign of

of Queen *Elizabeth*: And on the Defendants part it was argued contrary. As to the firſt point it was argued, that Execution could not be ſued againſt the iſſue in tail; and therefore it hath been agreed, that the Judgment only againſt the Tenant in tail did not bind, but the Judgment to have in recompence, *ſequitur a conceſſis*, that the iſſue in tail cannot be barred: And for proof that in this Caſe the iſſue in tail could not have any recompence: Firſt it was ſaid, that if Execution could not be ſued againſt the iſſue in tail, then the iſſue could not take any benefit of the recompence. For it is agreed in 17 *E.* 3. Recovery in value, *Fitz.* 33. 1 *E.* 3. 12. That he who voucheth ſhall never have execution againſt the vouchee before execution ſued againſt him; ſo that the Judgment to recover over in value is not material (as this Caſe is) if not that execution may be ſued againſt the iſſue which cannot be in this Caſe. For he who is in of an eſtate in poſſeſſion by title paramount a Recovery ſhall not be bounden by the ſame Recovery; but the iſſue in tail in our Caſe is in of an eſtate in poſſeſſion which he had by title paramount the Recovery, and therefore the iſſue in tail ſhall not be bound by the Recovery. And in proof of the firſt propoſition, it hath been adjudged in 28 *H.* 8. reported by Serjant *Bendloes*, which Caſe began 26 *H.* 8. in the Book at large, where the Caſe was, that an Executor having Judgment to recover a debt due to the Teſtator, and dying inteſtate before Execution, and the Ordinary committing the adminiſtration of the firſt Teſtator to one, that the adminiſtrator ſhould not ſue execution upon that Recovery, becauſe he deriveth his intereſt, and repreſents the perſon of the Teſtator, and ſo before the Recovery. So if there be two Joyntenants, and one maketh a leaſe for years rendring rent, the leſſor dieth, the other ſhall not have the rent, becauſe that he claimeth by the firſt feoffor which is paramount the Leaſe and the Reſervation: So if Tenant for life make a leaſe for years reſerving Rent, and after ſurrender to him in the Reverſion, not being in by force of his ancient Reverſion, he cannot have the rent newly reſerved: And in proof that the iſſue in tail was in by a title paramount the Recovery, he ſaid, That the iſſue in [b] tail ſhall avoid all Leaſes, Charges, and other incumbrances made by his anceſtors, becauſe that he claimeth *per formam doni*. And if Tenant in fee ſimple make a Leaſe for life, and ſuffer a Recovery, he and his heirs are for ever concluded, but he ſaid, That if Tenant in tail be of a Reverſion expectant upon an eſtate for life, and ſuffer a Recovery, and hath Judgment to recover over in value, yet his iſſue ſhall avoid the Recovery, for he ſhall not be eſtopped, becauſe he claimeth *per formam doni*: But if execution had been ſued in the life of Tenant in tail, then foraſmuch as the eſtate tail doth not deſcend to the iſſue; and foraſmuch as that then he may ſue execution over, it is good reaſon to bar the eſtate tail; but if the iſſue in tail be in by lawful deſcent in poſſeſſion of the eſtate tail before the Recovery executed, then the Law ſeemeth to be otherwiſe. *Octavian Lumbard's* Caſe in 44 *E.* 3. which had been cited on the contrary ſide, was nothing againſt this opinion, for there the iſſue in tail took benefit of the releaſe made to his anceſtor, but in our Caſe, the iſſue in tail being in of an eſtate in tail paramount the Recovery, cannot take benefit of the recompence over in value. And wherefore ſhould not the iſſue in tail in this Caſe be at liberty, to chooſe if he would take the eſtate tail, or otherwiſe to admit of execution to be ſued againſt him, and to ſue execution over in value, as well as in 14 *H.* 6. 2. in the Caſe of Exchange, in which Caſe although aſſets of greater value deſcend to him then the land in tail, yet he may chooſe to have the one or the other at his election.

And if Tenant in tail be diſſeiſed, and levieth a fine to the diſſeiſor without warranty and dieth, if the iſſue in tail enter and be ſeiſed by force of the tail before all the proclamations be made, although the proclamations be afterwards made, yet the ſame ſhall not bar the iſſue: So if Tenant in tail levieth a fine and diſſeiſeth the conuſee, and dieth before all the proclamations be made, and after the proclamations in the time of the iſſue in tail paſs, yet the iſſue is not bound thereby, by the Statute of 32 *H.* 8. and yet the words of the Act are, That all fines after proclamations, &c. ſhall bar, &c. But it hath always been holden, if the iſſue in tail be remitted and ſeiſed by force of the tail before the bar be compleat, that is to ſay, before the proclamations be paſſed, the iſſue is not bound; ſo in this Caſe, the iſſue in tail is ſeiſed by force of the tail, and in *per formam doni* before the bar is compleat, and therefore the execution cannot be ſued againſt him, nor any bar can after the death of his Father be made unto the eſtate tail which is deſcended to him in poſſeſſion. And it is agreed in 7 *E.* 3. 335. that if a diſſeiſor at the Common Law before the Statute of *Non claime* had levied a fine or ſuffered Judgment in a Writ of Right, until execution ſued they were not bars, for the year ſhall be accounted after the tranſmutation of the poſ- [97] ſeſſion by execution of the fine or Recovery; and ſo it is ſaid in *Stowel's* Caſe, *Plow. Com.* 357. *e.* and the Books in 28 *Aſſ.* 32. 7 *H.* 4. 17. *Plow. Com.* 55. 12 *E.* 4. 20. were cited, that execution upon a feined recovery againſt the Father, cannot be ſued againſt the iſſue in tail.

To the ſecond Point they argued, That foraſmuch as the land was in leaſe for years, that the Recovery was executed by judgment of Law preſently after the judgment. And a difference was taken when lands were in the poſſeſſion of the Tenant at the time of the judgment, and when the lands were in leaſe for years. And the reaſon of their difference was, becauſe the Recoverors in the one Caſe might ſue execution, and in the other Caſe may not; and becauſe that the Recoverors cannot ſue execution, for this cauſe the Law ſhall adjudge him in execution preſently; the reaſon thereof is, that otherwiſe the leſſee during the term might commit Waſte, and ſhould be diſpuniſhable by the recoveror, but if the recoveror may enter or ſue execution, then he ſhall prevent the ſame. And therefore if a fine *ſur cogniſance de droit tantum* be levied of land in poſſeſſion, the cogniſee hath nothing before entry, as it is agreed 48 *E.* 3. 15. 10 *H.* 6. 16. and *Littleton* in his Chapter Attornment 131. But if a fine *ſur cogniſance de droit tantum* be levied of a reverſion upon an eſtate for life or years, or of a Seignory, or any other thing which lieth in grant, there the reverſion, or thing which lieth in grant paſſeth preſently. And it was ſaid, that a common Recovery is in nature of a common Conveyance, and ſo it appeareth, that a reverſion or thing which lieth in grant is more eaſily transferred from one perſon to another, then an eſtate of freehold in poſſeſſion. A Condition is Executory as well as a Judgment, but if the feoffor cannot enter, the Law will adjudge him in poſſeſſion preſently. And therefore it is holden in 20 *H.* 7. 4.

20 E. 4. 19. & 22 E. 4. that if the Condition be collateral, and the feoffee make a leaſe back again for years to the feoffor, and then the Condition is broken, the Law ſhall adjudge the feoffor in of a preſent fee ſimple, becauſe that he cannot enter; and yet in that Caſe he may ſay, that foraſmuch as he cannot enter, therefore he ought to make a claim, yet the Law in that Caſe requires no claim to be made; but in the Caſe before it is otherwiſe, where no leaſe for years had been made back again, and the reaſon may be for the miſchief before mentioned.

Alſo *Littleton's* Caſe, *fol.* 84. was cited, where *Littleton* is of opinion, that in the Caſe of a Condition the fee ſimple ſhall be reveſted again in the leſſor, becauſe he cannot enter, and the Law ſhall ad-
[*b*] judge him in poſſeſſion without entry or claim. And further it was ſaid, that of thoſe things which lie in grant, as in the Caſe before remembred of the fine, they paſs to the conuſee preſently, by the fine levied: So in the Caſe of a common recovery (which now is but a common aſſurance and conveyance) ſuch things which lie in grant are in the recoveror by the Judgment. And therefore there are ſome opinions in the Books in 22 *Aſſ.* 84. 45 *E.* 3. 26. & 30 *E.* 3. 33. that if a man hath judgment to recover a rent, or common, or any thing which lieth in grant, that there the thing ſo recovered is in the recoveror by the judgment, for the Books ſay, that the demandant is in ſeiſin preſently by the judgment. And they cited the Caſe in 27 *H.* 8. 7. *a.* which is direct in the point, that the recovery is executed preſently by the judgment; the land being in leaſe for years; ſo they ſaid, firſt, that execution could not be ſued againſt the iſſue in tail: ſecondly, if it were needful that Execution was had in the life of *Edward Shelley*, that the ſame was executed by the judgment of Law: And if the judgment were executed by operation of Law, then the eſtate tail to his heirs males of his body was in *Edward Shelley*, and by conſequence the entry of the Defendant was lawful without queſtion.

But for the argument of the third Point, admitting the Law in both the ſaid points to be againſt the Defendant, that is to ſay, that execution might be ſued againſt the iſſue in tail; and that the recovery was not executed in the life of *Edward Shelley*, but after his death, and before the defendant was born: yet the Defendants Counſel did argue that the Defendants entry was lawful. The firſt reaſon in effect was as followeth: When the Law preſcribeth a means to perfect or ſettle any right, or eſtate, if by the act of God this means in ſome circumſtance (as in our Caſe in time) come impoſſible, yet no party who was to have received benefit, if the means had been with all circumſtances executed, ſhall not receive any prejudice for not executing thereof in ſuch circumſtance which becomes impoſſible by the act of God, if all be performed without lacheſs that the parties might do; for it ſhould be againſt reaſon, that thoſe things which are inevitably by the act of God, which no induſtry can avoid nor policy prevent, ſhall be conſtrued to the prejudice of any in whom there was no lacheſs. And therefore the preſcript Rule of Law is, that a man ſhall not be Tenant by the Curteſie without actual ſeiſin; yet of a Rent, or of an Advowſon, if the Wife die before the rent due, or before the avoidance, he ſhall be
[98] Tenant by the Curteſie, as it is agreed in 7 *E.* 3. 66. & 3 *H.* 7. 5. *b.* for it is impoſſible for him by the act of God to have actual poſſeſſion. Alſo if leſſee for the term of another mans life be diſſeiſed of lands, and the diſſeiſor take the profits thereof, now if the diſſeiſee will recover the mean profits, the means which the Law preſcribes for the ſame is, That the Tenant for the other mans life reenter, and then he ſhall recover all the mean profits in an action of Treſpaſs; but if the means become impoſſible by the act of God by the death of the *Ceſtuy que vie*, ſo as he cannot enter, then he ſhall have an action of Treſpaſs without any reentry, becauſe that the means is become impoſſible by the act of God, *viz.* the reentry, as it is holden in 38 *H.* 6. 28. *c.* Alſo if a leſſee covenanteth to leave a wood in as good plight as the wood was at the time of the Leaſe, and afterwards the trees are overturned by tempeſt, he is diſcharged of his Covenant *quia impotentia excuſat legem*, as it is holden in 40 *E.* 3. 6. So in this Caſe when *Edward Shelley* dieth the morning of the ſame day that Judgment was given, immediately upon the Judgment the Recoverors ſue forth an *Habere facias ſeiſinam*, ſo that no *lacheſs* was in any party, but it became impoſſible by the act of God that execution ſhould be ſued in the life of *Edward Shelley*, and therefore execution being had after his deceaſe, ſhall not prejudice the Son born after, who at that time was in *utero matris*. The ſecond reaſon was, becauſe that the uſe veſted in *Richard Shelley*, although not directly by deſcent as to have his age, or take away an entry, &c. yet in the nature and degree of a deſcent by reaſon of the original act begun in the life of the anceſtor; and their reaſon in ſubſtance was to this purpoſe. When the heir taketh any thing which might have veſted in the anceſtor, the heir ſhould be in by deſcent; but in the Caſe here the uſe might have veſted in *Edward Shelley*, and if the ſame had veſted in *Edward*, then *Richard Shelley* had taken it by deſcent, and therefore *Richard* in this Caſe ought to take this uſe in the nature and courſe of a deſcent. And therefore if a fine had been levied *ſur conuſance de droit tantum* to *Edward Shelley* in fee, and after, and before execution *Edward* had died, and *Richard* had entred before *Henry* was born; now although *Richard* be the firſt who entreth, yet foraſmuch as this fine was levied to his anceſtor and to his heirs, ſo that he claimeth by words
[*b*] of limitation, and foraſmuch as the firſt and original act was done in the life of the Father, and becauſe it might have veſted in the anceſtor, and if the ſame had veſted in the anceſtor the ſame had dedeſcended, for this cauſe *Richard* had taken the ſame in the degree of a deſcent, and the entry of the defendant had been lawful upon him. And yet in that Caſe *Richard* had not been in directly by deſcent, either to be in ward, or to have had age, or to have taken away the entry of one who had right; but otherwiſe it is when the remainder is limited to the right heirs of *J. S.* &c. for there it beginneth in the Son by name of purchace, and could not have veſted in the Brother as the Book in 9 *H.* 7. 24. cited by the other ſide is agreed. So in the Caſe of Raviſhment 5 *E.* 4. 6. which was cited on the other ſide, from thoſe Caſes and all the other which have been put on the contrary ſide, the eſtate veſted originally by purchace, and no beginning was in the life of the anceſtor, nor could have ever veſted in the anceſtor. And 16 *E.* 3. *Age Br.* 51. if *R. S.* had a Seigniory by deſcent, and afterwards the tenency had eſcheated, and after the Son is born, in that Caſe the Son ſhall enter upon him; for although the

the tenancy firſt veſted in him, yet becauſe that the original cauſe, *viz.* the Seignory, was in the Father, therefore the Son ſhall enter upon the Uncle. And *Chapman*'s Caſe in Mr. *Plowden*'s new Reports was cited, for there it appeareth, that a covenant was made with *Chapman*, &c. and before the leaſe was made *Chapman* died, and then the leaſe was made to his Executors, ſo as the Term did firſt commence in the Executors, yet for as much as the covenant made to the Teſtator was the cauſe of the making of the eſtate to the Executors, for that cauſe the Term was Aſſets in the Executors hands, as well as if it had been made to the Teſtator himſelf. So in our Caſe, although that the land firſt veſted in *Richard*, yet the ſame veſts by reaſon of the Recovery had againſt *Edward Shelley*, and the Indenture made by him, and therefore *Richard* ſhall be in courſe of deſcent as well as the Executors in the courſe of Executors. *Com.* 284.

Further, admit that *Edward Shelley* had exchanged certain land with another, and the other had entred in the lands of *Edward Shelley*, but *Edward Shelley* had died before entry, the Law is clear that the heir of *Edward Shelley* may enter into the lands taken in exchange if he will. And ſo *Perkins* clearly takes it *fol.* 57. *a.* Then admitting that *Richard Shelley* had entred into the lands taken in exchange, now he is the firſt in whom the lands veſt, but becauſe the ſame might have veſted in *Edward Shelley*, and becauſe he came to the ſame by words of limitation, the Son of the eldeſt Son after born ſhall enter upon him: And yet no right, title, uſe, nor action deſcends in this Caſe; for at his choice the exchange might have been avoided: And ſo it is, if a man ſeiſed of the Mannor of *S.* covenant with another that when *J. S.* ſhall enfeoffe him with the Mannor of *D.* then he will ſtand ſeiſed of the Mannor of *S.* to the uſe of the Covenantee and his heirs; the Covenantee dieth his heir within age, *J. S.* enfeoffeth the Covenantor, in this caſe it was holden in *Wood*'s Caſe 3 *Eliz.* in the Court of *Wards*, that the heir ſhall be adjudged in courſe and nature of a deſcent, and yet there was not right, title, uſe, nor action which deſcended, but only a poſſibility of an uſe which could not be releaſed or diſcharged, yet the ſame might, if the Condition had been performed, have veſted in the anceſtor, and then the heir had claimed by deſcent. And therefore in that Caſe the heir was not in by purchaſe, but in courſe of deſcent. And admit that in all the Caſes which have been put, as in the Caſe of Raviſhment, and in the Caſe of Remainder, &c. he who firſt may enter dieth before entry, and the younger Son entreth, and afterwards the Son of the eldeſt Son is born, now it is clear, that the Son of the eldeſt Son ſhall deveſt the land from the Unkle, for the ſame might have veſted in the anceſtor; and to the Caſe which hath been urged by the Plaintiffs Counſel in 9 *H.* 7. 25. of the Condition: The Sollicitor and *Coke* ſaid, that it might be allowed for Law if the true ſence thereof be apprehended. And therefore if the Condition be, that the feoffor or his heirs pay the ſum of 20 *l.* or to do any act before a day certain that they ſhall reenter, in that Caſe if the Father dieth before the day of paiment, and the Daughter to ſave the Inheritance pay the money or ſatisfie the Condition, in thoſe Caſes peradventure the Son ſhall not deveſt the ſame, for if the Daughter had not performed the Condition the land had been utterly loſt. And therefore, in that Caſe a good argument may be made, that the Daughter may detain the land, for *qui ſentit onus, ſentire debet & commodum.* But if the Condition was to be performed on the part of the feoffee, or broken in the life of the feoffor, then they ſaid that the Law was clearly otherwiſe, for the heir entring for the Condition broken ſhall be in ward, and have his age, and that is no ſuch ſpecial reaſon as in the Caſe before. [59]

It was alſo demanded, out of what fountain this ſhould riſe, and who was the Mother who conceived this uſe? And the Indenture anſwereth, That the Recovery. For the Indentures ſaid, that the Recovery ſhall be to the uſes, &c. Then it was ſaid, If the Recovery be the Mother which conceiveth this uſe, and the fountain out of which the uſe riſeth, for as much as this Recovery was had in the life of *Edward Shelley*, although that the uſe ſlept, and was as *embrio in utero matris* until execution ſued: yet the execution being once had, the execution ſhall reſpect the recovery and ſhall raiſe the uſe, which ſlept before, which uſe being once awaked, or raiſed, taketh his life and eſſence from the Recovery which was had in the life of *Edward Shelley*. And thereupon ſome of the Defendants Counſel did reaſon in this manner, The execution of a thing which is executory reſpecteth always the original act or cauſe executory, and when the execution is done, it hath relation to the thing executory, and all maketh but one Act or Record, although it be performed at ſeveral times: And therefore if *A.* by deed indented covenanteth with *B.* that *B.* ſhall recover againſt him the Mannor of *D.* within a year next following; and that the recovery and execution thereupon to be had within the ſaid year, ſhall be had unto the uſe of the Recoveror in tail, &c. and after the recovery is had within the year, and the execution is ſued after the year, in this Caſe it is clear, that although that the Covenant is not purſued in time according to the preciſe form thereof, yet the uſe ſhall be guided by the ſaid Indentures; So in the ſame Caſe, if the ſame Recovery betwixt the ſame parties of the ſame land were ſuffered after the year, yet if no intervenient agreement were between the parties, the Recovery ſhall be intended to the uſes of the ſaid Indentures. For variance in time in this Caſe ſhall not ſubvert the original agreement and contract of the parties. And it is holden in 6 E. 3. 44. that if the preſentment of an uſurper to a Church be in time of war, and the Inſtitution and Induction, which are not but as executions of the preſentment be in time of peace, yet the ſame ſhall be avoided, for the Law reſpecteth the original acts, *& cauſa & origo eſt materia negotii.* If a man who is *Non compos mentis* give unto himſelf a mortal wound, and before he dieth he becometh of *ſanæ mentoriæ*, and afterwards dieth of the ſame wound; in this Caſe, although that he dieth of *ſanæ memoriæ*, yet becauſe the original cauſe of his death, *viz.* the ſtroke was when he was *Non compos mentis*, he ſhall not be *Felo de ſe*, becauſe the death, &c. hath relation to the original act which was the ſtroke or wound; which ſee 22 E. 3. *Corone* 244. And ſo it is in 33 *Aſſ.* 7. *Corone* 210. If a ſervant who hath an intent to kill his Maſter, and before execution of his intent leaveth his Maſters ſervice, and being out of ſervice, executeth his purpoſe, and killeth him who was his Maſter, the ſame is Petit Treaſon, for execu- [b]

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tion doth reſpect the Original cauſe, which was the Malice conceived when he was ſervant; and yet if the Law ſhould adjudge and make conſtruction according to the ſeveral times, then it would be plain, it would be no Petit Treaſon. So in our Caſe, the execution of the uſe relates to the Indentures and Recovery.

[100] It was further asked, when after that the Execution was had, ſo that now the uſe, which before ſlept, was raiſed, what thing it is which governeth and directeth this uſe? and it is to be anſwered, The Indentures. And what is their direction? that the ſaid *Edward Shelley* ſhall have the ſame, and after his death the Heirs Males of his Body, ſo as the Indentures do direct the uſe to the Heirs Males of his body by way of limitation of eſtate, and not by way of purchaſe. And then upon that, this reaſon was collected; the Indentures do direct and govern the manner and quality of the uſe, but the Indentures do direct that the Heirs Males of the body of *Edward Shelley* ſhall take the ſame by limitation of Eſtate and not by name of purchaſe; therefore *Richard* ought to have it as Heir by limitation of eſtate and not by name of purchaſe; for when the execution was had, the Indentures preſently guide the uſe to *Richard*, becauſe he was at the time Heir Male of the body of *Edward Shelley*, which *Richard* is not Heir after the birth of the ſon of the eldeſt ſon. Further it was ſaid, admitting all the matter before ſaid will not ſerve for the Defendant (which the Defendants Counſel held ſtrongly it would) yet it is to be conſidered, that in this Caſe, that the eſtate veſts in *Richard* by way of limitation of uſe, and not by any conveyance by the Common Law in poſſeſſion: And therefore admit our Caſe had been before the making of the Statute of 27 *H.* 8. and that the recoverors had ſued execution after the death of *Edward*, and before the ſon of the eldeſt ſon was born, and then the ſon of the eldeſt ſon had been born; In this Caſe it was asked, Which of them ſhould have the Subpena? And the Defendants Counſel conceived that the ſon of the eldeſt ſon, although that the uſe did firſt attache in the Uncle, ſhall have the Subpena For if the intent of *Edward Shelley* may appear to the Court, that the ſon of the eldeſt ſon ſhall have this uſe, then that is the uſe by which the rule is to be guided and directed. For at the Common Law the intention of the parties was the direction of the uſes, for they were only determinable, and to be adjudged by the Chancellor who is Judge of Equity, and that in Chancery, which is a Court of Conſcience: And as *Bracton* ſaid 18 *Nihil tam conveniens eſt naturali æquitati quam voluntatem domini volentis rem ſuam in alium trasferre ratam haberi.* And therefore in proof, that uſes are directed by the intention and meaning of the parties, divers Caſes were cited, 31 *H.* 6. *Subpena* [b] 23. *Statham Conſcience* 1. A man being *Ceſtuy que uſe*, and having one ſole daughter declared his intent and meaning, that after his deceaſe his daughter ſhould have his Land. And therefore queſtion was made in the Chancery, whether he might revoke this limitation of the uſe made to his daughter; and in arguing of this Caſe, *Forteſcue* held opinion, That if *Ceſtuy que uſe* hath iſſue a daughter, and being ſick declareth his intent to his Feoffee, that his daughter ſhall have his Land after his deſceaſe; and after he recovereth his health, and hath iſſue a ſon, he ſaid it is good Conſcience that the Son ſhall have the Subpena, for he is his Heir. Note the reaſon of *Forteſcue*, becauſe he is his Heir. And there *Forteſcue* ſaid, that *Conſcientia, dicitur a con, & ſcio, quaſi ſimul ſcire cum Deo*, that is to ſay, the will of God as near as reaſon will. Alſo in divers Caſes of our Books we find, that the intention of the parties is the direction of uſes, by a conſcionable and favourable conſtruction. And therefore it is holden in 7 *H.* 6. 4. if a man be ſeiſed of Land on the part of his Mother, and maketh a feoffment in fee reſerving rent to him and Heirs, in this Caſe by the rule of the Common Law as *Littleton* ſaid, the Rent ſhall go to the Heir on the part of the Father; but if a man be ſeiſed of Lands on the part of the Mother, and maketh a feoffment in fee to the uſe of him and his Heirs, the book is directly agreed in 5 *E.* 4. 7. that this uſe ſhall not go to the Heir at the Common Law, but for as much as the Land and Living moveth from the part of the Mother, therefore in equity the uſe which is nothing but a Truſt and Confidence ſhould go alſo to the Heirs on the part of the Mother. As *Littleton* ſaith, that a man by a feoffment or grant ſhall not have a fee ſimple without theſe words (Heirs.) And yet the Law is plain that if a man before the Statute of 27 *H.* 8. had bargained and ſold his Land for Money without theſe wors (Heirs) the bargainee hath a fee ſimple. And the reaſon is, becauſe by the Common Law nothing paſſeth from the bargainor but a uſe, which is guided by the intent of the parties, which was to convey the Land wholly to the bargainee, and for as much as the Law intends that the bargainee doth pay the very value of the Land, therefore in equity and according to the meaning of the parties the bargainee had the fee ſimple without theſe words (Heirs) as it is holden in 27 *H.* 8. 5. 4 *E.* 6. *Br. eſtates* 78. 6 *E.* 6. and in the time of *H.* 8. *Br. Conſcience* 25. ſo in our Caſe, although that the uſe firſt veſt in the Uncle, admitting the Caſe to be before the Statute of 27 *H.* 8. yet ſeeing that the intent of *Edward Shelley* was to advance the ſon of his eldeſt ſon, and becauſe in equity the general heir is not to be favoured, therefore the ſon after born ſhall have the Subpœna.

Moreover the rule in Law is, that if an eſtate be limited to two, whereof the one is capable, and the other not capable, he who is capable ſhall take the whole as the Caſes are agreed in 51 *E.* 3. 29. 18 *E.* 3. 59. If a man give Lands to one *& primogenito filio*, if he hath no ſon the Father taketh the whole; [101] And ſo it is 1 *Aſſ.* 11. *& temps. E.* 1. *taile* 24. if a man give Lands to a man, and to ſuch a woman as ſhall be his wife, the man taketh the whole; but if a man make a feoffment in fee, to the uſe of himſelf and his wife that ſhall be, and afterwards he taketh a wife, his wife ſhall take joyntly with him, as it was holden in the Lord *Pawlet's* Caſe 17 *Eliz. Dier.* 340. notwithſtanding all at the firſt veſts in the Husband. Alſo the rule of Law is, that a remainder cannot ſtand without a particular eſtate, and yet the Book is agreed in 37 *H.* 6. 36. that if a man make a feoffment in fee unto the uſe of one for life, and after unto the uſe of another in fee, although that the particular Tenant refuſeth, yet the remainder is good. And ſo it is ſaid in the Book in the Caſe of a deviſe. As if a man deviſeth Lands for life, the remainder in fee, and the Tenant for life refuſeth, yet the remainder is good: and ſo note that the limitation in uſes and eſtates given by deviſes are vouched together. So the Judges there took the

the conſtruction of deviſes, and of eſtates conveyed in uſe to be all one, *viz.* according to the meaning of the parties: And admitting the Caſe here, that Land had been of the Cuſtome of Gavelkind, and upon that it was asked, If *Ed. Shelley* had had ſundry other ſons, ſhould the eldeſt Son only have the whole uſe? ſurely he only ſhould not have it, but all equally, and yet if he had taken the ſame by purchace, then ought the eldeſt ſon only have it. Now the intent of *Ed. Shel.* is to be proved by divers apparent circumſtances within the Record; 1. if *Ed. Shelley* had intended to have given it to the Uncle, he never would have given it by ſo general a name as (Heir Male) for if the recovery had been executed in the life of *Ed. Shelley* as was fully intended, then it had been in manner agreed, that *Rich. Shelley* could not have had the land, for the heirs males are words of limitation; or if the ſon of the eldeſt ſon had been born in the life of *Ed. Shelley*, which was impoſſible for *Ed. Shel.* to have known the contrary, for the Def. was born within 1 Month after his death, then out of all queſtion the uncle could never have had the ſame, and therefore except you will ground upon two abſurdities, the one, that *Ed. Shelley* knew that he ſhould die before the Recovery executed, the other, that he knew he ſhould die before the birth of the ſon of the eldeſt ſon, which none could know but God, it ought to be granted, that the intent of *Ed. Shelley* was to advance his eldeſt ſon, and by no means to diſ-inherit him. Alſo at the time of his death *Rich. Shelley* was 18 years old: And therefore if he intended to advance *Rich.* he would [b] not have given his lands to his friends M. *Carill* and others for twenty four years; but without doubt he intended that the ſon of his eldeſt ſon ſhould have the ſame, and the ſame moved him to deviſe ſuch a term which might be ended when the Def. ſhould be of fit age to receive and govern his living. The reaſon wherefore the ſaid *Ed. Shelley* ſuffered the ſaid Recovery was (as it ſeemeth) becauſe *Mary* daughter of his eldeſt ſon named in the ſpecial verdict had inherited; and if the wife of the eldeſt ſon had been delivered of a daughter, then had the Land gone out of his name, and therefore for the continuance of the Land in his name and family he ſuffered the ſaid Recovery, and therefore the ſame being by way of limitation of uſe, the ſon of the eldeſt ſon ought to have the ſame, and eſpecially in as much as no rule in Law in our Caſe is impugned, but it ſtands well as hath been proved before with the rule of the Common Law. And one of the Def. Counſel ſaid, that at the Common Law an uſe being but a truſt and confidence, and as is ſaid in 14 *H.* 8. reſting only in privity betwixt thoſe who had notice thereof; and for as much as the conſciences of the feoffees and others who were truſted became very large, and they would not perform the confidence repoſed in them, but made feoffments upon divers conſiderations unto ſtrangers not having notice of the uſes, and by divers fraudulent devices did deceive and defraud thoſe to whoſe uſes they were ſeiſed; therefore firſt was the Statute of 1 *R.* 3. made by which authority was given to *Ceſtuy que uſe* to enter and make a feoffment; But after that Stat. the feoffees oftentimes did prevent the feoffment of *Ceſtuy que uſe* by ſubtil and cunning practices yet defrauding the *Ceſtuy que uſe*, and not diſcharging the truſt repoſed in them; and therefore to take away all the power and means of deceiving by the feoffees, the Stat. of 27 *H.* 8. was made. And therefore it is holden for the better opinion at this day, that for the raiſing of future uſes after the Statute the regreſs of the Feoffees is not requiſite, and that they have not power to bar theſe future uſes, for the Statute hath transferred all the eſtate out of them. But he ſaid, that in our Caſe if the ſuing of the execution after the death of *Ed. Shelley*, and before the birth of the Son of the eldeſt Son, ſhould make the Uncle to have the Land, then it ſhould reſt in the diſpoſition and pleaſure of the Recoverors, whom they would make to inherit, for then it would follow, that if they enter and execute the recovery before the Birth of the Son of the eldeſt Son, then the Uncle ſhould have the ſame, and if they would not enter until after the birth of the Son of the eldeſt Son, then without all queſtion the Son of the eldeſt Son ſhould have the Land, ſo that by this conſtruction, the matter ſhould lie in the Recoverors who were but inſtruments, and not perſons in any manner truſted to ſettle the inheritance in whom they pleaſed, which was never any part of the meaning of *Ed. Shelley*, and which is very abſurd in reaſon. And it ſhall be miſchievous that the inheritance of any man ſhould be at the appointment and diſcretion of two ſtrangers, who were named only as inſtruments, and never in any manner truſted, and it ſhould be a greater miſchief than any was at the Common Law. Alſo as this Caſe is, if the Sheriff had executed the [102] recovery upon the day upon which the Writ of execution was ſued forth, then it had been evident that the ſon of the eldeſt ſon ſhould have had the Land, for then had execution in Judgment of Law been in the life of *Ed. Shelley*. But by the conſtruction which hath been made, it alſo ſhould be in the power of the Sheriff to ſettle the inheritance in whom he would, for if he had executed the recovery the ſame day, as might have been done, or after the birth of the Son of the eldeſt Son, then the Son of the eldeſt Son ſhould have had the Land; but *uno abſurdo dato infinita ſequuntur*. And therefore for the avoidance of theſe miſchiefs and abſurdities, the Law will adjudge *Rich.* in the Land in courſe and nature of a deſcent, and then all the miſchiefs and abſurdities are avoided, and no ground or rule in Law is thwarted.

And note, the Statnte of 27 *H.* 8. is, that *Ceſtuy que uſe* ſhall have the poſſeſſion to all intents, conſtructions, and purpoſes in Law, and of and in ſuch like eſtates as they had or ought to have in the uſe; and that he ſhall have the poſſeſſion after ſuch quality, manner, form, and condition, as they uſed before, or had the uſe, truſt, or confidence, in nature and courſe of deſcent, and that the ſon of the eldeſt ſon ſhall deveſt the uſe, and ſhall have the Subpœna; and becauſe the Statute doth execute the poſſeſſion after ſuch quality, manner, form, and condition, as the uſe, truſt, or confidence was in them, for theſe cauſes the poſſeſſion executed by the Statute ought to be ſubject to the entry of the ſon of the eldeſt ſon. And therefore if *Ceſtuy que uſe* had iſſue a daughter, and died before the Statute of 27 *H.* 8. his wife being great with child with a ſon, and before the birth of the ſon the Statute had been made, ſo that the poſſeſſion had firſt veſted by force of the Statute in the daughter, yet the ſame after born might enter upon her, for the daughter had the poſſeſſion in the ſame quality and condition as ſhe had the uſe, but ſhe had the uſe by deſcent, and ſubject to be deveſted by the birth of the ſon, and therefore he ought to have the poſſeſſion by the Statute in the ſame quality and degree, and that is in the ſame nature and courſe of deſcent. But in the Caſe of deſcent, the ſon after born ſhall enter upon the daughter, and therefore the ſon in this Caſe ſhall enter upon the daughter; and the like conſtruction upon the like Caſe hath been made before this time. And therefore *Mountagu* in *Wimbiſhes* Caſe in *Plowdens Comm.* held opinion that if a Woman hath a Joynture made unto her in tail, and hath iſſue a daughter being great with

Child

[a] child with a ſon, and before the birth of the ſon ſhe doth diſcontinue with warranty; now the Statute of 11 *H.* 7. ſaith, that ſuch perſon to whom the title after the death of ſuch Wife doth appertain ſhall enter into the lands, and ſhall poſſeſs and enjoy the ſame according to their title to the ſame, as if no ſuch diſcontinuance had been made; and therefore he held clearly, that although the Daughter after ſuch diſcontinuance firſt entreth, the ſon born after ſhall enter upon her by the words of the Statute of 11 *H.* 7. for the words are, that ſhe ought to enjoy the ſame according to her title; but her title is in tail, and and therefore after the birth of the ſon he being next heir in tail, the title of the tail ſhall be devolved from her to the ſon.

So in our Caſe the Statute of 27 *H.* 8. ſaith, that *Ceſtuy que uſe* ſhall have the poſſeſſion in the ſame quality, manner, form and condition as he had the uſe. And therefore if an uſe were limited before the Statute to *J. S.* and *J. G.* and to their heirs, and afterwards they entermarry, and after the Statute is made, by which the poſſeſſion is executed to them and their heirs during the coverture, yet they ſhall not have a divided eſtate, but the like moities as they had in the uſe. So if *Ceſtuy que uſe* be of certain lands holden by priority and of other land by poſteriority, and after the Statute is made, by which execution is made of the poſſeſſion of both at the ſame time, yet he ſhall have the poſſeſſion of both in the ſame quality as he had the uſe, and all that by the expreſs words of the Statute. And it is to be noted, that the Statute of 27 *H.* 8. doth not ſpeak only of uſes, but alſo of truſts and confidence, ſo that although no uſe riſe in the time of the life of *Edward Shelley*, yet there was a truſt and confidence expreſſed in his life. And therefore when the uſe is once raiſed, it behoveth to be veſted according to the truſt and confidence which *Edward Shelley* intended and declared by the Indentures.

Laſtly, the defendants Counſel argued, That the uncle could not have the land as a purchaſor, admitting the remainder had been limited to the right heirs males of the body of *Edward Shelley*, in as much as the eldeſt ſon of *Edward Shelley* had iſſue *Mary* his daughter, which is yet alive, as appeareth by the Record, and who is heir to *Edward Shelley*. It hath been ſaid, that although that *Mary* at the time of the death of *Edward Shelley* was heir general, yet it was ſaid, that the ſaid *Richard* at that time was heir male of the body of *Edward Shelley*. And therefore he might as ſpecial heir male of the body of *Edward Shelley* take the remainder, although *Mary* is heir general; and therefore it hath been ſaid that if lands had been given to *Edward Shelley*, and to the heirs males of his body lawfully begotten, that in that Caſe, after his death, *Richard Shelley* as heir male *per formam doni* ſhall inherit, although the daughter of the eldeſt ſon were general heir to *Edward Shelley*. To that they anſwered, and took a difference when the heir male of the body claimeth by deſcent, and when he claimeth by purchace; for in deſcents the Law
[103] is as hath been alledged, but otherwiſe it is in Caſes of purchaſe. This difference was proved by the Caſe in 37 *H.* 8. *Br. done* 42. If a man make a gift in tail of lands in Gavelkind to a man and his heirs males of his body lawfully begotten, and hath iſſue four ſons, in this Caſe all the ſons ſhall inherit: But if a Leaſe for life be made of lands in Gavelkind, the remainder to the right heirs of *J. S.* and *J. S.* dieth, having iſſue four ſons, in this Caſe the eldeſt ſon only ſhall have the remainder, for there can be but one right heir in the Caſe of purchace.

And ſo is *Ellerker*'s opinion expreſly in 9 *H.* 6. 24. If a man make a Leaſe for life, the remainder to the right heirs females of the body of *J. S.* and *J. S.* hath iſſue a ſon and a daughter and dieth, in this Caſe the daughter ſhall not take the remainder, for ſhe is not heir female to take by purchace. And yet it is plain, that if a gift in tail had been made to *J. S.* himſelf, and to the heirs females of his body, and *J. S.* dieth, having iſſue a ſon and a daughter, the daughter ſhould have had the land by deſcent. Alſo in 37 *H.* 8. *Br. Done* 61. it appeareth, that the Lord *Huſſey* made a feoffment in fee unto the uſe of *Anne* his Wife for life, and after to the uſe of the heirs of his body, and after the Lord *Huſſey* was attainted of Treaſon, and although *Brook* hath not expreſſed the Judgment, yet it was ſaid, it was adjudged, that the right heirs of his body could not as purchaſor take the remainder, becauſe he was not heir of his body to take the ſame by purchace, by reaſon of the attainder of his Father. And yet before the Statute of 26 *H.* 8. if Tenant in tail had committed high Treaſon the land had deſcended. And in *Brook*'s Report aforeſaid it appeareth, that *Hare* the Maſter of the Rolls took the difference between a gift in poſſeſſion to a man and to his heirs females of his body, and a Leaſe for life, the remainder to the right heirs females of the body; for in the Caſe of a remainder (as he ſaid) ſhe ought to be heir indeed, or elſe ſhe can never claim the ſame by purchace. So it appeareth by theſe authorities that in Caſe of purchace the heir male of the body ought to be heir indeed. And for that in our Caſe, the Uncle was not heir male, for a man cannot have two heirs to claim by purchace, therefore as purchaſor the Uncle cannot claim it. But it hath been ſaid, that the Statute of *Donis condicionalibus* aideth and helpeth the heir male of the body to take, for that the will of the donor appeareth, that the heir male of the body ſhould have the land. The Statute ſaith, *Quod voluntas donatoris ſecundum formam in Charta doni ſui manifeſte expreſſa, de cætero obſervetur.* In anſwer of which, one of the Defendants Counſel declared the reaſons
[b] of the other Caſes and authorities which had been cited, and of the difference which was taken before; and thefore he ſaid that the Statute of *Donis condicionalibus* did not help this Caſe. Mr. *Littleton* in his Chapter of Eſtate tail ſaith, That every gift in tail before the Statute of *Donis, &c.* before the making of that Statute was a fee ſimple at the Common Law; and therefore put the Caſe before the Statute of *Donis, &c.* and examine if the ſame had been a fee ſimple conditional before the ſaid Statute, for otherwiſe it cannot be an eſtate tail by the Statute. For he ſaid that the Statute of *Donis Condicionalibus* was a Nurſe, and no Mother of eſtates of Inheritances tail, and that it preſerved the eſtates of Inheritances in tail, but did not beget or procreate any eſtates tail, which were not fee ſimple conditionals before. And therefore he took the Law to be clear, that if a man give land to a man *& ſemini ſuo*, or *pueris ſuis de corpore*, in theſe Caſes the donor hath no eſtate in tail: but only an eſtate for term of life, for if ſuch gifts had been made before the Statute, they had been no fee ſimples conditional; and therefore by Maſter *Littleton*'s rule no eſtate tail by the Statute of *Donis Condicionalibus*. For the Statute creates no new inheritances, the

which

which were no inheritances at the Common Law. And therefore the Law was taken in the Caſe of *Martin Haſtings* of *Norfolk* for the Mannor of *Elſinge*, that where an eſtate was made to one and his anceſtors, and to the iſſue male of his body, that in that Caſe he had but an eſtate for life. And ſo it was holden by Sir *Roger Manwood* then one of the Juſtices of the Common Pleas clearly in the Argument of *Clatch*'s Caſe *anno* 16 *Eliz.* and therefore he examined the Caſe here before the ſaid Statute; and he took it without queſtion, that if a Leaſe had been made for life, the remainder to the heirs males of the body of *J. S.* that in this Caſe, if *J. S.* hath two ſons, and the eldeſt ſon having iſſue a daughter dieth in the life of *J. S.* and then *J. S.* dieth, that in this Caſe the younger ſon of *J. S.* cannot take this fee ſimple conditional by the Common Law, for he is not heir male of the body to take this fee ſimple by purchace, for firſt he ought to be heir, and ſecondly he ought to be heir male. And in this Caſe if *J. S.* had been attainted of Treaſon or Felony, the heir male of his body could never have taken the remainder, for he was not heir, which might be the reaſon of the Lord *Huſſey*'s Caſe before cited. And it is holden 12 E. 3. *Variance* 77. that where a man maketh a gift to the husband and wife, and to the [104]
heirs of the body of the husband, and if the husband and wife die without iſſue of their two bodies, that then it ſhall remain over; in this Caſe although the will of the donor appeareth, that the wife ſhall be alſo donee in ſpecial tail, yet for as much as by the order of the Common Law ſhe could not have the eſtate of fee ſimple conditional, for that cauſe ſhe could not have the eſtate tail by the Statute. But in the ſaid Caſe where lands are given to a man and the heirs females of his body, there is an eſtate of inheritance veſted in the donee, which eſtate of inheritance the Statute of *Donis Condicionalibus* directs to the heir female by deſcent, although there be an iſſue male.

And to that which hath been objected, that for as much as the limitation was to the heirs males of the body of *Edward Shelley*, and of the heirs males of the body of the heirs males lawfully begotten, that the heirs males of the body of *Edward Shelley* ſhould be purchaſors, for otherwiſe the ſubſequent words ſhould be void: The Defendants Counſel anſwered to the ſame, That it is a Rule in Law, that when the anceſtor by any gift or conveyance taketh an eſtate of freehold, and in the ſame gift or conveyance an eſtate is limited either mediately or immediately, to his heirs in fee or in tail, that always in ſuch Caſes (the heirs) are words of limitation of the eſtate, and not words of purchace. And that appeareth in 40 *E.* 3. 9. in the Provoſt of *Beverlie*'s Caſe, in 38 E. 3. 31. *d.* 24 E. 3. 36. 27 E. 3. 87. and in divers other Books. So in as much as in this Caſe *Ed. Shelley* took an eſtate of freehold, and after an eſtate is limited to his heirs males of his body, it behoveth that the heirs males of his body of neceſſity ſhall take by deſcent and cannot be purchaſors: otherwiſe is it when an eſtate for years is limited to the anceſtor, the remainder to another for life, the remainder to the right heirs of the leſſee for years, there his heirs are purchaſors. Or if the remainder be limited to the heir in the ſingular number upon a Leaſe for life, there the heir taketh an eſtate for term of life by purchace. And if it ſhould be admitted that in regard of the ſaid ſubſequent words, the right heirs males ſhould have by purchace to them and the heirs males of his body, then ſhould violence be offered as well to the words as to the meaning of the party, for if the heir male of the body of *Edward Shelley* ſhould take as purchaſor, then ſhould all the other iſſue males of the body of *Edward Shelley* be excluded to take any thing by the limitation, and it ſhould be againſt the expreſs limitation of the party. For the ſaid limitation is to the uſe of the heirs males of the body of *Edward Shelley*, and of the heirs males of their bodies begotten, and for default of ſuch iſſue, to divers other perſons in remainder; ſo if *Richard Shelley* being the heir male of the body of *Edward Shelley* at the time of his death ſhould take by purchace, then the heirs males of the body of *Richard Shelley* only ſhould be inheritable, and no other of the ſons of *Edward Shelley* nor their heirs males, and by conſequence if *Ric. Shelley* ſhould die without iſſue male, the land ſhould remain over to ſtrangers, and all the other ſons of *Ed. Shelley* which he then had or might have, and their iſſues ſhould be utterly diſ-inherited, becauſe the words were in the plural number, heirs males of the body of *Ed. Shelley*, the former conſtruction ſhall be againſt the very letter of the Indentures, for by this means the plural number ſhould be reduced to the ſingular number, that is to ſay, unto one heir male of the body of *Edw. Shelley* only: and for as much as the firſt words, *viz.* (heirs males of the body of *Edw. Shelley* include the ſubſequent words, *viz.* the heirs males of their bodies) for every heir male begotten of the body of the heir male of *Ed. Shelley* is in conſtruction of Law an heir male of the body of *Ed. Shelley* himſelf, for this cauſe the ſubſequent words are words declaratory, and do not reſtrain the former words. As in the Caſe of *Littleton*, if a man make a feoffment in fee, *ita quod* the feoffee ſhall do ſuch an act, in this Caſe *Littleton* ſaid it is commonly uſed in ſuch Caſes to have alſo theſe words (and if the act be not done that it ſhall be lawful for the the feoffor to reenter) the which he ſaid was more then needed, for the firſt words are ſufficient in Law and include them, yet he ſaid they are well put in, to declare and expreſs the Law to lay people.

And laſtly in this Caſe, if *Ric. Shelley* ſhall not be in courſe and nature of a deſcent, then he could not take at all, for when an eſtate is made to a man, and after in the ſame deed to limit the quality of the eſtate, another limitation is made, to his heirs, or to the heirs of his body, in all thoſe Caſes his heirs or the heirs of his body ſhall never take as purchaſors; but in this Caſe theſe words, heirs males of the body of *Edw. Shelley* were words of limitation, and therefore the heir male of the body cannot take as purchaſor. And in proof of the firſt propoſition it was ſaid, that the ſame is the reaſon of the Book in 40 *Aſſ.* 19. and of Mr. *Littleton*'s Caſe 128. That if a man grant a reverſion or a Seigniory by deed to *J. S.* and [105]
his heirs, if the grantee dieth before attorment, the attorment to the heir is void, for if the attornment ſhould be good, then ſhould the heir be in as a purchaſor, where by the grant and meaning of the parties theſe words, his heirs, were words of limitation to limit the eſtate of the grantee himſelf; and ſo it was holden in *Nichol*'s Caſe in *Plowden*'s *Comment.* 483. that if a man leaſe lands to a man for life, and if the leſſor die without heir of his body, that then the leſſee ſhall have the land to him and to his heirs; in this Caſe if leſſee for life dieth, and then the leſſor dieth without heir of his body, the heir of the leſſee ſhall not have the land, as it was holden clearly for the cauſe above ſaid.

And ſo the Law is clear, as it is commonly agreed in our Books, if two men exchange lands in fee ſimple, or fee tail, if both the parties die before the exchange be executed of each part, the exchange is void, for if the heirs ſhould enter, they ſhould be in as purchaſors by force of the words, which were words of limitation of the eſtate, and not of purchace. And upon the ſame reaſon is *Bretts* and *Rigdens* Caſe adjudged in *Plowden's Comment. f.* 342. a ſtronger Caſe then this Caſe is. For a man deviſed lands to another man and to his heirs, and the deviſee died in the life of the deviſor, and then the deviſor died, and it was adjudged, that the heir ſhould not take by the deviſe, for in that Caſe the heirs are not named as words of purchace, but only to expreſs and limit the eſtate which the deviſee ſhould have, for without theſe words, heirs, the deviſee could not have the fee ſimple, and the heirs are named only to convey the land in fee ſimple, and not to make any other to be purchaſor then the firſt deviſee. So in our Caſe, the heirs males of the body of *Ed. Shelley* are named only to give *Ed. Shelley* an eſtate tail, and not to make any other purchaſor then *Ed. Shelley* only, and with out thoſe words he could not have an eſtate tail; and therefore the uncle in our Caſe cannot claim the lands as a meer purchaſor, but if he taketh it in any ſort, he ſhall take the ſame in nature and courſe of a deſcent, and therefore *quacunque via data*, the uncle cannot have the land; and if he take the ſame in nature and courſe of a deſcent (for as a purchaſor he cannot take) then the eldeſt ſons ſon ſhall enter upon him, and ſo *quacunque via data* the ſon of the eldeſt ſon ought to have the land. And therefore in concluſion; Firſt, no execution could be ſued againſt the iſſue in tail, becauſe that no execution was ſued in the life of *Ed. Shelley*. Secondly, admitting that execution might have been ſued againſt the iſſue in tail, and that execution were requiſite to be had in the life of *Ed. Shelley*, in as much as the lands were in leaſe for years, that the Reverſion was preſently veſted in the recoverors by the Judgment: Thirdly, admitting that execution might be ſued againſt the iſſue in
[*b*] tail, and that the Recovery was not executed till after the death of *Ed. Shelley*; yet firſt, for as much as by the act of God it was impoſſible that execution ſhould be ſued in the life of *Edw. Shelley*: Secondly, that the Indentures guide the uſe, and direct it to the heirs males of the body of *Ed. Shelley* by words of limitation: Thirdly, that the uſe and eſtate doth not commence originally in the uncle as meer purchaſor, but firſt veſteth in the uncle by force of the Indentures made by *Ed. Shelley*, and the recovery had againſt him, and might have veſted in *Ed. Shelley*, and if it had been veſted in *Ed. Shelley*, then without doubt *Ric. Shelley* had taken by deſcent; fourthly, that the eſtate is conveyed by way of limitation of uſe, the which is always directed by the intent of the parties; fifthly, that it ſhould be abſurd and miſchievous to adjudge the whole inheritance to be in the diſpoſition of the Recoverors, or of the Sheriff who never were truſted; and laſtly, that *Richard* the uncle ought either claim in nature or courſe of a deſcent; and then no queſtion but that the entry of the Defendant was lawful, or otherwiſe meerly by purchace, the which by the rules of Law, and for the reaſons aforeſaid he cannot; and therefore they concluded that the entry of *Henry Shelley* the Defendant was lawful, and that judgment ought to be given againſt the Plaintiff, that he take nothing by his Bill.

After the ſaid Caſe had been openly and at large argued at three ſeveral days by the Counſel of each ſide in the King's Bench, the Queen hearing thereof (ſuch was the rareneſs and difficulty of the Caſe being of importance that it was generally known) of her gracious diſpoſition, to prevent that long, tedious, and chargeable ſuit between parties ſo near in blood, which ſhould be the undoing of both, being Gentlemen of a good and ancient family, directed her gracious Letters to Sir *Tho. Bromley* Knight, Lord Chancellor of *England* who was of great and profound Science and Judgment in the Law, requiring him by them to aſſemble all the Juſtices of *England* before him, and upon conference between themſelves touching the ſaid Queſtions, to give their Reſolutions and Judgments thereof; and thereupon the Lord Chancellor in *Eaſter* Term in the 35 year of her reign called before him at his houſe called *York-houſe*, Sir *Chriſt. Wray* Knight, Lord chief Juſtice of *England*, and all his Companions Juſtices of the Queen's Bench, Sir *James Dier* Knight, Lord chief Juſtice of the Court of Common Pleas, and all his Companions Juſtices of the ſame Court; and Sir *Roger Mainwood* Knight, Lord chief Baron of the Exchequer, and the Barons of the Exchequer, before whom the Queſtions aforeſaid were moved and ſhortly argued by Serjant *Fenner* on the Plaintiffs part, and by one on the Defendants part. At which time the Lord Chancellor was of opinion for the Defendant, and openly declared his opinion before all the Juſtices, That upon the third Queſtion
[106] the Law was for the Defendant, and for that cauſe the entry of the Defendant was lawful upon the uncle, but the ſaid Queſtions were not reſolved at that time, for the ſaid Juſtices did deſire time to conſider of the Queſtions. And 8 or 9 days after in the ſame Term, all the ſaid Juſtices and Barons met together in Serjants Inn in *Fleetſtreet*, for the Reſolution of the ſaid Caſe, and there was the Caſe ſhortly argued again by them; after which arguments the Juſtices at that time did conſer amongſt themſelves, and took further time to conſider of the ſaid Queſtions in the next Vacation until the beginning of *Trinity* Term then next following; and accordingly in the beginning of *Trinity* Term after great ſtudy and conſideration of the ſaid Record of the ſpecial Verdict, all the ſaid Juſtices and Barons met again in Serjants Inn in *Fleetſtreet*, at which time upon conference amongſt themſelves all the Juſtices of *England*, the Lord chief Baron, and the Barons of the Exchequer, except one of the puiſne Juſtices of the Court of Common Pleas, agreed that the entry of the Defendant was lawful upon the ſaid *Richard* the uncle; and four or five days after their laſt meeting, one of the Defendants Counſel came to the Bar in the Queen's Bench, and moved the Juſtices to know their Reſolutions in the ſaid Caſe, for their Reſolution was not before known to the Defendant nor to his Counſel. And Sir *Chriſtopher Wray* Knight, Lord chief Juſtice anſwered, that they were reſolved, and demanded of the Plaintiffs Counſel being then at the Bar, if they could ſay any more on the Plaintiffs part, who anſwered, That they had ſaid as much as they could: And alſo demanded of the Defendant's Counſel if they had any new matter to ſay for the Defendant, who ſaid, No. And then the ſaid chief Juſtice gave judgment, that the Plaintiff ſhould take nothing by his Bill: And becauſe the Counſel of both ſides who were preſent, were deſirous to know upon what points the Reſolution did depend, the ſaid chief Juſtice openly declared, That as to the firſt point, the better and greater

part of all the Juſtices and Barons was, that execution might be ſued againſt the iſſue in tail, becauſe that the right of the eſtate tail was bound by the Judgment againſt Tenant in tail, and the Judgment over to have in value, and that in favour of common Recoveries which are common aſſurances of the land. [b]

As to the ſecond point, they were all agreed, that the Reverſion was not in the Recoverors preſently by the Judgment: But he ſaid, that all the Juſtices of *England* and Barons of the Exchequer, except one of the Juſtices of the Common Pleas, were agreed as to the third point. That the uncle was in courſe and nature of a deſcent, although that he ſhall not have his age, nor be in ward, &c. Firſt, becauſe that the original act, *viz.* the recovery out of which all the uſes and eſtates had their eſſence, was had in the life of *Edward Shelley*, to which the execution after had a retroſpect: Secondly, becauſe that the uſe and poſſeſſion might have veſted in *Edward Shelley* if execution had been ſued in his life: Thirdly, the Recoverors by their entry, nor the Sheriff by doing of execution, cannot make inherit whom they pleaſed. Fourthly, becauſe that the uncle claimed the uſe by force of the Recovery, and of the Indentures by words of limitation, and not of purchace. Theſe were as the chief Juſtice ſaid the principal reaſons of their judgment. And it was reſolved by them all, that the Recovery was good notwithſtanding the death of *Edward Shelley* in the morning between the hours of five and ſix the ſame day. And ſo this Caſe was reſolved by Sir *Thomas Bromley* Knight, Lord Chancellor of *England*, Sir *Chriſtopher Wray* Knight, Lord chief Juſtice of *England*, Sir *James Dier* Knight, Lord chief Juſtice of the Court of Common Pleas, Sir *Roger Manwood* Knight, Lord chief Baron of the Exchequer, Sir *Thomas Gawdy* Knight, one of the Juſtices of her Highneſs Bench, and by all the Juſtices of the Queens Bench, and by all the Juſtices ſaving one of the Common Pleas, and by all the Barons of the Exchequer, that the right of the Defendant was good, and his entry lawful, and accordingly judgment was given.

Hill. Term. ann. 28 Eliz. *between* Grendon *and* Albanie *in the King's Bench.*

Albanie's Caſe.

IN Treſpaſs brought by *John Grendon* Plaintiff againſt *Thomas Albanie* Defendant for a Treſpaſs done in twenty acres of land in *W.* in the County of *Middleſex*. The Defendant as to five acres [110] [b] pleaded, that *Francis Bunny* 1 *Maii* 20 *Eliz.* by deed indented did enfeoff *Miles Hitchcock* unto the uſe of the ſaid *Francis* for life, and after unto the uſe of one *David Bunny* in tail, and after to the uſe of one *Walter Bunny* in tail, and after to the uſe of one *Stephen Bunny* in fee. And afterwards, *viz.* 1 *Maii* 21 *Eliz.* the ſaid *Francis* of the ſaid five acres in which &c. did enfeoff one *Richard Tompſon* in fee upon whom the ſaid *David* entred for the forfeiture. And afterwards, *viz.* 1 *Maii* 22 *Eliz.* deviſed the ſaid five acres unto *Adam Blunt* for twenty one years, who enfeoffed the ſaid *Thomas Albanie* the now Defendant, and juſtified the Treſpaſs, and gave colour to the Plaintiff. And as to the ſaid fifteen acres reſidue, the Defendant pleaded, that the ſaid *David* ſo ſeiſed as aforeſaid in tail, 2 *Maii* 22 *Eliz.* by deed indented and enrolled in the Chancery according to the Statute did bargain and ſell the ſaid fifteen acres to the ſaid Defendant in fee, and juſtified the Treſpaſs, and gave colour to the Plaintiff. The Plaintiff replied and ſaid, that in the ſaid deed of feoffment of the ſaid *Francis Bunny*, it was provided, that if it ſhould happen one *Peter Penruddock* to die without iſſue male of his body, that it might be lawful for the ſaid *Francis* at all times at his pleaſure during his life by his deed indented to be ſealed and delivered in the preſence of four honeſt and credible witneſſes at the leaſt, to alter, change, determine, diminiſh, or amplifie any uſe, or uſes, limitations, intents, or purpoſes limited or appointed in or by the ſaid deed of feoffment, or the uſe of any parcel of the premiſſes. And afterwards, 1 *Maii* 23 *Elizabeth*, the ſaid *Peter Lumbard* died without iſſue male, and after, that is to ſay, 20 *Marcii*, 24 *Eliz.* the ſaid *Francis* by Indenture between him and [111] the ſaid *David Bunny*, and ſealed and delivered in the preſence of four honeſt and credible witneſſes (naming their names as ought to be) did alter the uſes in the ſaid deed contained; and further covenanted and agreed with the ſaid *David*, that for ever from thence after the ſaid *Miles Hitchcock* and his heirs, &c. ſhould ſtand ſeiſed of the ſaid twenty acres to the uſe of the Plaintiff in fee, as by the ſaid Indenture more fully appeareth, by force whereof he was ſeiſed until the Defendant did the Treſpaſs prove. The Defendant rejoyned and confeſſed, that in the ſaid deed of feoffment there was ſuch a *Proviſo* as the Plaintiff in his Replication hath alledged. But he ſaid, that the ſaid *Francis Bunny* in the life time of the ſaid *Peter Penruddock*, *ſcil.* 1 *Aprilis*, 23 *Elizab.* by his deed did renounce, relinquiſh and ſurrender unto the ſaid *Miles*, *David*, *Nicholas*, *Walter*, and *Stephen*, all ſuch liberty, power, and authority of revocation, that he had after the death of the ſaid *Peter* without iſſue as is aforeſaid. And further the ſaid *Francis* by the ſame deed granted unto them and their heirs, that for ever from thenceforth as well the ſaid Condition, *Proviſo*, Covenant, and Agreement, as the ſaid power, liberty, and authority ſhould ceaſe, and to all intents ſhould be void, &c. Upon which rejoynder the Plaintiff did demur in Law. And *Altham* and others of Counſel with the Plaintiff did argue, That by the ſaid feoffment, the liberty and power aforeſaid was not extinguiſhed or loſt, for the feoffment is ſufficient to exclude the party of all rights and titles to the

land, as well preſent as future; but an authority or power which is collateral unto the right and title of the land was not nor could be given or extinct by the feoffment, nor by that, could he diſable himſelf to make an eſtate according to his authority and power, when the ſame cometh in *eſſe*. As in 15 *H.* 7. 1. where *Ceſtuy que uſe* deviſeth, that his feoffees ſhall ſell his land and dieth, and afterwards his feoffees make a feoffment over, yet the feoffees may ſell againſt their own feoffment, becauſe the power to ſell was meer collateral to the right of the land.

And ſo if Executors have power to ſell lands to *J. S.* and they enter and diſſeiſe the heir and enfeoff a ſtranger, yet they may ſell to *J. S.* for the reaſon before. And it was reſembled to the Caſe of Tithes in 42 *E.* 3. 13. *a.* where it is holden, that a Prior Parſon in perſonce ſhall have Tithes againſt his own feoffment, becauſe he doth not claim them in reſpect of the ownerſhip of the land, or any right or title
[*b*] therein, but as Tithes in reſpect that he is Parſon by collateral title. And 12 *Aſſ.* 41. pendant a *Præcipe*, the Tenant maketh a feoffment, and after erroneous judgment is given againſt him, yet he ſhall have a writ of Error againſt his own feoffment, for the Error is collateral to the right of the land. And as to the Releaſe they ſaid, that that which ſhould be releaſed is but a poſſibility, which cannot be releaſed. And a diverſity was taken between a Condition precedent, and a Condition ſubſequent; for a Condition ſubſequent before the breach thereof may be releaſed, for there the eſtate paſſeth and the Condition is annexed to that which may be releaſed. But in the caſe of a Condition precedent, there is but a poſſibility; as if I grant to you, that if you do ſuch an act, that you ſhall have annuity of 20 *l. per ann.* during your life, and before the performance of the Condition you releaſe the annuity to me, this releaſe is void, becauſe that the Releaſe cannot extinct a poſſibility. The Caſe of *Littleton* Chapter *Releaſe* 105. where the ſon releaſeth in the life of his Father, the releaſe is void. And 40 *E.* 3. a future duty as a Relief, &c. is not releaſed by this word demand, 18 *E.* 3. 26. *a. Avowry* 99.

On the other part it was argued by one of the Inner Temple; and to the firſt Point he ſaid, That the ſaid feoffment had utterly extinguiſhed the ſaid power and authority, ſo as the feoffor had diſabled himſelf to execute the ſame when it came in *eſſe*. And therefore the Caſe by way of admittance is no other in effect, but that *A.* enfeoffeth *B.* to the uſe of *A.* for life, and after to the uſe of *B.* in tail, and after to the uſe of *C.* in fee, with *Proviſo* and liberty to revoke the uſes and to limit new uſes, if *A.* ſurvive *B.* and afterwards *A.* maketh a feoffment, and after *B.* dieth; whether *A.* may limit new uſes againſt his own feoffment is the Queſtion; and I think that he cannot. And firſt he ſaid, that a Livery is of ſuch force that the ſame giveth and excludeth the feoffor not only of all his preſent rights, but of all future rights and titles. Alſo as the Books are, in the Caſe of Tenant by the Curteſie in 9 *H.* 7. 1. and in the Caſe of Intruder, and Recovery in a Writ of Deſcent in 9 *H.* 7. 24. *b.* and in the Caſe where the ſon diſſeiſeth the father and makes a feoffment, in 39 *H.* 6. 43. *a.* And in all actions which are in manner collateral to the land, as 34 *H.* 6. 44. *a.* The Caſe of Attaint, 38 *E.* 3. 16. *b.* The Caſe of Deſcent, in theſe Caſes theſe actions are extinct by the feoffment of the land, and yet they are collateral to the right of the land, by which no land is demanded, but are only to reform the erroneous proceeding, the falſe oath, and falſe return of the Sheriff; but becauſe that by a mean the poſſeſſion and inheritance of the land, ſhall be alſo removed and deveſted by them, for this cauſe by feoffment of the land, theſe Actions are gone.

[112] So in the Caſe at Bar, although that the power to revoke the former uſes and eſtates, and to limit a new uſe is not properly any intereſt or right in the land, yet it is a mean by which the poſſeſſion and right of the land ſhall be altered and deveſted out of a third perſon. Alſo it is clear, that a future uſe ſhall be given excluſive in the Livery, as 27 *H.* 8. 29. *b.* and in *Delamor's* Caſe *Plow. Comm.* and then if future right, future action, which is collateral to the right of the land, and future uſe ſhall be given and extinguiſhed by the Livery of the land; So it was ſaid, ſhall it be in the Caſe at the Bar; for let us examine the Caſe by parcels, and put that in the Caſe above the *Proviſo* had been only, That if *A.* ſurvive *B.* that then he might revoke the former uſes, without more it were clear, that after the ſaid feoffment he could not revoke, for then he ſhould have the land againſt his own feoffment, which ſhould be againſt all reaſon, and againſt all the Books aforeſaid.

Then in the Caſe at Bar the *Proviſo* goeth further, *ſcil.* That he may alter, change, &c. Put caſe then, that he had power to revoke the ancient uſes, and power to limit new uſes to a ſtranger, how ſhould the ſtranger have this new uſe? Truly by force of the firſt feoffment made by the ſaid *A.* for out of that all the preſent and future uſes alſo grow. And the ſtranger ſhall have this uſe in manner by the ſaid *A.* againſt his own late feoffment and livery, which for the cauſes aforeſaid cannot be. And it was ſaid that the Book in 15 *H.* 7. 11. *b.* which hath been cited on the other ſide, is not to be reſembled to this Caſe for two cauſes; one, becauſe that there the feoffees having power to ſell, as is aforeſaid, the former feoffment over to the firſt uſes, for ſo is the Book, and then notwithſtanding their feoffment they may ſell as well as the Teſtator may deviſe, and that was the uſe. The ſecond reaſon is, becauſe that when the feoffees ſell the uſe, the *vendee* is in by the deviſe of *Ceſtuy que uſe*; as in the Caſe of Executors who have power to ſell, their *vendee* ſhall be in by the Teſtator and not by them; but in the Caſe at Bar, the new *Ceſtuy que uſe*, as hath been ſaid before, ſhall be in in a manner by the feoffor, for the feoffor in caſe of an eſtate tail limited in uſe, ſhall be ſuppoſed donor. And as to the Caſe in 12 *Aſſ.* 41. of *Error*, he ſaid, That the feoffment cannot bar him of the Writ of Error, becauſe that notwithſtanding his feoffment he remains Tenant as to the demandant, and ſhall plead all pleas which the Tenant may plead, and notwithſtanding the ſame ſhall be received, &c. and Judgment given againſt him as Tenant, by which upon ſuch Judgment given againſt him after his feoffment he ſhall have a Writ of Error; but if after the Judgment given he make a feoffment, he ſhall never have a Writ of Error, nor Attaint; and therefore the reaſon is
[*b*] not in the Caſe of 12 *Aſſ.* as hath been urged, that the feoffment doth not extinct it, becauſe it is collateral to the right of the land, for then by the ſame reaſon his feoffment after Judgment given ſhould not extinct it; wherefore it ſeemed to him, that the ſaid feoffment had extinguiſhed the ſaid future power.

And

And of such opinion upon conference had with the Lord *Anderson* and other Justices was *Wray* chief Justice of *England*, and all the Court of King's Bench, that is to say, that by the said feoffment, his power as well to revoke, as to limit new uses was utterly gone and extinguished. And to the second Point, he conceived, that the said future power might be released, for it may be resembled to a Condition subsequent, for although that the performance or breach thereof cannot be done without an act precedent; as if *A.* enfeoff *B.* and his heirs upon condition, that if *B.* survive *C.* if then *A.* or his heirs pay unto *B.* his heirs or assignees 40 *s.* that then he and his heirs shall reenter; in this Case, the same is a Condition subsequent, and although the same cannot be performed but upon a contingency, yet is the Inheritance in him, and the same shall descend to his heir, and therefore may be released, and his heir by his release may be barred. And therefore if a man make a feoffment in fee with warranty, in this Case before that he can vouch, he ought to be impleaded, so as the voucher dependeth upon an act uncertain, that is to say, that he shall be impleaded in a real action by a stranger, yet by the Release of all demands, *Littleton* in his Chapter of Warranty, *fol.* 171. saith, That the Warranty is extinct, for it is an Inheritance in him and may descend to the heir, and by consequence may be released.

Also if a man covenant to do a collateral thing, in this Case before the breach thereof, a release of all Actions, Suits, and Quarrels, is nothing worth, for before the breach there is not any duty, nor cause of Action, but the breach ought to go before as it was adjudged, *Tr.* 4 *Eliz. Rot.* 1027. *in Communi Banco.* But in the same Case a release of all Covenants shall bar the same, as it is said in 35 *H.* 8. 56, 57. *Dier.* For by his death the Law transfers it to his Executors, and by consequence he may release it. And 16 *E.* 3. *Fitz. Barre* 245. A woman hath title of Dower of land, whereof one is Tenant for life, the reversion to another in fee, and the woman releaseth to him in the reversion, it is a good bar in a Writ of Dower against Tenant for life, and yet at the same time she had not present cause of Action against him, but in *futuro* after the death of Tenant for life. So 21 *H.* 7. 41. release of annuity to the Patron in time of vacation is good, yet no Action lieth against him, nor against any other till a successor be made; and yet a release shall extinguish it. And put that in the Case at Bar, the power of revocation upon the said contingent had been reserved to the feoffor and his heirs, without doubt, the same was an Inheritance in him, and should descend to his heir, and by consequence his release shall extinct it; But as to this Point the Court gave not any resolution: But it was agreed by the whole Court, that if the power of revocation had been present, as usual provisions of revocation are, that it might be extinguished by release, made by him who had the power, unto any who had estate of freehold in the land in possession, reversion, or remainder, and by it the estates which before were defeasable by the *Proviso*, are by such release made good. [113]

And he moved another Point, that if it were admitted, that the said future power could not be released, yet as well the power as the *Proviso* and Covenant might by the same words of defeasance be defeated, for both are executory, *scil.* the power it self which was created by the said Covenant and *Proviso* which, &c. and as the *Proviso* and Covenant it self commence by deed, so by deed they may be adnulled and defeated. And it was said, that in all Cases, when any thing executory is created by a deed, that the same thing by consent of all persons who were parties to the creation thereof, might be by their deed defeated and made void; and therefore it was said, that Warranties, Recognisances, Rent charges, Annuities, Covenants, Leases for years, Uses at the Common Law, and such like, may by a defeasance made with the mutual consent of all those who were parties to the creation of them by deed, be adnulled, discharged, and made void; for it was said, it should be strange and unreasonable, that a thing which is created by the act of the parties, should not by their act or mutual consent be dissolved again. And of the same opinion was *Wray* Chief Justice, and the whole Court, *scil.* That by the said defeasance as well the said Covenant which created the said power, as the power it self created thereby was utterly defeated and adnulled; And according to the Resolution Judgment for the causes aforesaid was given.

The Case between Dillon *and* Freine, *commonly called,* The Case of Perpetuities; *Or,*

Chudleigh's Case.

[120] WIlliam *Dillon* Esquire, brought an Action of Trespass against *John Freine* in the King's Bench for breaking of his Close called *Sedon* in the Parish of *Tavestock* in the County of *Devon:* The Defendant pleaded, Not guilty, and the Jury found a special Verdict to this effect; Sir *Richard Chudleigh* Knight was seised of the Mannor of *Hescot*, whereof the place where, &c. was parcel in his demesn as of fee, and had issue *Christopher Chudleigh* his eldest son, *Thomas* his second son, *Oliver* his third son, and *Nicholas* his fourth son. Sir *Richard Chudleigh* 26 *Aprilis annis* 3 & 4 *Phil. & Mar.* by his deed indented, *Quadripartite* (whereof one part sealed with his seal was shewed forth to the Jurours in evidence) of the said Mannor did enfeoff Sir *John Seintlinger* Knight, *Giles Strangwaie's* Knight, and divers others, to have and to hold to them and their heirs, unto the use of the said Sir *Richard* and his heirs, on the body of *Mary* then wife of *Thomas Carew* lawfully begotten, and for default of such issue unto the use of the said Sir *Richard*, and to his heirs on the body of *Elizabeth* then wife of *Richard Bampfield* lawfully begotten, and for default of such issue, unto the use and performance of his will for ten years immediately

ately after his death; and after the ſaid term ended, unto the uſe of the ſaid feoffees, and their heirs during the life of the ſaid *Chriſtopher Chudleigh* the ſon, and after his death, to the uſe of the firſt iſſue male of the body of the ſaid *Chriſtopher* lawfully to be begotten, and for default of ſuch iſſue, to the uſe of the ſecond iſſue male of the body of the ſaid *Chriſtopher* the ſon lawfully to be begotten, and to the heirs of
[b] the body of ſuch ſecond iſſue lawfully begotten, and ſo with like remainders unto the tenth iſſue male, and for default of heirs males of the body of the ſaid *Chriſtopher* the ſon, unto the uſe of *Thomas* ſon of the ſaid Sir *Richard*, and to the heirs of his body lawfully begotten, and for default of ſuch iſſue, unto the uſe of the ſaid *Oliver*, and to the heirs males of his body lawfully begotten; and for default of ſuch iſſue, unto the uſe of the ſaid *Nicholas*, and to the heirs of his body lawfully begotten, and for default of ſuch iſſue, unto the uſe of the right heirs of the ſaid Sir *Chriſtopher* for ever. And afterwards, that is to ſay, 17 *Nov.* 5 *&* 6 *Phil. & Mar.* the ſaid Sir *Richard Chudleigh* died without iſſue on the body of the ſaid *Mary* and *Elizabeth* or any of them; and after his death, that is to ſay, 14 *Auguſti*, 1 *Eliz.* the ſaid feoffees (the ſaid *Oliver Chudleigh* then being alive) by their deed ſealed with their ſeal bearing date the ſame day and year, did enfeoff the ſaid *Chriſtopher Chudleigh* in fee unto the uſe of him and his heirs, which feoffment was made without any conſideration. And the ſaid *Chriſtopher* then had notice of the ſaid uſes in the ſaid *Quadripartite* Indenture ſpecified and declared. And afterwards, that is to ſay, 20 *Sept.* 3 *Eliz.* the ſaid *Chriſtopher* had iſſue *Strachley Chudleigh* his eldeſt ſon. And after, that is to ſay, 3 *Marcii* 5 *Eliz.* the ſaid *Chriſtopher* had iſſue *John Chudleigh* his ſecond ſon; and afterwards 1 *Julii* 6 *Eliz.* by deed indented and enrolled the 4 day of *October* next enſuing before the Clerk of the Peace, and one Juſtice of Peace within the ſaid County, according to the Statute of 27 *H.* 8. did bargain and ſell the ſaid Mannor to Sir *John Chicheſter* Knight and his heirs, to the uſe of him and his heirs: But it was found, that between the date of the ſaid Indenture, and before the enrolment, that is to ſay, 6 *Julii anno ſexto ſupradicto*, the ſaid *Chriſtopher* by his deed, ſealed with his Seal, bearing date the ſame day and year, of the ſaid Mannor did enfeoff Sir *John Chicheſter* and his heirs, unto the uſe of him and his heirs with warranty againſt all: And afterwards the ſaid *Strachley*, *anno* 12 *Eliz.* died without iſſue. And the Jury further found, that Sir *John Chicheſter*, 6 *Sept.* 7 *Eliz.* of the ſaid Mannor did enfeoff *Philip Chicheſter* in fee. And that the ſaid *Philip* at the Court of the ſaid Mannor holden 8 *Octob.* in the fifteenth year of the ſaid Queen, did grant the place where, &c. being cuſtomary land by Copy unto the ſaid *John Freine* for life according to the cuſtome of the Mannor, by force whereof he entred, upon whom the ſaid *John Chudleigh* 11 *Marcii* 28 *Eliz.* did enter into the ſaid Mannor, and the ſame day and year did thereof infeoff the ſaid *William Dillon* now Plaintiff in fee, who entred in the place where, &c. upon the poſſeſſion of the Defendant, upon whom he reentred; and whether upon the whole matter the ſaid *John Freine* be guilty or not, the Jurours pray the diſcretion of the Juſtices, &c.

And this Caſe as to the principal point was ſuch:

[121] Sir *Richard Chudleigh* having iſſue *Chriſtopher*, *Thomas*, *Oliver*, and *Nicholas* after the Statute of 27 *H.* 8. did enfeoff divers of the Mannor of *Heſcot* in fee unto the uſe of his feoffees and their heirs, for the life of *Chriſtopher* his eldeſt ſon, and after to the uſe of the firſt ſon which *Chriſtopher* his ſon ſhould beget in tail, and ſo to the tenth ſon; and after to the uſe of the ſaid *Thomas* his ſecond ſon in tail; and after to the uſe of *Oliver* his third ſon in tail; and after to the uſe of *Nicholas* his fourth ſon in tail; and after to the uſe of the right heirs of Sir *Richard*: Sir *Richard* died, and before any iſſue born of the body of *Chriſtopher* his ſon, the feoffees enfeoff *Chriſtopher* having notice of the former uſes, and afterwards *Chriſtopher* hath iſſue *Strachley* and *John*. If the uſe which before was in contingency ſhall veſt in the ſaid ſons of *Chriſtopher*, and ſhall be executed by the Statute of 27 *H.* 8. was the Queſtion, and great doubt of the Caſe. And in this Caſe the point is no other, but whether theſe contingent uſes before their eſſence by the ſaid feoffment of the feoffees be deſtroyed and ſubverted, ſo that they ſhall never riſe out of the eſtate of the feoffees after the birth of the iſſues. And this Caſe was argued many times at the Bar on the part of the Plaintiff, and on the Defendants part in the King's Bench. And becauſe the Caſe was difficult and of great conſequence and importance, it was thought neceſſary that all Juſtices of *England* openly in the Exchequer Chamber upon ſolemn Argument, ſhould ſhew their opinions in this Caſe. And afterwards, *Ter. Hill.* 36 *Eliz.* the Caſe was argued in the Exchequer Chamber before all the Juſtices of *England*, by *Hugh Wiat* on the Plaintiffs part, and by *Cook* the Queens Sollicitor General on the Defendants part. And after in *Eaſter* Term following, by *Robert Atkinſon* for the Plaintiff, and by *Francis Bacon* for the Defendant, but I did not hear their Arguments. And yet it is neceſſary to report what matters were moved at the Bar, to the intent the ſtate of the Queſtion ſhould be better known, and the Arguments and Reaſons of the Judges at the Bench better apprehended.

For the Argument of the principal point four things are to be conſidered.

Firſt, What an uſe is, and the ſeveral natures of uſes, and of what eſteem and account all manner of uſes are in judgment of Law.

Secondly, If contingent uſes (as well as uſes in *eſſe*) might have been diſcontinued or taken away at the Common Law before the Statute of 27 *H.* 8. *cap.* 10.

Thirdly, If our contingent uſe had been continued or deſtroyed, if the ſaid Statute of 27 *H.* 8. had not been made, in as much as the feoffee had notice of the uſes.

Fourthly, If the ſaid Statute of 27 *H.* 8. preſerve any contingent uſe, which had been deſtroyed by the Common Law, and in that to conſider the miſchiefs which were before the ſaid Act, and the remedy which the makers of the Act have provided by the purview thereof. What an uſe is, and the ſeveral na-
[b] tures of uſes, and of what eſtimation all uſes are in Law. An uſe is a truſt and confidence which is not iſſuing out of land, but as a thing collateral annexed in privity to the eſtate, and to the perſon, touching the land, *ſcil.* That *Ceſtuy que uſe* ſhall take the profits, and that the Terre-tenant ſhall make eſtates according to his direction. So that, he who hath an uſe hath not *jus neque in re, neque ad rem*, but only a confidence and truſt, for which he hath not any remedy by the Common Law, but his remedy was only

only by *Subpena* in Chancery: If the feoffees would not perform the order of the Chancery, then their perſons for the breach of the truſt were to be impriſoned until they did perform it; and therefore the Caſe of an uſe, is not like unto Commons, Rents, Conditions, &c. which are hereditaments in judgment of Law, and which cannot be taken away or diſcontinued by the alienation of the Terre-tenant, or by Diſſeiſors, or by Eſcheats, &c. as uſes may, as ſhall after be ſaid. There were two Inventors of Uſes, Fear, and Fraud; Fear in times of Troubles and civil Wars to ſave their Inheritances without forfeiture; and Fraud to defeat due Debts, lawful Actions, Wards, Eſcheats, Mortmains, &c.

There are two manners of Uſes; 1. *in eſſe*, in Poſſeſſion, Reverſion, Remainder: 2. in Contingency, which by poſſibility may fall into Poſſeſſion, Reverſion, or Remainder. To every of theſe uſes there are two inſeparable incidents, Confidence in the perſon, and Privity in eſtate, as appeareth in 14 *H.* 8. 6. *a.* And this confidence in the perſon, is either expreſſed by the party, or implied by the Law; and ſo is privity in eſtate expreſſed or implied, as ſhall be after ſhewed: Theſe uſes and confidences to ſome reſpect were reputed as chattels, and therefore were deviſable; and to other reſpects they were eſteemed as hereditaments, of which there ſhould be a *poſſeſſio fratris*, &c. as 5 E. 4. 7. *b.* is: But yet in Law, neither chattel, nor hereditament, for they were not Aſſets to Executors, nor Aſſets to the Heir. Whether a contingent uſe might be diſcontinued before the Statute; and it ſeems clearly, that before the Statute uſes in contingency might have been taken away and deſtroyed as well as uſes in *eſſe*. And therefore if there be feoffee at the Common Law unto the uſe of me for life, and after to the uſe of him who ſhall be my firſt ſon in tail, &c. and ſuch feoffee before the birth of my ſon had been diſſeiſed or made a feoffment upon good conſideration to him who had notice of the uſe; the contingent uſe in the one caſe was ſuſpended, and in the other caſe utterly deſtroyed. For if uſes in *eſſe* which were of greater value and eſtimation then uſes in contingency (which were but poſſibilities of an uſe) might be diſcontinued or deſtroyed as above as the Books are 24 *H.* 8. *feoffm. al. uſes.* 14 *H.* 8. 6, 7, 24. & 28 *H.* 8. 9, 10. *a multo fortiori* uſes in contingency and future might be diſcontinued and taken away. Alſo a contingent uſe was but a truſt and confidence; and therefore, if confidence in the perſon or privity in eſtate fail, the uſe was alſo [122]
ſuſpended or deſtroyed; and therefore without queſtion feoffee upon good conſideration without notice, diſſeiſor, or Lord by Eſcheat, Lord of a villein, Corporation, an alien born, a perſon attainted ſhall not ſtand ſeiſed to a contingent uſe no more then to an uſe in *eſſe* before the Statute of 27 *H.* 8. And therefore it is agreed in 33 *H.* 6. 14. *b.* & 31 *E.* 3. *Colluſion* 29. if the father make a feoffment unto his eldeſt ſon upon colluſion, now by the Statute of *Marlebridge* the Lord had a poſſibility to have the ward if the father dieth his heir within age, there this poſſibility was deſtroyed, becauſe that a ſtranger who had no notice hath gotten the land *bona fide*: So if *A.* grant a Reverſion, or Seignory unto *B.* now he hath a poſſibility to have the Reverſion; but if *A.* grant the Reverſion or Seignory to another, and he get attornment, then the firſt poſſibility of *B.* is deſtroyed, as *Littleton* ſaith *fol.* 126. *a.* but more ſhall be ſaid to this point after, in anſwer to certain objections of the other part. And although that in our Caſe the feoffee had not notice, yet becauſe he was in of another eſtate, ſo that the privity of eſtate failed, for this cauſe he ſhall not ſtand ſeiſed to the uſe, for the uſe is a confidence annexed in privity to the eſtate of the land. And therefore there is a difference between things annexed in privity to the eſtate of the land, and things annexed to the poſſeſſion of the land without reſpect of any privity: And therefore diſſeiſor, Abator, or Intrudor ſhall not be ſeiſed unto an uſe, although that he hath notice, for the uſe was not annexed to the poſſeſſion of the land which each of them hath, but unto the privity of the eſtate which is denied to them all, for they are not in privity of eſtate to which the uſe was annexed, but in the Poſſ. Alſo for as much as *Ceſtuy que uſe* hath no remedy but in Chancery, and the Chancellor had not any power to determine the right of Inheritances for that cauſe they cannot ſtand ſeiſed to an uſe. The Lord by Eſcheat, or Lord of a Villain, or who entreth for Mortmain, or who recovereth in a *Ceſſavit*, &c. ſhall not ſtand ſeiſed to an uſe, becauſe he is in by title paramount to the uſe, *ſcil.* by force of a Condition in Law *tacite* annexed to the land at the time of the creation of the Seignory, and the Tenancy came in lieu of his Seignory which he hath to his own uſe; and the Writ of Eſcheat ſaith, and which *ad ipſum reverti debet tanquam eſcaeta ſua.* And alſo they are not in in the *Per*, that is to ſay, in privity of the eſtate to which the uſe was annexed, but in the *Poſt.* The Lord by eſcheat, &c. loſeth his Seignory; ſo Tenant by Curteſie, and Tenant in Dower ſhall not be ſeiſed unto an uſe, for the Law gives to them their eſtates in conſideration of marriage, and they are not in in privity of eſtate, for which ſee 14 *H.* 8. 6, 7. & 24 *H.* 8. *Br. Feoffments al uſes* 40.

So if there be privity of eſtate, yet if confidence expreſſed or implied fail in the perſon, the uſe is ſuſpended or deſtroyed. If the feoffee unto an uſe upon good conſideration enfeoffeth another who hath no notice, here is privity in eſtate, but here is no confidence in the perſon expreſſed or implied, and therefore the uſe is gone; but if a feoffment be made without conſideration to one who hath notice, there is privity and notice of the truſt and there is alſo privity in eſtate, and therefore there the uſe remaineth, but not as a thing annexed to the land, but unto the privity of the eſtate, 5 E. 4. 7. *b.* If the husband make a feoffment in fee of the land of his wife upon conſideration, and without expreſſing any uſe, the wife ſhall not have the *Subpena*; for the feoffment doth diſaffirm the wives right, and the feoffee is not in in privity of the eſtate of the wife. So in the Caſe at Bar, Tenant for life, the remainder in fee to the uſe of another; Tenant for life maketh a feoffment in fee to one who hath notice, he cannot ſtand ſeiſed to the firſt uſe, becauſe that the uſe is annexed to one eſtate, and the feoffee is in of another eſtate. It is agreed in 45 E. 3. 18. that if donee in tail with warranty make a Leaſe for life, and afterwards in a *Præcipe* brought againſt the Leſſee for life, he is received upon the default of the Leſſee, he ſhall not vouch by force of the ſaid Warranty, for the Warranty is annexed to one, and he is in of another eſtate, and always the Warranty as to voucher requireth privity of eſtate, to which it was annexed. And the ſame Law of an uſe. So it is holden in 10 *Eliz. Plowd. Comm.* 351. that *Ceſtuy que uſe* for life or in tail, remainder in tail, with divers remainders over in uſe, maketh a feoffment unto one who hath notice, he ſhall [b]

not

not ſtand ſeiſed to the firſt uſes, *cauſa qua ſupra*. But of things annexed unto land it is otherwiſe, as of advowſons, and the like appendants or appurtenants. And therefore if Tenant in tail, or the husband ſeiſed in the right of his wife make a feoffment of a Mannor, or part thereof with the advowſon, the advowſon at leaſt after preſentment ſhall paſs as appendant unto the Mannor, or to part of the Mannor, as the Books are in 22 *Aſſ.* 34 E. 1. *Quare imped.* 179. 43 E. 3. 25, 26. & 17 E. 3. 5. *a.* 19. *b.* and not to the eſtate of the land, for the eſtate of the land is diſcontinued by the feoffment: So Diſſeiſor, Abettor, Entruder, or the Lord by Eſcheat, &c. ſhall have them as things annexed to the land. So note a diverſity between an uſe or warranty, and the like things annexed unto the eſtate of the land in privity, and Commons, Advowſons, and other hereditaments annexed to the poſſeſſion of the land: Then for as much as the Statute of 27 *H.* 8. had not been made, the contingent uſe in the Caſe at Bar had been taken away. Now is to ſee if the Statute of 27 *H.*8. hath provided for the preſervation and maintenance againſt contingent uſes againſt the rule of Law before; for if this Statute doth not ſupport the contingent uſe in the Caſe at Bar, without doubt the ſame is taken away. And therefore two things are neceſſary to be conſidered for the better diſcuſſion of this point.

[123] Firſt, The miſchiefs which were before this Act, the which the makers of the Act did intend to remedy.

Secondly, What manner of remedy they have provided for the ſame, and upon that will riſe the true interpretation and meaning of the Act. For the better apprehenſion of the miſchiefs which were before this Act, certain former Statutes made againſt the abuſes of uſes in particular Caſes (for the treaty ſhall be only of uſes) are to be conſidered. And therefore will appear fully the abuſes of ſuch uſes, and that fraud was the principal cauſe of the invention of them in ſubverſion of Law and Juſtice. By the Statute of 1 *R.*2 *cap.*9. it is provided, That becauſe Diſſeiſors make feoffments unto great men and others, for maintenance, and to other men unknown, to the intent to delay and defraud the diſſeiſees, for ſuch Caſe the diſſeiſee ſhall have his Action againſt the pernor of the profits (which was *Ceſtuy que uſe*) notwithanding ſuch feoffment by fraud and colluſion within the year: The Statute of 4 *H.* 4. *c.* 7. doth inlarge the Statute of 1 *R.* 2. in the time, and in the Actions alſo. The Statute of 11 *H.* 6. *c.* 4. explains it: The Statute of 1 *H.* 7. *c.* 1. giveth a *Formedon* againſt *Ceſtuy que uſe* who is called pernor of the profits; and by theſe Acts it appeareth, that fraud and deceit to defeat him who had good title and right unto the land, of his lawful remedy was the inventor of theſe feoffments to uſes. It was provided by the Statute *De Religioſis* 7 E. 1. in enlargement of the Statute of *Magna Charta cap.* 36. which had provided *quod non liceat alicui dare terram alicui domui religioſæ*, that they do not acquire to them lands or tenements *arte vel ingenio &c.* but to defraud both theſe Laws it was invented, that a feoffment ſhould be made to the uſe of religious Men, or Comminalties, and therefore was the Statute of 15 *R.* 2. *cap.* 5. made to remedy this fraud. By feoffment to uſes, Lords were defrauded of their Wards, until the Statute of 4 *H.* 7. *c.* 17. The Statute of 19 *H.*7. *c.* 15. recites, that Men were defrauded of their executions, the Lords of their Reliefs and Heriots, and the Lords of Villains of the purchaſes of their Villeins by feoffments to their uſes, and that Statute doth remedy thoſe miſchiefs.

The Statute of 1 *R.* 3. *c.* 1. which is more general then the other Statutes, intends to remedy four great miſchiefs by reaſon of ſecret feoffments to uſes: 1. Unſurety to purchaſors and other the King's Subjects: 2. Trouble: 3. Coſts: 4. Greivous vexations: So that it was not only unſurety, but unſurety with trouble; and not unſurety with trouble only, but unſurety with trouble and coſts; and not unſurety with trouble and coſts, but with great vexation. Alſo examples thereof are expreſſed in
[*b*] the preamble of the Act, no purchaſor of lands in perfect ſurety, no wife of Dower, no leſſee of his leaſe, no ſervant of any annuity granted to him for his ſervice, &c. by reaſon of theſe privy and unknown uſes; this Statute intended to provide for theſe miſchiefs, in eſtabliſhing all feoffments, grants, &c. made by *Ceſtuy que uſe, &c.* But ſo miſchievous and ſiniſter is the invention and continuance of uſes, that they alſo overreached the policy and providence of the makers of this Act alſo: For, for example, the purchaſor was not in better caſe then he was before, for if the feoffor limit to himſelf but an eſtate in life or in tail, or to his wife, or to his ſon, &c. Or if the feoffees made ſecret Leaſes or eſtates, the purchaſor could not have ſure eſtate, by any eſtate that *Ceſtuy que uſe* could make, ſo that unſurety, trouble, coſts, and great vexation remained in the Realm by theſe covenous and fraudulent uſes, notwithſtanding the ſaid Statute of 1 *R.* 3. For the remedy of which and many other miſchiefs, was the Statute of 27 *H.* 8. *cap.* 10. made, for the general remedy of all miſchiefs, and abuſes of uſes, which Act was divided into two general branches; into the preamble which expreſſeth the miſchiefs, and into the body of the Act which provideth the remedy.

The Preamble containeth theſe miſchiefs:

1. By Common Law, lands and tenements cannot paſs, but by ſolemn livery and matter of Record, or by ſufficient writing, if the thing lieth in grant. Now by divers and ſundry imaginations, ſubtile inventions, and practiſes by fraudulent feoffments, fines, recoveries, and other aſſurances, craftily made to ſecret uſes and purpoſes (ſo that the feoffment, fine, and recovery are called fraudulent, becauſe they were permitted and made to fraudulent uſes) the hereditaments of this Realm were conveyed from one to another upon ſolemn Livery, &c.

2. Laſt Wills were made by bare words, ſometimes by ſigns in great extremities.

3. By fraudulent uſes, heirs have been unjuſtly diſ-inherited.

4. Lords have loſt wards, marriages, reliefs, and in effect all the fruit and benefit of their Seigniories notwithſtanding the ſaid Statutes of 4 *Hen.* 7. & 19 *Hen.* 7. which intended to remedy part of this miſchief.

5. No

5. No purchaſor could be aſſured of any lands, notwithſtanding the ſaid Act of 1 *R.* 3. which intended to remedy the ſame.

6. Nor any man could know againſt whom he ſhould bring his action, or have his execution, &c. notwithſtanding the ſaid Statutes of 1 *R.* 2. 4 *H.* 4. 11 *H.* 6. 1 *H.* 7. & 19 *H.* 7. which were made one after the other to provide remedy againſt this miſchief.

7. Eſtates created by Law in conſideration of marriage, were defeated, *ſcil.* Tenancy in Dower, and by the Curteſie, notwithſtanding the ſaid Statute of 1 *R.* 3. which intended to remedy the ſame in part.

8. Perjuries for trial of ſecret uſes were committed, and daily encreaſed. [124]

9. The King had loſt the benefit of Eſcheats by Attainder, purchaſes by Aliens, Wards, *annum, diem, & vaſtum, &c.*

10. And the Lords had loſt their Eſcheats alſo.

11. The Statute ſaith, That many other inconveniencies have happened, and daily encreaſe amongſt the King's Subjects, to their great trouble and inquietneſs, and the utter ſubverſion of the ancient Common Laws. Theſe were the miſchiefs; but what remedy did the makers of the Act provide for all theſe and infinite other miſchiefs, which ſubtile and fraudulent uſes had introduced, ſurely to extirpate and extinguiſh (for ſo ſpeaketh the Statute) theſe ſubtile practiſed fraudulent feoffments, fines, and recoveries, abuſes and errors, and to make plain and perfect reſtitution of the ancient Common Law which was in a manner ſubverted by them; and to the intent that the King or his Subjects (as the Statute ſpeaketh) ſhall not be by any means or inventions deceived, damaged, or hurted by reaſon of ſuch ſecret, ſubtile, and fraudulent uſes, truſts and confidences: ſo that the full intent of the makers of the ſaid Act of 27 *H.* 8. was for a remedy of all the ſaid miſchiefs (which any Statute before nor altogether had made ſufficient remedy for) to extirpate and extinguiſh all uſes in manner as the Statute hath limited. For the makers of the Statute of 27 *H.* 8. did conſider and reconſider the ſaid former Statutes and proviſions by Parliament to reform the great abuſes of uſes in many particular caſes; At laſt reſolving, that uſes were ſo ſubtile and perverſe, that by no policy or proviſion they could be governed or reformed. And therefore as a skilful Gardiner will not cut away the leaves of the weeds but extirpate them by the roots, and as a wiſe houſholder will not cover the fire which is ſecretly kindled in his houſe, but utterly put it out: So the makers of the Statute of 27 *H.* 8. did not intend to provide remedy for continuance or preſervation, but for the extinguiſhing and extirpation of uſes: and becauſe uſes were ſo ſubtile and ungovernable, as hath been ſaid, they have with an undiſſoluble knot coupled and married them to the land, which of all elements is the moſt ponderous and immoveable. It ſhall be then againſt the expreſs intent and meaning of the makers of the Act to preſerve uſes otherwiſe then they were at the Common Law, for they intended *ſub modo* to extirpate and extinguiſh them. And if by any conſtruction contingent uſes ſhall be preſerved out of this Act. 1. Greater inconveniencies would follow then were before. 2. Great abſurdities would alſo enſue.

For 1. land ſhould paſs againſt the rule of the Common Law from one to another ſo cunningly, and upon ſuch ſecret conditions and limitations, that none ſhould know in whom the eſtate of the land did remain.

2. Land ſhould paſs and ſhould be transferred by nuncupative Will from one to another, as if a feoffment in fee be made to ſuch perſons as he ſhall name by his laſt Will, &c. he might limit the uſes by Will nuncupative. [*b*]

3. Heirs ſhould thereby be diſ-inherited: for if theſe perpetuities ſhould be adjudged of force, it is not poſſible (if they be not written in the walls of their houſes, and if the parties which are bound by them have not councel learned in the Law always with them) for them to keep the nice and preciſe points of the uſual proviſoes, and clauſes of reſtraint contained in the perpetuities.

4. Lords ſhall loſe their Wards and the fruits of their Seignories.

5. No purchaſor ſhall be aſſured of his purchaſe, and where the Statute intends to provide that the King nor any of his Subjects ſhall be deceived by theſe uſes; now the purchaſor ſhall be in worſe caſe then he was before, for before the Statute, if he had purchaſed it *bona fide* as hath been ſaid, he ſhould not ſtand ſeiſed to the uſe; now it is ſaid, that the land ſhall be tied with the uſe in whoſe hands ſoever that it cometh, ſo that where the preamble ſaith, That the Subject ſhould not be endamaged by theſe uſes, he by ſuch conſtruction ſhall be more damnified then he was before.

6. Greater miſchief would follow for ſtrangers actions then was before, for upon ſecret limitation of uſes the land it ſelf ſhould be transferred from one to the other, ſo that no man in the world can know in whom the eſtate of the land is. But before this Statute, although that they might change the uſe, yet they could not convey the land if not upon livery, fine, or recovery, but now the land it ſelf ſhould paſs by performance of a ſecret Condition in a Chamber.

7. No perſon ſhall be Tenant by the Curteſie, nor Tenant in Dower, for they do not know in whom the eſtate of the land remaineth.

8. Of neceſſity perjuries by reaſon of them will abound, for then the ſecret imaginations and intents of men, and attempts and goings about ſhall be put in trial upon ſuch clauſes of reſtraint.

9. The King and Lords ſhall loſe their Wards and Eſcheats, for ſuch deviſe may be made if the Statute ſhall be conſtrued for the preſervation of contingent uſes, that neither the King nor any other Lord ſhall ever have any eſcheats or wards, or in effect any profit or fruit of their Seignories. It ſhall be abſurd to ſay, that the makers of this Act intend to preſerve uſes, when they expreſly ſay, that they intend to extirpate and extinguiſh uſes. Alſo it is abſurd to think, that the makers of the Act intend to preſerve *& quodam modo* to revive the ancient Common Law, and yet intend to preſerve and continue any ſuch abuſe and fraud which tendeth to the overthrowing of the Common Law. For they have judged that the invention of theſe uſes was ſubtile, fraudulent, and crafty in diſ-inheriſon of heirs, in defrauding of Lords, of thoſe who had right of their lawful actions, of purchaſors of Tenant in [125]

Dower, of Tenant by the Curteſie, cauſes of manifeſt perjury in defrauding of the King and Lords of their eſcheats, &c. in ſubverſion of the ancien Common Laws, and the cauſe of many other inconveniences, and the occaſion of great trouble and diſquietneſs in the Common wealth. I ſay, it ſhall be abſurd to think that the makers of the Act intend not only to continue, but to increaſe and preſerve ſuch wickedneſs, miſchiefs, and inconveniences. It appeareth alſo by divers branches of the body of the Act, that the makers of the Act did not expect, that any land after the Statute ſhould paſs by limitation of uſes, if not only upon bargain and ſale which they foreſee convenient to continue. And therefore they at the ſame Parliament add to this enrolment of Record, which is agreeable to the preamble, *ſcil.* matter of Record, but other uſes they did not expect would after the Act have been put in ure, but that land ſhould paſs by ſolemn Livery, Record, &c. as is contained in the preamble. And they thought alſo, that little land would paſs by bargain and ſale enrolled, becauſe ſuch bargainee being in in the *Poſt*, ſhall never vouch by force of any warranty annexed to the eſtate of the land. And therefore it is to be noted, that in all the body of the Act there is not any ſaving for any *Ceſtuy que uſe*, or of any uſe. Note alſo, the Act doth not give any benefit of warranty to *Ceſtuy que uſe*, if not that the uſe were executed before 1 *Maii* 1536. which was 28 *H.* 8. as fully appeareth by expreſs clauſe in the end of the ſaid Act of 27 *H.* 8. Proviſion alſo is made by another clauſe of the Act for actions then depending that they ſhall not abate by execution of the uſe. And if they had expected that uſes ſhould continue, they would have provided for future uſes alſo. Alſo there is another clauſe in this very Act for the proviſion of the King's Wards now being within age, &c. And the laſt clauſe of the Act concerning *Wales*, *ſcil.* (now ſtand or be ſeiſed) prove the ſame alſo, that they did not expect that any uſes ſhould continue, if not in the Caſe of bargain and ſale, and in Caſe of entry of feoffees before the Statute to revive the former uſe. And theſe words in the beginning of the purview of the Act, *ſcil.* Where any perſon or perſons ſtand or be ſeiſed, or at any time hereafter ſhall happen to be ſeiſed, do not prove that the makers of the Act expected that uſes ſhall be as common and uſual after the Act as they were before, but by theſe words (hereafter ſeiſed) that they in-
[*b*] tended by entry of the feoffees to revive an uſe created before the Act; and the ſame is notably expounded by the firſt ſaving of this Act, for there is ſaved to all perſons, &c. ſuch right, &c. as they or any of them had or might have had before the making of this Act; ſo that ſuch rights, &c. which precede this Act, and were in *eſſe* before 27 *H.* 8. are only ſaved by the Act of 27 *H.* 8. for they did not intend that lands ſhould paſs by limitation of uſe, but by ſolemn livery, matter of Record, &c. as is expreſſed in the preamble. And therefore if after the Statute *A.* hath diſſeiſed *B.* and enfeoffed *C.* to the uſe of *D.* the right of *B.* is not ſaved by the expreſs letter of the Act, for the right was not former or precedent to the Act, ſo that for maintenance and continuance of conveyances by uſes after the Act, there ought to be a conſtruction by equity, for the makers of the Act intended to extirpate and extinguiſh all uſes, if not in the caſe of Bargain and Sale as before is ſaid. The which is ſaid to this intent only to ſhew the expectation of the makers of the Act, and by that to collect their intent and meaning concerning the preſervation of any uſe, and not to draw in queſtion ſuch uſes in *eſſe*, which are raiſed upon good conſideration after this Act, and lawfully executed by the letter of this Act, for it is not intended to deſtroy any uſe either in *eſſe* or in contingency, but by the ſaid rule of Law before the Statute of 27 *H.* 8. Now in as much as the miſchiefs before the Act, and the remedy which the makers of the Act intended to apply are underſtood: The purview, and the words of the Act by which the remedy is provided is to be conſidered; and it is to know that theſe words of the purview, It may pleaſe the King's highneſs that it may be enacted, &c. depend upon two ſentences of the preamble before, *ſcil.* for the better extirpating and extinguiſhing of all ſuch ſubtile practiſed feoffments, &c. and to the intent that the King's highneſs, nor any of his Subjects may be deceived by reaſon of ſuch truſt, uſes, or confidence. It may pleaſe the King's highneſs. So as the way to extirpate the uſes, and to avoid the deceit of them provided by the Act, is now to be ſeen, and that is, That where any perſon ſtand or be ſeiſed of any lands, tenements, &c. That in every ſuch caſe, all and every ſuch perſon, &c. that have, or hereafter ſhall have any ſuch uſe, &c. ſhall from henceforth ſtand, and be ſeiſed and adjudged in lawful ſeiſin, eſtate, and poſſeſſion of and in the ſame lands and tenements of and in ſuch eſtates as they had in the uſe, and that the eſtate, right, and poſſeſſion that was in ſuch perſons as were, or hereafter ſhall be ſeiſed to the uſe of any ſuch perſon or perſons, be from henceforth clearly deemed in *Ceſtuy que uſe*, after ſuch quality, manner, form, and condition as they had in the uſe.

[126] And that is the remedy which the makers of the Act have provided to ſalve all the ſaid miſchiefs; by which words of the purview of the Act it clearly appeareth, that every uſe in *eſſe*, *ſcil.* in poſſeſſion, reverſion, or remainder is executed by the Statute, and that no contingent uſe or right of an uſe ſhall be executed within this Statute until they come in *eſſe*. For to every execution of an uſe by force of this Statute four things are requiſite. Firſt, There ought to be a perſon ſeiſed, for the words of the Act are, Any perſon ſtand or be ſeiſed. Secondly, It behoveth that there be a *Ceſtuy que uſe* in *eſſe*, for the words of the Act are, Stand ſeiſed to the uſe of any perſon or perſons, &c. Thirdly, There ought to be an uſe in *eſſe*, *ſcil.* in poſſeſſion, reverſion, or remainder. Fourthly, The eſtate out of which the uſes riſe ought to be veſted in *Ceſtuy que uſe*, &c. for the words are, And that the ſtate of ſuch perſon ſeiſed to the uſe, ſhall be adjudged in *Ceſtuy que uſe*, &c. ſo that when theſe four concur, *ſcil.* ſeiſin in feoffees, *Ceſtuy que uſe in rerum natura*, a uſe in *eſſe*, and that the eſtate of the feoffees may veſt in *Ceſtuy que uſe*, there is execution of the uſe within this Statute; but if any of them fail, there is no execution of the uſe within this Statute; and therefore it is agreed in 10 *Eliz.* in *Plowden*'s Comment. *Dalamer*'s Caſe 351. *b.* that the Statute of 27 *H.* 8. doth not execute any uſe, but only uſes in *eſſe*, ſo right of a preſent uſe, or a future, or contingent uſe are excluded until they come in *eſſe*. It is holden in 36 *H.* 8. *Dier* 58. *a.* that if *Ceſtuy que uſe* in tail with divers uſes in remainder maketh a feoffment and dieth, and the Statute of 27 *H.* 8. is made, now the iſſue in tail hath right of an uſe in *eſſe*, as the Juſtices term it, and in 10 *Eliz.* *Dalamer*'s Caſe, but no execution thereof until entry by the feoffees. And with that agree the Caſes in 7 *E.* 6. *Stephen Davies* Caſe, *Dier* 88. *b.* & 15 & 16. of Queen *Eliz.* *Dame Baskervil*'s Caſe,

Dier

Dier 330. *a.* that if *Ceſtuy que uſe* in poſſeſſion make a feoffment before the Statute, no right of an uſe, neither in poſſeſſion nor in remainder ſhall be executed by the Statute of 27 *H.* 8. till regreſs by the feoffees. *Quid ita?* There ought to be ſeiſin in the feoffee, *Ceſtuy que uſe in rerum natura*, a uſe in *eſſe*, and the eſtate of the feoffees ought to be transferred to *Ceſtuy que uſe*; and therefore admit that our Caſe had been before the Statute of 27 *H.* 8. and that our feoffment was before the Statute, and after the Statute was made, without queſtion this uſe could never be recontinued, or the repoſſeſſion of the land executed to the ſame by the Statute; Then if the Statute doth not execute but only uſes in *eſſe*, and neither the right of an uſe in *eſſe*, nor an uſe in contingency, *Ex hoc ſequitur*, that the right of an uſe, and uſes in contingency remain at the Common Law, until they come in *eſſe*, and therefore if the eſtate of the feoffees be deveſted by diſſeiſin, or if the Queen, or Corporation, or alien, or perſon attainted, &c. [*b*] be enfeoffed before the uſe come in *eſſe*, or if the land be aliened *bona fide*, upon conſideration to one who hath no notice, the uſe ſhall never be executed, if not that theſe poſſeſſions be removed by lawful entry or action of the feoffees. And if their entry and right be barred, the uſe is gone for ever, as it was at the Common Law before this Statute. And therefore if *Ceſtuy que uſe* in tail, remainder in tail, reſtrained with clauſe of perpetuity be diſſeiſed, no uſe in contingency can be executed within this Statute, for a diſſeiſor cannot be ſeiſed to an uſe, and then there wants ſeiſin of the feoffees, and there wants an uſe in *eſſe*, for there is but a right of an uſe, and it is impoſſible that the eſtate of the feoffees can be veſted in *Ceſtuy que uſe* by the Act of 27 *H.* 8. when they have not any eſtate in them when the uſe ſhall be executed. And there is no difference as to the execution of an uſe by force of this Statute when the uſe is diſcontinued before the Statute, and when the eſtate of the land is altered after the Act, and before the contingent uſe came in *eſſe*. And yet more colourable argument may be made for execution of the right of a preſent uſe by this Act (as where feoffees were diſſeiſed before the Statute) then for the execution of a contingent uſe after the Act being deveſted by diſſeiſin before they come in *eſſe*, for the words of the Act are, And the eſtate, right, and poſſeſſion that was or hereafter ſhall be in ſuch perſon ſeiſed to any ſuch uſe, ſhall be in *Ceſtuy que uſe*, &c. So that when the feoffees are diſſeiſed before the Statute and after the Statute is made, now the feoffees have a right to the land, and *Ceſtuy que uſe*, a right to the uſe, and the Statute ſaith, That the eſtate, right, and poſſeſſion that was in the feoffees ſhall be in *Ceſtuy que uſe*, and they before the diſſeiſin had the eſtate, and after the diſſeiſin had right, but this clauſe is to be conjoyned with the firſt branches of the Act, and becauſe that ſeiſin fails in the feoffees, a uſe in *eſſe* in *Ceſtuy que uſe*, and the eſtate continues all concurring at the time of the execution, there cannot be any execution within this Statute. And yet at ſeveral times was there ſeiſin in the feoffees, a uſe in *Ceſtuy que uſe*, and ſeiſin for a time, but they do not meet together when the uſe ſhould be executed, and for this cauſe in the ſaid Caſe, the uſe cannot be executed within this Statute, but the Caſe at the Bar is ſtronger, for in this Caſe there was never an uſe in *eſſe* in the ſon of *Chriſtopher* before the diſcontinuance and deveſting of the eſtates. And ſuppoſe, that before the Statute a feoffment in fee had been made unto the uſe of *J. S.* for life, and after to the uſe of the right heirs of *J. N.* and the feoffees had been diſſeiſed, and after the Statute was made, and then *J. N.* died, and after his death *J. S.* dieth, ſhall this uſe be executed in the right heir of *J. N.*? No truly, for the cauſes before rehearſed: Then by the ſame reaſon if the diſſeiſin had been in the ſame Caſe after the Statute, and before the [127] death of *J. N.* (for no execution can be during his life) no poſſeſſion ſhall be executed in the right heir of *J. S.* within this Statute. By this it appeareth of what moment their Objection is who ſay, That after the Statute of 27 *H.* 8. the land is bound with the contingent uſe in whoſe hands ſoever the ſame cometh, for this Objection is grounded upon five abſurdities.

1. The uſe ſhall be annexed to the land, and not to the eſtate of the land, and by the ſame reaſon, a perſon attainted, alien, the King, a Corporation, the Lord by eſcheat, &c. might after the Statute be enfeoffed or ſeiſed to the uſe of another, if the land only were bound with the uſe, for they ſhall have Commons, Advowſons, Eſtovers, &c. as things annexed and appurtenant to the land; and what reaſon ſhall it be, that a perſon attainted, Corporation, &c. could not originally be as well enfeoffed to the uſe, as they ſhall ſtand ſeiſed to former contingent uſes, but *eadem eſt ratio* of the creation of an uſe, and of the continuance of an uſe.

2. The Statute requireth (as hath been ſaid) that there be an uſe in *eſſe*, and an uſe is but a confidence and truſt, for ſo the words of the Statute expound it in joyning theſe words together, that is to ſay (uſe, confidence, and truſt) but it is abſurd to ſay, That confidence and truſt can be repoſed in land which wanteth ſenſe, and which in regard of ſenſe is inferiour to brute beaſts, and it ſhall be leſs abſurd to ſay, That beaſts may be truſted who have ſenſe and want reaſon, then land which wants ſenſe and reaſon alſo ſhall be truſted.

3. If the land ſhall be bound and charged therewith, as with rent, common, or intereſt in the judgement of Law, then it in effect ſhall overthrow all uſes, for then how can one by the Law, by deed indented made between two, covenant to ſtand ſeiſed unto the uſe of a ſtranger to the deed; for if it ſhall be as a charge out of the land, it ſhall be void, for it is eſtrange to the deed; And how can a man after the Statute covenant to ſtand ſeiſed to the uſe of himſelf for life, or in tail the remainder over? For a man by the rule of the Common Law cannot create in himſelf a particular eſtate, nor give unto himſelf any eſtate in poſſeſſion, or remainder (if not peradventure in Caſes of concluſion) but in as much as uſes after the Statute are but truſts and confidences, the Law tolerates them ſo long as they agree in the declaration and limitation of their eſtates with the rule of Law.

4. If the nature of an uſe be changed, and a new hereditament made by conſtruction upon this Statute, then if a man make a feoffment of land on the part of the mother without conſideration, his heir on the part of the father ſhall have the ſame; but it was agreed of late in the Caſe between *Colgat* and [*b*] *Blythe* in the Common Pleas, *M.* 29 & 30 *Eliz.* that the heir on the part of the mother ſhall have the ſame after the Statute, as he ſhall have the ſame before the Statute, as 5 *E.* 4. 7. *b.* is.

5. If the Law ſhall be taken, that the land ſhall be bound with the contingent uſe in whoſe hands ſoever it comes, this abſurdity and confuſion would be. Put caſe that Tenant in tail were, the remainder or reverſion over in fee, and he in the remainder or reverſion covenant by deed upon good conſideration, that if Tenant in tail die without iſſue within four years, that he will ſtand ſeiſed unto the uſe of *B.* in fee, and afterwards Tenant in tail maketh a feoffment in fee, and the feoffee covenanteth by deed with *C.* that if Tenant in tail dieth without iſſue within the ſaid four years, he will ſtand ſeiſed unto the uſe of *C.* in fee, Tenant in tail dieth within the four years, who ſhall have the uſe in this Caſe? Certainly, there cannot be two ſeveral uſes in poſſeſſion in two ſeveral perſons at one and the ſame time in one and the ſame land, for then it will follow that there ſhall be two ſeveral eſtates in poſſeſſion in two ſeveral perſons at one time; for if the feoffee unto an uſe before the ſtatute had bargained and ſold the land upon good conſideration to one in fee who had no notice and execute no eſtate, the bargainee ſhall not have any uſe, but the ancient uſe continueth, for there remains privity in eſtate and confidence alſo. And there cannot be two ſeveral uſes of one and the ſame land in one and the ſame degree; and therefore I conceive in the Caſe which hath been put, the uſe of the feoffee ſhall be executed, and not the uſe of the remainder or reverſion, for both uſes cannot meet in *eſſe* together in one and the ſame land, and therefore they are compelled to confeſs that the future uſe in this Caſe may be taken away. And if it be ſo in the Caſe of Tenant in tail the remainder over, ſo is it in the Caſe of Leſſee for life. And therefore if Leſſee for life be, the remainder over in fee, and he in the remainder covenanteth with *B.* by deed upon good conſideration, that if Leſſee for life dieth within four years, that then he will ſtand ſeiſed unto the uſe of *B.* in fee: And afterwards Leſſee for life maketh a feoffment in fee, and the feoffee maketh the like covenant with *C.* as is aforeſaid, and afterwards the Leſſee for life dieth within the four years, none can deny but that the uſe of the feoffee ſhall be executed, and not the contingent uſe limited to *B.* for otherwiſe confuſion would follow. And the ſame is all one with the Caſe at the Bar in effect, for in that before the contingent uſe came in *eſſe* Leſſee for life maketh a feoffment in fee, ſo as the contingent uſe which ſhould riſe out of the reverſion or remainder cannot riſe until the eſtate be recontinued, and reveſted; And for the reaſon thereof a notable Caſe between *John Hunt* and *Thomas Gatley* was adjudged
[128] by all the Juſtices of *England M.* 34 & 35 *Eliz.* at *Hertford*, which Caſe began *Paſch.* 23 *Eliz.* And the ſame was in effect, that there was Tenant in tail, the remainder over in tail, he in the remainder chargeth the ſame with a rent charge, and afterwards Tenant in tail ſuffers a common Recovery and dieth without iſſue, the poſſeſſion of the Recoveror ſhall not be charged with the leaſe or rent, for the poſſeſſion and the new eſtate of the Recoveror which he hath gained from the Tenant in tail is ſubject to the charges and leaſes of the Recoveror, and cannot be ſubject unto the leaſes and charges of him in the remainder alſo *ſimul & ſemel*; So in the ſame Caſe it was agreed, that if Tenant in tail had made a feoffment, the eſtate and poſſeſſion of the feoffee ſo long as the ſame continueth is not ſubject unto the charges and leaſes of him in the remainder, but during the continuance thereof remaineth ſubject only to the charges and leaſes of the feoffee; for there it was holden that until the eſtate out of which the charge or leaſe is derived be recontinued, the leſſee cannot enter, nor the grantee diſtrain, *ex quo nota*, that although that the uſe ſhall be (as is injoyned as a charge out of the land) yet it cannot begin until the eſtate out of which it iſſueth be recontinued. Then it will be demanded, when the entry of the feoffees is requiſite and lawful after the Statute of 27 *H.* 8. and when not. And to that there are divers opinions. Some think that the entry of the feoffees is not requiſite after the Statute to the execution of a future uſe, but when the eſtate out of which the uſe riſeth is diſturbed or altered by diſſeiſin, or aliened to one who hath no notice, but if the eſtate continue without ſuch alteration, then there needeth no entry of the feoffees; And with this diverſity agreeth the Lord *Dier* and *Manwood* in 17 *Eliz.* *Dier* 340. where they both took the ſame difference when the feoffees ought to enter in the lands to awake the ſleeping uſe, and when not, and their reaſon is, becauſe there ought to be an uſe in *eſſe*, and not a right of an uſe, and the eſtate of the feoffees ought to be transferred to *Ceſtuy que uſe*, and ſo thought clear without queſtion. Others have taken this difference, when the feoffees by their entry may gain their ancient fee ſimple out of which the uſes riſe, there their entry is congeable, otherwiſe not, for the Law (as they affirm) will not ſuffer fractions of eſtates, and particular eſtates to be created without donors or leſſors; and to prove this difference, firſt they cite *Dalamer's* Caſe in *Plowden's Comm.* 350. which was in effect, *Robert Dalamer* and *Beatrice* his wife being *Ceſtuy que uſe* in ſpecial tail, the remainder unto the uſe of *Robert Dalamer* in general tail, the remainder to the uſe of *Simon Dalamer* in fee; *Robert Dalamer* 26 *H.* 8. did enfeoff *Dial*, who before the Statute enfeoffed *Lyſter*, who enfeoffed *Simon Dalamer*, who 3 *E.* 6. enfeoffed *Barnard* in fee, *Robert Dalamer* died, and *Jannings* the ſurviving feoffee entred for the reviving of the uſes; and it was adjudged that his entry was lawful, for he had gained his ancient fee ſimple, for it was agreed
[*b*] by all, that the feoffment of *Simon Dalamer* was not within the Statute of 1 *R.* 3. becauſe he had only an uſe in remainder, and he who hath but an eſtate in uſe in remainder or in reverſion (as it is there agreed) cannot make an eſtate over by the Statute of 1 *R.* 3. although that the words of the Statute are general, Every feoffment, gift, grant, &c. for he cannot make a feoffment, and a grant of the fee ſimple of the land he cannot make, for then would follow fraction of the eſtates of the feoffees, and particular eſtates without donor or leſſor.

And if *A.* be *Ceſtuy que uſe* for life, the remainder of the uſe to *B.* in fee, if *B.* may grant ſuch eſtate of the land as he had in uſe by the Statute of 1 *R.* 3. then it would follow that the grantee of *B.* ſhould have the fee ſimple of the land, and the feoffees who before had the fee ſimple ſhould have now but an eſtate for the life of *A.* which ſhould be abſurd and inconvenient. Alſo ſome ſay, that if there be Tenant for life the remainder in fee to the uſe of *B.* and before the Statute he in the remainder diſſeiſeth leſſee for life, and after the Statute is made, the Statute ſhall not execute the uſe of the remainder, for the uſe riſeth intirely out of both the eſtates, and there ſhall not be a fraction neither of the uſe nor of the eſtate, for then he in the remainder ſhould be a diſſeiſor for life only, and the remainder executed to another

another which ſhould be againſt the Rule of the Law, and ſuch conſtruction is to be made that the Rules of Law be not broken. So if there be two joynt feoffees to the uſe of another, and one diſſeiſeth the other before the Statute of 27 *H.* 8. and after the Statute is made, there ſhall not be fraction of the eſtate of the feoffee for one moity, nor a breach of the Joynture, for the Statute of 27 *H.* 8. ſaveth the warranty, which by ſuch fraction of the eſtate ſhould be loſt. And alſo the Statute ſaith, that the eſtate which was in the feoffee ſhall be deemed in *Ceſtuy que uſe*, and that cannot be if there ſhall be ſuch fraction of the eſtate of the feoffee. And they cite the Caſe in *M.* 15 & 16 *Eliz. Dier* 329, & 330. which was cited for the opinions of *Catlyn* and *Dier* chief Juſtices, *Saunders* chief Baron, and *Manwood* Juſtice without any open argument upon a Caſe referred to them out of the Chancery, where the Caſe in effect was. *A. Ceſtuy que uſe* in tail the remainder of the uſe to *B.* in tail, the remainder of the uſe to *A.* in fee. *A.* before the Statute makes a feoffment unto the uſe of himſelf for life, and after unto the uſe of his eldeſt ſon and his wife, and to the heirs of the body of the ſon, &c. and afterwards the Statute is made, the father dieth, the firſt feoffees enter intending to have revived the firſt uſe in tail, and ſo to have excluded the ſons wife, which was the Lady *Baskervile*, of the uſe limited upon the ſecond feoffment. But it was reſolved, that their entry was not lawful, becauſe that by the feoffment of *A.* who was *Ceſtuy que uſe* in tail in poſſeſſion (and alſo had the fee ſimple of the uſe.) The fee ſimple of the uſe was lawfully departed with, and as to that, the right of the feoffees bound by the Statute of 1 *R.* 3. then the feoffees by [113]
their entry cannot have their former eſtate, *ſcil.* the fee ſimple, but ſhould have a particular eſtate without donor or leſſor, for which cauſe their entry was not lawful, for the ſaid Juſtices took it, that when *Ceſtuy que uſe* in poſſeſſion maketh a feoffment, the ſame by the expreſs letter of the Statute of 1 *R.* 3. bars the entry of the feoffees for the fee ſimple, and by conſequence the Law will not ſuffer any diviſion or fraction of the eſtate of the feoffees, for this cauſe their entry was not lawful. But ſee *Dalamer's* Caſe. 10 *Eliz. Plowden's Comm.* 350. upon ſolemn argument and great deliberation adjudged contrary. But others ſay it is not impertinent to ſay, That by the Act of Parliament the eſtate of the feoffees ſhall be divided, and it is not to be reſembled to caſes at the Common Law: And if other conſtruction ſhall be made, it ſhall be againſt common reaſon and common allowance, and thereof great abſurdity would follow as they conceived; for they conceived and ſaid, That if a man covenanteth by deed with another, that after his death that his ſon ſhall have his land in tail, that in this caſe the Statute of 27 *H.* 8. ſhall make a fraction of his eſtate, for he ſhall have an eſtate for life, as parcel of his ancient eſtate, and his ſon ſhould have the uſe and eſtate executed by the Statute of 27 *H.* 8.

And if the feoffees ſhall never enter but when they ſhall have their ancient fee ſimple, *ex hoc* would follow, that if a man who hath not any ſon maketh a feoffment unto the uſe of himſelf for life, and after to the uſe of his 1, 2, 3, 4, &c. ſon in tail, and for default of ſuch iſſue unto the uſe of *A.* in tail, the remainder over to other perſons *in rerum natura*, there all the uſes in *eſſe* limited after the contingent uſes are executed by the Statute of 27 *H.* 8. And in ſuch caſe if by diſſeiſin or other alteration of the eſtate before the being of the future uſes, the entry of the feoffees be taken away, becauſe they cannot have their ancient and former fee ſimple, the ſame ſhall be as they conceive inconvenient and dangerous, and in effect it ſhould take away the entry of all feoffees at this day, for almoſt in all ſuch conveyances and limitations of uſes, ſome of the latter remainders are limited and executed by the Statute in perſons *in rerum natura*, which cannot be deveſted by the entry of the feoffees. On the other ſide great abſurdity and inconvenience will follow, to ſay the eſtate remaineth in the feoffees to ſerve the future uſe when it ſhall happen: For put caſe a man maketh a feoffment unto the uſe of the feoffor for life, and after unto the uſe of his eldeſt ſon in tail; (he having no ſon at the time) and after unto the uſe of *A.* in tail, and after to the uſe of *B.* in fee, in this caſe, if any eſtate ſhall be left in the feoffee to ſerve the future uſe, he ought to have an eſtate in fee ſimple determinable in the mean time, and then the feoffor ſhall have eſtate for life, and the feoffee ſhould have an eſtate to him and his heirs as long as he who is not in *eſſe* (and who peradventure never ſhall be) ſhall have heir of his body, and yet an eſtate tail ſhall be veſted and executed in *A.* and [*b*]
the remainder in *B.* in fee, which ſhall be abſurd and inconvenient as before is ſaid. And it ſhall be alſo convenient and dangerous, for then the feoffees ſhould puniſh Waſt, and enter for the forfeiture, &c. and yet peradventure the future uſe ſhall never happen; and therefore they conceived, that all the uſes in *eſſe* were preſently executed, and no eſtate ſhould be left in the feoffee in the mean time till the future uſe come in *eſſe*. But they conceived a poſſibility of entry ſhould remain in the feoffee, which the Lord *Dier* in 17 *Eliz.* 340. *b.* termeth *Scintilla juris*, for if the feoffor hath iſſue a ſon, then preſently by the operation of the Act of 27 *H.* 8. the feoffees ſhould have an eſtate to preſerve this uſe, for the Statute ſaith, That the eſtate, &c. that was in ſuch perſon or perſons, that were, or hereafter ſhould be ſeiſed of any lands to the uſe of any perſon or perſons, ſhould be deemed and adjudged in him or them that have or hereafter ſhall have ſuch uſe: So that when the ſon is born, or when the future uſe cometh in *eſſe*, they ſay that the Statute giveth the eſtate from the feoffee to *Ceſtuy que uſe*, and that for neceſſity of reaſon the eſtate after the contingent uſe cometh in *eſſe* ſhall be in the feoffee to preſerve this future uſe, which by force of the Statute might be deemed and adjudged out of the feoffee to *Ceſtuy que uſe*; but the feoffees in the Caſe before put have but a poſſibility, becauſe that if the future uſe do not come in *eſſe* during the particular eſtate, then it ſhall never take effect, for in as much as the ſame is in the nature of a remainder it ought to take effect and veſt during the particular eſtate, or at leaſt at the time of the determination of the particular eſtate. And it was ſaid, at the Bar by the Counſel of the Defendant, that that ſeemeth to be the better opinion.

And it was ſaid, that no uſes ſhall be executed by the Statute of 27 *H.* 8. which are limited againſt the Rules of the Common Law, and the reaſon thereof is apparent, for it appeareth by the preamble of the Statute of 27 *H.* 8. that it was the intent of the makers of the Act, to extirpate and extinguiſh ſuch ſubtile practiſed feoffments, fines, recoveries, abuſes and errors, tending to the ſubverſion of the good and ancient Common Laws of the land; ſo that it fully appeareth, that this Act of 27 *H.* 8. ſhall not exe-

cute

cute any uſes which is limited againſt the rule of the Common Law, for the intent of the Act was to extinguiſh and extirpate not the feoffment, fine, or recovery, for thoſe were laudable and good conveyances of lands and tenements by the Common Law, as is in effect recited in the beginning of the Preamble; but ſuch uſes which are abuſes and errors, and therefore erroneous becauſe they are againſt the rule of the Common Law, and therefore this Law of 27 *H.* 8. is a Law of reſtitution, *ſcil.* to reſtore the good and
[130] ancient Common Law which was in a manner ſubverted by abuſive and erroneous uſes. And therefore if a man at this day make a feoffment in fee to the uſe of *A.* for years, and after unto the uſe of the right heirs of *B.* or to the uſe of the wife of *B.* which ſhall be; this limitation to the right heirs and to the wife is void, becauſe it had been void if it had been limited in poſſeſſion, as appeareth *M.* 2 & 3 *Eliz. Dier* 190, 191. So in the ſame Caſe if the uſe be limited to *A.* for life, and after unto the uſe of the right heirs of *B.* or unto the wife of *B.* which ſhall be, if *A.* dieth, and after *B.* dieth, or taketh wife, this remainder to the right heirs or to the wife is void, for it ſhall be void if it had been limited in poſſeſſion. And the Statute of 27 *H.* 8. intendeth to reſtore the good and ancient Common Law, and not to give more privilege to execution of uſes then to eſtates, which are executed by the ancient Common Law. And in proof thereof, it was reſolved by all the Juſtices of *England*, *Paſch.* 35 *Eliz.* in the Caſe of the Earl of *Bedford* referred to them out of the Court of Wards, and was thus in effect, *Francis* Earl of *Bedford* made a feoffment in fee of divers Mannors unto the uſe of himſelf for years, and after to the uſe of *John* Lord *Ruſſel* his ſon and heir apparent, and to the heirs males of his body begotten, and for want of ſuch iſſue unto the uſe of the right heirs of the Earl, and afterwards the ſaid *John* Lord *Ruſſel* died with iſſue male in the life of the ſaid Earl, and it was reſolved, that the uſe and eſtate limited by way of remainder to the right heirs of the Earl was void, for it had been void if it had been limited by eſtate executed at the Common Law, for the remainder ought to veſt during the particular eſtate.

And if a man make a feoffment to the uſe of himſelf for life, and after to the uſe of his eldeſt ſon and his heirs males of his body, and for want of ſuch iſſue unto the uſe of his ſecond ſon in tail, &c. provided that if his eldeſt ſon attempt to ſuffer a recovery, or levy a fine, &c. that then his eſtate ſhall ceaſe as if he were naturally dead and not otherwiſe, and that then the land ſhall deſcend or remain as if he were naturally dead without any forfeiture; the eldeſt ſon hath iſſue a ſon, and attempts to alien, in this Caſe the *Proviſo* is repugnant and void, for if the ſame had been limited by conveyance at the Common Law in poſſeſſion, without doubt it had been void: And in ſuch Caſe if it ſhould be good, I demand in whom the eſtate tail ſhall be after ſuch attempt, and who ſhall have the Writ of Waſt, or ſhall enter for the forfeiture during the natural life of Tenant in tail. And if a man by deed with livery of ſeiſin giveth land in tail, the remainder in tail, the remainder in fee: Provided always (as above) ſuch *Proviſo* is repugnant and void as is directly proved by *Richil's* Caſe in *Littleton*, 163. and by 21 *H.* 7. 11. & 21
[*b*] *H.* 6. 33. *b.* And this Caſe of an uſe is not to be reſembled to a rent newly created, or any thing out of the land, but only to land it ſelf, for now the Statute hath with an indiſſoluble marriage united the land and uſe together, and it ſhall be conſonant unto the intent of the makers of the Act of 27 *H.* 8. to reſtore the ancient Common Law in conſtruction of the execution of the poſſeſſion to the uſe. Then it will be objected, that in as much as that the Statute in the mean time executeth all the uſes in *eſſe*, and *Ceſtuy que uſe* is *quodam modo* in the *Poſt*, and not in in privity of the eſtate out of which the future uſe riſeth, that for this cauſe, the future uſe ſhall not riſe at all, which ſhall be miſchievous and inconvenient.

The anſwer to this Objection ſhall be plainer, if a Caſe be put of an uſe in *eſſe*, and in *futuro*, and upon that the manner how future uſes ſhall be veſted by the Statute of 27 *H.* 8. ſhall be ſhewn, as by way of demonſtration. *A.* maketh a feoffment in fee to the uſe of *D.* for life, and after to the uſe of him who ſhall be his firſt ſon in tail, and for default of ſuch iſſue, to the uſe of *B.* in tail, and for default of ſuch iſſue to the uſe of *C.* in fee, in this Caſe preſently by the feoffment *A.* hath an eſtate for life, the remainder to *B.* in tail, the remainder to *C.* in fee, and no eſtate is put in abeiance or left in the feoffees; But if after *A.* hath iſſue a ſon, then the poſſibility which the feoffee had becometh an eſtate in Law, and preſently the Statute executeth the poſſeſſion according to the limitation of the uſe, but if Tenant for life be diſſeiſed before the birth of the ſon, and after he hath iſſue, now nothing veſts in the ſon, becauſe there ought to be an uſe in *eſſe* before the Statute can execute the poſſeſſion; but who ſhall enter to remove the impediment, and to reſtore the privity of the eſtates? Certainly, if the Tenant for life ſhall reenter, he ſhall revive all the former eſtates which the Statute of 27 *H.* 8. hath executed to the former uſes in *eſſe*, and therefore alſo the Statute doth transfer the eſtate of the land to the ſon in tail, for that is the privity which the Statute requireth, *ſcil.* privity of eſtates which the ſame Statute hath executed upon the limitation of the uſes in the ſame conveyance before, and after the death of Tenant for life the feoffees may enter and revive the uſe. And as leſſee for years or for life, upon condition to have fee, cannot have an increaſe and enlargement of his eſtate, but upon the privity of eſtate of the leſſee, ſo no remainder of a future uſe can be transferred into eſtate by force of this Act, before the particular eſtates executed by the Statute upon the limitation of the uſes in the ſame conveyance are recontinued. But if Tenant for life maketh a feoffment or dieth before the birth of the ſon, his remainder is deſtroyed. As if a leaſe be made for life, the remainder to the right heirs of *J. S.* if leſſee for life make a feoffment, or dieth during *J. S.* life, the remainder to the right heirs is deſtroyed, and that as it ſeemeth is the beſt con-
[131] ſtruction of the Statute of 27 *H.* 8. for other conſtruction ſhall overthrow the eſtate of infinite number of perſons, which ſhall be inconvenient, and againſt the practiſe and common opinion always after the making of the ſaid Act unto this day.

Another Objection hath been made that an uſe in contingency is in the cuſtody of the Law, and therefore cannot be diſcontinued or taken away; but thereof will follow great abſurdities. Firſt, It ſhall be abſurd that a future or contingent uſe might be diſcontinued or taken away by a feoffment *bona fide* upon notice or diſſeiſin, &c. before the Statute, and ſhall not be taken away or diſcontinued after the Statute,

when

when the Statute doth not extend to the ſame until it come in *eſſe*: Secondly, It ſhall be abſurd, that the Law, which by its definition is *ſanctio ſancta jubens honeſta, & prohibens contraria*, ſhall be conſervator or preſerver of a thing impious and fraudulent, for by the judgment of the whole Parliament of 27 *H.* 8. uſes are ſubtile and crafty, invented by frauds to diſ-inherit heirs, and to defraud the King and all other Lords of their eſcheats, wards, and other profits of their Seignories, &c. and as it is in the preamble to introduce many other inconveniences, and to raiſe trouble and unquietneſs between the Subjects, ſhall that be *jubere honeſta, & prohibere contraria?* No truly, but ſhall be *jubere iniqua, & prohibere contraria*; and therefore *Fitzherbert* in *Bokenham's* Caſe, 28 *H.* 8. *Dier* 12. *a.* ſaith truly, that uſes are odious in the Law. Thirdly, The Common Law will not keep and nouriſh theſe ſubtile and fraudulent uſes *tanquam in gremio legis*, becauſe as appeareth by the judgment of all the Parliament in 27 *H.* 8. they were invented and practiſed in ſubverſion of the ancient Common Law, but the Law will not preſerve a ſubverter and deſtroyer in its boſom; and theſe uſes are termed abuſes and errors by the whole Parliament in 27 *H.* 8. and therefore cannot remain in *gremio legis*. So the intent of the Parliament was to extirpate and extinguiſh ſubtile and fraudulent uſes as things tending to the ſubverſion of the ancient Common Law, and as increaſers of fraud, ſubtilty, deceit, trouble, vexation, inquietneſs, errors, and abuſes, beſides many and great miſchiefs and inconveniences; and the letter alſo of the purview of the Act was clearly againſt them, and therefore it ſhall be againſt all reaſon to make conſtruction againſt the expreſs intent and meaning alſo of the ſaid Act of Parliament, but therein to imitate the example of the reverend Judges in times paſt, who always conſtrue all Acts made againſt the fraud of uſes (for of thoſe only it was ſpoken) liberally and by equity, and againſt the letter for ſuppreſſing the fraud and inconveniencies of uſes; And therefore where the Statutes of 1 *R.* 2. & 4 *H.* 4. aforeſaid, which gave action for *Ceſtuy que uſe* (calling him pernor of the profits) and that the Writ ſhall not abate for Non-tenures, yet the Judges *M.* 4. *E.* 4. 38. by equity to meet with the fraud of uſes, extend the ſame to joyntenancy as it is there holden, and alſo in 5 *E.* 4. 44. *b.* & 45. & 7 *H.* 6. 10. *a.* and the Judges in 36 *H.* 6. 34. extend the ſaid Statutes by like equity to diſclaimer. Alſo the Statute of 1 *H.* 7. *c.* 1. gave a *Formedon* only by expreſs name to *Ceſtuy que uſe*, but the Judges in 14 *H.* 7. 17, 31. & 15 *H.* 7. 8. upon long debate extend the ſame to a *Scire facias* to execute an eſtate tail in remainder by equity; ſo the Statute of 1 *R.* 3. *cap.* 7. which ſpeaketh of leaſes, &c. made by *Ceſtuy que uſe* is extended by the Judges in 7 *H.* 7. 6. unto executions by *Elegit*, &c. by *Ceſtuy que uſe*, and where the Statute of 1 *R.* 3. ſaith, All grants, &c. ſhall be good againſt him and his feoffees, yet it was agreed in 4 *H.* 7. 8. *b.* that the grant of a rent charge ſhall be good againſt the diſſeiſor of the feoffees. And if *Ceſtuy que uſe* be enfeoffed by the diſſeiſors of the feoffees, and he make a feoffment over, if the letter of the Act of 1 *R.* 3. be only conſidered, the ſame is not according to his authority given by the preciſe words of the ſaid Act, for it is ſaid in 8 *H.* 7. 9. *a.* that he ought to do it as ſervant and in the right of the feoffees, and yet 27 *H.* 8. 29. *b.* it is good to a purchaſor by equity of the Statute. For as it is ſaid in 5 *H.* 7. 5. *b.* the ſame Act was made for advantage of the grantees, and not for the advantage of *Ceſtuy que uſe*. But in the Caſe at Bar, the meaning of the makers of the Act is apparent, and the letter of the Act is expreſly with us, and greater miſchiefs otherwiſe would follow then were before the Act if theſe future uſes ſhall be preſerved in the Caſe at the Bar. The Statute made in 31 *E.* 1. *de donis conditionalibus* in manner created perpetuities, and the ſame continued about 200 years, but in 12 *E.* 4. 19. by the reſolution of all the Judges it was reſolved, That by a common recovery the eſtate tail ſhall be barred, for the miſchiefs which were introduced in the Commonwealth thereby. In the time of *R.* 2. Juſtice *Richil* attempted to make a perpetuity, as it appeareth by *Littleton* in his Chapter of Warranty 263. & 21 *H.* 6. 33. *b.* which was ſuch in effect, Juſtice *Richil* having divers ſons, and intending that none of his ſons ſhould alien thoſe lands, or make any warranty to bar or hurt the others, he made a deed indented to ſuch effect, *ſcil.* That the lands and tenements were given to his eldeſt ſon in tail upon condition that if his eldeſt ſon alien in fee or in tail, &c. or if any of his ſons ſhall alien, &c. that then their eſtate ſhould ceaſe, and ſhould be void, and that then the lands ſhall remain to his ſecond ſon in tail, and ſo to his other ſons in remainder, and livery and ſeiſin was made accordingly. But all ſuch remainders were void becauſe the limitations of them were againſt the rule of law as appeareth there by *Littleton*. And ſo it appeareth in 21 *H.* 6. 33. that *Thirning* chief Juſtice of the Common Pleas made the like perpetuity for the continuance of his land in his blood without alienation; but the Judges held the ſame againſt the Law. And if after the Statute of 27 *H.* 8. which hath made an inſeparable unity and conjunction between the uſe and the poſſeſſion, the like conſtruction ſhall be made of eſtates limited in uſe and executed by the Statute as of eſtates executed in poſſeſſion, and by the Common Law, it ſhall be hard in my opinion to maintain ſuch Proviſoes, or Conditions to make eſtates of freehold and inheritance lawfully veſted to ceaſe in one and to veſt and reveſt in others againſt the rule of the Common Law. And ſo I conceive upon the whole matter, that the future uſes in the Caſe at the Bar by the ſaid feoffment of the feoffees was utterly deſtroyed, and by conſequence judgment ought to be given for the Defendant.

[*b*] [132]

And afterwards this Caſe was openly argued by all the Juſtices of *England*, and the Barons of the Exchequer, in the Exchequer Chamber, at ſix ſeveral days: 1. By Baron *Ewens* and Juſtice *Owen*; 2. By Juſtice *Beamond* and Juſtice *Fenner*; 3. By Juſtice *Walmeſley* and Juſtice *Gawdy*; 4. By Baron *Clark* and Juſtice *Clench*; 5. By Sir *W. Periam* chief Baron of the Exchequer, and by Sir *Ed. Anderſon* chief Juſtice of the Common Pleas; And 6. by Sir *John Popham* chief Juſtice of *England*. All which Arguments of the Judges and Barons I heard, but only of Juſtice *Beamond*, and therefore that which I ſhall ſay of that, I ſhall ſay by credible relation of others; but my intent is not to Report any of their Arguments at large, and in the ſame form as they were, delivered by them, but ſuch a ſummary collection of the effect and ſubſtance of them all as the matter (the ſame being the firſt Caſe which was adjudged, and being of great importance) will permit. And becauſe that Juſtice *Walmeſley* and the chief Baron only argued that Judgment ſhould be given for the Plaintiff, and all the other

other Judges and Barons concluded againſt the Plaintff, I begin with the effect of their two Arguments:

Before the Statute of 1 *R.* 3. the feoffees had not only all the eſtate in the land, but alſo all the power to give and diſpoſe thereof, for *Ceſtuy que uſe* was a treſpaſſor, if he againſt their will did enter upon the land. And after the Statute of 1 *R.* 3. *Ceſtuy que uſe* had power to make a diſpoſition of the land it ſelf, and yet notwithſtanding that, all the power of the land did remain in the feoffee until *Ceſtuy que uſe* had made ſuch a diſpoſition, for which cauſe the ſaid Act intending to provide for *Ceſtuy que uſe* had not made ſufficient proviſion for him. For the eſtate of the lands remaining in the feoffees, they many times contrary to the truſt repoſed in them, by ſecret feoffments, eſtates, and other covenous Acts had defrauded *Ceſtuy que uſe*, and had prevented ſuch diſpoſition of the land that the ſaid Act of 1 *R.* 3. gave to him; and as *Walmeſley* ſaid, there was ſometimes fraud in both, for when *Ceſtuy que uſe* by himſelf without the feoffees by force of the Statute of 1 *R.* 3. and the feoffees by themſelves without *Ceſtuy que uſe* by the Common Law had both ſeverally abſolute power to make diſpoſition of one and the ſame land; ſometimes *Ceſtuy que uſe* by his ſecret eſtates prevented the feoffees, and ſometimes the feoffees by the like
[*b*] ſecret eſtates prevented *Ceſtuy que uſe*, ſo that as he ſaid, they played at double hand, and thereby beguiled the true intention of the Act. And the chief Baron and *Walmeſley* ſaid, that the Statute of 27 *H.* 8. was not made to extinguiſh or eradicate any uſes, but the Statute of 27 *H.* 8. hath advanced uſes, and now hath eſtabliſhed ſafety and aſſurance for *Ceſtuy que uſe* againſt the feoffees, for before the Statute the feoffees were owners of the land, and now the Statute of 27 *H.* 8. hath made *Ceſtuy que uſe* owner of the land; before the Statute the poſſeſſion did govern and rule the uſe, but now after the Statute, the uſe doth govern and rule the poſſeſſion; for by the ſaid Act of 27 *H.* 8. the poſſeſſion is a ſubject and follower of the uſe. And no word in the preamble doth condemn uſes, but for the extirpating and extinguiſhing of all ſuch ſubtile practiſed feoffments, fines, recoveries, abuſes, &c. ſo as the uſes are not guilty of the inconvenienceies mentioned in the preamble, but the feoffments, fines and recovery ſubtilly and craftily practiſed, ſo as the intention of the Act was for to extirpate and extinguiſh (which both are ſignificant words) all ſuch feoffments, fines, recoveries, but how? By deſtroying of uſes; no truly, but by deveſting all the eſtate out of the feoffees, conuſees, and recoverors, and veſting the ſame in *Ceſtuy que uſe*, ſo that it ſhall be againſt the meaning and the letter of the Law alſo, to ſay that any eſtate or right or *ſcintilla juris* ſhould remain in the feoffees after the Statute of 27 *H.* 8. for it appeareth by the preamble, that the makers of the Act did intend to extirpate and eradicate all the eſtate of the feoffees, and the letter of the body of the Act is, that the eſtate, right, title, and poſſeſſion that was in ſuch perſon or perſons that were or hereafter ſhall be ſeiſed of any lands to the uſe of ſuch perſon be from thenceforth clearly adjudged and deemed in him or them, &c. ſo that by a Judgment given by all the Parliament the eſtate ſhall be out of the feoffees; and the chief Baron ſaid, that *ſcintilla juris* which is mentioned in 17 *Eliz.* is like to Sir *Thomas Moore*'s *Eutopia*; and they ſaid that after this Statute, that no truſt or confidence was repoſed in the feoffees. For now as *Walmeſley* ſaid the feoffees *non poſſunt agere aut permittere aliquid* in prejudice of *Ceſtuy que uſe*.

Before the Statute the office of the feoffee was to execute the eſtate according to the uſe, but now the Statute hath taken away all the office of the feoffees, and now the Act doth execute the poſſeſſion to the uſe, and takes away all the truſt and power out of the feoffees. And the letter of the Statute of 27 *H.* 8. is, Where any perſon or perſons ſtand or be ſeiſed, or at any time hereafter ſhall happen to be ſeiſed, and they relied much upon theſe words (at any time) for it ſeemed to them by theſe words, that the ſeiſin which the feoffees have at the beginning by the feoffment ſhall be ſufficient within this Act to ſerve all
[133] the uſes as well future when they come in *eſſe* as preſent, for there needeth not many ſeiſins, nor ſeiſin to continue, but ſeiſin at any time, ſo ſeiſin at one time ſhall ſuffice, for the Statute ſaith, ſeiſed at any time, and it ſhall be hard when the Statute requireth but one ſeiſin at one time only, that many ſeiſins and at ſeveral times againſt the intent and letter of the Act ſhould be required. The Statute of 27 *H.* 8. extendeth to all lawful and good uſes as well future as in *eſſe*, and no ſuch uſe is deſtroyed but advanced and extolled, as hath been ſaid before. And *Walmeſley* ſaid, that if ſuch conſtruction ſhall be made to deſtroy theſe future uſes, the uſual pleading all times in practiſe after the Statute ought to be altered; for the pleading of a feoffment in fee unto future uſes after that they come in *eſſe*, is *virtute cujus & vigore actus Parliamenti, &c. de uſibus in poſſeſſionem transferend'*, *Ceſtuy que uſe* was ſeiſed, &c. ſo that one ſeiſin is ſufficient as is proved by the uſual form of pleading, but now the pleading of it ſhall be altered if many ſeiſins ſhall be requiſite, and then more ſeiſins then one ought to be alledged. And he ſaid, as a fountain giveth to every one which cometh in their time to it a juſt meaſure of water, ſo the firſt ſeiſin and eſtate in fee given by the firſt feoffment to the feoffees is ſufficient to yield to all perſons to whom any uſe preſent or future is limited a competent meaſure of eſtate in their time proportionable to their eſtates which they ſhall have in the uſe; ſo that it ſeemeth to them, that the firſt ſeiſin by force of the feoffment by which the fee ſimple is given to the feoffees ſhall be ſufficient to ſerve all the particular uſes as well future as preſent in their ſeveral times, and nothing ſhall remain in the feoffees. But *Walmeſley* ſaid, that all the eſtate ſhall be firſt veſted in thoſe who are in *rerum natura*, and the poſſeſſion ſhall be veſted in him who hath the future uſe when the ſame cometh in *eſſe* by force of the firſt livery, and ſhall divide the eſtates which were conjoyned before. And he agreed that an alien, nor a perſon attainted, nor a Corporation cannot at this day be originally enfeoffed to the uſe of an other, for no uſe can be created out of their ſeiſin. *J. S.* maketh a feoffment in fee to divers natural perſons to certain uſes, ſome preſent, and ſome future, ſo as the uſes are well created and raiſed, although a Corporation be afterwards enfeoffed of the land, yet the future uſes when they come in *eſſe*, ſhall be raiſed and executed by force of the firſt livery, and the firſt ſeiſin of the feoffees, and by force of the Act, as he conceived. And *Walmeſley* further ſaid, that the future uſes in our Caſe cannot be ſuſpended, for a thing which never was in *eſſe* cannot but be ſuſpen-
[*b*] ded, but all the eſtate veſts firſt in them who have the preſent uſes, or the uſes in *eſſe*, and when the fu-

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ture uſes come in *eſſe*, then they ſhall become and ſhall come in between the other eſtates which were conjoyned before; and in proof thereof they cited the Caſe of *Cranmer* 14 *Eliz.* reported by the Lord *Dier*, *fol.* 309. and the Caſe of *Seniori puero* in 16 *Eliz.* reported alſo by the Lord *Dier* 337. and the Caſe of 5 H. 7. 6. If *Ceſtuy que uſe* by force of the Statute of 1 *R.* 3. make a feoffmene in fee upon Condition, and after entreth for the Condition broken, the feoffees never had the land again, becauſe all the intereſt and privity of the feoffees was once by the feoffment taken out of them; So in the Caſe in 19 *H.* 6. 76. & 2 *E.* 4. 2. if a man make a feoffment in fee upon Condition that he ſhall make a feoffment over in fee, in this Caſe if the ſecend feoffee refuſe, the feoffor ſhall enter, for it was the intent of both parties that the feoffee ſhould depart with all his eſtate, and nothing ſhould remain in him: Otherwiſe it is, if the Condition were that he ſhould make a gift in tail; and he ſaid, that if a feoffment be made of Land unto the uſe of *A.* and there is alſo a rent iſſuing out of the ſame Land unto the uſe of *B.* although the poſſeſſion of the Land be diſturbed by diſſeiſin, yet the uſe of the rent is not diſturbed thereby, becauſe the diſturbance is done to another ſeiſin, that is to ſay, to the Land and not to the ſeiſin of the rent out of which the uſe is limited. So in the Caſe at Barr, the diſturbance is not the firſt ſeiſin given by the feoffment, out of which all the uſes as out of a fountain flow, but the diſturbance is done to other ſeiſins, *ſcil.* to ſeiſins executed by the Statute of 27 *H.* 8. and not to the firſt ſeiſin, which by no means can be taken and deveſted, for it hath not any eſſence until the future uſe hath eſſence, which by force of the Statute ſhall draw a ſufficient eſtate to it, but when the future uſe is come in *eſſe*, now by reference and relation to the firſt ſeiſin there is ſeiſin and uſe within the Statute of 27 *H.* 8. And in proof thereof he cited *Bracebridges* Caſe 15 *Eliz.* which in effect was: A man made a feoffment of a Mannor to diverſe, to certain uſes, upon condition that if certain monies were not paid within a certain time, that then they ſhould ſtand ſeiſed to other uſes; the monies were not paid, and after attornment was to the feoffees when the poſſeſſion of the demeſns were executed before by the Statute; in this Caſe after the condition broken *Ceſtuy que uſe* had poſſeſſion of the Land by force of the firſt livery; and yet there was not any cotinuance of ſeiſin in the feoffees, nor the feoffees were not ſeiſed of the Land at the time of the execution of the poſſeſſion to the uſe.

And the Caſe of 13 *Eliz. Dier* 298. *b.* 22 *Eliz.* 369. *a.* Tenant in *Capite* enfeoffeth one and his heirs, provided that when the feoffor ſhall pay 100. *l.* to him or his heirs, that then it ſhall be to the uſe of the feoffor and his heirs, the feoffee dieth his heir within age, the 100. *l.* is paid, office is found, the feoffor ſhall have the uſe by force of the firſt livery, and by relation to it ſhall defeat the Wardſhip of the body and land. And he ſaid, that if a man make a feoffment in fee to the uſe of himſelf for life, and after to the uſe of another in tail, with divers remainders over with power to his leſſee for life to make [134] leaſes for 21. years, or 3. lives, in this Caſe, if the Tenant for life make a leaſe for 21. years or 3. lives, it ought be derived and take his eſſence out of the firſt feoffment, or otherwiſe all leaſes ſhall be determined by the death of the leſſee for life, and in the ſame Caſe there is not any ſeiſin continuing in the feoffees, but the firſt ſeiſin ſufficeth, and the ſame is conſonant to the words of the Act of 27 *H.* 8. for it ſaith, That the eſtate that was in the feoffee ſhall be adjudged in *Ceſtuy que uſe*; But *Periam* chief Baron conceived, that theſe future uſes before their births are not preſerved in the bowels and belly of the Land, but that they were *in nubibus*, and in the preſervation of the Law; for he well agreed with *Walmeſley*, that by force of the Act all the eſtate ſhall be out of the feoffees, and then of neceſſity he ſaid it ought to be in ſome perſon, or in abeyance and conſideration of the Law. And it ſhall be abſurd to ſay that the feoffees ſhall have leſs eſtate than they took by the firſt livery. And therefore becauſe nothing remains in the feoffees, and this future caſe cannot be executed until the perſon who ſhall take the ſame be in being, of neceſſity in the mean time it ought to be in the preſervation of the Law. And if any Caſe be doubtful upon a Statute it is good to conſtrue the ſame according to the reaſon of the Common Law, as it is ſaid in *Dalamers* Caſe in *Plow. Com.* 351.

And if the eſtate in our Caſe had been limited in our poſſeſſion by livery and ſeiſin, the remainder to the eldeſt ſon, &c. till his birth it ſhall be by the rule of the Common Law in the conſideration of the Law; and by the ſame reaſon the uſe ſhall be in our Caſe, and as the uſe ſhall be, ſo ſhall be the poſſeſſion by force of the Statute, for be the uſe in *eſſe*, or in the conſideration of the Law, the poſſeſſion ſhall be transferred to it by force of the Statute. And he took a difference between feoffees before the Statute, and feoffees after the Statute; for if feoffees unto an uſe were diſſeiſed before the Statute, no uſe could be executed after the Statute without regreſs of the feoffees, for the Statute ſaith, Which be or at any time hereafter ſhall be ſeiſed, &c. And thoſe who were diſſeiſed before the Statute, were not ſeiſed at the time of the Act, nor at any time after until regreſs; Otherwiſe it is when the feoffment is made after the Statute *cauſa qua ſupra*. And where the Statute ſaith, To the uſe of any perſon or perſons, the Statute doth not ſay, To the uſe of any perſon or perſons in *eſſe*, but to the uſe of another perſon, and that ſhall be intended when his time ſhall come; and it ſhall be a hard conſtruction to deſtroy the future uſes in our Caſe which were limited upon good cauſe and conſideration, and eſpecially when the ſons who then were not in *eſſe*, were not parties to any wrong, covin or practice; but he ſaid, that the uſe by the Common Law was in abeyance and cuſtody of the Law. And the poſſeſſion accordingly by force of the Statute, for no other perſon can take the ſame, and a thing which is committed to the cuſtody of [*b*] the Law, the Law will lawfully preſerve without any violence or deſtruction. And therefore 32 *H.* 6. if there be Tenant for life the remainder to the right heirs of *J. S.* and Tenant for life is diſſeiſed, and a deſcent caſt, and after *J. S.* dieth, and then the leſſee for life dieth, the entry of the right heir of *J. S.* is lawful, and he put alſo the Caſe of the Parſon to this purpoſe. And to prove that as well the poſſeſſion as the uſe are in the cuſtody of the Law, he cited *Cranmers* Caſe 14 *Eliz. Dier* 309. that the remainder limited to the Executors was in abeyance; and the Earl of *Bedfords* Caſe, in which Caſe he ſaid it was agreed, that the remainder to his right heirs was in the cuſtody of the Law until the death of *John* Lord *Ruſſel*. And 17 *Eliz. Dier. Brents* Caſe 340. that the remainder limited

to the wife that ſhall be was in abeyance in the Lord *Brayes* Caſe, 2 *Eliz. Dier fol.* 190, 191. where it was holden, that the remainder limited to the wife that ſhall be ſhould be in abeyance if the particular eſtate had not been but a Term, which cannot by the rule of Law ſupport a remainder in abeyance. And he cited the Caſes in *Brooks* Abridgement *Feoffments to uſes.* 30 *H.* 8. & 50 *pl.* 3. *M. pl.* 59. when *Brook* was chief Juſtice; and he ſaid, that the uſes do extend themſelves into many branches, and are to be reſembled to *Nebuchadnezzars* tree, for in this tree the fowls of the heaven build their neſts, and the nobles of this Realm erect and eſtabliſh their houſes, and under this tree the *infinita pecora campi*, and great part of Copyholders and Farmers of land for ſhelter and ſafety, and he ſaid, that if the tree ſhall be overthrown and overturned, it would make a great print and impreſſion in the land. And therefore it was convenient to repreſs the miſchief after by Parliament, and not to have retroſpect to Caſes before.

And he and *Walmeſley* alſo agreed in their argument, that the uſes in this Caſe ſhall follow the rules of eſtates at the Common Law. And therefore in this Caſe, if Tenant for life dieth before the birth of the ſon, the remainder in uſe ſhall be void, for ſuch remainder ſhall be void by the rule of the Common Law if it had been made in poſſeſſion, if the remainder do not veſt during the particular eſtate, or at leaſt when the particular eſtate determineth, and no difference between uſes and eſtates made in poſſeſſion to this purpoſe. And ſo they did conclude, that Judgement ought to be given for the Plaintiff.

On the other ſide it war argued by Baron *Ewens*, Juſtice *Owen*, Juſtice *Beamond*, Juſtice *Fenner*, Juſtice *Gawdy*, Baron *Clark*, Juſtice *Clench*, the Lord *Anderſon*, and *Popham* Lord chief Juſtice to the contrary. And it was agreed by them all, that the feoffment made by the ſaid feoffees who had an eſtate for life by limitation of uſe deveſted all the eſtates, and the future uſes alſo. And although that *Richard* [135] *Chudleigh* their feoffee had notice of the future uſe, yet it is not material, becauſe that all the ancient eſtates were deveſted by the ſaid feoffment; and this new eſtate cannot be ſubject to the ancient uſes which riſe out of the ancient eſtate which was deveſted by the feoffment. And *Gawdy* Juſtice ſaid, that the uſes limited to the eldeſt ſon, &c. were in abeyance, and he ſaid that the eſtates of the land ſufficient to ſerve theſe future uſes were in abeyance alſo; but he agreed that the ſame was not by the letter of the Statute of 27 *H.* 8. but ſhall be taken by equity of the ſaid Statute. For he ſaid, that the letter of the Statute is, To the uſe of any perſon or perſons, and here wanteth perſon, &c. alſo in every Caſe ſuch perſon ſhall be adjudged in lawful ſeiſin, &c. alſo, and that the eſtate, &c. ſhall be adjudged in him or them that ſhall have ſuch uſe; and therefore he ſaid, the uſes in abeyance by the equity of the Statute did draw ſufficient eſtate to ſerve them in abeyance alſo, and that for the ſaving and maintenance of future uſes, and that they ſhall be defeated and deſtroyed; and he agreed alſo, that all the preſent uſes as well precedent as ſubſequent were executed preſently; and he agreed with the other Juſtices, that the Statute of 27 *H.* 8. did not extend to ſubvert and deſtroy uſes in other manner then by the executing and transferring of the poſſeſſion of the land to them. And *Gawdy* cited the opinion of *Fitzherbert* in 28 *H.* 8. 12. *a.* that it was an inconvenience and impoſſibility in Law before the Statute of 27 *H.* 8. that two men ſhould have ſeveral powers to make diſpoſition of the ſame land, *ſcil.* the feoffees by the Common Law, and *Ceſtuy que uſe* by the Statute of 1 *R.* 3. and that inconvenience was intended to be remedied by this Act of 27 *H.* 8. and he conceived, that all the eſtate ſhall be out of the feoffees, for no right of the feoffees is ſaved which they have to other uſes, as it is ſaid 7 *E.* 6. in *Stephen Davies* Caſe. *Dier* 88. *b.*

And if a feoffment in fee be made unto the uſe of one for life, and after to the right heirs of *J. S.* the feee ſimple of the land ſhall be in abeyance; and before the Statute if a man had made a feoffment unto the uſe of one for years, and after to the right heirs of *J. S.* this limitation had been good, for the feoffees remain Tenants of the freehold, but ſuch limitation after the Statute is void, for then the freehold ſhall be in ſuſpence, for nothing can remain in the feoffees; but he ſaid, that theſe remainders in future were deveſted and deſtroyed by the feoffment of the Tenants for life; and although the remainders be within cuſtody of [*b*] the Law, yet they ought to be ſubject to the rules of the Law, for the Law will never preſerve any thing againſt the rule of Law: And becauſe that the rule of Law is, that he in the remainder ought to take the land when the particular eſtate determineth, or elſe the remainder ſhall be void; and in this Caſe for as much as by the feoffment of the Tenants for life their eſtate was determined, and title of entry given for the forfeiture, and then thoſe in the future remainder were not in *eſſe* to take it, for this cauſe the remainders *in futuro* by matter *ex poſt facto* were utterly deſtroyed and made void, and there is no difference when the eſtate for life determineth by the death of the Tenant for life, and when the ſame determineth in right by his forfeiture, for in both Caſes entry is given unto him in the next remainder, and then if he cannot take the land when the particular eſtate endeth, the remainder is void. And if *Chriſtopher Chudleigh* at the time of the forfeiture had been born, he could not have entred for the forfeiture.

If there be Tenant for life, the remainder to the right heirs of *J. S.* if in this Caſe Tenant for life maketh a feoffment in fee during the life of *J. S.* the remainder is deſtroyed, for otherwiſe there ſhould be a remainder without a particular eſtate, which cannot be, no more in the Caſe of an uſe then in the Caſe of an eſtate made in poſſeſſion. And upon that he cited the Caſe 3 *Eliz. Dier. Brayes* Caſe. And of the ſame opinion was *Popham* chief Juſtice, Baron *Clarke* and *Owen*, as to the ſaid point of forfeiture, admitting that no diſturbance or alteration of the eſtate had been made. And the chief Juſtice denied the opinion of *Gaſcoigne* in 7 *H.* 4. 23. *b.* who thought that ſuch remainder ſhould not be defeated by the feoffment of Tenant for life. And Baron *Clarke* put the Caſe in 11 *R.* 2. *Fitz. Detinue* 46. A gift in tail was made to *A. C.* the remainder to the right heirs of *A. S.* the donee made a feoffment unto *B.* in fee, and after *A. S.* died, his right heir ſhall never have the remainder nor any Charter which doth concern the ſame, but the eſtate of the land was by the feoffment of the Tenant in tail deveſted and determined, and all eſtates veſted in the feoffee, and there was not any particular eſtate neither in *eſſe*,

nor

nor in right to ſupport the remainder when it fell, for by the feoffment of the Tenant in tail his right is utterly gone, as *Littleton* ſaid, and then at the time the remainder fell, *ſcil.* at the death of *A. S.* there was not any particular eſtate to ſupport the remainder, neither in *eſſe* nor in right. And in the ſaid Caſe, note the words of *Charleton* chief Juſtice, and the judgment; But if Tenant in tail be diſſeiſed and dieth, the ſame ſhall not take away the remainder, for there a right of the particular eſtate remaineth to ſupport the right of the remainder, but when the Tenant in tail maketh a feoffment no right remaineth in him. And Juſtice *Owen* ſaid, If Tenant for life had made a feoffment in our Caſe before the birth of the ſon, he in the next remainder in *eſſe* ſhould enter for the forfeiture. And *Gawdy* ſaid, that in divers Caſes a thing in abeyance may be barred and deſtroyed; as if Tenant in tail be diſſeiſed, and releaſe to the diſſeiſor, now *Littleton* ſaith the ſtate tail is in abeyance, yet it may be barred by a common recovery in which the Tenant in tail is vouched: So if Tenant in tail be, the remainder to the right heirs of *J. S.* if Tenant in tail ſuffer a common recovery, the remainder is barred. So he ſaid upon the Caſe of 17 *Eliz. Dier fol.* 340. If the husband maketh a feoffment in fee before the taking wife, the wife ſhall never take, for the poſſeſſion and eſtate of the land is altered and charged and transferred to the poſſeſſion of another before the title of the wife doth accrue, but if no deveſting or alteration had been, then the uſe ſhall veſt in the wife, and he reſembled it to the Caſe 22 *Aſſ.* 37. 26 *Aſſ.* 8. & 29 *Aſſ.* 34. If a warranty be made to the poſſeſſion of a villain if the anceſtor dieth, ſo long as it continueth in his poſſeſſion it ſhall bind, but if the Lord of the villain entreth before the warranty doth attach, then the warranty ſhall not bind, for the Lord of a villain is in by force of his title of villainage, and the eſtate and the poſſeſſion of the land doth not continue, but by the entry of the Lord is altered and changed. And it was holden by Baron *Ewens*, *Owen*, *Beamond*, *Fenner*, *Clark*, *Clench*, the L. *Anderſon*, and *Popham* L. chief Juſtice, that at the Common Law, by diſſeiſin or by ſuch feoffment as in the caſe at Bar, as well all future uſes or uſes in contingency are deveſted and diſcontinued, as uſes in *eſſe* until the firſt eſtate out of which the uſes riſe be recontinued. And the Statute of 27 *H.* 8. doth not transfer any poſſeſſion to any uſe but only to uſes in *eſſe*, and not to any uſe in future or in contingency until they come in *eſſe*; and the ſame appeareth by the expreſs letter of the Act, for as there ought to be a perſon in *eſſe* ſeiſed to the uſe, ſo there ought to be an uſe in *eſſe* which ſhould riſe out of the eſtate, and there ought to be a perſon in *eſſe* who ſhall take the uſe, before any poſſeſſion can be transferred and executed to the uſe, for if the perſon who ſhall take the uſe be not in *eſſe*, or if the perſon be in *eſſe*, and no uſe be in *eſſe*, but only a poſſibility (as the Lord *Anderſon* ſaid) of an uſe, then cannot be any execution of the poſſeſſion to the uſe. And as at the Common Law there cannot be any uſe in *eſſe*, if there be no ſeiſin out of which the uſe ſhall riſe, ſo no uſe can be executed by the Statute of 27 *H.* 8. if there be no ſeiſin in ſome perſon ſeiſed to ſuch uſe at the time of the execution thereof, for the expreſs words of the Act is, Where any perſon or perſons ſtand or be ſeiſed or hereafter &c. ſhall ſtand or be ſeiſed, &c. to the uſe of any other perſon or perſons, ſo as there ought to be a perſon in *eſſe* of both parties, *ſc.* who ſhall be ſeiſed to the uſe, and who ſhall take the uſe, ſo as it behoveth not only to have a uſe limited but a perſon capable of the uſe when the Statute transferreth the poſſeſſion to it, and therefore if the perſon fail, it is not poſſible to have the poſſeſſion executed by this Statute to one who is not *in rerum natura*, for the Statute ſaith, To the uſe of any perſon or perſons in every ſuch Caſe, all and every ſuch perſon and perſons that have any ſuch uſe in fee ſimple, fee tail, for term of life or years, or otherwiſe, or any uſe in reverſion or remainder, &c. in which words note the word [ſuch] is iterated three times. So that uſes in *eſſe*, that is to ſay, in poſſeſſion, reverſion, or remainder, for there is no word of poſſibility or contingency, and perſons in *eſſe* are only within this Act; Shall from henceforth be deemed and judged in lawful ſeiſin, eſtate, and poſſeſſion, and that cannot be any perſon who is not in *eſſe*, or any perſon who is in *eſſe*, and who hath but a poſſibility of an uſe, who perhaps ſhall never have an uſe in *eſſe*. And by theſe words it fully appeareth, that no eſtate by this Statute can be transferred to the poſſibility of an uſe. And that the eſtate that was in ſuch perſon or perſons that were or hereafter ſhould be ſeiſed to the uſe of any ſuch perſon or perſons be from henceforth clearly deemed and adjudged to be in him or them that have or hereafter ſhall have ſuch uſe: ſo that this clauſe doth not deveſt any eſtate out of the feoffees, but when it can be executed in the *Ceſtuy que uſe*, (that is to ſay) in him or them that have or hereafter ſhall have ſuch uſe, and that cannot one have who is not in *eſſe*; for he is not a perſon who can have an uſe, and by conſequence cannot have any poſſeſſion by this Act.

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It was further holden by the ſaid two chief Juſtices, *Clenche*, *Clarke*, *Fenner*, *Beamond*, *Owen*, and *Ewens*, that thoſe who had argued on the other ſide have taken but the firſt part of the ſentence, that is to ſay, that the eſtate ſhall be out of the feoffees, but they have forgot the latter part of the ſentence, *ſcil.* that the eſtate ſhall be in ſuch perſon who hath the uſe, and that cannot be until the perſon and the uſe alſo be in *eſſe*. And by this clauſe it alſo appeareth, that no eſtate of the feoffees ſhall be transferred in abeyance out of the feoffees, and veſted in no body, or be transferred to a poſſibility of an uſe which hath not any being, for then an eſtate in *eſſe* ſhall be transferred to the poſſibility of an uſe which hath not any being, which ſhall be againſt reaſon, and againſt the letter and meaning of the Act, for the words are, And ſhall be adjudged in him or them that ſhall have ſuch uſe, *Ergo*, the eſtate of the feoffees ſhall not be in abeyance. And the two chief Juſtices, *Fenner*, *Beamond*, *Owen*, and *Ewen*'s ſaid, That if the eſtate ſhall be utterly out of the feoffees, and all veſted in thoſe who have the preſent uſes (as ſome have holden before) then the future uſe ſhall never riſe, for it is not poſſible that it ſhould be raiſed out of the poſſeſſion of *Ceſtuy que uſe*, for an uſe cannot be raiſed out of an uſe, as is 36 *H.* 8. *tit. Feoffments al uſes*, *Br.* 54. 5 *Mar. Dier* 155. And if *A.* enfeoff *B.* in fee to the uſe of *C.* and his heirs, with *Proviſo* that if *B.* pay to *C.* 100 *l.* that *C.* and his heirs ſhall ſtand ſeiſed to the uſe of *D.* and his heirs, this is utterly void, for the future uſe ought to be raiſed out of the eſtate of the feoffee, and not out of the eſtate of *Ceſtuy que uſe*. And it was holden by them, that the feoffees after the Statute had a poſſibility to ſerve the future uſe when it came in *eſſe*, and that in the mean time all the uſes in *eſſe* ſhall be veſted, and when the future uſe comes

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in *eſſe*, then the feoffees (if the poſſeſſion be not diſturbed by diſſeiſin or other means) ſhall have ſufficient eſtate and ſeiſin to ſerve the future uſe when it cometh in *eſſe*, to be executed by force of the Statute, and that ſeiſin and execution by force of the Statute ought to concur at one and the ſame time.

And this Caſe is not to be reſembled to Caſes at the Common Law, for an Act of Parliament may make diviſion of eſtates, and for as much as this diviſion is made by Act of Parliament, it is not neceſſary that the feoffees have their ancient eſtates. And they ſaid that this conſtruction is right, and conſonant to reaſon and equity, for by this conſtruction the intereſt and power that every one hath is preſerved by the Act, for if the poſſeſſion be diſturbed by diſſeiſin or otherwiſe, the feoffees ſhall have power to enter to revive the former uſes according to the truſt repoſed in them; and if they by any Act bar themſelves of their entry, then this Caſe (not being remedied by the Act) doth remain as it was at the Common Law. And the chief Juſtice and *Fenner* ſaid, That if a man make a feoffment in fee to the uſe of one for life, and after to the uſe of the feoffee in tail upon contingency, and after the contingency happeneth, in this Caſe the feoffee is the donor as is proved by 2 *E.* 6. *Br. Formedon* 41. 7 *E.* 6. *ib.* 46. *Plow. Comm.* 59. 20 *Eliz. Dier* 362. but it ſhall be abſurd that the feoffee ſhall be donor, and yet ſhall have nothing, but ſhall be only as an Inſtrument, or as the wind out of an Organ pipe. And *Fenner* put the Caſes in 7 *H.* 6. 3. *a.* 13 *R.* 2. *Dower* 55. 29 *Aſſ.* 64. if Tenant for life make a leaſe to him in the reverſion for the life of him in the reverſion, although that the leſſee had but a freehold and departed with a freehold, yet the leſſee hath a poſſibility which by the death of him in the reverſion may come in eſtate. So although the eſtate of the feoffees be transferred unto the uſes in *eſſe*, yet a poſſibility doth remain in the feoffees, which may be reduced to an eſtate ſufficient to ſerve the future uſes. And he ſaid, that it was not ſtrange that an action in Law ſhould alter the original eſtate, but then the new eſtate ought to be ſo near the ancient eſtate as might be, ſo that all intereſts may be ſerved and ſaved according to the
[*b*] intent and meaning of the parties; as in the Caſe of *Littleton*, & 2 *H.* 4. 5. if a man make a feoffment in fee upon condition to make an eſtate to husband and wife in ſpecial tail, and before any gift made the husband dieth without iſſue, now by this act in Law, the eſtate ſhall be made to the wife without impeachment of waſt, &c. and ſo by an act in Law the original eſtate ſhall be altered.

And Baron *Clark* ſaid, that ſome have ſuppoſed that future uſes were preſerved in the bowels of the Law, and that the land ſhall be charged with them in whoſe hands ſoever they come; and ſome have ſuppoſed that they were *in nubibus*, and in the cuſtody of Law, but he ſaid in our Caſe be they below under the land, there they ſhall be perpetually buried and ſhall never riſe again, and be they above *in nubibus*, in the clouds, there they ſhall always remain, and ſhall never deſcend; for he ſaid that the ſons of *Chriſtopher Chudleigh* in our Caſe were not born in due time, and as this Caſe is they ſhall never take the future uſe. And he put many good Caſes when the ſon born after fit and due time ſhall not take, and upon that he put the Caſe of Raviſhment in 5 *E.* 4. 6. where the ſon is born after the entry of the daughter, and 9 *H.* 7. 25. & 30 *Aſſ.* 47. when the remainder limited to the right heirs of *J. S.* firſt veſts in the daughter, and after the ſon is born, and many good Caſes were put by him to the ſame purpoſe. And further he ſaid as in the Caſe of *Kidwelly* in *Plow. Comm.* the leſſor by the agreement of the parties may come upon the land to demand his rent, although that the eſtate of the land be transferred to another; ſo by the original agreement of all parties the feoffee may reenter and revive ſuch future uſes, which by the Law may be revived; and in ſuch Caſes he ſaid, that when the future uſes ſhall come in *eſſe*, the feoffees ſhall have by force of the Act a qualified eſtate ſufficient to ſerve the future uſes, and reſembled it to the Caſe in 21 *E.* 4. 41. King *E.* 3. gave lands to the Black Prince and to his heirs Kings of *England*, in this Caſe the grantee hath a qualified Inheritance, for in as much as the Black Prince died in the life of his father, and his ſon *Richard* was not then King of *England*, the land did revert. So all the Juſtices and Barons of the Exchequer, beſides *Periam*, *Walmeſley* and *Gawdy* did conclude, that foraſmuch as the Statute of 27 *H.* 8. doth not extend but to the uſes in *eſſe*, and to perſons in *eſſe*, and not to any uſes which depended only in poſſibility, for this cauſe the contingent uſes in the Caſe at Bar do remain ſo long as they depend in poſſibility, only at the Common Law, and by conſequence they might be deſtroyed or diſcontinued before they came in *eſſe* by all ſuch means as uſes might have been diſcontinued or deſtroyed by the Common Law.

And all the Juſtices and Barons of the Exchequer did agree with the chief Baron and *Walmeſley* in this
[138] point, *ſcil.* that the remainders limited in uſe in the Caſe at Bar ſhould follow the rule and reaſon of eſtates executed in poſſeſſion by the Common Law, and therefore they all unanimouſly agreed, that if the eſtate for life in the Caſe at Bar had been determined by the death of the feoffees before the birth of the eldeſt ſon, that the ſaid remainders *in futuro* were void, and ſhould never take effect although that the ſons were born after, for a remainder in uſe ought to veſt during the particular eſtate, or at leaſt *eo inſtante* when the particular eſtate endeth, as well as an eſtate in poſſeſſion. And it was holden by all the Juſtices, that if the contingent uſe in the Caſe at Bar had come in *eſſe* without any alteration of the eſtate of the land, that it ſhall be executed by the Statute of 27 *H.* 8. but the alteration of the eſtate before it cometh in *eſſe* hath deſtroyed it, as it hath been ſaid, but if any ſuch alteration of eſtate be before the execution, or eſſence of the future uſe, then the uſe ſhall not be transferred into poſſeſſion before the impediment be removed, and the eſtate recontinued.

It was holden by the Juſtices and Barons who argued againſt the contingent uſe, that the Statute of 27 *H.* 8. ſhall not be (againſt the expreſs letter of the Act) conſtrued by equity for the maintenance and preſervation of theſe contingent uſes, for as well as by ſuch conſtruction, the miſchiefs which were intended to be prevented by the makers of the Act ſhould be continued, or greater brought in, as after by the argument of *Popham* chief Juſtice as to this point appeareth. And *Popham* chief Juſtice in his argument ſaid, that by force of the Act of 27 *H.* 8. ſome uſes are preſently executed, ſome uſes are executed by matter *ex poſt facto*, and ſome uſes are extirpate and extinguiſhed by the Act; uſes in *eſſe* draw the poſſeſſion preſently by force of the Act; uſes *in futuro* limited according to the rule of the Common

Law

Law are alſo if they come in *eſſe* in due time within the purview of this Statute, but uſes invented and limited in a new manner not agreeable to the ancient Common Laws of the land, ſuch uſes are utterly deſtroyed and extirpated and extinguiſhed by this Act: For it appeareth by the expreſs words of the Act, that it was the intent of the Parliament to root out and extinguiſh them, and to reſtore the ancient Common Law of the land. And therefore he ſaid, that if a feoffment be made to the uſe of *A.* for life, and after to the uſe of every perſon who ſhall be his heir after, for the term of the life of every ſuch heir only, in this Caſe, if this limitation ſhall be good, the inheritance ſhall be in no body, but this limitation is meerly void, for the limitation of an uſe to have a perpetual freehold is not agreeable with the rule of Law in eſtates in poſſeſſion; So if one make a feoffment in fee to the uſe of one in tail with divers remainders over, *Proviſo* that if any ſhall attempt to purchaſe any *Præcipe* againſt any Tenant of the freehold, &c. that his eſtate ſhall ceaſe, and that then the feoffees ſhall ſtand ſeiſed to the uſe of another, &c. ſuch *Proviſo* or limitation is againſt the rule of the Common Law if it had been conveyed in poſſeſſion, for he cannot limit new remainders upon ſuch Conditions; and at this day, an eſtate tail in land cannot ceaſe till entry, and no entry or reentry is given to any but only to the feoffor or his heirs and not to any in remainder. And he agreed the Caſe which was put before that the *Proviſo* that the eſtate in tail by limitation of an uſe ſhall ceaſe as if Tenant in tail were naturally dead, and not otherwiſe, for he ſaid, that ſuch limitation ſhall be void if it were limited in poſſeſſion: And he ſaid, that there was no difference at this day between eſtates conveyed in uſe and eſtates conveyed in poſſeſſion, for the eſtate and limitation of an uſe ought to be known at the Common Law, and governed and directed by the rules thereof. But he ſaid, that the limitation of the uſes in this Caſe as well future as in *eſſe* were good and lawful, for ſuch eſtates executed in poſſeſſion were good, but the future uſes were deſtroyed by ſubſequent matter as he ſaid: And he ſaid, that if ſuch conſtruction upon the Statute of 27 *H.* 8. by equity or otherwiſe ſhall be made for the maintenance and preſervation of future uſes as hath been made by thoſe who have argued on the other ſide, greater inconveniencies ſhall be introduced then were before the making of the Statute of 27 *H.* 8. for he ſaid, that the ſaid conſtruction did tend to the overthrow of noble and great families, and to the diſenheriſon of their heirs, ſo that no land ſubject to ſuch perpetuities can continue four deſcents, for if he who is ſo reſtrained and tied with the Proviſoes of perpetuities ſell any part of his lands for payment of any debts or legacies, or if he be taken priſoner in the war for his ranſom, or for the preferment of his younger ſons, or for advancement of his daughters in marriage, or for any cauſe, or any neceſſity whatſoever, he ſhall forfeit his eſtate: alſo when the eldeſt ſon knoweth that he ſhall have the lands and poſſeſſions of his father in ſpight of him, it is a cauſe that the ſon becomes diſſolute and diſobedient, ſo that he will not depend upon the government of his father, but refuſe to be ruled and directed by him. Alſo it ſhall raiſe variance and diſcord in the ſame blood, and in effect tear the bowels of nature, and ſtir the ſon (upon every ſuppoſition of breach of the Proviſoes) to put his father out of the land, whereof great troubles and ſuits would ariſe, to the waſting and overthrow of the family, and ſo from brother to brother, and from couſin to couſin; and it is needful that he who hath ſuch perpetuity have always a Counſellor at Law at his elbow, for he cannot make any conveyance concerning his lands, but his ſon or he who is next to the land watch for a forfeiture: And alſo he who hath an eſtate ſubject to ſuch perpetuity, if he hath two ſeveral farms whereof two ſeveral rents have been reſerved, and peradventure where the ſeveral rents amount but to 40 *s. per ann.* and he joyneth both in one leaſe for life, and reſerveth one rent of four Marks *per ann.* it is a forfeiture of his eſtate. For upon this leaſe the uſual and accuſtomed rent is not reſerved; ſo in many Caſes if he do not obſerve the preciſe form and power which is given to him it ſhall amount unto a forfeiture of his eſtate, and within two or three deſcents the Proviſoes and limitations ſhall not be ſo freſh in memory that every Gentleman can in every leaſe which he maketh follow the preciſe form of the Proviſoes. Alſo if the wives of ſuch perſons become incontinent, and have iſſue by other men then by their husbands, this adulterous generation ſhall inherit the husbands lands in deſpight of them. And the ſame ſhall be a great occaſion for women to offend when they know that their iſſues ſhall inherit, and many other inconveniencies will follow upon ſuch conſtruction in maintenance of theſe perpetuities: And ſo men who intend to overreach the providence of God, and covet to eſtabliſh their lands in their names and in their bloods by theſe ways, they are in truth thereby the cauſe of waſting and overthrowing of their houſes. Alſo no purchaſor ſhall be ſure of his purchaſe without an Act of Parliament; and where at the Common Law if he had purchaſed the land *bona fide* without notice of the uſe, he had been free of the uſe, he ſhall be now in worſe caſe, for by the conſtruction which hath been made, his lands ſhall be ſubject to theſe future uſes.

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Alſo farmers and leſſees cannot have any certainty or full aſſurance: for put caſe a feoffment in fee be made unto the uſe of one for life, and after to the uſe of another in tail with remainder over, with power to the leſſee for life to make leaſes ſo as he reſerve the accuſtomed rent paiable to all thoſe who have the reverſion: If Tenant for life maketh leaſes according to his power, the leſſees derive their intereſt out of the firſt feoffment, how then can the reſervation of the rent be good, and how can his heir, or he in the remainder come by the ſame? And if ſuch *Proviſo* be added in the original aſſurance, then the leſſees ſhall pay the rent, or that they ſhall enjoy the land ſo long as they pay the rent, then for as much as the ſame is no rent, it ought to be paid without demand, and if ho do not pay the ſame his intereſt ſhall preſently ceaſe by the limitation of the uſe.

Alſo thoſe who have cauſe of Action ſhall be in worſe caſe then they were before, for before this Statute they might have an action againſt the pernor of the profits, but now all ſuch pernancies of the profits are taken away, as appeareth 28 *H.* 8. *Dier* 33. *a.* & *Plow. Comm.* in *Manxel's* Caſe, and thereby ſuch ſubtile devices as in the Caſe before put, he who hath cauſe of Action ſhall never find one that ſhall be Tenant to his *Præcipe*, and ſo by ſuch conſtruction he ſhall be without remedy.

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Alſo perjury ſhall be increaſed in reſpect of the ſecrecy more than it was before the Statute, for no uſe could have been raiſed before this Act but upon tranſmutation of poſſeſſion, or upon a covenant or full contract

contract by apt words upon good conſideration concluded amongſt the parties; but now uſes ſhall be determined and raiſed by words without any conſideration upon a bare imagination and intention only without any concluſion, covenant, or contract. For if one intend, go about or attempt, &c. he ſhall loſe his land, although that he do nothing, or conclude nothing.

Alſo the King and other Lords ſhall loſe their Wards, Eſcheats, and other profits of their Seignories, for if the ſaid Caſe of a perpetual freehold ſhall be maintained, that no heir ſhall have but an eſtate for life, and that the inheritance ſhall be in no body, what Eſcheat, or Wardſhip, or Heriot, or other profit ſhall accrue to the King or other Lords? And he ſaid that it was not the intent of him and the other Juſtices, to overthrow the Tree of uſes, but to lop the rotten and unprofitable boughs and branches dangerous to the eſtate of the Commonwealth and mens aſſurances, ſo as the reſidue of the Tree which is profitable for the uſe of men may the better grow and proſper. And he ſaid, that the reaſon that the Lord by Eſcheat, or the Lord of a villain ſhall not ſtand ſeiſed to an uſe was, becauſe that the *Ceſtuy que uſe* had not remedy by the Common Law for any uſe, but his remedy was only in Chancery: And becauſe the right of freehold, or inheritance cannot be determined in Chancery, his title ſhall not be drawn into examination there; and for this cauſe a diſſeiſor ſhall not be compelled in the Chancery to execute an eſtate to *Ceſtuy que uſe*, but *Ceſtuy que uſe* ſhall compel the feoffees in the Court of Chancery to enter upon the diſſeiſor, or to recover the land againſt him at the Common Law, and then the Chancery ſhall compel the feoffees to execute the eſtate according to the uſe. And the Chancellor ought to direct uſes according to the rules of the Common Law. And he ſaid, that before *Richard* the ſeconds time, no Act of Parliament or other Record, nor no Book, nor any writing made any mention of uſes of lands, having regard unto the very words of the Statute. And therefore he ſaid, that uſes in ſuch ſenſe as now we take them were not at the Common Law, but were invented in times of trouble for fear, or in times of peace by fraud; but he ſaid, that confidence was at the Common Law, but not that which we now call uſe.

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Periam chief Baron held, that uſes were at the Common Law, but the Lord *Anderſon* ſaid, that uſes were neither by the Common Law, nor by any Statute, for he ſaid, that uſes were but imaginations, and nothing in the conſideration of Law, or for which the Law hath given any remedy, and that *Ceſtuy que uſe* hath nothing in the land, for if he come upon the land, by Law he was a Treſpaſſor to the feoffees. And afterwards the ſame *Michaelmas* Term Judgment was given for the Defendant. And note Reader, that in the Argument of this Caſe five things were reſolved for Law by the Juſtices beſides the principal matter in Law.

Firſt, It was adjudged in this Caſe, that when there is Tenant for life the remainder in tail, the reverſion in fee, and the Tenant for life doth enfeoff him in the reverſion in fee, the ſame is a forfeiture of his eſtate, and doth deveſt the eſtate tail in remainder. So if there be Tenant in tail the remainder in tail; and the Tenant in tail doth enfeoff him in the reverſion in fee it is a diſcontinuance; and the difference was taken and agreed when the eſtate or privity is ſole or immediate, and when not, for which ſee *Littleton* 141. 9 *E.* 4. 24. *b.* *F. N. B.* 142. *a.* 41 *E.* 3. 21. & 41 *Aſſ.* 2.

Secondly, That for as much as the warranty of *Chriſtopher* was collateral, yet in as much as it appeareth in computation of time, that the eldeſt ſon of *Chriſtopher Chudleigh* was within age, and at the time of the death of the eldeſt ſon the youngeſt ſon was alſo within age; and although that the youngeſt ſon cannot enter before the warranty deſcended upon him to defeat the warranty, and that he cannot take benefit of the nonage of his brother, and although that he do not enter within convenient time after his full age; yet this collateral warranty doth not bind him, and as to that the Caſe in effect was ſuch; *A.* hath iſſue *B.* and *C.* infants within age, a leaſe is made to *A.* for life, the remainder unto *B.* in tail, the remainder to *C.* in tail, *A.* Tenant for life is diſſeiſed, and afterwards releaſeth to the diſſeiſor with warranty and dieth, and the ſame deſcendeth upon *B.* being within age, afterwards *B.* dieth within age, *C.* being then his brother and heir and within age, upon whom the ſaid warranty doth deſcend, and afterwards *C.* cometh of age, and three years after his full age entreth, his entry is lawful. For it was reſolved, that if the entry of an infant be lawful, and he cannot enter in the life time of his anceſtor, and doth not enter, the warranty ſhall not bind in ſuch Caſe; *a fortiori* when the warranty deſcendeth upon him his entry being lawful, and no lacheſs to be attributed to him; but if his entry were not lawful, ſo that he was put to his action, there the warranty ſhall bind him; and the ſame Law ſhall be in the caſe of a feme covert where ſhe is put to her action. And if a warranty doth deſcend upon an infant he may enter when he will at his full age, and need not haſtily enter, or in convenient time after his full age, but let him take heed he ſuffer not a deſcent after his full age before his entry, for there the warranty ſhall bind him; for which matter ſee 33 *H.* 8. *Br. Warranty* 84. 3 *H.* 7. 9. 35 *H.* 8. 63. 18 *E.* 3. 3. 18 *E.* 4. 13. *Br. Warr.* 54. 28 *Aſſ.* 26.

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Thirdly, If a diſſeiſor or other who hath a diſſeiſible title in a Mannor grant a voluntary eſtate by Copy, as if a Copihold eſtate be forfeit to him, or if a Copiholder dieth without heir, and he granteth thoſe lands again by Copy, thoſe grants ſhall not bind him who hath right after that he hath recontinued the Mannor; but ſuch admittances which a diſſeiſor maketh unto Copiholders of the Mannor, thoſe are good, for thoſe are in a manner judicial acts and ſhall bind the diſſeiſee, 17 *Eliz. Dier* 343.

Fourthly, That an eſtate made to one and his heirs during the life of *J. S.* is but an eſtate for life upon which a remainder may depend by the Common Law, as appeareth by the Books of 11 *H.* 4. 42. *a.* 39 *E.* 3. 25. *b.* 7 *H.* 4. 46. *a*, 8 *H.* 4. 14. *b.* 8 *Eliz. Dier* 253. *a.* 17 *E.* 3. 48. *b.*

Fifthly, That an eſtate made to one and his heirs on the body of *J. S.* begotten is an eſtate tail and no fee ſimple againſt the opinion of *Aſcough*, 20 *H.* 6. 36. *b.* For all theſe points were adjudged in this Caſe, as it may appear upon Conſideration of the Caſe.

Hill.

Hill. 35 Eliz.

Anne Mayowe's Caſe.

IN a Replevin between *John Kettle* Plaintiff, and *George Maſon* and *Francis Eſtorley* Defendants, which began *Hill.* 35 *Eliz. Rot.* 498. the Caſe was ſuch; *Thomas Mayowe* was ſeiſed in fee of the Mannors of *Sapers* and *Hawley* in *Sutton at home* in the County of *Kent*, and ſo ſeiſed by deed indented did enfeoff *Thomas Scot* and *John Fremling* in fee to the uſe of *Dioniſe Mayowe* ſon and heir apparent of the ſaid *Thomas Mayowe* and his heirs upon certain conditions, and afterwards, and before the Conditions or any of them broken, the ſaid *Thomas* and *Dioniſe* by their deed ſealed with their ſeal bearing date 30 *Maii*, 19 *Eliz.* grant to *Anne Maxy* a yearly rent of 20 *l.* iſſuing out of the ſaid Mannors for the term of her life with clauſe of diſtreſs; and after the Condition was broken, and *Thomas Mayowe* thereupon did enter upon the ſaid *Dioniſe* for breach of the Condition, and afterwards the Defendants as Bailiffs of the ſaid *Anne Maxy* diſtrained for the ſaid rent, &c. And the great Queſtion in this Caſe was, If the poſſeſſion of the ſaid *Thomas Mayowe* after his entry for the condition broken ſhall be charged with the ſaid rent. And it was objected by *Godfrey* and others of Councel with the Plaintiff that his poſſeſſion ſhould not be charged for divers cauſes: Firſt, when the father and the ſaid ſon joyn in the grant of the ſaid rent, it was the grant of the ſon, for he was the Terretenant, and the grant doth enure as the confirmation of the father, for then it was ſaid, that the confirmation can make any eſtate which is ſubject unto a Condition to be abſolute, and a confirmation cannot alter the quality of the eſtate, if it enlarge not the eſtate; and therefore *Littleton, fol.* 120. *a.* ſaith, If the diſſeiſee confirm the eſtate of one diſſeiſor, the ſame ſhall not alter the eſtate of the diſſeiſors; and 11 *H.* 7. 29. *a.* If the feoffor confirm the eſtate of the feoffee upon Condition before the Condition broken, the ſame doth not alter the eſtate of the feoffee to make the ſame abſolute which was ſubject to a Condition before; So it was ſaid in our Caſe, the grant of the rent made by the feoffee upon Condition was ſubject to the Condition, and then the confirmation of the feoffor, and namely before any Condition broken cannot alter the quality of the eſtate of the rent, and to make the ſame abſolute. And the manner of pleading in the Caſe aforeſaid was urged, for the effect of the Avowry was, that *Dioniſe Mayowe* was ſeiſed of the ſaid Mannors in fee, and by the deed aforeſaid, granted the ſaid rent charge to the ſaid *Anne ut ſupra*, and the effect of the bar unto the Avowry was, that before the ſaid *Dioniſe* had any thing in the ſaid Mannors, *Thomas Mayowe* was ſeiſed in fee, and enfeoffed the ſaid *Dioniſe ut ſupra*, and confeſſeth the ſaid grant of the rent charge by *Dioniſe*, and after the Condition broken *Thomas* entred; To which the avowant ſaid, that well and true it is that the ſaid feoffment was made upon Condition to *Dioniſe*, and that he 30 *Maii, anno* 19. granted the ſaid rent *prout, &c.* But further he ſaith, that the ſaid *Thomas Mayowe prædict' conceſſionem redditus prædict', ac ſtatum ejuſdem Annæ in eodum reddit' adtunc, ſcilicet prædict'* 30 *Maii anno* 19. *per quoddam ſcriptum ſuum ſigillo ſuo ſigillat' curiæque hic prolat' geren' dat' iiſdem die & anno præfat' Annæ ratificavit & confirmavit, &c.* The Plaintiff prayeth the ſaid grant of confirmation may be entred *in hæc verba*, and ſo it was, by which it appeareth that both, that is to ſay the feoffor and feoffee joyn in the grant *ut ſupra*, and upon that the parties demur. And it was ſaid, that by that it appeareth, that the avowant pretended the deed by way of confirmation, ſo that in ſuppoſition of Law the grant of the rent doth precede the confirmation, and then all is one if it had been a day or a year after the grant, and then the Caſe had been clear as he ſaid. For *Littleton* doubts the Caſe of the diſſeiſor and diſſeiſee, if they both joyn in a grant of a rent charge, if the diſſeiſee after his regreſs ſhall avoid the ſame, and yet there the entry of the diſſeiſee is lawful, and no eſtate ſubject to any Condition. And 11 *H.* 7. 28. was cited, where a ground is taken, that where I may avoid a thing by my entry, I may make it good by my confirmation; upon which they did imply, that if his entry be not lawful at the time of the confirmation, (as in our Caſe it was not) the confirmation is nothing worth.

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Againſt which it was argued by the Attorney General and others; and to the firſt reaſon they conceived that there was a difference between the Caſe at Bar, and the Caſes which were put; for when the eſtate of him to whom the confirmation is made is upon an expreſs Condition, there the confirmation made to him cannot take away the Condition, but if ſuch feoffee upon Condition make a feoffment over, ſo as his eſtate is only ſubject to a Condition contained in another conveyance, but no Condition is expreſſed or annexed by his feoffor to his eſtate, there a confirmation of his eſtate which he hath by abſolute words ſhall extinguiſh the Condition which was annexed to the eſtate of the firſt feoffee. And the Attorney ſaid, that this difference is well proved by the Caſe of *Littleton* and other Books; for if the leſſee for life grant a rent charge in fee, this grant by the words is abſolute, and a fee ſimple not determinable by any thing contained in the deed, but in reſpect of the eſtate of the grantor it is determinable by his death. And yet *Littleton fol.* 122. *a.* ſaith, and 26 *Aſſ.* 38. and 45 *Aſſ.* 13. agree it alſo, that if he in the reverſion confirm ſuch grant the rent is good in fee, but without queſtion if the determination of the rent had been expreſſed in the deed, the confirmation had not not enlarged the ſame, or made it abſolute. And therefore if leſſee for life had granted a rent to one and his heirs during the life of the leſſee for life, and afterwards the leſſor had confirmed the rent to the grantee and his heirs, and the Tenant for life died, the rent ſhould ceaſe, for the confirmation cannot enlarge that which is determinable by expreſs Condition or limitation, and that fully appeareth by *Littleton* in his Chapter of Confirmation 124. So that this difference well appeareth by *Littleton*, for in his Chapter of Confirmation

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he puts both the Caſes. The Attorney further ſaid, that if a man be leſſee for life upon Condition, and he grant a rent in fee, and the leſſor confirm it, and then the Condition is broken, and the leſſor entreth, yet the rent doth remain *cauſa qua ſupra*; And it ſeemeth to him, that if the feoffee upon Condition make a feoffment over abſolutely, and the firſt feoffor confirmeth his eſtate, he ſhall hold it without any Condition, be the confirmation made after or before the Condition broken.

So if feoffee upon Condition grant a rent in fee, and the feoffor by another deed confirmeth it to him and his heirs, and after the Condition is broken, and the feoffor entreth for the Condition broken, yet the rent doth remain, which was granted by *Popham* chief Juſtice, *& totam Curiam*. And further he ſaid, it appeareth by *Littleton*, that it is a principle in Law, that all land in fee ſimple may be charged with a rent charge by one way or other; So in this Caſe, when all thoſe who have intereſt in the land joyn in a grant of a rent, ſo that the grant is made *concurrentibus his quæ in jure requiruntur*, he conceived the grant is good: And therefore if the Patron and Ordinary charge the Glebe in time of vacation it ſhall bind, becauſe that no other hath intereſt therein during the vacation but they only, and he relied much upon the Book of 11 *H.* 7. 21. *a. Eriches* Caſe, which in effect was, That Tenant in tail made a feoffment in fee upon Condition, which feoffment is to the uſe of himſelf and his heirs, and afterwards he binds himſelf in a Statute, which by force of the Statute of 1 *R.* 3. *c.* 5. is extended (he having then
[148] but an uſe and a Condition) and after the Condition is broken, by which the feoffment is avoided, and he is ſeiſed of an eſtate in tail again, yet he ſhall not avoid the extent; The ſame Law, if he had granted a rent charge, and after the Condition had been broken, the charge had been good although that the eſtate out of which the uſe was limited, and which was the cauſe that the grant of the rent was given by the ſaid Statute were defeated by the Condition; yet he having the uſe and the Condition together at the time of the grant, the grant remaineth good. And the Caſe of diſſeiſor and diſſeiſee which is agreed in 11 *H.* 7. 28. is all one in effect with our Caſe, and our Caſe is ſtronger becauſe that the grant and confirmation, are all by one deed, ſo that the rent was not ſubject to any Condition; And afterwards Judgment was given by *Popham* chief Juſtice, *Clench*, *Gawdie*, and *Fenner* Juſtices for the Avowant, that the rent did remain good.

Term. Mich. 40 & 41 Eliz. *in* B. R. *between* David Lloyd *Plaintiff, and* William Wilkenſon *Defendant.*

The Rector of *Chedington*'s Caſe.

[153] IN an *Ejectione firmæ* between *David Lloyd* Plaintiff, of the Rectory of *Chedington* in the County of *Buck.* of the demiſe made by *David Roberts* Rector there, againſt *William Wilkenſon* Defendant, upon Not-guilty pleaded, the Jurours gave a ſpecial verdict to this effect: *Nicholas fitz Williams* was Parſon of the ſaid Rectory, and 2 *Martii*, 2 *E.* 6. by his Indenture between him on the one part, and *Elizabeth Elderker* widow, *Ralph Elderker*, *William Elderker*, and *Thomas Elderker* on the other part, did demiſe unto the ſaid *Elizabeth* the ſaid Rectory to have and to hold to her from the ſaid ſecond day of *March*, *uſque ad finem & durante termino octoginta annorum extunc proxime ſequent' ſi præfat' Eliz. tam diu viveret.* And if the ſaid *Elizabeth obier' infra prædict' terminum* 80 *annorum*, or ſhall alter the premiſſes that then her eſtate ſhall ceaſe. *Ac adtunc prædict' Nicolaus per Indenturam prædict' dedit, conceſſit & dimiſit omnia & ſingula præmiſſa pro tot annis quod tunc inexpirat' remanerent poſt mortem prædict' Eliz. vel alienationem ſuam præfat' Radulpho, pro & durante reſid' termini, prædict'* 80. *annorum ſi ipſe tam diu viveret ſine alienatione dicti termini & ſi ipſe contingeret obire vel alienare præmiſſa infra terminum prædict, quod tunc ejus ſtatus ceſſaret. Ac adtunc prædict' Nicolaus per Indentur' illam conceſſit omnia & ſingula præmiſſa præfato Willielmo pro & durant' tot annis prædict' termini* 80. *annorum quot adtunc remanerent ſi ipſe tam diu viveret & non alienaret dictum terminum, & ſi contingeret ipſum Wilielmum obire vel alienare præmiſſa infra dictum terminum quod tunc ejus ſtatus ceſſaret. Et tunc prædict' Nicholaus per Indenturam illam conceſſit præmiſſa prædict' durante tot annis de prædict'* 80. *annis quod adtunc continuarent & remanerent inexpirat' prædict'*
[*b*] *Thomæ execut' & aſſignat' ſuis.* Which Indenture of demiſe and all therein contained was confirmed by the Patron and Ordinary, and afterwards the ſaid *Nicholas fitz Williams* died, and afterwards the ſaid *Thomas Elderker* 10 *Junii*, 16 *Eliz.* died, and after in the ſaid 17 years the ſaid *Elizabeth Elderker* died, after whoſe death the ſaid *Rafe Elderker* entred into the ſaid Rectory and died 18 *Eliz.* and afterwards *Rafe Hetherington* and *Anne* his wife adminiſtratrix of *Thomas Elderker* did aſſign the ſaid Rectory to *Rafe Cely*, who aſſigned the ſame to *John Eden*, who aſſigned the ſame to *Thomas Tasburgh* Eſquire, who aſſigned the ſame to *John Agmondiſham* Eſquire, who conveyed the term to the Defendant by mean aſſignments. And afterwards the ſaid *Roberts* was admitted, inſtituted, and inducted to the ſaid Rectory, and made the leaſe to the Plaintiff, who entred upon the Defendant and was poſſeſſed, upon whom the Defendant reentred, and if his entry be lawful or not is the Queſtion.

And this Caſe was argued by the Attorney General, *Coventry*, and *Hughes* on the Plaintiffs part, and by *Lawrence Tanfield* and *Francis Moore* on the Defendants part, and the Plaintiffs Counſel did argue that the Plaintiff ſhould have Judgment for divers cauſes: 1. That the demiſe to *Rafe* and *William* was void, becauſe that the term which *Elizabeth* had was for 80 years if ſhe ſhould ſo long live, ſo her

her term was not for 80. years abſolutely, but for 80. years *ſub modo*, *ſcil.* upon this limitation if ſhe ſhould ſo long live, then her term by her death is determined, and by conſequence the dimiſe to *Kaſe pro tot annis quot remanerent poſt mortem dičiæ Eliz. pro & durante reſiduo dičti termini prædičtorum* 80. *annorum* is void, for there cannot be a reſidue of the ſaid term of 80. years after the death of *Elizabeth*, for the term was by expreſs limitation by the death of *Elizabeth* determined. So it was adjudged in the Common Pleas *M.* 32. & 33. *Eliz. Rot.* 1832. between *Green* Plantiff and *Edwards* Defendant, for which the Plaintiffs Councel concluded, That the ſaid demiſes to *Kaſe* and *William* were void, *quod fuit conceſſum per totam curiam.* And thereupon the Defendants Coucel did endeavour to maintain the demiſe made to *Thomas* (for if any of the demiſes be in force the Action ſhall not be maintenable) and they conceived that there was apparent difference betwixt the demiſes to *Kaſe* and *William*, and the ſaid demiſe to *Thomas*, for the demiſe to *Thomas* is *durant' tot annis de præd'* 80. *annis*, and not *durant' tot annis de præd' termino* 80. *annorum*, for *de præd'* 80 *annis* relates to the ſaid years without any other limitation, but *prædičt' termin'* 80 *annorum* referreth to the ſaid term of years ſubject to the ſaid limitation, *ſcil.* if the ſaid *Eliz.* ſo long live, and ſo there appeareth difference *inter terminum annorum & tempus annorum*; and this diverſity is holden for good Law in 2 *Eliz. Dier* 178. *ſcil. inter terminum annorum, & ſpatium ſive tempus annorum.* So in *Worteſleys* Caſe *Plow. Com.* 198. if one make a leaſe for 21. years, and afterwards maketh another leaſe to begin at the end and expiration *prædičt' termini annorum demiſſ.* and after the firſt leaſe is ſurrendred, the ſecond leaſe ſhall begin preſently, but if it were at the end and expiration *prædičt'* 21. *annorum*, there although that the firſt term be ſurrendred, the ſecond term ſhall not begin, for the terme which continueth the intereſt for years is determined by ſurrender, but the years are not ended but by fluction of time, ſo that *terminus annorum* includes alſo the eſtate and intereſt in the land, and by grant of the term, the eſtate and intereſt for years ſhall paſs. And 35 *H.* 8. *tit. Expoſition de parols Br.* 44. agreeth to this difference, for there it is agreed, if *A.* make a leaſe to *B.* for 10. years, and covenanteth that if *B.* pay 100. *l.* to *A. infra dičtos decem annos*, that *B.* ſhall have fee, if *B.* ſurrender his terme to *A.* and afterwards pay the 100. *l.* within the 10 years he ſhall have fee, otherwiſe where it is covenanted, that if he pay 100. *l. infra terminum præd' decem annorum.* And the Caſe of the Lord *Paget* which was adjudged in the Exchequer in *M.* 33. & 34. *Eliz.* which began *Paſc.* 33. before Sir *Roger Manwood* chief Baron, and other Barons of the Exchequer upon conference had with all the Judges of *England* was ſuch in effect: *Thomas* Lord *Paget* being ſeiſed of the Mannors of *B. L.* &c. in the County of *Strafford*, by deed indented 10 *October* 20 *Eliz.* covenanteth with *Thomas Fearmer* Eſquire and others, that in conſideration of diſcharge of his funeral, paiment of his debts and legacies out of the profits of his Lands, and for the advancement of his ſons, brother, and others of his blood, that he and his heirs would ſtand ſeiſed of the ſaid Mannors unto the uſe of the ſaid *Thomas Fearmer*, &c. for the life of the Lord *Paget*, and after his death to the uſe of *Ch. P.* and others for the term of 24. years, and after the expiration or end of the ſaid term of 24. years, then to the uſe of *William Paget* his ſon in tail with divers remainders over. And afterwards the Lord *Paget* was attainted of Treaſon; And in this Caſe it was agreed and adjudged that the ſaid term to *Ch. P.* was void, becauſe it wanted good conſideration, for as much as *Ch. P.* and the others were ſtrangers to the conſideration, *ſcil.* to the payment of his debts or legacies; but if he had made them Executors, ſo as that they had been chargeable to the paiment of them, and ſo privy to the conſideration, then the conſideration had been good. But the doubt of the Caſe was, although that the ſaid term was void, yet in as much as the uſe to *Willam Paget* was to be raiſed by covenant out of the eſtate of the Covenantor, and not by tranſmutation of the eſtate, if the uſe ſhould be raiſed and veſted in *William Paget* until the 24. years were expired by effluction of time; for in the ſame Caſe it was ſaid by Sir *Roger Manwood* cheif Baron, that if a man make a feoffement in fee to the uſe of *A.* for life, and after to the uſe of *B.* for life, and after to the uſe of *C.* in fee, in this Caſe if *A.* refuſe, *B.* ſhall take his Eſtate preſently, for the feoffor by his feoffement hath given all his eſtate out of him, and all the uſes are created out of it as out of one root, and therefore as long as any of the uſes can take effect the feoffor ſhall not have any medling with the land; But in the Caſe of a Covenant which raiſeth an uſe, there the conſideration which is the cauſe which raiſeth every ſeveral uſe is ſeveral, and all the uſes grow and riſe out of the eſtate of the Covenantor, and therefore there if one refuſeth he who is next in remainder ſhall not take the land preſently, but the Covenantor ſhall keep it; As if *A.* covenant that in conſideration that *B.* is his ſon, he ſhall have it for life, and after his death in conſideration that *C.* hath given him 100. *l.* that he ſhall have it in fee, here the conſiderations and grounds of raiſing of theſe uſes are ſeveral; and therfore if *B.* refuſeth *A.* ſhall keep the land, and *C.* ſhall not take preſently. And it was adjudged in the principal Caſe that the Lord *Paget* himſelf had eſtate for life, for in as much as the remainders were limited by the Covenant after his death, &c. the eſtate cannot paſs out of him during his life; and therefore in Caſe of Covenant he himſelf had an eſtate for his life.

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[b]

And it was alſo agreed in the ſame Caſe, that although the ſaid term was void *ab initio*, yet if the Covenant had been (and after the end or expiration of the ſaid 24. years that then he would ſtand ſeiſed unto the uſe of his ſon *ut ſupra*) that his ſon ſhould not have the ſame till the years be incurred, for although that the term was void, yet the eſtate of the ſon by expreſs limitation ſhall not commence untill the 24. years expired, and that ſtood well with the words and the intent alſo of the words, but for as much as the words of the Covenant were (after the expiration or end of the ſaid term of 24. years,) and the term imports in it ſelf the eſtate and intereſt in the land (as hath been ſaid) for this cauſe the term being void, the eſtate of the ſon ſhall begin preſently. And upon that *William Paget* had by the rule of the Court an *Amoveas manum*; for which the Councel of the Defendant concluded, that there was a difference between the demiſes of *Kaſe* and *William*, and the ſaid demiſe to *Thomas quod fuit conceſſum per totam Curiam*, and the Court directed the Plaintiffs Councel to argue only againſt the demiſe

made unto *Thomas*, againſt which the Plantiffs Councel did argue, that the ſame was void for divers cauſes.

Firſt, becauſe the leſſor had not power to contract for the land during the 80. years, for although that the term ſhall determine by the death of *Elizabeth*, yet ſhe had an eſtate for 80. years, and the leſſor had but a poſſibility to have the land again during the 80. years, that is to ſay, if *Elizabeth* died, which poſſibility (was ſaid) could not be demiſed. But it was agreed by the Plantiffs Councel, that if a man
[155] make a leaſe for life, and after the leſſor maketh a leaſe for years, and after the leſſee for life dieth, the leſſee ſhall have the land for the reſidue of the years: And ſo if a man make a leaſe for 80. years, if the leſſee ſo long liveth, and afterwards leaſeth to another by deed indented for 80. years, and after the firſt leſſee dieth, the ſecond leſſee ſhall have the land for the reſidue of the term as appeareth in *Plow. Com.* 15. *Eliz. fo.* 434. But in this Caſe *Thomas* cannot take any advantage of any concluſion, for a concluſion is to eſtoppe one to ſpeake the truth, but here all the truth appeareth in one and the ſame Indenture, as in 8 *Eliz. Dier* 244. *a.* King *E.* 6. grants unto the Biſhop of *Coventry* and his ſucceſſors the Advowſon of a Church, and that after the death of the preſent Incumbent he ſhall keep it *in proprios uſus*. The Biſhop by Indenture made a leaſe to commence after the death of the Incumbent, which is confirmed, and the Incumbent dieth; It was adjudged that the leaſe was void, and that it ſhould not take effect by eſtoppel, becauſe it appeareth in the indenture it ſelf, that the leſſor had nothing at the time of the leaſe made. See 37 *Aſſ.* 17. & 19 *E.* 3. 3. *Abbot* 13. But as to this point the Court did not deliver any opinion, for they reſolved upon the other points following.

Secondly, it was moved that the leaſe to *Thomas* was void for the incertainty, for it was incertain at the time of the making of the leaſe how many years ſhould be behind at the time of the death of *Elizabeth* as it is agreed in 7 *E.* 6. *tit. Grants*, *Br.* 154. & *Plow. Com.* 520. *b.* A man poſſeſſed of a leaſe for 40. years, grants to *B.* as many of the years as ſhall be behind *tempore mortis ſuæ*, it is void for the incertainty: And 3 & 4 *Phil.* & *Mar.* *Gravenor's* Caſe, *Dier* 150. a man made leaſe for life by deed indented, Proviſo that if the leſſee die within 60. years that his Executors ſhall have it for ſo many of the 60. years as ſhall be behind at the time of his death, it is but a covenant, and no leaſe for the incertainty, *vide* 22 *Aſſ.* 37. And Juſtice *Gawdy* ſaid that there was a Caſe late adjudged in this Court in *Locroft's* Caſe, *M.* 34 & 35 *Eliz.* and the Caſe was, One poſſeſſed of certain lands for 90. years in conſideration of a marriage to be had between his ſon and the daughter of another man, did demiſe the land to his ſon for 70. years to begin after his death, and after the leſſor died; and it was adjudged that the leaſe was good; And the reaſon of the difference between this Caſe and the Caſe in 7 *E.* 6. was becauſe that in *Locroft's* Caſe he demiſed the land, *Habendum* after the death of the leſſor for 70. years, in which there was ſufficient certainty, and no apparent incertainty in the deed, but in 7 *E.* 6. he granted ſo much of his term as ſhould be behind from his death, which was incertain in the grant it ſelf; which difference put by Juſtice *Gawdy* was agreed by *Popham* chief Juſtice, and the whole Court.

[*b*] Thirdly, It was objected againſt the leaſe made to *Thomas*, that for as much as *Thomas* was dead in the life of *Elizabeth*, ſo that it was at firſt incertain and was not reduced to any certainty during the life of *Thomas*, for this cauſe the leaſe was utterly void. For when an intereſt or an eſtate which is to be reduced to a cerainty upon a contingent precedent, and the leſſor or grantor, or leſſee and grantee die before the contingency fall, the leaſe or grant is void and ſhall never take effect, as in *Plow. Com. Say* & *Fullers* Caſe 273. *b.* If a man make a leaſe to another for as many years as his Executors ſhall name, the ſame is void, for it ought to be reduced to a certainty in the life of the parties. And note there is a difference between a Covenant or other agreement which is perfect and certain, although that it take effect in poſſeſſion upon a future matter precedent, and a covenant and agreement incertain, which is to be reduced to certainty by future matter *ex poſt facto*, for in the one Caſe the intereſt or eſtate in the land is preſently bound, in the other Caſe not, as in 3 *Ma. Br. Feoffement al uſes* 59. It is covenanted by Indenture between *A.* and *B.* that if the ſon of *A.* ſhall marry the daughter of *B.* for which *B.* ſhall give to *A.* 100. *l.* and therefore *A.* covenants that if the marriage do not take effect, that *A.* and his heirs will ſtand ſeiſed of certain lands unto the uſe of *B.* and his heirs until *A.* pay the 100. to *B.* his Executors or Adminiſtrators; and afterwards *B.* hath iſſue within age, and after the marriage doth not take effect, the eſtate is executed in the heir of *B.* and ſhall have relation to the making of the Indenture. (Note the reaſon) for theſe Indentures the Book ſaith bind the land with the uſe and they were made in the life of *B.* But if a man grant the reverſion of his leaſe for life to *B.* and his heirs, and before attornment the grantee dieth, no attornment can veſt it in the heir of *B.* for by the grant the eſtate of the reverſion was not bound, but is to receive his perfection by the attornment, and the grantor may notwithſtanding ſuch grant transferre the reverſion to whom he will. So in
[156] *Brets* and *Rigdees* Caſe *Plow. Comm.* 345. if a man deviſe lands to one and his heirs, and afterwards the deviſee dieth before the deviſor, the deviſe is void; for the Will was alterable at the pleaſure of the deviſor, and the heir cannot be a purchaſor. But in *Shelly's* Caſe it was adjudged, that where *Edward Shelley* ſuffered a recovery of the Mannor of *Worminghurſt* unto uſes declared by certain Indentures between him and others; that is to ſay, unto the uſe of himſelf and the heirs males of his body (for ſo it was in effect) and afterward *Edward Shelley* died before any execution of the recovery, the wife of his eldeſt ſon (who before him was dead) being great with child with a ſon, and afterwards and before the birth of the ſon of the eldeſt ſon execution of the recovery was had; It was adjudged that in the mean time the uſe veſted in *Richard* the younger ſon of *Edward* as heir male of the body of *Edward*, and that he had it in the nature of a deſcent, and that the ſon of the eldeſt ſon born after ſhould enter upon him, for the agreement was perfected in the life of the parties, and the execution of the recovery was only after the death of *Edward*.

So

So 11 *H.* 7. 12. *a.* if land be rendred by fine to one and his heirs, the land is bound thereby, and although that he to whom the render is made dieth before execution, yet his heir ſhall have it, for the fine was levied in the life of the parties, and the eſtate of the land was ſo bound by it that he who made the render could not alter or defeat it. But if a man make livery within the view, there till entry by the feoffee the eſtate of the land is not bound, no more then by the grant of a reverſion before attornment; and therefore if the feoffor or feoffee die in ſuch caſe before entry by the feoffee, the feoffment ſhall not take effect. So in the Caſe at Bar, the demiſe made to *Thomas* depends upon a contingency precedent, and upon a meer incertainty, ſo that until the ſame happen the intereſt or term which is intended to be demiſed is not certain nor the Land bound therewith. So that in as much as *Thomas* died before it was reduced to a certainty the leaſe could never take effect, and cannot veſt in his Executors or Adminiſtrators for the reaſons and cauſes aforeſaid, *quod fuit conceſſum per totam Curiam.*

Fourthly, it was objected againſt the ſaid demiſe made to *Thomas*, that if *Thomas* had been living it could never have veſted in him, for *Thomas* died before *Rafe* and *William*, and *William* and *Rafe* ſurvived *Elizabeth*. And by the expreſs condition precedent *Rafe* cannot take if not that *Elizabeth* die within the term, and *William* cannot take if *Rafe* die not *infra terminum prædict'*, and that is as much as to ſay, that if *Rafe* die before *Elizabeth*, for the term is but for 80. years if *Elizabeth* ſo long live, and *Thomas* cannot take if *William* die not in the life of *Elizabeth*, *ſcil. infra terminum prædict'*, and *William* and *Rafe* alſo ſurvived *Elizabeth*, ſo that both the contingents precedent fail, *ſcil.* the death of *Rafe* and the death of *William* in the life of *Elizabeth*, ſo that the demiſe to *Thomas* could never begin; and although the demiſe unto *Rafe* and the demiſe to *William* are void, yet the limitation precedent, (*ſcil.* if *Rafe* and *William* die in the life of *Elizabeth*) unto the leaſe made to *Thomas* is not void, for his intereſt may depend upon both the contingents. And ſo was the meaning of the parties, and all this was affirmed by the Court. And Juſtice *Popham* put this Caſe, If *A.* demiſe his Lands to *B.* for 30. years after the death of *C.* if *C.* die within 10. years next following, if *C.* ſurvive the 10. years the term ſhall never take effect: So here the leaſe of *Thomas* cannot commence, if not that *William* die before *Elizabeth*, but he ſurviveth *Elizabeth*, and therefore the leaſe to *Thomas* ſhall never begin. And *Popham* chief Juſtice ſaid, that the leaſe to *Thomas* was void for another cauſe, for he ſaid it cannot commence upon a contingent which dependeth upon another contingent: as here, the leaſe to *Thomas* dependeth upon the contingent annexed to the demiſe made to *William*, and the leaſe to *William* dependeth upon the contingent annexed to the demiſe of *Rafe*. And to this purpoſe he cited the Caſe in 12 *Aſſ.* 5. *A.* leaſes unto *B.* upon condition that if *A.* pay unto *B.* 10. l. within a certain day that he ſhall reenter, and if he do not pay before the ſaid day, and *B.* pay to him 10. l. at ſuch a day which is after, that he ſhall have fee. *A.* doth not pay, nor *B.* pay. *A.* entreth after one term and the other *B.* ouſt him, *A.* brought an Aſſiſe and got nothing by his Writ. And after in this Caſe Judgment was given and entred for the Plaintiff. [b]

Ter. Trinit. 42 *Eliz.* in a *Monſtrans de droit* between *Chriſtopher Digges* and *Edward Digges* Plaintiffs, againſt *Palmer* and his Wife Defendants in the *Kings Bench.*

Digges Caſe.

IN a *Monſtrans de droit* by *Chriſtopher Digges* and *Edward Digges* againſt *Palmer* and his Wife the grantees of the Ward of *Poſthumus Digges* ſon and heir of *Thomas Digges* now dead, in which the iſſue was *abſque hoc quod Chriſtopherus Digges* father of the ſaid *Thomas*) *obiit ſeiſitus* (of Land found in the Office) *in Dominico ſuo ut de feodo*, upon which a ſpecial verdict was found to this effect; The ſaid *Chriſtopher* was ſeiſed of the Land in queſtion and of other Land in fee, and by deed indented 6 *Maii*, 10 *Eliz.* covenanted (in conſideration of marriage between him and his wife, and for advancement of the ſaid *Thomas* their ſon, and for 200. l. paid to him before marriage, and for other conſiderations) that he and his heirs would ſtand ſeiſed unto the uſe of himſelf for life, and after to the uſe of the ſaid *Thomas* in tail, and after to the uſe of the ſaid *Chriſtopher* in tail, with a Proviſo for the conſiderations aforeſaid, &c. that it ſhall be lawful for the ſaid *Chriſtopher* at any time during his life with the conſent of certain perſons by deed indented to be enrolled in any of the Queens Courts to revoke any of the uſes or eſtates, and to limit new uſes. And afterwards 6 *Maii* 12 *Eliz. Chriſtopher* with the conſent, &c. by deed indented and enrolled in the Chancery revoketh the uſes and eſtates in the firſt Indenture in part of the land, and limits the uſe thereof to him and his heirs: *Afterwards Chriſtopher* by deed indented 20 *Sept.* 13 *Eliz.* with conſent, &c. and enrolled in the Common Pleas *M.* 13 & 14 *Eliz.* declareth that for the payment of his debts, &c. that from the time of the enrolment of this deed in the Chancery all the uſes in the firſt Indenture ſhall be void, and that the lands ſhall be to the uſe of *Chriſtopher* in fee: [173] [b]

[*b*] Afterwards *Chriſtopher* by Indenture 26 *October.* 14 *Eliz.* covenanteth to levy a fine of all his lands, part whereof ſhall be to the uſe of him and to his wife and his heirs, and the reſidue to the uſe of him and his heirs, which fine in the ſame Term was levied accordingly; and after the ſaid Indenture bearing date 20 *Sept.* 13 *Eliz.* was enrolled in the Chancery, and afterwards *Chriſtopher* entred into the land and made his claim. And if *Chriſtopher* died ſeiſed in fee of the ſaid lands mentioned in the deed of revocation of 20. *Septembr.* 13 *Eliz.* was the queſtion. And in this Caſe after many Arguments at the Bar and at the Bench, ſix Points upon good advice and deliberation were reſolved and adjudged.

Firſt, that *Chriſtopher* might revoke part at one time and part at another time, and ſo of the reſidue till he had revoked all. But he could revoke one part but once, unleſs he had a new power of revocation to the uſes newly limited; for theſe words (at any time) amount to as much and are equivalent, as if he had ſaid, from time to time as often as he ſhould think good. As if a man leaſe 20. acres of wood, and grants that he may cut the timber trees at any time during the term, he may cut part at one time, and part at another. So if a man deviſe that his Executors ſhall ſell his lands, they may ſell part at one time, and part at another: And the chief Juſtice ſaid, that this point had been adjudged before, and it was ſaid it was Sir *Richard Lee's* Caſe in the Common Ples.

Secondly, it was reſolved, that where the revocation is to be made by Indenture to be enrolled, it is as much as to ſay, by deed indented and enrolled, for no revocation ſhall be in the ſame Caſe untill the deed be enrolled; for if there ſhall be a revocation before the enrolment, then peradventure the deed ſhould never be enrolled, which ſhould be againſt the words and intents of the parties.

Thirdly, it was reſolved, that it was not a perfect and compleat revocation by the Indenture 20 *Sept.* 13 *Eliz.* until the Indenture was enrolled in the Chancery, for although that the Proviſo of revocation in the firſt Indenture ſhall be ſatisfied with an enrolment in any of the Kings Courts (as in this Caſe it was in the Common Pleas) yet for as much as the Indenture of revocation it ſelf limiteth the revocation to take effect after the enrolment thereof in the Chancery, for this cauſe until it be enrolled in the Chancery, there was no perfect revocation.

Fourthly, it was reſolved, that the fine levied before the enrolment of the Chancery (which was before the revocation) hath extinct the power of revocation, for it is not to be reſembled to the Caſe in 15 *H.* 7. 11. *b.* if Executors or feoffees who have power by the will of *Ceſtuy que uſe* to ſell the uſe, if they make a feoffement of the land unto the former uſe, yet they may ſell the uſe, for the ſame uſe which was deviſed to be ſold doth remaine not touched by the feoffement, alſo after the ſale, the vendee ſhall be
[174] in by the deviſor and not by the feoffees; but in the Caſe at the Bar, the feoffement is made of the land it ſelf, which is to be reveſted to *Chriſtopher Digges* by the revocation, or is to be transferred to him to whom he ſhall limit the ſame, and he ſhall come in under him, for in ſuch Caſe he who raiſeth and limiteth the uſe ſhall be ſuppoſed to be the donor, 2 *E.* 6. *Br. Formedon* 49. 35 *H.* 8. *Dier* 55. *a.* and ſo was it adjudged in this Court between *Albany* and *Grendon* for land in *Midd.* 28 *Eliz.* that by the feoffment of the land the power of revocation was extinct. And then it was alſo agreed *per totam Curiam*, that ſuch power of revocation may be releaſed by a releaſe made to any who hath eſtate of freehold in poſſeſſion or remainder. And *Popham* chief Juſtice ſaid, that there was not any queſtion thereof, for his power is not meerly collateral, but ſavoreth and taſteth of the eſtate and intereſt of the land, which was granted by the whole Court. But the chief Juſtice ſaid, that if a feoffment in fee be made by *A.* to divers uſes, with Proviſo that if *B.* ſhall revoke, that the uſes ſhall ceaſe, there *B.* cannot releaſe this power; and a fine levied or a feoffment made by him ſhall not extinguiſh it, for the power of *B.* is meerly collateral, and the land doth not move from him, nor the party ſhall not be in by him, nor under him; but a fine, or a feoffment, or a releaſe by *A.* if the power had been referred to him, would extinguiſh the ſame, *cauſa qua ſupra.*

Fifthly, it was agreed, that if the fine had not been levied, then by the revocation of *Chriſtopher* the ancient uſes were determined without entry or claim, becauſe he himſelf was tenant for life of the land, ſo that he could not enter upon himſelf, and claim he need not when he himſelf is ſeiſed of the land, and makes expreſs act of revocation which is as ſtrong as a claim can be. And therefore it is agreed in 20 *E.* 4. 18, & 19. that if a feoffment be made upon a collateral condition, and before the condition performed the feoffee leaſeth the ſame to the feoffor, if after the feoffee perform the condition the land ſhall be in him preſently without entry or claim, becauſe he himſelf is in poſſeſſion of the land. So if a villain purchaſe a rent which is iſſuing out of the Lords land, it ſhall be in the Lord without entry or claim of the Lord; for if he ſhall make an entry or claim, it ought to be upon the land, and that needeth not when he himſelf is ſeiſed thereof. And this very point was agreed *M.* 40 & 41 *Eliz.* in the Earl of *Shrewſburies* Caſe, that the uſes in the like Caſe ſhould ceaſe without entry or claim, he who made the revocation being Tenant for life as in the Caſe at the Bar.

Sixthly, it was ageed, that by the ſame conveyance the uſes are revoked, by the ſame conveyance other uſes may be limited or raiſed, for in as much as the old uſes ceaſe *ipſo facto* by the revocation
[*b*] without claim or other act, the Law ſhall adjudge priority of the operation of the ſame deed, although it be ſealed and delivered at one and the ſame inſtant; and therefore it ſhall be firſt in conſtruction of Law a revocation and a ceſſer of the old uſes, and then a limitation or raiſing of the new. As if a Tenant in tail and a ſtranger levy a fine to *A.* who granteth and rendreth to the ſtranger for years rendring rent, and by the ſame fine granteth the reverſion and rent to the Tenant in tail (which manner of fine is commonly admitted at this day) in this Caſe although the render of the leaſe and the grant of the reverſion be by the ſame fine, and at the ſame inſtant, yet in Law the leaſe ſhall preceed; and the grant of the reverſion ſhall be ſubſequent, *vide* 36 *H.* 8. *Br. Fines* 118. and ſee

M. 41.

M. 41 & 42. *Eliz. Rot.* 366. adjudged upon a demurrer in the Common Pleas between *White* and *White* in a Replevin ajudged accordingly. And here in this Caſe a Judgment was cited, That where *A.* covenanteth with *B.* that in conſideration that he will marry his daughter, that *A.* and his heirs will ſtand ſeiſed unto the uſe of *B.* and his heirs, *B.* entreth and diſſeiſeth *A.* and maketh a feoffment in fee, *A.* reenters and afterwards *B.* marrieth his daughter, yet the uſe ſhall not veſt in him, for he hath extinguiſhed it by his feoffment.

Term. Hill. 24 & 26 Eliz.

Mildmay's Caſe.

THE Caſe in an Information exhibited in the Court of Wards by *Richard Kingſmill* Eſquire Attorney of the ſame Court, againſt the Lady *Anne Sharington* late wife of Sir *Henry Sharington* Knight, and *John Talbot* Eſquire, and *Oliffe* his wife, one of the daughters and heirs of the ſaid Sir *Henry Sharington*, which was reſolved *Hill.* 24 *Eliz.* and after *Hill.* 26 *Eliz.* in the Court of Common Pleas, *Rot.* 745. between *Anthony Mildmay* Eſquire Plaintiff, and *Roger Standiſh* Gentleman Defendant. in an action upon the Caſe for ſlandring his Title, &c. adjudged; which Judgment *M.* 26 & 27 *Eliz. Rot.* 35. in the Kings Bench, in a Writ of Error affirmed, was in effect thus; The ſaid Sir *Henry Sharington* having wife the ſaid Dame *Anne*, and three daughters, *Grace* married to the ſaid *Anthony Mildmay*, *Urſula* married to *Thomas Sadler* Eſquire, and *Oliffe* married to the ſaid *John Talbot* by Indenture bearing date 27 *Auguſti* 15 *Eliz.* made between the ſaid Sir *Henry Sharington* of the one part, and *Edmond Pirton* and *James Paget* Eſquires of the other part, in conſideration of a Joynture for his wife, and for the advancement of his iſſue male of his body, and for the continuance of the lands in his name, and for other good and juſt conſiderations covenant to ſtand ſeiſed of 600. acres of lands (*exempli gratia*) unto the uſes, intents and purpoſes, and under the *Proviſo* following, *ſcil.* [175] [*b*] of all to the uſe of himſelf for his life, and after for 300. acres of land in certain to the uſe of his wife for her life for her Joynture; And of the other 300. acres after his death, and of the ſaid 300. acres limited for the Joynture of the wife after their deaths unto the uſe of the heirs males of his body begotten, and for default of ſuch iſſue, then for 300. acres not being limited for Joynture, &c. unto the uſe of his three daughters ſeveral by their ſelves, and to the heirs of their bodies, and for default of ſuch iſſue to the uſe of the right heirs of the ſaid Sir *Henry*, with like limitation of the other 300. acres to them of the like eſtate with the reverſion to his right heirs. And if any of his ſaid three daughters die without iſſue, then her portion by moieties ſhall be to the ſurvivors of like eſtate, *ut ſupra*, with remainder *ut ſupra*; which Proviſo for the three ſeveral husbands of the ſaid three daughters to have ſeveral portions for their lives, if they ſurvive their wives, and ſhall not be entitled to be Tenants by the Curteſie, with this Proviſo in theſe words following, *ſcil.* Provided always, and it is covenanted and agreed between all the ſaid parties, that it ſhall be lawful for the ſaid Sir *Henry* by his Will in writing to limit any part of the ſaid lands to any perſon or perſons for any life, lives, or years, for payment of his debts, performing of his Legacies, preferment of his ſervants, or any other reaſonable conſiderations as to him ſhall be thought good, and all perſons thereof ſeiſed, to ſtand ſeiſed thereof to the uſe of ſuch perſons and for ſuch intereſts as ſhall be ſo limited by his Will. After the ſaid *Urſula* dieth without iſſue, *Grace* and *Oliffe* ſurviving by which her portion by moities came to them: And afterwards the ſaid Sir *Henry* by his Will in writing for the advancement of his daughter *Oliffe*, and of her husband, and of the heirs of the body of the ſaid *Oliffe*, limited a great part, limited by the Indenture for the portion of *Grace* after the death of his wife, and another great part of land which remained to her by the death of the ſaid *Urſula* to the ſaid *Oliffe* and her husband, and to the heirs of the body of *Oliffe* for 1000. years without reſervation of any rent; and afterwards the ſaid Sir *Henry* died without iſſue male, and if this limitation for 1000. years being made for the advancement of his daughter *Oliffe* and her husband, and the heirs of the body of the ſaid *Oliffe* be good in Law by force of the ſaid Proviſo was the Queſtion. And it was reſolved and adjudged by Sir *Chriſtopher Wray* Lord chief Juſtice of *England*, Sir *Edmund Anderſon* chief Juſtice of the Common Pleas, and all the Judges of *England*, That the limitation for 1000. years was void. And in this Caſe five points were reſolved.

Firſt, That an uſe cannot be raiſed by any Covenant or Proviſo, or by bargain and ſale upon a general conſideration: And therefore, if a man by deed indented and enrolled according to the Statute [176] for divers good conſiderations bargaineth and ſelleth his lands to another and his heirs, *nihil operatur inde*, for no uſe ſhall be raiſed upon ſuch general conſideration, for it doth not appear to the Court that the bargainer hath *quid pro quo*, and the Court ought to judge whether the conſideration be ſufficient or not, and that cannot be when it is alledged in ſuch generalty. But note Reader, the bargainee in ſuch Caſe may aver that money or other valuable conſideration was paid or given, and if the truth be ſuch, the bargain and ſale ſhall be good. And ſo if I by deed covenant with *J. S.* for divers good conſiderations that I and my heirs will ſtand ſeiſed unto the uſe of him and his heirs, no uſe without ſpecial averment ſhall be raiſed by it; but if *J. S.* be of my bloud, and in truth the covenant were made for advance-

advancement of his bloud, he may averr that the covenant was in conſideration thereof, and in both theſe Caſes the perſon who ſhall take the uſe is certain; and that ſuch averment may be taken which ſtands with the deed, although it be not expreſly compriſed in the deed is proved by a Caſe adjudged in an Aſſiſe between *Villers* and *Beamond*, *Term. Paſch.* 3 & 4 *Phil.* & *Mar.* reported by *Bendloes* Serjeant at Law, which Caſe you ſhall find alſo *Paſch.* 3 & 4 *Phil.* & *Mar. Dier* 146. where the Caſe in effect was, That *George Beamont* and *Jane* his wife, as in the right of his wife were ſeiſed of the Mannor of *Northall*, &c. and had iſſue *William Beamont*, who had iſſue *Richard Beamont*, and he and his wife by Indenture 12 *H.* 8. between them of the one part, and *Richard Clark* of the other part, in conſideration of 70 l. given by *Richard Clark*, did bargain and ſell the land to the ſaid *Richard Clark* for 30. years, the remainder to themſelves for their lives, the remainder to *William Beamont* for life, the remainder to *Richard Beamont* and to one *Collet* the daughter of *Richard Clark* in tail, &c. and afterwards a recovery was had to the ſame uſes; *Richard Beamont* and *Collet* did entermarry; and it was found and averred that the ſaid Indenture was made *tam in conſideratione maritagii prædict' inter Richardum Beamont & Colletam, habend' & celebrand* (to make it a Joynture within the Statute of 11 *Hen.* 7.) as for the ſaid ſumm of 70. l. and it was adjudged, That although there was a particular conſideration mentioned in the deed, yet the averment in the ſame caſe might be made of another conſideration which ſtood with the Indenture, and which was not contrary to it, *a fortiori* in the ſaid Caſe; for in the deed is no certain conſideration, but the deed is general for divers good conſiderations; then the averment that the bagainee gave money, &c. or that the covenantee was of his blood is but explanation and particularizing of the general words of the deed, which include every manner of conſideration, and in all of the ſaid caſes, the matter ſo averred is traverſable and iſſuable.

[*b*]

Secondly, it was reſolved, that when uſes are raiſed by covenant in conſideration of paternal love, &c. to his ſons and daughters, or for the advancement of any of his blood, and after in the ſame Indenture a Proviſo is added, that the covenantor for divers good conſiderations may make leaſes for years, &c. that the covenantor in ſuch caſe cannot make a leaſe for years to his ſon or daughter, or unto any other of his blood (much leſs to any other perſon) becauſe that the power to make leaſes for years was void when the Indenture was ſealed and delivered; for the covenant upon ſuch general conſiderations cannot raiſe the uſe for the cauſes aforeſaid, and no particular averment can be, becauſe that his intent was as general as the conſideration was, and his intent was not at the time of the delivery of the deed to demiſe to any perſon in certain, to one more then other, but to demiſe general to whom he pleaſed, and therefore his power to make leaſes (the uſes being created and raiſed by covenant upon the conſiderations aforeſaid) was void *ab initio*. But if the uſes had been limited upon a recovery, fine or feoffment, there needeth not any conſideration to raiſe any of the uſes, and ſo a manifeſt difference. And the Caſe at Bar is ſtronger, becauſe that the Proviſo which gave power to make leaſes ſhall defeat or at leaſt incumber the eſtates veſted and ſetled upon good conſiderations in ſtrangers by the covenants of the ſame Indenture. So note a difference when the conſideration is general, and the covenant or bargain made with a perſon certain, there averment according to the truth of the Caſe may be taken as aforeſaid; but when the conſideration is general and the perſon uncertain, there no averment can help: And therefore if I for good conſiderations covenant with you that I will ſtand ſeiſed to the uſe of ſuch a one as you ſhall name, now although you name my ſon, or my couſin, yet no uſe ſhall be raiſed thereby; for, for the generality and incertainty it was void *ab initio*, and never could be made good to any purpoſe after; and no averment can make the ſame good, or reduce it to any certainty, for the intent of the covenantor was as general as the words were. But if I covenant with you that in conſideration of fatherly love, or for the advancement of my blood I will ſtand ſeiſed to the uſe of ſuch of my ſons, or to the uſe of ſuch of my couſins as you ſhall name, upon the nomination the uſe ſhall be raiſed, for there the conſideration is particular and certain, and the perſon by matter *ex poſt facto* may be made certain.

[177]

Thirdly, upon theſe words in the Proviſo (other conſiderations) it was holden, that this word (other) ought to be other in nature, quality, and perſon, and the advancement of his daughter is the conſideration mentioned before.

Fourthly, it was reſolved, that the ſaid limitation of 1000. years was as well againſt the intent of the parties, as againſt the words of the Proviſo, for the intent and ſcope of the Indentures was to make diſtribution of his lands amongſt his three daughters, and the heirs of their bodies, and every of them upon good conſideration and agreement between their Parents had her portion by her ſelf; but if this limitation for 1000. years ſhall be good, it ſhall be rather to fruſtrate the eſtate of the other ſiſter, and to defraud the intent of the parties grounded upon a conſideration of marriage, then to perform and follow the intent and meaning of the Proviſo, for the intent of the Proviſo was never to give any power to make void the eſtates of the other ſiſters; but it appeareth by all parts of the Indenture, that each daughter ſhould be advanced equally; And ſo this limitation for 1000. years without any rent reſerved was againſt the intent and meaning of the parties; It ſeemeth alſo it was againſt the words of the Proviſo, for that cannot be ſaid a reaſonable conſtruction which tendeth to the ſubverſion of eſtates veſted and ſetled by the ſaid Indentures upon ſo good and juſt conſiderations againſt the meaning of the parties. After the reſolution of the Juſtices certified in the Court of Wards, it was adjudged in the Common Pleas, and alſo affirmed upon a Writ of Error in the Kings Bench in an Action upon the Caſe brought by the ſaid *Anthony Mildmay* againſt *Roger Standiſh*, becauſe the ſaid *Roger* had ſaid, and openly publiſhed that the ſaid land was lawfully aſſured to the ſaid *John Talbot* and *Oliffe* his wife for 1000. years, and that they were lawfully poſſeſſed of the intereſt of the ſaid term, whereas in truth the ſaid land was not lawfully aſſured for the term aforeſaid, nor the ſaid *John Talbot* and *Oliffe* were not lawfully poſſeſſed thereof, and ſo for ſlandering of the eſtate and title which was conveyed

to

to his wife by the ſaid Indentures, and ſhewed all in certainty, and how he was prejudiced by the ſaid ſpeeches he brought the ſaid Action. And *Standiſh* pleaded the ſaid Proviſo in the ſame Indentures, and the ſaid limitation for 1000. years by the ſaid Will, &c. according to the ſaid Proviſo (as he pretended) by force whereof he and the ſaid *Oliffe* had intereſt for 1000. years, and juſtified the ſpeeches, upon which the Plantiff demurred. And it was adjudged, that the Action upon the Caſe was maintainable: And in this Caſe two points were reſolved in both the Courts: Firſt, that the ſaid leaſe for the cauſes aforeſaid was void in Law. Secondly, although *de facto* the ſaid *John Talbot* and *Oliffe* his Wife had a limitation of the land by the ſaid Will of Sir *Henry Sharington* for 1000. years, which was the occaſion that *Standiſh* being a man not learned in the Law, did affirm and publiſh that *Oliffe* had a term for 1000. years, yet foraſmuch as he hath taken upon him the knowledge of the Law, and medling with a matter which did not concern him had publiſhed and declared, That *Oliffe* had a good eſtate for 1000. years, in ſlander of the title of *Mildmay*, and thereby hath prejudiced the Plaintiff, as appeareth by the Plaintiffs Declaration; for this cauſe the firſt Judgment given for the Plaintiff was affirmed in the Writ of Error, *Et ignorantia juris non excuſat.* [b]

THE

THE REPORTS OF Sir Edward Coke Kt. &c.

PART II.

Paſc. 26. Eliz. Rot. 1608. *in the Common Pleas.*

Manſer's Caſe.

BEtween *Painter* and *Manſer* the Caſe was ſuch; *Painter* brought an Action of Debt againſt *Manſer* upon an Obligation: the Defendant pleaded that the Bond was with Condition, *ſcil.* That where the Defendant hath enfeoffed the Plantiff of certain Lands, that if the Plantiff ſhall at all times then after enjoy thoſe lands diſcharged, or otherwiſe ſaved harmleſs from all incumbrances, &c. and alſo if the Defendant and *John Manſer* his ſon ſhall do all acts and deviſes for the better aſſurance of thoſe lands to him, as by the Plaintiff or his Councel learned in the Law ſhall be deviſed, that then the Obligation ſhall be void: And pleaded that the Plantiff hath enjoyed the ſaid lands diſcharged and kept harmleſs from all incumbrances, &c. And that the Plaintiff deviſed a writing of releaſe to be made by the Defendant and *John* his ſon to the Plaintiff, which the Defendant ſealed and delivered as his deed, and becauſe that *John* his ſon was not lettered, nor could not read, the ſaid *John* prayed the Plaintiff to deliver the ſame to him to be ſhewed to ſome man learned in the Law that might enform him if it were made according to the Condition; and further he ſaid that if it were made according to the Condition he would deliver it, which the Plaintiff refuſed for which he did not deliver it as it was lawful for him, upon which the Plaintiff did demurre. And it was adjudged for the Plaintiff. And in this Caſe three points were reſolved. [3]

1. If a man not lettered be bound to make a Deed, he is not bound to ſeal and deliver any writing which ſhall be tendred to him, if any be not preſent who can read the ſame to him if he require the writing to be read to him; And if the Deed be in Latine, French, or other Language which the party who ſhould make the Deed underſtandeth not, in this Caſe if the party require that one read and expound the writing to him, and none be there preſent who can read and expound the tenor thereof in the ſame language that the party who is to deliver the Deed underſtandeth, there the party may refuſe to deliver the ſame. So although a man can read, ye if the Deed be in Latine, French, or other ſuch language as the party who would make the Deed cannot underſtand, if he require that the Deed be read or expounded to him in ſuch language as he may underſtand it, and none be there ready ſo to do, the party may refuſe to deliver the ſame. And it is to be known that *ignorantia eſt duplex*, viz. *facti & juris*; *& rurſum ignorantia facti (quoad rem noſtram attinet) eſt duplex*, viz. *lectionis*, *& linguæ*. Note Reader, that ignorance in reading, or ignorance of the language, which are *ignorantia facti* may excuſe, but it is commonly *ignorantia juris non excuſat*. For notwithſtanding that there it was ſaid, that although the party can read and knoweth the language alſo in which the writing was made, yet he doth not know the ſenſe and operation of the words in Law, and whether they agree with the Condition of his Obligation or not; And therefore ſome of the Juſtices thought that in ſuch Caſe the party ſhall have reaſonable time to ſhew the writing to his Councel at Law to be inſtructed by them, whether it be according to that which he be bound to do, and eſpecially when there is no time limited in which the ſame is to be done; ſo that in as much as the other party may requeſt the doing thereof when he pleaſeth, it is not poſſible for the party to have his learned Councel all times with him; And therefore *prima facie* it ſeemed reaſonable that the party ſhould have reaſonable time as afore is ſaid. But at length upon view of a Record of a Judgment in the ſame Court, 16 *Eliz.* in the Lord *Diers* time, between Sir *Anthony Cook* and *Wotton*, that upon ſuch requeſt [b]

made to Sir *Anthony Cook* by *Wotton* to ſeale an Indenture, Sir *Anthony* who was not learned in the Law, was to ſeale the ſame peremptorily at his peril, and could not have convenient time to conſult upon it with his Councel; upon that it was reſolved in the Caſe at the Bar according to the ſaid Judgement. See the Caſe reported by the Lord *Dier. Trinit. 16 Eliz. Dier* 337, 338. And it was ſaid that the Caſe at Bar was a ſtronger Caſe then the Caſe of Sir *Anthony Cook*; for in this Caſe the Defendant was bound, that his ſon who was a ſtranger to the bond, ſhould make, &c. in which caſe he hath taken upon him, his ſon ſhall do it at his peril, for he who is bound taketh upon him more for a ſtranger then for himſelf
[4] in many caſes. *Vide* 33 *H. 6. 16. b.* 36 *H. 6.* 8. 2 *E.* 4. 2. 15 *E.* 4. 5. *b.* 22 *E.* 4. 43. *&* 10 *H.* 7. 14. *b.* It was reſolved that the pleading was inſufficient, for he hath pleaded that the Plaintiff had enjoyed the lands diſcharged and kept harmleſs from incumbrances, where he ought to have ſhewed how: So if he had pleaded, that he had ſaved him harmleſs, he ought to have ſhewed how; but in ſuch caſe if he had pleaded in the negative, *Non fuit damnificatus*, there it is otherwiſe. Secondly, he hath pleaded, *Quod quoddam ſcriptum relexationis* was ſealed and delivered, and doth not ſhew whether the releaſe concern the land mentioned in the condition, and for all theſe cauſes the Plaintiff had Judgment for to recover.

Note Reader, it is great reaſon, that the writing be expounded in ſuch language that the party may underſtand it, although he could read, becauſe by the Law he is at his peril to deliver the ſame, and to deliver it preſently upon requeſt, and hath not time to conſult upon with his learned Councel.

Hill. 26 Eliz. *Rot.* 1038. *in the Common Pleas.*

Goddard's Caſe.

[b] *Goddard* adminiſtrator of *James Newton* brought an Action of Debt againſt *John Denton* upon a Bond made to the inteſtate bearing date 4 *Aprilis* 24 *Eliz.* The Defendant pleaded, that the inteſtate died before the date of the Bond, and ſo concluded, that the ſaid writing was not his Deed, upon which they were at iſſue; the Jury found that the Defendant did deliver it as his deed 30 *Julii, anno* 23 *Eliz.* and found the tenor of the deed *in hæc verba, Noverint univerſi, &c. dat.* 4 *Aprilis, anno* 24 *Eliz.* and that the inteſtate was living 30 *Julii* 23 *Eliz.* and that he died before the date of the Bond: And prayeth the advice of the Court, if it were the Defendants deed. And it was adjudged by *Anderſon* chief Juſtice, *Windham*, *Periam* and *Walmeſley* that it was his deed, and the reaſon of their Judgment was, That although that the obligee cannot alledge the delivery before the date, as it was adjudged in 12 *H. 6.* 1. which caſe was affirmed to be good Law, yet the Jurors who are ſworn to ſay the truth ſhall not be eſtopped, for an eſtoppel is to conclude one to ſay the truth; and therefore Jurors cannot be eſtopped, becauſe they are ſworn to ſay the truth. *Vide* 1 *H.* 4. 6. *b.* 35 *Aſſ.* 8. 17 *E.* 3. 6. *Plow. Comm.* 515. *a.* but if the eſtoppel or admittance be within the ſame record in which the iſſue is joyned upon which the Jurors ſhall give their verdict, there they cannot find any thing againſt that which the parties have affirmed and admitted of record, although the truth be contrary; for the Court ought to give Judgment upon a thing confeſſed by the parties, and the Jurors are not to be charged with any ſuch thing, but only with things in which the parties differ. *Vide* 28 *Aſſ.* 34. 9 *H.* 6. 37. 3 *&* 4 *Phil.*
[5] *& Mar. Dier* 147. And the date of a deed is not of the ſubſtance of the deed; for if it want date, or if it have a falſe or impoſſible date, as the thirtieth day of *February*, yet the deed is good; for there are but three things of the eſſence and ſubſtance of a deed, that is to ſay, writing in paper or parchment, ſealing, and delivery, and if it have theſe three, although that it wanteth, *In cujus rei teſtimonium ſigillum ſuum appoſuit*, yet the deed is ſufficient, for the delivery is as neceſſary to the eſſence of a deed, as the putting of the ſeal to it, and yet it needeth not to be contained in the deed, that it was delivered. And note the order of making a deed is, firſt to write it, then to ſeal it, and after to deliver it, and therefore it is not needfull that the ſealing and delivery be mencioned within the writing, for as much as they are to be done after. And ſo it was reſolved in *Henry* the eighths time. See Reader 40 *E.* 3, 2. and an opinion in 7 *H.* 7, 14. to the contrary; but ſee the Caſe cited in the time of *H.* 8. now reported by the Lord *Dier* 28 *H.* 8. 19. and beleive Reader the late Judgments are grounded upon full and pregnant reaſon. And when a deed is delivered, it takes effect by the delivery, and not from the day of the date. And therefore be the deed without date, or of a falſe or impoſſible date, yet the deed is good. Secondly, by this Judgement it is to be obſerved, That if a man bring an Action of Debt, and declare that the Defendant 4 *Aprilis* 24 *Eliz.* made a Bond bearing date the ſame day and year, and the Defendant plead, *Non eſt factum*, and it is found that the deed was delivered at another day before or after then the Plaintiff hath declared, that yet Judgment ſhall be given for the Plaintiff, for as much as the date is not material, and the Defendant cannot be twice charged. And many times Bonds are delivered at other days then they bear date. So it appeareth by this Judgment, that the miſtaking of the date of the Bond ſhall not hurt, upon *Non eſt factum* pleaded.

Trin.

Trin. 29 Eliz. *in the Common Pleas.* Rot. 928.

Throughgoods Caſe.

Throughgood brought an Action of Treſpaſs for breaking of his Cloſe againſt *Cole* Defendant, who pleaded, That long time before the Treſpaſs, the Plaintiff did releaſe to *William Chicken* all demands whatſoever, &c. whoſe eſtate he had in the land, and ſo juſtified the Treſpaſs. The Plaintiff ſaid, that he was a Lay man not lettered, and that at the time of ſaid releaſe made, divers arrearages of an annuity were due to him by the ſaid *William Chicken*, and that the ſaid writing of Releaſe was read and declared to him as a writing of acquittance for thoſe arrerages onely; and that he (giving credit thereunto) did ſeal and deliver the ſame to the ſaid *William Chicken*, and ſo, not his deed, upon which iſſue was joyned; and the Jury found a ſpecial verdict to this effect: That is to ſay, that the Plaintiff was a Lay man, not lettered, and that divers arrerages of the ſaid annuity were behind, and that the writing was never read to him; but after that one *Thomas Ward* had begun to read it to the Plaintiff, and before he had read a line of the writing, one *William Ward* took the writing out of his hands ſaying to the Plaintiff, Goodman *Throughgood* you are man unlearned, and I will declare it to you, and make you underſtand it better than you can by hearing of it read; And then ſaid further to him, Goodman *Throughgood* the effect of it is this, That you do releaſe to *William Chicken* all the arrerages of rent that he doth owe you, and no otherwiſe, and then you ſhall have your land again: To which the Plaintiff ſaid, If it be no otherwiſe I am content; and thereupon the Plaintiff giving credit to the ſaid *William Ward* delivered the ſaid deed of releaſe to the ſaid *William Chicken*, and if upon the whole matter it be the Plaintiffs deed, the Jury doth refer to the conſideration of the Court. And it was adjudged, that it was not the Plaintiffs deed; and in this Caſe three points were reſolved: Firſt, that although the party to whom the writing is made, or other by his procurement doth not read the writing, but a ſtranger of his own head read the ſame in other words then in truth it is, yet it ſhall not bind the party who delivereth it; for it is not material who readeth the writing, ſo as he who maketh it be a Layman and being not lettered, be (without any covin in himſelf) deceived; and that is proved by the uſual form of pleading in ſuch Caſe, that is to ſay, That he was a Lay man and not learned, and that the Deed was read unto him in other words, &c. generally without ſhewing by whom it was read. And if a ſtranger menace *A.* to make a Deed to *B. A.* ſhall avoid the Deed which he made, as well as if *B.* himſelf had threatned him, as it is adjudged 43 *E.* 3. 6. *Vid.* 39 *H.* 6. 36. [14] [b]

Secondly, That ſuch lay man not learned is not bound to deliver the Deed, if there be not one preſent which can read the Deed unto him in ſuch language that he who ſhould make the Deed may underſtand it; and that is the reaſon that if it be read in other words then are contained in the writing, it ſhall not bind the party who delivereth it, for it is to the peril of the party to whom the writing is made, that the true effect and purport of the writing be declared if it be required, but if the party who ſhould deliver the Deed doth not require it, he ſhall be bound by the Deed, although it be penned againſt his meaning.

Thirdly, Although that the writing be not read to the party, yet if the effect be declared to him in other form then is contained in the writing, and upon that he deliver it, he ſhall avoid the Deed; for it is all one in Law to render the ſame in other words, and to declare the effect thereof in other manner then is contained in the writing, if the party who maketh the writing (being not learned) deſire one to read the writing to him, and he read it, or declare the effect thereof to him in other manner then the writing doth purport, the ſame (if there be no covin betwixt them) ſhall not bind him.

Trin. 27 Eliz. *in the Common Pleas, Rot.* 1354.

Wiſeman's Caſe.

BEtween *Wiſeman* Plaintiff, and *Bernard* Defendant in Debt, upon a Leaſe for years, the Caſe was ſuch, Tenant in tail of certain land, the remainder in fee; he in the remainder by Deed indented and enrolled, in conſideration and to the intent; That all his lands and tenements for ever after ſhould continue and remain in his family, name, and blood: as for other good conſiderations doth covenant, that he himſelf will ſtand ſeiſed of all his lands, &c. to the uſe of himſelf and of the heirs males of his body begotten, and after to the uſe of divers of his brothers in tail, and for default of ſuch iſſue unto the the uſe of the Queen, Her Heirs and Succeſſors, Kings and Queens of this our Realm; and afterwards the Tenant in tail in poſſeſſion doth ſuffer a common Recovery with voucher; and if the ſame [15]

ſhall bar the iſſue in tail or no was the Queſtion: And it was adjudged, that the iſſue in tail by this recovery was barred. And in this Caſe ſix points were reſolved.

1. That no uſe by the ſaid Indenture was raiſed to the Queen; for the words, that is to ſay, for other good conſiderations, are too general to raiſe any uſe as it hath been adjudged, without ſpecial averment that valuable or other good conſideration was given.

2. The conſideration that the land ſhall remain in the name and blood, notwithſtanding the uſe limited to the Queen, is for the benefit and preſervation of the eſtates in tail, as well againſt diſcontinuances, as againſt barres, as it was ſaid, it was reſolved to be no conſideration to raiſe the uſe to the Queen, for there wanteth *Quid pro quo*, &c. *& contractus dicitur quaſi actus contra actum.*

[b] 3. Admit that the Covenantor had ſaid in his Indenture, In conſideration that the Queen is the head of the Commonwealth, and hath the care and charge as well to preſerve the peace of the Realm, as to repeal forraign hoſtility (which is implied in the word Queen) yet it is not a good conſideration to raiſe an uſe for the cauſe aforeſaid, for there wanteth *Quid pro quo*, and Kings *ex officio* ought to govern and preſerve the Subjects in peace and tranquillity.

4. It was reſolved, that admit the conſiderations had been ſufficient to raiſe the uſe to the Queen, yet it doth not preſerve the eſtate tail in poſſeſſion by force of the Act of 34 *H.* 8. for no eſtate tail is preſerved by the ſaid Act, if not that the eſtate tail be created by the Kings Letters Patents, or the eſtate tail be by the Kings proviſion, and not where the eſtate tail is of the gift or proviſion of a common perſon without the Kings proviſion; and the ſame appeareth fully by the preamble of the Act. And note Reader, this word (ſuch) through the whole body of the Act which couples it with the preamble, extends only to gifts made by the King or by the Kings proviſion. And it was no miſchief at the Common Law (as it appeareth by the preamble) that the donees of common perſons ſhould bar their iſſues. See the Statute of 32 *H.* 8. *cap.* 26. that a fine levied by Tenant in tail ſhall barre his iſſue, if not that the eſtate tail be created by the Kings Letters Patents: And the Statute of 34 *H.* 8. doth preſerve no eſtate, if not that it be of the Kings gift, or by the Kings proviſion. Alſo the Queen doth not loſe any primer ſeiſin, or livery, when the eſtate tail is of the gift of a common perſon, as ſhe loſeth when her donees are barred by Recovery, ſo the diſadvantage of the Queen is not equal, and therefore without queſtion it ſhall not be taken by equity. And in this Caſe it was ſaid, that if one make a gift in tail, and afterwards the Crown deſcended to him, this gift is out of the Statute, for it was made by a Subject. So if the Anceſtor of the King who was not King make a gift in tail, and afterwards the Reverſion deſcended to the King, ſuch gift is out of the Statute; for the words of the Preamble are, Whereby ſuch heirs ſhould have in ſpecial memory &c. the profit that they have and take by the ſervice of their Anceſtors done to the Kings of this Realm; By which it appeareth that the intent of the Act was not to extend to the gift of any Anceſtor of the King who was not King. Alſo there is more miſchief to the Subject in one Caſe then in the other. For by the limitation of the remainder to the King, the meſnalties of the Subjects are in ſuſpence, or extinct, by which they loſe their Eſcheats, Wards, Heriots, Reliefs, &c. but no ſuch miſchief is in the Kings gifts. Alſo by ſuch ſecret and unknown limitations of remainder to the Queen purchaſors are deceived, and the Tenant in tail in poſſeſſion deprived of the power which the Law giveth unto him to cut off the Remainder, but when the King maketh the gift in tail there is no ſuch miſchief.

[16] 5. It was reſolved, that the true interpretation of theſe words (whereof the Reverſion or Remainder at the time of ſuch Recovery had ſhall be in the King, &c.) is, where the King createth the eſtate by his Letters Patents, reſerving the Reverſion; or when the King in conſideration of money, or of aſſurance of other lands, or for other conſideration procureth a Subject to make a gift in tail to one of his ſervants or ſubjects, for recompence of ſervice or other conſideration, the remainder to the King; And therefore, where the Preamble of the Act ſaith, Where the King &c. hath given, &c. or otherwiſe provided to his ſervants or ſubjects; theſe words, Reverſion to the King in the body of the Act, have reference to the gift of the King in the Preamble: and theſe words, Remainder to the King in the body of the Act, referre to proviſion mentioned in the Preamble of the Act made by the King, when he procureth a Subject to make the gift with the remainder to him, and ſo the body of the Act well expounded by the Preamble.

6. It was reſolved, that before the Statute of 34 *H.* 8. a common Recovery did barre the eſtate tail which was created by the Kings Letters Patents, whereof the reverſion did continue in the King. And with this Reſolution agreeth 33 *H.* 8. *tit. Recovery in value* 31 *Br.* and 29 *H.* 8. 32. *Dier.*

Mich. 28 & 29 Eliz. *in the Common Pleas*

Lanes Caſe.

[b] BEtween *Smith* Plaintiff and *Lane* Defendant in the Common Pleas, the Caſe in effect was ſuch; The King ſeiſed of a Mannor in fee in the right of his Crown, by his Steward granted Copihold lands parcel of the Mannor to one by Copy of Court Roll according to the cuſtome of the Mannor in fee. And afterwards the King by his Letters Pattents under the Exchequer Seale made a Leaſe of

of thoſe lands for 21. years to another who granted his term to the Copiholder: And afterwards the Queen that now is, reciting the ſaid leaſe for years granted the Reverſion in fee, the term for years expired, the Patentee of the Reverſion entred upon the Copiholder, and if his entry were lawful or no was the Queſtion. And in this Caſe three Points were reſolved by the whole Court.

1. That although by the Common Law no grant of any land by the King is available or pleadable but under the great Seal of *England*, and although that in this Caſe it was not alledged, That in the Exchequer the common courſe of the Court was to make ſuch Leaſes under the Seal of the Court, yet it was adjudged, that the ſaid Leaſe under the Exchequer Seal was good, and that by the common uſage of the Court of Exchquer; for the cuſtoms and courſes of every of the Kings Courts are as a Law, and the Common Law for the univerſality thereof doth take notice of them, and it needeth not to alledge or plead any uſage or preſcription to warrant the ſame. And ſo it is holden in *Long* 5 *E.* 4. 1. & 11 *E.* 4. 2. *b.* that the courſe of a Court is a Law; and in 2 *R.* 3. 9. it is holden, that every Court of *Weſtminſter* ought to take notice of the Cuſtomes of other Courts, otherwiſe is it of Courts in the Country. And *vide* 8 *H.* 6. 34. & *Br. Leaſes* 71. where it is ſaid, The order of the Exchequer is to make [17] their Leaſes by this word *Committimus* ſuch lands, *Habendum & reddendum* ſuch Rent, or Farm, and it is a good Leaſe there by uſage. By which it appeareth, that the ancient uſage maketh a Leaſe to be good and available in Law; and if ſuch Leaſes ſhould not be good, great inconvenience would follow, for infinite number of Leaſes and grants under the Exchequer Seal ſhall be otherwiſe ſaid void, and a great number of grants of Reverſions expectant upon Leaſes under the Exchequer Seal ſhall be alſo void: For if the King granteth a Reverſion where he hath a poſſeſſion, his grant is void. And the Judges in general Caſes have great reſpect and conſideration that their Judgments ſhall not impeach the eſtates and inheritances of many men againſt ancient and common approbation. In a Patent of King *Hen.* 7. four letters, *viz. H. R. F. H.* of the firſt words were left out, intending afterwards *propter honorem* to be drawn and limmed with gold, but the great Seal was put to the grant leaving out the ſaid letters. And yet the Patent was adjudged good for the multitude of Preſidents.

Note Reader, in every Commiſſion to make Leaſes under the great Seal is a ſpecial grant, that Leaſes made by the Commiſſioners under the Seal of the Exchequer ſhall be good, but that was not touched in this Caſe, nor do I think was it material; for if the Leaſes were not good for the cauſes aforeſaid, certainly the clauſe in the Commiſſion will not remedy it.

2. It was reſolved that by the acceptance of the term by the Copiholder, the Copihold eſtate was determined, as well as if the Copiholder had accepted immediately a leaſe for years of his Copihold, as hath been adjudged in *Hides* Caſe, for it is all one reaſon in both Caſes, *viz.* that a Copihold intereſt and an eſtate for years of the ſame land cannot ſtand together in one perſon at the ſame time, without confounding the leſſer. Alſo they are of divers natures, and therefore they cannot ſtand together in one and the ſame perſon.

3. That the ſeverance of the freehold and inheritance of the land holden by Copy of the Mannor, hath not extinguiſhed or determined the Copihold eſtate; for notwithſtanding that his eſtate is taken but for an eſtate at will, yet the cuſtom hath ſo eſtabliſhed the Copiholders eſtate, that he is not removable at the Lords will, ſo long as he performs the cuſtoms and ſervices, and by the ſame reaſon the Lord cannot determine his intereſt by any act that he can do, and ſo it hath been adjudged divers times [*b*] in the Kings Bench: But for that the eſtate of the Copiholder was determined by the acceptance of the leaſe for years it was adjudged againſt the Copiholder.

Note Reader, the Law to ſeveral purpoſes and intents taketh notice of divers of the Kings Seals. 1. Of the great Seal. 2. Of the Seal of the Exchequer, as appeareth before. 3. Of the Privy Seal: *F. N. B. 26. b.* The King may grant to one to make Attorney by his Letters Patents under his Privy Seal, and therewith agreeth 37 *H.* 6. 27. *b.* and the King may command under his Privy Seal that one do not go beyond the Sea out of the Realm, as appeareth by *F. N. B.* 85. *a.* But it is holden in 35 *H.* 6. that a protection or warrant of an Eſſoin is worth nothing under the Privy Seal. And it appeareth by the Statute of *Articuli ſuper chartas cap.* 6. that no Writ ſhall be ſealed with the petit Seal.

4. The Law taketh notice alſo of the privy Signet, *vide F. N. B.* 85. *a.* That the privy Signet is ſufficient to prohibit one to go beyond the Sea. And ſee a Record in the Exchequer *Hil.* 1. *E.* 4. *ex parte Rememoratoris dom' Reginæ Rot.* 14. that the diſcharge of a debt under the privy Signet by the Sheriff of *London* was not ſufficient, but it ought to have been under the privy Seal, and then it had been a good diſcharge in Law.

Know Reader, that of ſmall things (as the Caſe at Bar was) and to poor men, Leaſes have been made under the Exchequer Seal, as appeareth by many old preſidents before and in the time of King *E.* 3. and by infinite preſidents after to this day, And ſuch Leaſes made according to ſuch preſidents have been allowed good. And there were three cauſes of the beginning of the uſage. 1. For the multiplicity, that every poor man ſhall not be driven by ſuch infinite number of Leaſes to ſue for Cottages to the King, and other ſmall things to paſs by the King ſigning, the privy Signet, privy Seal, or great Seal. 2. For neceſſity, leſt if a poor Subject be driven to ſuch tedious ſuit, the land lie freſh many times without a Tenant to the Kings damage. 3. For the impoſſibility, becauſe many times the Subject was not able, nor the thing leaſed was not of value to paſs the great Seal. But to you who are rich, my advice is to paſs your Leaſes under the great Seal for that is the ſure way.

Paſc. 31 Eliz. *in the Common Pleas.* Rot. 151.

Baldwin's Caſe.

[23] BEtween *Baldwin* and *Morton* in Treſpas in the County of *York*, and adjudged in the Common Pleas, the Caſe was ſuch; the Prior of *Boulton, anno* 25 *H.*8. with the aſſent of his Covent by Indendenture demiſed the land in queſtion to *Hugh Baldwin* and *Anne* his wife for 21. years. And afterwards the Priority by ſurrender came to King *H.* 8. and after *Hugh Baldwin* died, King *H.* 8. *ann.* 33. granted the land in queſtion to *Henry* Earl of *Cumberland* and his heirs, who 37 *H.* 8. by his Indenture covenanted, granted, demiſed and to Farm let the ſaid land to the ſaid *Anne*, and to one *Anthony Baldwin* her ſon, and to the heirs of the ſaid *Anthony Habendum* to them from the date of the ſame Indenture until the end of 99. years, and ſo from 99. years to 99. years until 300. years be expired without impeachment of Waſt in as ample and large manner and form as the ſaid *Hugh Baldwin* and *Anne*, or any Tenant or Farmer ever had or enjoyed the ſame. And the leſſee covenanted to pay during the ſaid term 5. *s.* 8. *d.* if it were demanded: And the leſſee covenanted that he and his Heirs and Aſſigns at the end of the term of 300. years, would make unto the Heirs and Aſſigns of the ſaid *Anthony Baldwin* ſuch Leaſe for other 300. years, &c. And the Jury found, that no livery and ſeiſin was made for the ſaid *Anthony* or *Anne* according to the ſaid Indenture; *Anne* died, and *Anthony* ſurvived, *Henry* [*b*] Earl of *Cumberland* died, *George* his Son and Heir, *anno* 14 *Eliz.* did enfeoff the defendant thereof; the ſaid *Anthony* at the time of the feoffment being in poſſeſſion of the land, upon whom the Defendant entred, upon which entry the ſaid *Anthony* brought this Action of Treſpas. And the doubt in this Caſe was, If for as much as that the fee ſimple was limited and expreſſed by the premiſes unto *Anthony* and his Heirs, if the limitation of the term for years in the *Habendum* were contrary and repugnant to the premiſes. And firſt it appeareth, that the entent of the parties was, that but a term ſhould paſs; for in the premiſſes the parties uſe the uſual words of a Leaſe, *ſcil.* grant, demiſe, and to farm let, and a certain term for years is limited by the *Habendum*; alſo it is limited without impeachment of Waſt; alſo the leſſee binds himſelf by covenant to pay the rent during the term; And the leſſor covenants, that a new Leaſe ſhall be made at the end of the term, and that the leſſees ſhall enjoy the land, &c. as other Farmers, &c. had enjoyed the ſame. Then ſuch conſtruction ſhall be always made, that the intent of the parties ſhall take effect, if the ſame by any conſtruction may ſtand with the rule of Law; And it was objected, that the rule of Law was, That an *Habendum* being contrary or repugnant to the premiſes is void, and the premiſſes ſhall ſtand: As if a man by deed give lands by the premiſſes to one and his heirs *Habendum* to him for his life, this *Habendum* is void, becauſe that a fee ſimple is expreſſed in the premiſes, and but an eſtate for life in the *Habendum*, which is repugnant and void, which Caſe was agreed on all ſides. But it was adjudged by *Anderſon* cheif Juſtice, *Windham*, *Periam* and *Walmeſley* Juſtices, that the *Habendum* in the Caſe at Bar was not repugnant; and that by the ſaid demiſe both the leſſees had a leaſe for years therein expreſſed: and in this Caſe theſe differences were taken and agreed for good Law.

1. When things which take their eſſence and effect by the delivery of the deed without other ceremony, and which lie in grant, there in ſuch limitation as in Caſe at Bar, the *Habendum* was repug- and void. As if a man grant Rent, or Common, &c. out of his land by the premiſſes of the deed to one and his heirs, *Habendum* to the grantee for years or for life, the *Habendum* is repugnant, for a fee paſſeth by the premiſſes by the delivery of the deed, and therefore the *Habendum* for years or life is void.

[24] 2. If one by deed grant a rent in *eſſe*, or a Seignory in the premiſſes to one and heirs, *Habendum* to the grantee for years, or life; although that another thing or ceremony is requiſite, that is to ſay, (Attornment) beſides the delivery of the deed, yet for as much as the thing lieth in grant, and both eſtates that is to ſay, as well the eſtate in fee, as the eſtate for years or for life ought to have one and the ſame ceremony, that is to ſay (Attornment) to paſs it as a Seignory, &c. and for this cauſe the *Habendum* in ſuch Caſe is repugnant and void.

3. When a man gives land by deed in fee by the premiſes, *Habendum* to the leſſee for life, there the *Habendum* is void, as hath been ſaid; for one ceremony, *ſcil.* livery is requiſite to both the eſtates: and therefore when livery is made according to the form and effect of the deed, it ſhall be taken ſtrongeſt againſt the the feoffor, and more for the advantage of the feoffee, and the *Habendum* in ſuch Caſe is void, and till livery be made the feoffee hath but at will.

4. When to the eſtate limited by the premiſſes a ceremony is requiſite unto the perfection of the eſtate, and to the eſtate limited by the *Habendum*, nothing is required to the perfection and eſſence thereof but only the delivery of the deed, there, although that the *Habendum* be of leſſer eſtate then is mentioned in the premiſſes, the *Habendum* ſhall ſtand, as in the Caſe at the Bar: Unto the fee ſimple limited by the premiſſes it is requiſite to have livery and ſeiſin, and till livery be made nothing ſhall paſs but an eſtate at will (if the deed had not gone further) and therefore the *Habendum* for years is good preſently by the delivery of the deed, and ſo it appeareth it was the intent of the party that it ſhould take effect by the livery of the deed for years.

Note

Note Reader, a difference between an estate in the premises implied, and an estate expressed; for if *A.* grant a rent to *B.* generally, the same by explication and construction of Law is an estate for life: but if the *Habendum* be for years, it is good, and shall qualify the generality and implication of the premisses. And note in the Case at Bar, the *Habendum* cannot be good to *Anne* only, and void to *Anthony*, for *Mala expositio quæ corrumpit textum.* Also it is to be observed, that although that *Anne Baldwin* had an estate for years in possession, and had sole and lawful possession and *Anthony* nothing, and therefore it might be objected, that this deed should enure to *Anne* only by way of confirmation or release, yet it was adjudged that the lease was good to both, *scil.* to *Anthony* and *Anne*, for so are the words and the intention of the parties; and these words, And to the Heirs of *Anthony*, upon consideration of the whole deed are void, and both lessees shall have a good estate for years. And if livery and seisin had been made to the lessees, it had not changed the Case, for it was a lease for years at the beginning; and Judgment was given for the Plaintiff. [b]

Trinit. 31 Eliz.

The Case of Bankrupts.

GRegory *Smith Cullamor*, and other good Merchants of *London*, brough an Action upon the Case upon Trover and Conversion of divers goods in *London* against *Thomas Mills*, and upon Not guilty pleaded, the Jury gave a special verdict to this effect: *John Cook* of *Spalding* was possessed of the same goods, and exercising the Trade of a buyer and seller 30 *Januarii* 29 Eliz. became Bankrupt, and absented himself *secundum formam Statuti* (which was found at large) and the said 30 *Januarii* was endebted to the Plaintiff being a Subject born in 273. *l.* 12. *d. pro merchandizis per quemlibet eorum quibus venditis*; and then also was endebted to *Robert Tibnam* being also a Subject born in 64 *l.* Afterwards 12 *Februarii* 29 *Eliz.* the Plaintiff exhibited a Petition to the Lord Chancellor to have a Commission upon the Statute of Bankrupts, and 17 *Feb.* 29 *Eliz.* a Commission was granted according to the said Statute under the great Seal to *William Watson* and others. And afterwards 21 *Feb.* 29 *Eliz.* *John Cook* gave and delivered the said goods to *Tibnam* in satisfaction of part of his due debt, the goods being of the value of 24 *l.* And afterwards *ultimo Martii* 29 *Eliz.* the Commissioners by deed indented sold to the Plaintiffs joyntly the said goods, and at the same time the said *Mills* then Factor to *Tibnam in ea parte* refused to come in as Creditor, but claimed the said goods as the proper goods of his Master by the gift aforesaid; and afterwards the goods came to the Defendants hands and he converted them, but whether the said sale of the said Commissioners, notwithstanding the said gift and delivery to *Tibnam* be good or not, that was the doubt referred to the consideration of the Court. And Judgment was given by *Wray* chief Justice, and the whole Court for the Plaintiffs. And in this Case divers points were resolved: [25] [b]

1. That the said sale made by the said Commissioners was good; and because the doubt rose upon the words and intent of the Statute of 13 *Eliz. cap.* 7. only, the Court had consideration of divers parts and branches of the same. First, the Act describeth a Bankrupt, and whom he defraudeth, *scil.* the Creditors: 2. To whom the Creditors should complain for relief, *scil.* to the Lord Chancellor: 3. How and by what way relief and remedy is provided *scil.* by force of a Commission under the great Seal, &c. 4. The authority of the Commissioners, *scil.* to sell &c. that is to say, to every one a portion rate and rate like according to the quantity of his or their debt. So that the intent of the makers of the Act expressed in plain words was to relieve the Creditors of the Bankrupt equally, and that there should be an equal and ratable proportion observed in distribution of the goods of the Bankrupt amongst the Creditors having regard unto the quantity of their several debts, so that one should not prevent the other, but all should be in *equali jure.* And so we see in divers Cases, as well at the Common Law as upon the like Statutes such constructions have been made; for as *Cato* saith, *Ipsæ eteninm leges cupiunt ut jure regantur:* And therefore it is holden in 35 *H.* 8. *tit. Testaments Br.* 19. a man holdeth three Mannors of three several Lords by Knights service, each Mannor of equal value, he cannot devise two Mannors and leave the third to descend according to the generality of the words of the Acts of 32 & 34 *H.* 8. of Wills, for then he should prejudice the other two Lords, but by a favourable and equal construction he can devise but two parts of each Mannor, so that equality between them shall be observed. And in 4 *E.* 3. *Assise* 178. the Lord of a Town cannot improve all the same, leaving sufficient Common in the lands of other Lords within the Statute of *Merton cap.* 4. And so in Cases at the Common Law an equality is to be required as in 11 *H.* 7. 12 *b.* a man binds himself in an obligation and his heirs, and hath heirs and lands on the part of his Father, and on the part of his Mother, both heirs shall be equally charged. 48 *E.* 3. 5. in Dower if the heir be vouched in three several Wards within the same County, he shall not have execution against one only, but all shall be equally charged. 29 *E.* 3. 39. the like Case. So here in our Case there ought to be an equal distribution *secundum quantitatem debitorum suorum*, but if after that the Debtor come Bankrupt he may perform one (who peradventure hath least need) and defeat and defraud many poor men of their true debts, it should be unequal and unconscionable, and a great defect in Law if after that he hath discredited himself by becoming a Bankrupt, the Law should credit him to make distribution of his goods to whom he pleased, being a Bankrupt man and of no credit, but the Law as hath been said before hath appointed certain Commissioners of indifferency and [26]

credit

credit to make the diſtribution of his goods, To every one of his Creditors rate and rate like a portion according to the quantity of their debts as the Statute ſpeaketh. Alſo the Caſe is ſtronger becauſe that this gift is an aſſignment of the Bankrupt after the Commiſſion awarded unde the great Seal, which Commiſſion is matter of Record, whereof every one may take conuſance.

Laſtly and principally, the Court relied upon other words in the Act, *ſcil.* And that every direction, bargain and ſale, &c. given by the perſons ſo authorized as is aforeſaid in form aforeſaid ſhall be good and ſufficient in Law, &c. againſt the ſaid offender, &c. and againſt all other perſons claiming by, from, or under ſuch offender by any Act had, made, or done after any ſuch perſon ſhall become Bankrupt, &c. So that in as much as this aſſignment and delivery of the goods was after the ſaid *Cook* became Bankrupt, notwithſtanding that the Commiſſioners may ſell them. And the Cort reſolved, that the Proviſo concerning gifts and grants *bona fide* maketh not any gift or grant good which the Bankrupt maketh after he becomes Bankrupt, but excludes them out of the penalty inflicted by the ſame Proviſo, And divers exceptions were taken to the verdict by the Defendants Councel.

1. That it was not found, that the ſaid ſale by the ſaid Commiſſioners of the goods was by deed enrolled, as they objected the words of the Act require: but to that it was anſwered and reſolved by the Court, That the words of the Act concerning enrolment of the deed next comming after theſe words, goods and chattels, are, or otherwiſe to order the ſame for true ſatisfaction and paiment, &c. and that every direction, order, &c. ſhall be good and effectual, ſo this ſale without deed inrolled is ſatisfaction.

2. It was objected, that it was not found that the Commiſſioners firſt before their ſale had ſeen the goods, for the words of the Act are, *ſcil.* to be ſearched and viewed, &c. To that it was anſwered and reſolved, that the ſaid words, Or otherwiſe to order, &c. and that every direction, &c. referre the ſame to the diſcretion of the Commiſſioners, and peradventure they cannot come to the ſight of them.

3. That the Commiſſioners ought to make ſeveral diſtribution to the ſeveral Creditors, and not to make a joint ſale or aſſignment to ſeveral Creditors; for if he owed to *A.* 20. *l.* and to *B.* 20. *l.* and
[*b*] to *C.* 5. *l.* a joint ſale or aſſignment to *A. B.* and *C.* is not according to the power given to the Commiſſioners by the Act, for the Act limits them to make diſpoſition amongſt the Creditors, *viz.* to every one a portion rate and rate like according to the quantity of their debts; but in this he who hath the leaſt debt ſhall have as great intereſt in the goods as he who hath the greateſt, and ſo ſuch aſſignment in the ſaid Caſe put of ſeveral debts is void, *quod fuit conceſſum per Curiam.* But it was anſwered and reſolved by the Court, that in the Caſe at the Bar it appeareth by the verdict, that the debt due to the Plaintiffs was joint, for they found *ut ſupra*, that the ſaid *John Cook* was indebted to the Plaintiffs in 273. *l.* 12. *d.* which ſhall be intended a joint debt, and ſo the ſale good in the Caſe at the Bar.

4. That for as much as the words of the Act are, To every of the ſaid Crditors a portion, rate and rate like, it behoveth that diſtribution be made to all the Creditors: But here it appeareth that the ſaid *Tibnam* was a Creditor, and 64. *l.* due to him, and yet nothing is alloted or aſſigned to him, ſo the ſale is void. To that it was anſwered and reſolved by the Court, that in this Caſe the Factor of the ſaid *Tibnam in ea parte* refuſed to come in as a Creditor but claimed all the goods: And this Act giveth benefit to thoſe who will enquire and come in as a Creditor, and not thoſe who for obſtinacy refuſe, or for careleſneſs neglect to come before the Commiſſioners and pray the benefit of the Statute; for *vigilantibus & non dormientibus jura ſubveniunt*, for otherwiſe one debt might be concealed, or one Creditor might abſent himſelf, and avoid all the proceedings of the Commiſſioners by force of the Act. And every Creditor may take notice of the Commiſſion, being a matter of Record as is aforeſaid; and ſo no incovenience may happen to any Creditor who will be vigilant, but great inconvenience will follow, and the whole effect of the Act ſhould be overthrown if other conſtruction ſhall be made.

Paſch. 22 Eliz. Rot. 738. *and adjudged in the Common Pleas Trinit.* 33 Eliz.

Bettiſworth's Caſe.

[31. *b*] IN a Replevin between *Hayward* and *Bettiſworth* in the Common Pleas, which began *Paſch.* 22 *Eliz. Rot.* 738. the Caſe was ſuch; A Leaſe for years was made of a houſe, of a Cloſe called *Reginalds*, and of divers other lands in *Dale*, which Cloſe called *Reginalds* was incloſed and ſevered by it ſelf; and afterwards the leſſee being in the houſe, the leſſor entred into the Cloſe and made a feoffment of the houſe and of all the land ſo demiſed, and made livery in the ſaid Cloſe, the leſſee continuing in the ſaid houſe, and not put out thereof, and afterwards the leſſee did reenter into the ſaid Cloſe, and if the ſame were a good feoffment and livery of ſeiſin of the ſaid Cloſe the leſſee nor other for him being upon the Cloſe, was the doubt. And it was adjudged that the livery and ſeiſin was void, as well for the Cloſe as for the houſe and other lands ſo demiſed. For when a Meſſuage with land is intirely demiſed the Meſſuage is the principal, for that ſerves for the habitation of man, and in a *Præcipe* ſhall be demanded as the more worthy before land; and the demand for rent behind ſhall be at the houſe as the moſt principal and notorious thing. So that the Meſſuage being more worthy, and the principle, the land

but

but as acceſſory, without queſtion the poſſeſſion of the houſe is a good poſſeſſion of the land demiſed with it.

Secondly, the leſſee cannot be upon every parcel of the land for preſervation and continuance of his poſſeſſion, for it may be that divers parcels of the lands lie in ſeveral parcels, and diſtinct one from the other by ſeveral diſtances; and therefore it ſhall be reaſonable, that his continuance, not only in the houſe, but alſo upon any other part of the land demiſed ſhall be a good poſſeſſion of the reſidue. And ſo it [32] was reſolved by the whole Court.

Thirdly, peradventure the leſſee durſt not for fear of force be upon the land to preſerve his poſſeſſion, but his houſe is his Caſtle which he may by Law ſafely keep, and therefore the Caſe of the houſe is ſtronger. And this difference was taken when a man lawfully departeth with his poſſeſſion, and when a man keeps his poſſeſſion againſt unlawful and torcious entry. For when a man maketh a feffoment of a Meſſuage *cum pertinentiis*, he departs with nothing thereby but what is parcel of the houſe, *ſcil.* the buildings, Curtilage, and Garden; but in the Caſe at Bar the keeping of the poſſeſſion of the houſe or any part of the thing demiſed againſt torcious entry and expulſion by the leſſor is not only a poſſeſſion of all that which might paſs by the name of the houſe or of ſuch parcel, but of all lands, &c. which are demiſed by one intire demiſe in one County for the reaſons and cauſes aforeſaid. And it is not material whether the thing where the livery was made be within the view or not: but if the leſſee for years in the ſame Caſe make a leaſe for a certain term of any parcel, and ſo divide the poſſeſſion thereof from the reſidue, if of ſuch parcel ſo ſevered livery be made, the poſſeſſion in the reſidue by the firſt leſſee is not any impediment to the livery of this parcel; otherwiſe it is if the leſſee make a leaſe at will of any parcel, for there his poſſeſſion of the reſidue ſhall hinder the livery made in ſuch parcel. And with this Judgement agreed all the other Judges and Serjeants of *Serjeants Inne* in *Fleetſtreet*.

Ter. Mich. 36 & 37 Eliz.

Doddington's Caſe.

[b] *William Hall* brought an *Ejectione firmæ* againſt *John Peart* and *James Peart*, upon a demiſe made by *William Doddington* of lands in the Pariſh of *Dynder* in the County of *Somerſet* 16 *Martii* 24 *Eliz.* for 7 years, from the feaſt of St. *Micheal* the Archangel then paſt; and upon Not guilty pleaded, the Jury gave a ſpecial verdict to this effect: King *H.* 8. was ſeiſed of the ſcite of the late Hoſpital of St. *John* of *Wells* in the ſaid County of *Somerſet*, and of all the lands and tenements appertaining to the ſaid late Hoſpital (whereof the tenements aforeſaid in which, &c. was parcel) and that the tenements aforeſaid in which, &c. lay in the Pariſh of *Dynder*, and are diſtant from the ſcite of *Wells*, and from the ſuburbs and liberty thereof by the ſpace of a league; And afterwards the ſaid King by his Letters Patents bearing date 26 *Martii* 36. of his reign under the great Seal (*ex certa ſcientia & mero motu ſuis*) *& in conſideratione de* 300. l. *dedit & conceſſit Johanni Ayleworth & Radulpho Duckinfield, omnia & ſingula illa meſſuagia, tofta, cotagia, terras, tenementa, ædificia, & gardina ſua quæcunque cum pertinentiis tunc vel nuper in ſeperalibus tenuris ſive occupationibus Thomæ Gibbes, Johannis Brown* (and divers other by ſpecial names) *ſcituat', jacent' ſeu exiſten' in Civitate Wells in dicto Com' Somerſet, ac in ſuburbiis ejuſdem Civitatis & extra eand' Civitatem infra juriſdictionem & libertat' ejuſdem Civitatis dicto nuper Prioratui ſive Hoſpitali dudum ſpectant' & pertinent', quæ quidem meſſuagia, tofta, &c. in dicta Civitate Wells ac ſuburbiis dicto nuper Hoſpitali ſpectant' tunc extendebanur ad clarum annuum valorem* 40. l. 3. s. 8. d. *Habend' & tenend' omnia & ſingula præmiſſa præfato Jo. A. & Ra. D. & hæredibus ſuis, ad opus & uſum prædict' J. A. & hæredum ſuorum.* And the Jury further found, that at the time of the particular made [33] by the Auditor of the late King upon which the ſaid grant was made, and at the time of the grant aforeſaid, the ſaid *John Brown* was Tenant of the Tenements aforeſaid, in which, &c. for the yearly rent of 6. s. 8. which *John Brown* was named in the ſaid particular, and that he paid the ſaid rent. And the Jury found that the ſaid *John Brown* at the time of the ſaid particular and grant was Farmer of the Tenements in which, &c. and had not any other lands parcel of the ſaid late Hoſpital in *Wells*, but only the Tenements in which, &c. And that the ſaid rent of 6. s. 8. d. was parcel of the value of the ſaid 40. *l.* 3. *s.* 8. *d.* mentioned in the ſaid particular, and in the ſaid Letters Patents. And that the ſaid *John Ayleworth* died, and that *Aſhton Ayleworth* his ſon and heir demiſed the Tenements aforeſaid unto the Defendants for their lives. And that the Queen that now is 5 *Jul.* 30. of her reign did grant unto *Edward Borough* the reſidue of the Tenements appertaining to the ſaid late Hoſpital not granted to *John Ayleworth* and *Ralph Duckinfield* who by deed enrolled ſold them to the ſaid *William Doddington*, who leaſed them to the Plaintiff, *prout*, *&c.* upon whom the Defendants entred. And if their entry were lawful or not was the Queſtion. And in this Caſe two Points were moved:

1. If this grant of the King were good by the Common Law or not.
2. If it were void by the Common Law, if the Statute of 34 *H.* 8. *cap.* 21, hath made it good.

And as to the firſt Point it was reſolved by *Popham* chief Juſtice, *Clench*, *Gawdy*, and *Fenner* Juſtices, that the grant was void by the Common Law, as this Caſe is, as well in the Caſe of a common perſon as in the Caſe of the King. For to that, the Point is no other, but the King or a common perſon granteth *omnia illa meſuagia in tenura Johannis Brown, ſcituat' in Well', nuper Prioratui de W. ſpectant'*, and in truth the lands lie in *D.* in this Caſe, becauſe that the grant is general, and is reſtrained to a certain Town, the Patentee or grantee ſhall not have any lands out of the Town to which the generallity

of the grant doth referre. And this Caſe is the ſtronger by reaſon of this Pronoun (*illa*) for *omnia illa meſuagia, &c.* maketh ſuch a neceſſary reference as well to the Town as to the tenure of *John Brown*, that if one or the other fail, the general grant is void; for (*illa*) is not ſatisfied till the ſentence be ended, and (*illa*) governeth all the ſentence till the full ſtop. For which it was unanimouſly agreed by the
[*b*] whole Court, that this grant was void by the Common Law. But the greater doubt was conceived upon the ſecond Point; for the ſaid act of 34 *H.* 8. maketh all Letters Patents which ſhall be made within 7 years after good, notwithſtanding the miſnaming of any Town wherein the Honours, Mannors, &c. granted do lie. And it was ſaid, that here the Town was miſnamed, for the Tenements lay in *D.* and are ſuppoſed by the Patent to lie in *W.* and ſo the Town is miſtaken. And to this purpoſe the Book in 3 *Mar. Dier* 127. *b.* was cited, *Heydons* Caſe, where it is conceived that the miſpriſion of the Town and of the name of the Tenant alſo are remedied by the ſaid Act. And in this Caſe at the Bar it appeareth that the Tenements in the tenure of *John Brown* were contained within the particular, and were parcel of the value mentioned in the Letters Patents which *John Aylesworth* and *Ralph Dukenfield* purchaſed of the King. And by the Letters Patents all lands in the tenure of *John Brown*, &c. are granted as appeareth before. And ſo it appeareth as it was objected, That it was the Kings intent to paſs them, and the King was not deceived in his grant, for they were parcel of the value which the Patentees purchaſed, and the King hath accepted a conſideration of money from the Patentees for the ſame.

But it was reſolved by the whole Court, that notwiſtanding that theſe lands were in the tenure of *John Brown* for the rent of 6. s. 8. d. and were parcel of the value mentioned in the Letters Patents; and if this miſpriſion of the Town be not remedied by the ſaid Act, the Patentees ſhould loſe ſo much of their value as was in the tenure of *John Brown*; and the ſaid grant of all the lands in the tenure of *John Brown* ſhall be by the miſpriſion of the Town or be utterly void; yet the ſaid grant was not remedied by the ſaid Act. And difference was taken between a general grant as our Caſe is, and a grant which compredendeth convenient certainty: For ſuch general grants are not remedied by the ſaid Statute, nor by any other Act of Confirmation of Letters Patents, but ſuch grants only which comprehend convenient certainty, and that for two cauſes:

1. Becauſe that *generale nihil certum implicat*; For if a common perſon be bound to demiſe or grant all his lands in the tenure of *J. B.* in *W.* the obligor may ſay, that he hath not any lands there, for *generale nihil ponit*: and with that agreeth the Book in 21 *E.* 4. If a man be bound to be Nonſuit in all Actions which he hath againſt him in the Common Pleas, he may ſay, that there is no Action there;
[34] otherwiſe if the Condition be particular, *ſcil.* that he ſhall be Noſuit in a *Formedon*, &c. So that it appeareth, that general words do not imply any cetainty, nor ſhall conclude any perſon to ſay that he had nothing there. And the difference between general grants and particular appear in *Plow. Comm.* in *Worteſley's* Caſe 191 *b.* 20 *Aſſ.* 8. 9 *H.* 6. *fol.* 11, 12. 2 *Ed.* 4. 27. *b.* Then for as much as the eſſence of this general grant in the Caſe at Bar dependeth upon the Town, if the Town be miſtaken nothing is granted. And in this Caſe it cannot be ſaid that the Town in which the Tenements lie, as the Statute ſpeaketh, is miſtaken; for no Tenements are granted or mentioned to be granted by theſe Letters Patents, becauſe the general grant being entire was referred to a falſity, it cannot be conſtrued to extend to any lands or tenements, and therefore it cannot be ſaid, that the Town in which the lands lay, &c. is miſnamed.

Secondly, great inconvenience will follow, if ſuch general grants ſhall be remedied by the Act; for put, That the King being ſeiſed of 1000 acres of lands of the yearly value of 100. *per ann.* in *D.* in the County of *N.* parcel of the poſſeſſions of the late Priory of *N.* and one will deſire the King to grant to him all his lands in *F.* in the County of *S.* appertaining to the ſaid Priory, and in truth the King hath nothing in *F.* and becauſe none of his offices can find any lands there appertaining to the King he was the more eaſily induced to make the grant. But in ſuch Caſe, if by ſuch conſtruction all the land which the King hath in *D.* in the ſaid County ſhall paſs it ſhall be inconvenient. For as it is ſaid, *Doloſus verſatur in generalibus*; and the King and his Officers ſhall be by ſuch conſtruction utterly deceived. And therefore when the general words of the Patent do not comprehend content, number, nature, quality, certain name, nor any convenient certainty of the land, but the Town is the principal thing which reſtraineth the generality of the grant, and reduceth the ſame to certainty, it ſhall be dangerous to extend the ſame out of the Town compriſed in the grants by any conſtruction upon the ſaid Statute. But otherwiſe is it when the grant doth comprehend any convenient certainty, as of a Mannor, Farm, land known by certain name, or containing ſo many acres, &c. ſo as there may appear in the Letters Patents ſome convenient certainty of the thing which the King intended to paſs, for there the ſaid Act doth remedy the ſame, and the King cannot in ſuch Caſe be deceived. And as to the particular, the Judges in this Caſe did not give any regard to the ſame, for in this Caſe they ought to ground their
[*b*] Judgments upon their Letters Patents, and not upon the particular, for the particular is *prima intentio Regis*, and the Letters Patents are *ultima intentio Regis*. And to this purpoſe the Book in 16 *Eliz. Dier* 331. was cited, where the Judges took no regard to the particular. But note, the principal Caſe there is not to be likened to the Caſe at Bar; for there the words of the Patent are ſatisfied, but not in this Caſe, and therefore the greater doubt was conceived upon it; but the ſaid Caſe of 16 *Eliz.* was agreeed to be good Law by the whole Court. And afterwards Judgment was given for the Plaintiff.

Note Reader, it is the moſt ſure way for the Patentee to expreſs in the Kings grant before the general words as much as he can in certain. *Vide* 38 *H.* 6. 38. *b.* a difference between a ſpecial confirmation by Patent, and general. And the Attorney General and others were of Councel with the Plaintiff, and *Godfrey* and others with the Defendants.

Paſch.

Paſch. 35 Eliz. *in the Court of Wards.*

Sir *Rowland Heyward's* Caſe.

SIR *Rowland Heyward* Knight ſeiſed in fee of the Mannors of *Doddington*, alias *Ditton*, *Round Acton*, and *Wenlock* in the County of *Shrewsbury*, and divers other lands and tenements, whereof part was in the demean, part in leaſe for years with rent reſerved, and part in Copihold, by Indenture dated 2 *die Septembris*, *anno* 34 *Reginæ Eliz.* in conſideration of a certain ſum of money paid to him by *Richard Warren*, *Edward Pilſworth*, and *Willam Cotton*, demiſed, granted, bargained and ſold to the ſaid *Warren*, *Pilſworth* and *Cotton* the ſaid Mannors, Lands, Tenements, and the Reverſions and Remainders of them with all rents reſerved upon any demiſe, to have and to hold to them and their aſſigns preſently after the deceaſe of the ſaid Sir *Rowland Heyward*, for the term of 17 years, yeelding to the Heirs of Sir *Rowland* a red Roſe at the feaſt of St. *John Baptiſt*; which Indenture was acknowledged to be enrolled, and afterwasds the ſaid Sir *Rowland* by another Indenture covenanted with *Thomas Fanſhaw* and others to ſtand ſeiſed of the premiſſes to the uſe of himſelf and the heirs of his body; And no Attornment was ever had to the ſaid *Warren*, *Pilſworth* and *Cotton*. And afterwards the ſaid Sir *Rowland* died ſeiſed of the premiſſes, his heir within age, and left a third part to deſcend to his heir: In the Court of Wards the Queſtion was, If *Warren* and the other leſſees ſhall have the demeans, and the rents of the Copiholders, as an intereſt at the Common Law, and the rents of the leſſees for years by bargain and ſale by the Statute of 27 *H.* 8. without Attornment; or if any Attornment by the Common Law were requiſite at all to the future intereſt, or that the bargainees ſhall have election to take the ſame by bargain and ſale *in toto*, or by demiſe *in toto*, notwithſtanding their general entry; or if the intereſt which paſſeth as an intereſt at Common Law ſhall be preferred before the raiſing of the uſe. And after many arguments and great deliberation, it was reſolved by *Popham* and *Anderſon* cheif Juſtices, and the whole Court of Wards: [35] [b]

Firſt, if it ſhall paſs as a future intereſt at the Common Law, there ought to be Attornment of the leſſees for years, and the attornment in this Caſe ought to be in the life of Sir *Rowland Heyward* which is before the intereſt beginneth. But if a man make a leaſe of a Mannor to beging at a day to come, the Tenants may attorn either before or after the day, ſo as the Attornment be in the life of the parties. And in the Caſe at Bar becauſe there was not any Attornment of the leſſees for years in the life of Sir *Rowland Heyward*, it was reſolved, that if they take this future intereſt as a demiſe at Common Law, they ſhall not have the rents reſerved upon the ſaid leaſes for years. [a]

Secondly, that it ought to take effect intirely as a demiſe at Common Law, or intirely by bargain and ſale, by raiſing of an uſe, and not part by the Common Law, and for other part by raiſing of uſe, for by that the Mannor ſhall be diſmembred, which ſhall be againſt the expreſs demiſe and bargain; for both parties agree that a Mannor ſhall be wholly demiſed and bargained, and one Mannor accepted by the leſſee without any fraction or diviſion thereof.

Thirdly, it was reſolved that in this Caſe *Warren*, *Pilſworth* and *Cotton* had election to take the ſame, either by demiſe at Common Law, or by bargain and ſale; for although that at the Common Law, if *Ceſtuy que uſe* and his feoffeer joyn in a feoffment, grant, or demiſe generally, the ſame ſhall be by conſtruction of Law, the feoffment, grant or demiſe of the feoffees who were owners of the lands, and who paſs the eſtate by Common Law, and not by *Ceſtuy que uſe* who hath nothing but a truſt and confidence, and who deriveth only his authority by the Statute of 1 *R.* 3. as it is agreed in 21 *H.* 7. and the feoffee by Common Law be in ſuch Caſe by his own conſtruction preferred, yet when a man ſeiſed of lands in fee, for money demiſeth, granteth, bargaineth and ſelleth his lands for years, he who is owner of the land by his expreſs grant giveth election to the leſſee to take the ſame the one way or the other, for he hath ſole power to paſs the ſame by demiſe or by bargain; And therefore the Law ſhall not make conſtruction againſt ſuch expreſs grant, and namely in this Caſe, when it ſhall trench to the prejudice of the leſſees, for if the the Law ſhould enforce them to take it by demiſe, then they ſhould looſe the rents reſerved upon the ſaid leaſes for years; for it was agreed, if this intereſt ſhall take effect by bargain and ſale, then there needeth no attornment; for the Statute of 27 *H.* 8. *cap.* 10. of uſes, doth execute the poſſeſſion to it. And the Statute of 27 *H.* 8. *cap.* 16. of Enrolments doth not extend to the ſame becauſe that no eſtate of freehold paſſeth, but only an eſtate for years. Alſo at this day the uſe and intereſt paſs in a manner *uno flatu* together in an inſtant. [36]

Fourthly, it was reſolved, that this election doth remain to them, notwithſtanding the alteration of the eſtate by the ſecond Indentures, and notwithſtanding the death of the leſſor, and notwithſtanding alſo the Queen was entituled to the Wardſhip of the heir, as appeareth before: for they had an intereſt in them preſently, which they before election might aſſign over, and which the Executors of the ſurvivor ſhould have, although they all died before election; for here is not election to claim one of two ſeveral things by one and the ſame title, but to claim one and the ſame thing by one of the two ſeveral titles; for where the things are ſeveral, nothing paſſeth before election, and the election ought to be precedent; but when one and the ſame thing ſhall paſs, there it paſſeth preſently, and the election of the title may be ſubſequent; and therefore if I have three horſes, and I give unto you one of my horſes, in this Caſe election ought to be in the life of the parties, for in as much as none of the horſes is

given in certain, the certainty, and therefore the property beginneth by election. And with that agreeth 10 *Eliz.* 281. *Bullock's* Caſe; The Biſhop of *Shrewsbury* having a great wood of 1000. acres (called *Berewood*) enfeoffed another of an houſe and 17. acres parcel of the ſaid wood, and made livery in the houſe, none of the wood paſſed before election, and therefore his heir ſhall not make election: But when one only thing is granted, and the party hath election to take the ſame in one manner or other, there the intereſt veſteth preſently, and it ſhall be always in the election of the grantee or his Executors at any times to elect in what manner and degree he will claim the ſame: As if I grant to you a rent of 40. *s.* out of my Mannor of *D.* for years, you ſhall have in this Caſe but one ſum of 40. *s.* but you ſhall have election to take it in what manner or degree you will, that is to ſay, either as a rent-charge to charge the Mannor by diſtreſs, or to charge the perſon of the grantor in a writ of Annuity, and therefore the intereſt paſſeth preſently, and you or your Executors at any time ſhall make election at your pleaſure, and in the mean time the Law will not determine it one way or other. And therefore it was reſolved by all
[b] the Juſtices of *England*, and afterwards adjudged in the Common Pleas in a writ of Annuity between *George Fulwood* Gent. Plaintiff, and *William Ward* Gent. Defendant, where the Caſe was; That *William Ward* being Tenant for years determinable upon the life of *Thomas* Lord *Paget* of a Barn and certain Tithes in *Stretton* in the County of *Stafford*, granted a rent of 10. *l per annum*, by his deed bearing date 30 *Junii* 29 *Eliz.* out of the ſaid Barn and Tithes to *George Fulwood* for 15. years, with clauſe of diſtreſs; and afterwards 32 *Eliz.* the Lord *Paget* died, and the writ of Annuity was maintenable for the arrerages after the death of the Lord *Paget*, for there was not election given to have one of two ſeveral things, but to have one ſum in one degree as a Rent, or in another as an Annuity: And therefore preſently by the grant the thing veſted in the grantee, and his election doth always remain, either to make a real thing to charge the land, or a perſonal thing to charge the perſon. And there in the principal Caſe the act of God, *ſcil.* the death of the Lord *Paget* by which the rent was determined, was no determination of the Annuity. So in the principal Caſe, election being given to the ſaid leſſees to have one thing by one means or another, there the leſſees have intereſt veſted in them preſently, and election doth remain in them in what manner they will take the ſame. But when election is given to ſeveral perſons, there nothing veſted before election, and the firſt election ſhall ſtand. And it was ſaid, that if a man maketh a leaſe for life of two acres, the remainder of one acre to *I. S.* and of the other acre to *I. N.* he who firſt maketh election ſhall enjoy the one acre, and therefore the other acre hath veſted in the other. And it was ſaid, That if a man giveth two acres to another, *Habendum* one acre to him in fee, and the other acre to him in tail, and he alieneth both and hath iſſue and dieth, in this Caſe the iſſue may bring a *Formedon in diſcender*, for which acre he will, for the election is not determined by his death: for an eſtate paſſeth preſently by the livery, and the iſſue ſhall take by diſcent. But in the Caſe of 10 *Eliz.* 281. *Bullocks* Caſe, if the heir of the feoffee ſhould make the election, he ſhould be in as a purchaſor, for there nothing paſſeth of the 17. acres unto the feoffee before election, and by the Law he cannot be a purchaſor; for there theſe words (his heirs) were words of limitation. So that note Reader theſe differences concerning election.

[37] 1. When nothing paſſeth to the feoffee or grantee before the election, to have one thing or the other, there the election ought to be in the life of the parties, and the Heir or Executor cannot make the election. But when an eſtate or intereſt paſſeth preſently to the feoffee, donee or grantee, there election may be made by them, or by their Heirs or Executors.

2. When one thing paſſeth to the donee, or grantee, and the donee or grantee hath election in what manner or degree he will take it, there the intereſt paſſeth preſently, and the party his Heirs or Executors may make election when they will.

3. When election is given to ſeveral perſons, there the firſt election made by any of the parties ſhall ſtand.

4. In caſe election be given of two ſeverall things, always he who is the firſt agent, and who ought to do the firſt act ſhall have the election. As if a man grant a rent of 20. s. or a robe to one and his heirs, the grantor ſhall have the election, for he is the firſt agent by paiment of the one, or delivery of the other. So if a man make a leaſe yealding rent, or a robe, the leſſee ſhall have the election, *cauſa qua ſupra.* And with that agreeth the Books 9 E. 4. 36. *b.* 13 E. 4. 4. *b.* L. 5 E. 4. 6. *b.* 11 E. 3. *Annuity* 27. 11 *Aſſ.* 28. 29 *Aſſ.* 55. 3 E. 3. *Aſſiſe* 175. 43 E. 3. *Barre* 195. But if I give to you one of my horſes in my ſtable, there you ſhall have election, for you ſhall be the firſt agent by taking or ſeiſure of one of them, 2 *H.* 7. 23. *a.* And if one grant to another 20. loads of Haſel, or 20. loads of Maple to be taken in his wood of *D.* there the grantee ſhall have election, for he ought to do the firſt act, *ſcil.* to cut and take it.

5. When the things granted are annual things and are to have continuance, there the election remaineth to the grantor (in caſe the Law give him election) as well after the day as before; otherwiſe when the things are to be performed *unica vice.* And therefore, if I grant to another for life an annuity or a robe at the feaſt of *Eaſter*, and both are behind, the grantee ought to bring his Writ of Annuity in the disjunctive, for if he ſhall bring his Writ of Annuity for one only and recover, this Judgement ſhall determine his election for ever; for he ſhall never have a Writ of annuity after, but a *Scire facias* upon the ſame Judgement; which reaſon *Fitzherbert* in his *N. B.* not obſerving, held opinion contrary. But if I conttract with you to pay you 20. s. or a robe at the feaſt of *Eaſter*, after the feaſt you ſhall bring debt for the one or the other, *Vide* 9 E. 4. 36. 13 E. 4. 4. and the Books before.

6. The feoffee, &c. by his act and wrong may loſe his election, and give the ſame to the feoffor, &c. As if one enfeoff another of two acres, to have and to hold, one for life, the other in tail, and he be-
[b] fore election maketh a feoffment of both, in this Caſe the feoffor ſhall enter into which acre he will for the act and tort of the feoffee.

7. Al-

7. Although that the leaſſees in the Caſe in queſtion enter generally, yet they after may elect either to take by the demiſe, or by the bargain and ſale, for their general entry cannot be any determination of the election, no more then if one be Executor and demiſee of a term and he entreth generally, it is no determination of his election; and after the leſſees made their election, to take it by bargain and ſale, and thereupon they had the rents reſerved upon the leaſes for years, which otherwiſe they could not have.

Paſch. 38 Eliz.

The Biſhop of *Wincheſters* Caſe.

IN a Prohibition between *Robert Wright* Plaintiff, and *John Wright* Defendant, which began *Paſch.* 38 *Eliz.* the Caſe was ſuch; the Plaintiff ſhewed that *Stephen Gardiner* Biſhop of *Wincheſter* the 4th day of *July* 38 *H.* 8. was ſeiſed in the Mannor of *Eaſtmean* in *Eaſtmean* in the County of *Southampton* in the right of his Biſhoprick; and that the ſaid Biſhop and all his predeceſſors of the ſaid Biſhoprick ſeiſed of the ſaid Mannor had holden and enjoyed the ſcite of the ſaid Mannor, and all the demeans of the ſaid Mannor time whereof the memory of man was not to the contrary, for him his Tenants and Farmers for years, or at will, *exonerat' acquietat' & privilegiat' de & a ſolutione decimarum quarumcunque de in vel ſuper præd' ſcit' & terr' dominic' & qualibet ſeu aliqua inde parcel' annuatim quoviſmodo per totum tempus præd' creſcent', contingent', ſive renovant'.* And the Plaintiff conveyed to himſelf an intereſt for years in parcel of the demeans of the ſaid Mannor by the demiſe of the ſaid Biſhop; And that the Defendant being Farmer of the Rectory of *Eaſtmean* had libelled againſt him for Tithes growing within parcel of the demeans of the ſaid Mannor before the Judges delegates, and how that the Plaintiff hath ſhewed all the matter, and pleaded the ſame before them, and offered with inevitable proof to prove it; yet *prædicti Judices delegati in prædict' Cur' Chriſtianitatis coram eis placitum allegationes & probationes prædict' Roberti Wright admittere recuſaverunt.* The defendant to have a conſultation, confeſſed that the ſaid Plaintiff had alledged all the matter before the Judges delegates, and that the Judges delegates allowed the plea and allegation of the Plaintiff, and admitted him to his proof therof, *abſque hoc quod prædict' Judices delegati in Curia Chriſtianitatis coram eis placitum allegationes & probationes prædict' Roberti Wright admittere recuſaverunt.* And upon this plea the Plaintiffs Councel did demurre in Law; and in this Caſe three Points were removed. [43. b]

1. If the ſaid preſcription for diſcharge of Tithes were good or not.
2. If the Plaintiff being a Lay man ſhall take benefit thereof.
3. If the ſaid traverſe were good or no. And as to the firſt Point three things were conſidered:

1. Who were by the Common Law capable of Tithes in pernancy and who not.
2. Who was capable of a diſcharge of Tithes at the Common Law, and who not.
3. How he who was capable of a diſcharge might be diſcharged of Tithes, *ſcil.* either by preſcription, or by compoſition, &c.

As to the firſt it was reſolved, That none by the Common Law had capacity to take Tithes but only ſpiritual perſons, or a mixt perſon, and regulary no meer Layman was at the Common Law capable of them if not in ſpecial Caſes; for no Layman but in ſpecial Caſes could ſue for them at the Common Law in the ſpiritual Court, *ſcil.* for the ſubtraction of them. See the Books in 7 *E.* 3. 5. 11 *Aſſ.* 9. 44 *E.* 3. 5. 10 *H.* 7. 18. & 7 *E.* 3. 6. *Dier* 84. and the Books in 43 *E.* 3. 34. & 44 *E.* 3. 39. that a Farmer of a Parſon may ſue for Tithes; but it appeareth that ſuch Farmer was a ſpiritual man, as Vicar, &c. And ſo it was ſaid by ſome are all the other Books in 31 *H.* 6. 11. 35 *H.* 6. 39. 2 *E.* 4. 15. 6 *E.* 4. 3. 12 *H.* 7. 24. (in which in truth there are but opinions) to be intended: And if the Common Law had generally enabled a Layman to be capable of Tithes, the Common Law would have given him remedy for the recovery of them: but regularly a Layman had not any remedy for the ſubſtraction of Tithes till the Statut of 32 *H.* 8. *cap.* 7. But ſee 22 *Aſſ.* 75. that the King was capable of Tithes at the Common Law, for he was *perſona mixta*, and his Patentee alſo by his Prerogative as it there appeareth.

To the ſecond Point it was reſolved, That a meer Layman who who was not capable of Tithes in pernancy, yet was capable of a diſcharge of Tithes at the Common Law in his own land as well as a ſpiritual man; for by the Common Law, the Parſon, Patron, and Ordinary might have diſcharged a Pariſhioner of Tithes in his land, &c. or the Pariſhioner might have given part of his land to the Parſon for diſcharge of Tithes in the reſidue. And for proof thereof ſee the Book in 8 *E.* 4. 14. and *Regiſter* 38. where it appeareth that a Layman might be diſcharged of Tiths at the Common Law; but a Layman might be dicharged of Tithes at the Common Law by grant, or compoſition, as it appeareth in the ſaid Books, but not by preſcription to be diſcharged of Tithes; for it is commonly ſaid in our Books, that he may preſcribe *in modo decimandi*, but not *in non decimando*, and the reaſon thereof is, becauſe he is not [b] but in ſpecial Caſes capable of Tithes at the Common Law, and therefore without ſpecial matter ſhewed it ſhall not be intended that he hath any lawful diſcharge. And for this cauſe in favour of holy Church, although it may have a lawful be beginning, the Law will not ſuffer ſuch preſcription in this

Caſe,

Caſe, to put it to the trial of Laymen, who rather will ſtrain their conſciences for their private benefit, then yeeld to the Church the duties which belongs thereunto. And the Law had great policy therein, for the decay of the Revenues of men of holy Church, in the end will be the overthrow of the ſervice of God and of his Religion. And therefore it is recorded in Hiſtory that there were (amongſt others) two greivious Perſecutions, one under *Diocleſian*, the other under *Julian* called the *Apoſtata*; for it is recorded that one of them intending to have rooted out all the Profeſſors and Preachers of the word of God, *occidit omnes presbyteros*, but notwitſtanding that Religion flouriſhed, for *ſanguis Martyrum eſt ſemen Eccleſiæ*; and yet the ſame was a fearful and grievious Perſecution: But the Perſecution under the other was more grieveous and dangerous, becauſe (as the Hiſtory ſaith) *ipſe occidit presbyterium*, for he robbed the Church, and ſpoiled ſpiritual perſons of their Revenues, and took all from them whereon they might live; and thereupon in ſhort time did follow great ignorance of the true Religion and ſervice of God, and thereby great decay of the Chriſtian Profeſſion; for none will apply themſelves, or their ſons, or any other who he hath in charge to the ſtudy of Divinity, when they ſhall have after long and painful ſtudy nothing to live upon. And it was ſaid, that if a perſcription in *Non decimando* ſhall be ſuffered, the Church will loſe more then gain in theſe days. And for this cauſe ſuch preſcription was not allowed of. But a ſpiritual perſon who was capabe of Tithes at the Common Law in pernancy may preſcribe to be diſcharged of Tithes generally: for as he may preſcribe to have a portion of Tithes in the land of another, ſo they may preſcribe to diſcharge their own lands of Tithes; for it is commonly ſaid in our Books, that before the Councel of *Lateran*, every man might have given his Tithes to any Eccleſiaſtical perſon he would, and that appeareth by the Books aforeſaid. And note, that it is recited by the Statute of 2 *E. 6. cap.* 13. that land may be diſcharged of Tithes by preſcription, but that cannot be in Caſe of a Layman, *Ergo* it ought to be in Caſe of a ſpiritual man, *Vide* 10 *Eliz. Dier* [45] 277. The Orders of the *Ciſtercians*, *Templars*, & *Hoſpitularii* were diſcharged of Tithes *ſub modo*, *ſcil. quamdiu propriis manibus excolutur*, *&c.* and 18 *Eliz. Dier* 349. And as to the ſecond Point the ſame dependeth upon the firſt, for if the land of the Biſhop were diſcharged in his hands abſolutely by preſcription, then the demiſing thereof to a Layman cannot make the ſame chargeable which was diſcharged before; and in that it may be more beneficial to the Biſhop, for in reſpect of that he might reſerve the greater rent.

To the third Point it was reſolved, that the traverſe was inſufficient, for as it is ſaid in 8 E. 4. 14. the Spiritual Court will not allow any plea in diſcharge of Tithes, and therefore the refuſal in ſuch Caſe is not material, for the party may have a prohibition before any ſuch plea pleaded by him in diſcharge of tithes, and therefore in ſuch Caſes the allegation of the refuſal of the Eccleſiaſtical Judge are words more of courſe then of effect or ſubſtance; but in ſome caſe the refuſal is traverſable, as it was adjudged *M.* 30 & 31 *Eliz.* in this Court between *Morris* and *Eaton*, where the Caſe was, that *Morris* was ſued by *Eaton* in the ſpiritual Court for Tithes; *Morris* did alledge that *Eaton* did not read the Articles according to the Statute, and that the Eccleſiaſtical Judge did refuſe to allow the ſame; and this refuſal was traverſable by the Judgement of the Court, for otherwiſe upon ſuch ſurmiſe all matters might be prohibited in the Spiritual Court; although the Spiritual Judge do all that belongeth to Law and Juſtice. And in the ſame Caſe the party grieved may have his remedy by his appeal; but in the other Caſe of diſcharge of Tithes, or *de modo Decimandi*, the Judges of out Law well know, that the Eccleſiaſtical Judges will not allow ſuch allegation, and ſo is the difference.

Note Reader, a man may preſcribe, that he and all thoſe whoſe eſtate he hath in the Mannor of *D.* in *D.* whereof, &c. have paid to the Parſon for the time being a certain penſion yearly for maintenance of Divine Service there, in contentation of all Tithes renewing or ariſing within the ſame Mannor: and further preſcribe, that he and all thoſe whoſe eſtate he hath in the ſaid Mannor time out of mind, &c. have uſed in reſpect of the ſaid penſion ſo paid to the Parſon, to have all the Tithes accruing and ariſing within the ſaid Mannor, or any part thereof, *ſcil.* of all lands holden of the ſaid Mannor, or parcel thereof: And ſuch preſcription was adjudged good in the Kings Bench *M.* 39 & 40 *Eliz. Rot.* 199. in an Action upon the Caſe between *Pigot* and *Hern*, in which Caſe two Points were reſolved.

1. That in ſuch ſpecial Caſe, a Lay perſon owner of the ſaid Mannor ſhall ſue for the Tithes upon the ſpecial matter aforeſaid in the Spiritual Court, for it ſhall be intended at the beginning, the Lord was ſeiſed of the whole Mannor before the Tenancies were derived thereout, and then by compoſition or other lawful means the Lord ſhould have all the Tithes within the Mannor for the ſaid penſion paid [*b*] to the Parſon; and the Law intendeth that at the beginning it was for the maintenance of Divine Service, and *pro bono Eccleſiæ*, the reaſon of which intendment is the continual uſage of time, &c.

2. It was reſolved, that upon this ſpecial matter adjudged, a man may have Tithes as appurtenant to a Mannor; for he preſcribeth by a *Que* eſtate in the Mannor, and therefore cannot have them in groſs. But it was adjudged in *Winſcombes* Caſe in this Court in a Prohibition *Hill.* 35 *Eliz.* that a man cannot preſcribe generally in him and all thoſe whoſe eſtate he hath in the Mannor to have any Tithes appertaining to the ſame; for without ſuch ſpecial matter ſhewed, Tithes which are Spiritual things, and due *jure Divino*, for the ſubſtraction of which remedy lieth only in the Spiritual Court, and no remedy at the Common Law, cannot be parcel or appurtenant to a Mannor, or any other temporal Inheritance. And the Attorney General was of Councel with the Plaintiff, and *Walter* of the Inner Temple with the Defendant.

Trin.

Trin. 38 Eliz. *in* B. R.

The Archbiſhop of *Canterburys* Caſe.

IN a Prohibition in the Kings Bench between *Green* and *Balſer* the Caſe was, That in *Maidſtone* was a Religious Colledge, to which the Rectory of *Maidſtone* was appropriated. And the ſaid Colledge had divers lands and tenements within the ſaid Pariſh of *Maidſtone*, and all was given to the King by the Statute of 1 *E.* 6. And afterwards the ſaid Rectory was conveyed to the Biſhop of *Canterbury*, and the lands parcel of the poſſeſſions of the ſaid Colledge were conveyed to the Lord *Cobham*; and now the Farmer of the Lord *Cobham* brought a Prohibition againſt *Balſer* Farmer of the ſaid Rectory to *Whitegift* Archbiſhop of *Canterbury*, and in his Prohibition he alledged the branch of the Statute of 31 *H.* 8. concerning diſcharge of Tithes, and ſhewed that the Maſter of the ſaid Colledge was ſeiſed of the ſaid lands, and of the ſaid Rectory *ſimul & ſemel*, as well at the time of the making of the Act of 31 *H.* 8. as at the making of the ſaid Act of 1 *E.* 6. and held them diſcharged of Tithes; and ſhewed the ſaid Act of 1 *E.* 6. by which the ſaid Colledge was given to King *E.* 6. and that thereupon the Defendant did demur in Law. And in this Caſe divers Queſtions were moved. [46]

1. If the ſaid Colledge came to the King as well by the Statute of 31 *H.* 8. as by the Statute of 1 *E.* 6. for if this Colledge came to the King by the Statute of 31 *H.* 8. then without queſtion the branch of the ſaid Act concerning diſcharge of Tithes extendeth to it: And it was objected by the Plaintiffs Councel, that the words of the ſaid Act are general, *ſc.* That all Monaſteries, Colledges, &c. which hereafter ſhall happen to be diſſolved, &c. or by any other means come to the Kings highneſs, &c. ſhall be veſted, deemed, and adjudged by authority of this preſent Parliament in the very actual and real poſſeſſion of the King, &c. And when this Colledge came to the King by the Statute of 1 *E.* 6. it came unto the King within theſe words of the Act (by any mean.) But it was anſwered by the Defendants Councel, and reſolved by the Court, That that could not be for divers cauſes: [b]

1. When the Statute ſpeaks of diſſolution, renouncing, relinquiſhing, forfeiture, giving up, &c. which are inferiour means by which ſuch religious Houſes came to the King, then the ſaid latter words (or by any other means) cannot be intended of an Act of Parliament, which is the higheſt manner of conveyance that can be; and therefore the makers of the Act would have put that in the beginning, and not in the end after other inferiour conveyances, if they had intended to extend the Act thereunto. But theſe words (by other means) are to be ſo expounded, *ſcil.* by any other ſuch inferiour means. As it hath been adjudged, that Biſhops are not included within the Statute of 13 *Eliz. cap.* 10. for the Statute beginneth with Colledges, Deans and Chapters, Parſons, Vicars, and concludes with theſe words, And others having ſpiritual promotions; theſe latter words do not include Biſhops, *cauſa qua ſupra.* So the Statute of *Weſt.* 2. *cap.* 41. the words of which are, *Statuit Rex, quod ſi Abbates, Priores, cuſtodes Hoſpital' & aliarum domorum religioſarum, &c.* theſe latter words do not include Biſhops, as it is holden 1 & 2 *Phil. & Mar. Dier* 109. for the cauſe aforeſaid.

2. The ſaid clauſe of 31 *H.* 8. That the ſaid Religious houſes ſhall be in the King by authority of the ſame Act; and the Statute of 1 *E.* 6. enacts, That all Colledges, &c. ſhall be by authority of this Parliament adjudged and deemed in the actual and real poſſeſſion of the King, ſo that the latter Parliament being of as high nature as the firſt was, and providing by as expreſs words, That the Colledges ſhall be by authority of the ſaid Act in the actual poſſeſſion of the King, the ſaid Colledge cannot come to the King by the Act of 31 *H.* 8. It is ſaid in 29 *H.* 8. *Parliament & Statutes Br.* if lands be given to tenant in tail in fee, his iſſue cannot be remitted, for the latter Act doth take away the Statute of *Donis, &c.* 3. The uſual form of pleading of them which came to the King by the Statute of 1 *E.* 6. and by the Act of 31 *H.* 8. doth manifeſt the Law clearly, *ſcil.* to plead ſurrender or relinquiſhment, &c. *virtute cujus ac vigore* of the Statute of 31 *H.* 8. the King was ſeiſed, but to plead the Act of 1 *E.* 6. of Chauntries, *virtute cujus ac vigore* of the Statute of 31 *H.* 8. was never heard or ſeen, and for all theſe cauſes it was reſolved, that this Colledge came to the King by the Act of 1 *E.* 6. and not by the Act of 31 *H.* 8.

The ſecond Queſtion was, for as much as the ſaid Colledge came to the King by the Act of 1 *E.* 6. and not by the Act of 31 *H.* 8. if the ſaid branch of diſcharge of Tithes ſhall extend to ſuch Colledges which came to the King by any other Act, and not by the Act of 31 *H.* 8. and it was objected, that the ſaid branch ſhould extend to Colledges which came to the King by any other act, for it was ſaid, that although the preamble of the ſaid branch ſaith, The late Monaſteries, &c. yet this is not literally to be underſtood of Monaſteries only which were diſſolved before the Act, for (late) is to be conſtrued according to the body of the Act, *ſc.* of thoſe which were diſſolved before, or which ſhall come to the King afterwards by the ſaid Act, that when they are diſſolved and in the King by force of this Act, this Act may call there (late) *quod fuit conceſſum per Curiam.* Alſo they ſaid, that the words of the branch it ſelf are general, *ſcil.* any Monaſteries and Colledges, &c. without any limitation, ſo that they conceived that the words of the ſaid branch made for them, and that this clauſe of diſcharge ſhall extend to all Monaſteries, &c. Colledges, &c. *quæcunque*, by what means ſoever they came to the King; and they ſaid that the intent of the Act was ſo, for the intent of the Act was to benefit the King, and to make the Subject [47]

to

to have more deſire to purchaſe them, &c. Againſt which it was ſaid by the Defendants Councel, and reſolved by the whole Court, that neither the words, nor the meaning of the ſaid branch did extend to any Monaſteries, &c. but to thoſe only which came to the King by the Act of 31 *H.* 8. for it ſhall be abſurd, that the branch of the Act of 31 *H.* 8. ſhall extend to a future Act of Parliament which the makers of the ſaid Act of 31 *H.* 8. without the ſpirit of Prophecy could not have foreknowledge of; but this clauſe of diſcharge ſhall extend only to thoſe poſſeſſions which came to the King by the ſame Act. And where it was ſaid, that the firſt words of the Act are general, the ſame is true, but the concluſion of that branch is, In as large and ample manner as the late Abbots, &c. ſo that (late) being ſo intended as it hath been agreed on the other ſide, *ſcil.* only of Religious houſes which came to the King by 31 *H.* 8. It is clear that that branch cannot extend to this Colledge which came to the King by the Act of 1 E. 6.

The third Queſtion was, admitting that the ſaid Colledge had come to the King by the Statute of 31 *H.* 8. If ſuch general allegation of unity of poſſeſſion of the Rectory and of the lands were ſufficient; and it was reſolved by the Court, That it was not ſufficient, for no unity of poſſeſſion ſhall be ſufficient within the ſame Act, but a lawful and perpetual unity of poſſeſſion time out of mind, &c. as it was adjudged *M.* 34 & 35 *Eliz.* in a Prohibition between *Valentine Knightly* Eſquire Plaintiff, and *William Spencer* Defendant, where the Caſe was, The Plaintiff in a Prohibition ſhewed, that *Philip Abbot* of *Eveſham*, and all his predeceſſors time out of mind, &c. were ſeiſed as well of the Rectory impropriate of *Badby cum Newnam* in the County of *Northampton*, as of the Mannor of *Badby cum Newnam* in *Badby* aforeſaid in
[b] his demean as of fee in the right of his Monaſtery *ſimul & ſemel* until to the ſuppreſſion of the ſame Monaſtery, *quodque ratione inde* the ſaid Abbot and all his predeceſſors until to the diſſolution of the ſame Monaſtery had holden the ſaid Mannor diſcharged from the point of Tithes until to the diſſolution of the ſame houſe, and ſhewed the branch of the Statute of 31 *H.* 8. concerning diſcharge from the point of Tithes, and conveyed the ſaid Mannor to *Knightly*, and the ſaid Rectory to *Spencer*, who libelled in the Spiritual Court for Tithes of the demeans of the ſaid Mannor againſt *Knightly*, who upon the matter aforeſaid brought the Prohibition, and it was adjudged that the Prohibition was maintainable; For the ſaid branch of the Act of 31 *H.* 8. was made to prevent two miſchiefs, one, that otherwiſe all the Impropriations of Rectories to houſes of Religion had been diſappropriate; for if the body to which the Rectory had been appropriated had been diſſolved, the impropriation to ſuch body had been diſſolved alſo, as appeareth by 3 *E.* 3. 21 *E.* 4. *a.* 21 *H.* 7. *a.* *F.N.B.* 33. *k. l.* Another miſchief was, that many religious perſons were diſcharged of payment of Tithes, ſome by their Order, as the *Ciſtercians*, *Templars*, *Hoſpitallers* of S. *Johns* of *Jeruſalem*, as appeareth by 10 *Eliz.* *Dier.* 277. Some by Preſcription, ſome by Compoſition, ſome by the Popes Bulls, &c. And the greater part of Religious houſes, as the ſaid Abby of *Eveſham* was, were founded before the Councel of *Laterane*; and before time of memory, it ſhall be infinite, and in a manner impoſſible by any ſearch to find all the diſcharges and immunities which ſuch Religious houſes had. And for this alſo the ſaid branch was made. And the great doubt of the ſaid Caſe was conceived upon this word (diſcharge) for it was ſaid, that unity of poſſeſſion was not any diſcharge of Tithes, and by conſequence was not ſuch diſcharge as was within the intent of the ſaid Act. And for the force of this word (diſcharge) 18 *Eliz.* 3. *Bar* 247. 35 *H.* 6. 10. 22 *E.* 4. 40. & 6 *H.* 7. 10. were cited. But as to that it was reſolved by the Court:

1. That the Statute doth not ſay diſcharge of Tithes, but diſcharge of payment of Tithes.

2. The Statute doth not ſay, diſcharge of payment of Tithes abſolutely, but as freely as the Abbot, &c. held the ſame at the day of diſſolution, and then this word (diſcharge) being referred to a certain time, cannot be intended of a ſuſpenſion by unity. As if a man ſeiſed of a rent diſſeiſe the tenant of the land, and maketh a feoffment with warranty, the feoffee ſhall vouch as of land diſcharged of the rent, and yet the rent was but ſuſpended, but every ſuſpenſion is a diſcharge for a time, and there diſcharge being referred to the time of the warranty extendeth to ſuſpenſion. *Vide* 30 *E.* 3. 30. 3 *H.* 7. 41. 21 *H.* 6. 9. *F. N. B.* 135. *c.*

[48] 3. The Statute ſaith, as freely as the Abbot, &c. retained the ſame. And it was ſaid, that it was the intent of the King, and of the makers of the ſaid Act to diſcharge the land of payment of Tithes in ſuch caſe of unity of poſſeſſion, being a general Caſe to induce purchaſors the rather to purchaſe the land for greater prizes.

4. For the infinite impoſſibility, and the impoſſible infiniteneſs as hath been ſaid, all the diſcharges which ſuch Religious houſes had, could not be known; and the ſame conſtruction was made in this Court, *Hill.* 24 *Eliz.* in a Prohibition between *John Roſe* and *William Gurling* for tithes in *Flixton* in the County of *Suffolk*. See 18 *Eliz.* *Dier* 349. the Parſon of *Peykirck*'s Caſe. And it was reſolved in the ſaid Caſe of *Knightly*, that nothing could be traverſed but the unity, for *ratione inde*, &c. is but the concluſion and the judgment of the Law upon the precedent matter; but it was alſo reſolved, that if before the diſſolution the Farmers of the demeans have paid tithes, &c. unto the Abbot, &c. then the intendment of the Law by the reaſon of the ſaid unity of poſſeſſion (which ought to be time out of mind, &c.) that the land was diſcharged of the payment of Tithes will not hold place. For as *Bracton* ſaith, *Stabitur præſumptio donec probetur in contrarium.* But if the lands were always occupied by the Abbots or demiſed over, and no Tithes paid for the ſame before the Act, although the land be conveyed to one, and the Rectory to another, yet the land is diſcharged of the payment of Tithes; And if the Farmers of the demeans have paid Tithes before the Act, the ſame ſhall be pleaded by the Defendant in the Prohibition, and iſſue thereupon may be taken, as it was in the like Caſe, *Trin.* 38 *Eliz.* in this Court between *Edward Grevil* Eſquire, poſſeſſor of the demeans of the Mannor of *Naſing* in the County of *Eſſex* Plaintiff, and *Martin Trot* proprietor of the Rectory of *Naſing* Defendant, where againſt ſuch unity of poſſeſſion in manner and form aforeſaid, alledged by the Plaintiff in the Abbot of *Waltham* and his predeceſſors,

deceſſors, &c. in the Rectory and demeans, and with like concluſion as aforeſaid: The Defendant alledged paiment of Tithes by the Farmers of the ſaid demeans (without any traverſe by the rule of the Court) and iſſue was joined thereupon, and was tried againſt *Trot*, and therefore the Prohibition ſtood. And it was reſolved, that although the Plaintiff in the Caſe at Bar alledged that the Maſter of the ſaid Colledge at the time of the making of the ſaid Act of 1 *E.* 6. held them diſcharged of Tithes; and although that the lands of ſuch Religious perſons may be diſcharged of Tithes by preſcription, as it hath been late adjudged in the caſe of one *Wright* in this Court, or by compoſition, &c. yet ſuch general allegation that he was diſcharged of Tithes was not ſufficient without ſhewing how he was diſcharged, either by preſcription, compoſition, or other lawful means. But if the land come to the King by the Statute of 31 *H.* 8. then by force of the ſaid branch of dicharge of the paiment of Tithes ſuch general allegation that ſuch Prior, &c. held the land at the time of the diſſolution of the ſaid Priory diſcharged of the paiment of Tithes without ſhewing how, had been ſufficient, and ſo is the Common uſe in Prohibitions. [b]

The fourth Queſtion in the Caſe at Bar was, If any houſe which was Eccleſiaſtical and not Religious, as Biſhops, Deans and Chapters, Archdeacons, and the like ſhall be within the Act ſaid of 31 *H.* 8. for no houſe within the Act of 31 *H.* 8. is ſaid Religious, but ſuch which was regular, and which conſiſted of ſuch perſons which had profeſſed themſelves, and vowed three things, that is to ſay, Obedience, Voluntary poverty, and perpetual Chaſtity; and thoſe were ſaid in our Law, dead perſons in Law. For after ſuch profeſſion their heirs ſhall have their lands, and their Executors or Adminiſtrators their goods, and that was called civil death, which was the cauſe that when a leaſe for life was made, always the *Habendum* was, To have and to hold to him *durante vita ſua naturali*, for it was then taken, that if the *Habendum* had been *durante vita ſua* (without ſaying *naturali*) the civil death, that is to ſay, the entry into Religion had determined the ſame. But it was reſolved by the Court, that no Eccleſiaſtical houſe, if it be not Religious, is within the Act of 31 *H.* 8. for divers cauſes.

1. The words of the Act are always through the whole Act in the copulative, Religious and Eccleſiaſtical, ſo that if it be Eccleſiaſtical only it is out of the Act.

2. The makers of the Act gave to the King as well thoſe Religious and Eccleſiaſtical houſes as were diſſolved, as thoſe which ſhould be afterwards diſolved, but none were diſſolved before the Act but only Religious houſes, and no houſe Eccleſiaſtical only, for no Biſhoprick, Deanery, Archdeaconry, &c. or like Eccleſiaſtical and Secular Corporation was diſolved before; therefore no Eccleſiaſtical houſe which was not Religious, which after the Act ſhall be diſſolved, was within the intent and meaning of the ſaid Act.

Thirdly, it is enacted by the Statute of 31 *H.* 8. that all Religious and Eccleſiaſtical houſes which after ſhall be diſſolved, &c. ſhall be in the actual poſſeſſion of the King in the ſame ſtate and condition as they were at the time of the making of the ſaid Act, upon which clauſe of the Statute it was adjudged *Paſch.* 5 *Eliz. Rot.* 129. reported by Serjeant *Bendloes*. And *Mic.* 6 & 7 *Eliz. Dier.* 231. and *Plow. Comm.* 207. that if an Abbot after the ſaid Act grant the next avoidance of a Church, or maketh a leaſe for years, and afterwards ſurrendereth, ſo that by the Act the poſſeſſions of the Abby ought to be in the King in the ſame ſtate and condition as they were at the time of the making of the Act; and at the time of making of the Act the land and the advowſon were diſcharged of all intereſts, for this cauſe it was adjudged in both Caſes that the leaſe and the grant were void by the ſaid Act. But if a Dean and Chapter and other ſuch Eccleſiaſtical and Secular Corporations ſhall be within the ſaid Act, then if they will ſurrender their poſſeſſions they ſhall avoid all their own grants and leaſes, which ſhall be dangerous. And that was one of the principal reaſons that Colledges, Chanteries, &c. which came to the King by the Acts of 37 *H.* 8. or 1 *E.* 6. ſhall not veſt in the King by the Act of 31 *H.* 8. for the miſchief before, for avoiding of their leaſes, grants, &c. And to conclude this Point it was holden in the Common Pleas in *Parret's* Caſe concerning the Priory of *Fridiſwide*, that if the houſe be not Religious and regular, that it is not within the Act of 31 *H.* 8. [49]

And as to the opinion of 10 *Eliz. Dier* 280. *Corbet's* Caſe, concerning the Priory of *Norwich*, it ſeemeth to differ much from other Deans and Chapters, for the Dean and Chapter of *Norwich* was once Religious, for they were Prior and Covent before; and yet this Caſe was denied by *Popham* cheife Juſtice, and ſome other of the Judges for the cauſes aforeſaid.

Fifthly, it was holden by the Court, that although it is provided by the Statute of 1 *E.* 6. that the King ſhall have the lands of the Colledges, &c. in as ample and large manner as the ſaid Prieſts, Wardens, &c. had or enjoyed the ſame, that theſe general words ſhall not diſcharge the land of any Tithes, for theſe are not iſſuing out of land, but are things diſtinct from the land. For as the Book is 42 *E.* 3. 13. the Prior ſhall have tithes of land againſt his own feoffment of the ſame land; and it is not good cauſe of Prohibition to alledge unity of poſſeſſion in a Colledge which came to the King by the Statute of 1 *E.* 6. as a man may by Statute 31 *H.* 8. in an Abbot, Prior, &c. as is aforeſaid; for the Statute of 1 *E.* 6. hath no ſuch clauſe of diſcharge of paiment of Tithes as the Statute of 31 *H.* 8. hath. And therefore ſuch perpetual unity, as hath been ſaid before, will not ſerve upon this Act of 1 *E.* 6. And afterwards a Conſultation was granted: And another Conſultation was granted the ſame Term in another Prohibition upon the ſame matter, between *Green* and *Buffken*. And *Laurence Tanfield* and others were of the Councel with the Plaintiff, and the Attorney Genearl and others with the Defendant. [b]

Paſch. 39 Eliz. *in the Exchequer.*

Sir *Hugh Cholmley*'s Caſe.

[50] SIR *Hugh Cholmley* Debtor to the Queen, brought an Action of Treſpaſs in the Exchequer againſt *Randal Hamner* and others, *Quare clauſum fregit* in *Bettifield* in the County of *Flint*, *quo minus*, *&c.* And upon Not guilty pleaded, the Jury gave a ſpecial verdict to this effect; *Thomas Holford* had iſſue two ſons, *Chriſtopher* the eldeſt, and *George* his younger ſon; *Chriſtopher* had iſſue *Mary* wife of the ſaid Sir *Hugh Cholmley* now Plaintiff; and that the ſaid *Thomas Holford* was ſeiſed in fee of the land in queſtion amongſt others; and he and *Jane* his wife, and *Chriſtopher* their ſon did levy a fine of the ſaid lands 7 *Eliz.* to *John Warren* and *Thomas Stanley*, *&c.* to the uſe of the ſaid *Thomas Holford* for life, and after to the uſe of the ſaid *Chriſtopher* and his heirs males of his body, and afterwards to the uſe of the ſaid *George*, and to the heirs males of his body, &c. and after to the uſe of the right heirs of the ſaid *Thomas*. And after, that is to ſay, in *Sept.* 11 *Eliz.* the ſaid *Thomas Holford* died; 23 *Jan.* 12 *Eliz.* the ſaid *George* by Indenture between him and *John Warren* enrolled within ſix months in the Chancery for 20 l. bargained and ſold the Tenements aforeſaid, and all his eſtate, right, title and intereſt in them to the ſaid *John Warren* to have and to hold the tenements aforeſaid and all his eſtate, right, title, in them to the ſaid *John Warren* for the life of the ſaid *Chriſtopher*, and after his death the remainder to the Queen her heirs and Succeſſors for ever upon condition that the eſtate ſhall be [b] void upon tender of 20 l. at the Chappel of the Rolls to the ſaid *Warren*, or to the Queen her heirs or Succeſſors; 14 *Martii* 12 *Eliz.* the ſaid *Chriſtopher* did enfeoff Sir *Hugh Cholmley* father of the Plaintiff and others to the uſe of them and their heirs, and 17 *Aprilis* 12 *Eliz.* at the great Seſſions holden within the County of *Flint* a common Recovery was had againſt the ſaid feoffees, who vouched to warranty the ſaid *Chriſtopher* who vouched over the common vouchee, and execution was had accordingly, which was to the uſe of *Chriſtopher* and his heirs. And afterwards, that is to ſay 21 *Novemb.* 14 *Eliz.* *George Holford* tendred 20 l. to *Warren* at the Chappel of the Rolls, which he received. After which tender the Queen by her Letter Patents bearing date 14 *Decemb.* 14 *Eliz.* reciting the grant made by the ſaid *George Holford* to *Warren*, the remainder to her upon the condition aforeſaid; and that the ſaid grant and remainder to her was by fraud and covin, &c. *prout nobis ſatis liquet*, the Queen *ex certa ſcientia & mero motu* granted the remainder which ſhe had in the premiſſes to the ſaid *Chriſtopher* in fee. And afterwards 15 *Decemb.* 14 *Eliz.* *George Holford* by Indenture delivered at *Weſtminſter* and enrolled within ſix months in the Chancery, bargained and ſold to *John Bruin* the tenements aforeſaid, to have and to hold for the term of the life of *Chriſtopher* the remainder to the Queen in fee upon condition to ceaſe upon tender of 30 s at the Church of St. *Dunſtans*, &c. to which grant 18 *Decemb.* 14 *Eliz.* *Bruin* agreed; and afterwards 4 *Feb.* 14 *Eliz.* another Recovery with double voucher in which the ſaid *Chriſtopher* was vouched again was ſuffered, which Recovery was to the uſe of the ſaid *Chriſtopher* and his heirs, *anno* 19 *Eliz.* *Chriſtopher* died without iſſue male, 27 *Jan.* 23 *Eliz.* *George* paid the 30 s. to *Bruin* according to the condition which was found by Inquiſition, found by force of a Commiſſion under the great Seal of *England*, upon which the ſaid *George* ſhewed his title to the Court. And thereupon the Defendants by the commandment of the ſaid *George* entred upon the Plaintiff, who claimed in the right of his wife, whereupon the Plaintiff brought his Action of Treſpaſs, and if the entry of the ſaid *George* was lawful or not was the Queſtion.

And after many Arguments at the Bar, the Caſe was argued at the Bench by *Ewens*, *Clark*, and *Periam* chief Baron. And it was agreed by them, that the entry of the ſaid *George Holford* was not lawful, for which cauſe Judgment was given for the Plaintiff. And in this Caſe divers Points were re-
[51] ſolved by the Court.

1. That the remainder limited to the Queen after the death of *Warren* was void for three cauſes:

1. Becauſe that *Warren* who was party to the firſt Indenture took nothing, and by conſequence the Queen who is not party to the Indenture, but named by way of remainder after the *Habendum*, the particular eſtate being void, ſhall take nothing; for the eſtate which is limited to *Warren* is for the life of *Chriſtopher*. And as to this Point the Caſe is ſuch, *Chriſtopher* being Tenant in tail, the remainder to *George* in tail, *George* by Deed indented and enrolled doth bargain and ſell his remainder to *Warren* for the life of *Chriſtopher*, this grant is void, becauſe it can never take effect in poſſeſſion, nor the grantee can never have the benefit thereof; And therefore difference was taken between ſuch grant of a reverſion, and the ſaid grant of remainder, for the grant of a reverſion during the life of tenant in tail is good, becauſe he ſhall have the ſervices which the tenant in tail ought to do during the life of the tenant in tail; but ſuch grant of a remainder can never to any purpoſe take effect, and therefore it is void. Alſo manifeſt difference appeareth between this Caſe at Bar, and a Leaſe to *Chriſtopher* for his life, the remainder to another for the life of *Chriſtopher*, for by poſſibility the remainder may take effect, *ſcil.* if the Tenant for life maketh a feoffment in fee, or commit any forfeiture, he in the remainder may enter for the forfeiture, and that is proved by the Book in 41 *Fitz. Waſt E.* 3. 83. and *(remanere dicitur quaſi terra remanens)* and that cannot be when a remainder cannot by any poſſibility fall into poſſeſſion. For a remainder ough to veſt in eſtate, during the particular eſtate, and ought to take effect in poſſeſſion when the particular eſtate endeth, for *vana eſt illa potentia quæ nunquam venit in actum.* It was objected, that *Chriſtopher* might enter into Religion, and then might *Warren* enter during his natural life,

for

for as much as as *Chriſtophher* hath no iſſue male. But it was anſwered and reſolved, that ſuch poſſibility of poſſeſſion ſhall not make the remainder good for two cauſes:

1. Becauſe it is a remote poſſibility which ſhall be intended may never happen; but a poſſibility which ſhall make a remainder good ought to be a common poſſibility, and *potentia propinqua*, as death, or death without iſſue, or coverture, or the like. And therefore as the Logician ſaith, *Potentia eſt duplex, remota & propinqua*, 2 *H.* 6. 24. the remainder to a Corporation which is not at the time of the limitation of the remainder is void, although it be erected during the particular eſtate, for it was *potentia remota*: And this difference appeareth in a Common Caſe in our Books. If a leaſe be made for life, the remainder to the right heirs of *J. S.* this is good, for by common poſſibility *J. S.* may die during the life of the Tenant for life: But if at the time of the limitation of the remainder there by not ſuch *J. S.* but during the life of the Tenant for life *J. S.* is born and dieth, his heir ſhall never take as it is agreed in 2 *H.* 7. 13. And in 10 *E.* 3. 46. the Caſe was, That upon a fine levied to *R.* he granted and rendred the tenements to one *I.* and *Florence* his wife for their lives, the remainder to *G.* ſon of *I.* in tail, the remainder to the right heirs of *I.* and in truth at the time of the fine levied *I.* had not any ſon called *G.* but after he had a ſon named *G.* and died: And in a *Præcipe* againſt *Florence* it was adjudged that *G.* ſhould not take the remainder in tail, becauſe he was not born at the time of the fine levied, but long after, for which another who was right heir to *I.* by Judgment of the Court was received; for when *I.* had not any ſon named *G.* at the time of the fine levied, the Law will not expect that he ſhall after have a ſon named *G.* for the ſame is *potentia remota*. Note Reader, a difference between a remainder limited by particular name, and by a general name, for a remainder limited by a general name may be good, although that the perſon be not in *eſſe* at the time of the remainder limited. For if a leaſe for life be made, the remainder to the right heirs of *J. S.* who is alive, this remainder may be good, and yet he hath no heir at the time of the remainder limited. The ſame Law of a remainder *primogenito filio*. But a remainder limited in particular by name of Baptiſm and Surname is not good, if the party be not in *eſſe*. It is holden in 7 *E.* 3. that if the advowſon of the Church of *D.* be granted to the Parſon of *D.* and his Succeſſors, it is void as to the Succeſſor, becauſe the Succeſſor cannot take it, nor can have any benefit by way of Preſentation. [b]

The ſecond reaſon wherefore the remainder limited to the Queen is void, was becauſe that the Law will never adjudge a grant by reaſon of a poſſibility or expectation of a thing which is againſt Law, for the ſame is *potentia remotiſſima & vana*, which by intendment of Law *nunquam venit in actum*.

Thirdly, the remainder to the Queen is void, becauſe that *George* having a remainder in tail hath granted all his eſtate to *Warren*, *Habendum* all his eſtate during the life of *Chriſtopher* the remainder to the Queen, in which Caſe when he hath granted all his eſtate to *Warren*, he cannot limit any remainder thereof to the Queen; becauſe a remainder is but a remnant of the eſtate of the grantor, and the Queen cannot have any remnant of the eſtate of *George*, when he having a remainder in tail has granted all his eſtate to *Warren*. And *Littleton fol.* 145. ſaith, That in ſuch Caſe the eſtate tail is in abeyance. And 19 *H.* 6. 60. it is ſaid, That if Tenant in tail be attainted of felony, and the King after office found ſeiſeth, the eſtate tail is in abeyance. And *vide* 13 *H.* 7. 10. *a.* if there be Tenant for life, the remainder in tail, if he in the remainder in tail releaſe to tenant for life all his right, it putteth the eſtate tail ſo into abeyance that no right remaineth in him who releaſeth to have an Action of Waſt, for in the ſame Caſe by his releaſe he hath put all his eſtate out of him. It was agreed, *Hill.* 35 *Eliz.* in *Blitheman's* Caſe, that if tenant in tail in conſideration of paternal love covenanteth by deed to ſtand ſeiſed to the uſe of himſelf for his own life, and after his death to the uſe of his eldeſt ſon in tail, and after this covenant the covenantor taketh wife and dieth, the wife ſhall be endowed, for when tenant in tail hath limited the uſe to himſelf for the term of his own life, he cannot limit any remainder over, for an eſtate for his own life is as long as he can limit by the Law, and therefore the limitation of the remainder is void. For which it was concluded, that upon coſideration of the firſt Point *Warren* had nothing. And upon conſideration of this later if he ſhall take at all, he ſhall take too much, and by conſequence the remainder to the Queen is void *quacunque via data*. And it was agreed that the limitation to *Warren* by the *Habendum* for the life of *Chriſtopher* was void and repugnant. [52]

2. Admitting that the remainder to the Queen were good; yet it was reſolved, that the common recovery did bar the eſtate of *Warren*, and by conſequence the condition alſo during his life; and therefore as to that, the Point is no other, but a man maketh a gift in tail, the remainder in fee, the remainder to the Queen in fee upon condition *ut ſupra*, Tenant in tail ſuffereth a common recovery, if this recovery ſhall bar the eſtate of Tenant for life in the remainder and the Condition alſo is the Queſtion. And it was reſolved, that the recovery doth bar not only the eſtate tail, but alſo the eſtate for life of *Warren*, although that the remainder in fee was in the Queen, for it is out of the Statute of 34 *H.* 8. becauſe that the eſtate tail was not of the Queens gift, nor of any of her Anceſtors Kings of *England* as it hath been adjudged *Mich.* 15 & 16 *Eliz.* in a *Partitione facienda*, between *Jakſon* and *Drury*; and 27 *Eliz.* in the Common Pleas, between *Wiſeman* and *Jennings*. And if the eſtate of *Warren* be bound and barred, the Condition alſo annexed to his eſtate is barred during his life. And therefore if one giveth lands in tail, and after granteth the reverſion upon condition, if tenant in tail ſuffereth a Common Recovery, it barreth the reverſion and condition alſo. And therefore it was adjudged *Mich.* 34 & 35 *Eliz.* between *Gately* and *Hunt* being an Exchequer Chamber Caſe by all the Judges of *England*, That if he in the Reverſion with a remainder expectant upon an eſtate tail grant a rent charge, or common, or maketh a leaſe for years, or acknowledgeth a Statute, and afterwards tenant in tail ſuffereth a common recovery and dieth without iſſue the poſſeſſion of the reverſion ſhall not be ſubject to the Charges, Leaſes, or Statutes of him in the remainder. 1. Becauſe the recoveror, ſo long as the recovery remaineth in force is in under the eſtate of Tenant in tail, which eſtate was not ſubject to any of [b]

the ſaid incumbrances of him in the remainder: For put caſe, that before the recovery Tenant in tail had made a Leaſe for years, or acknowledged a Statute, and afterwars had ſuffered the recovery and died without iſſue, without queſtion the poſſeſſion of the recoveror ſhall be ſubject unto the Leaſe and Statute of the Tenant in tail, and ſhall not be Subject unto the Leaſes and Statutes of him in the remainder alſo, for then there ſhall be confuſion. Alſo the charges of him in the remainder or reverſion cannot take effect in poſſeſſion until the remainder or reverſion come in poſſeſſion, and that cannot fall after the recovery. The ſame Law is of a condition annexd to a reverſion or remainder for the reaſons aforeſaid; then this payment to *Warren* cannot veſt the remainder out of the Queen for three cauſes:

1. Becauſe the condition during the life of *Warren* was diſcharged.

2. Becauſe he who taketh benefit of a condition ought to have the whole eſtate given to be reveſted in him as in his firſt eſtate, and that cannot be here; for the eſtate after the life of *Warren* was barred by the recovery: Alſo the tender to *Warren* was to the intent to reveſt his eſtate, and that cannot be when his eſtate is barred, and cannot be reveſted, for which cauſe this paiment cannot deveſt the remainder out of the Queen.

A third Point was argued be the Defendants Councel, That there needed not in this caſe any Office, or *Monſtrance de droit* to deveſt the remainder out of the Queen by force of the Condition for the Condition is to be performed by one Subject to another Subject by matter *in pais*, and in as much as the eſtate for life cannot be reveſted by force of the condition, if the whole eſtate to which the condition trencheth be not defeat, for this cauſe for neceſſity, and by the operation and working of the Law, the eſtate for
[53] life being defeated, the remainder to the Queen which dependeth upon it ſhall be defeated alſo, as in 49 *E.* 3. in *Iſabel Goodcheaps* Caſe. One deviſed houſes in *London* deviſable by cuſtome, and holden of the King in tail, and if the donee died without iſſue, that the land ſhould be ſold by his Executors, and died; and the deviſee died without iſſue, now the land eſcheated to the King, yet the bargain and ſale of the Executors ſhall deveſt the Kings eſtate for neceſſity, and that without Petition, or *Monſtrance de droit*; and alſo their vendee is in by the deviſor paramount the eſcheat: So the bargainor in this Caſe ſhall be in of his ancient eſtate paramount the remainder to the Queen. 25 *E.* 3. 48. If a diſſeiſor, or one who hath no title maketh a leaſe for life, the remainder to the Queen; if the diſſeiſee, or he who hath got good right, recovereth againſt Tenant for life, and entreth, by that the Queens remainder ſhall be defeated; otherwiſe if the recovery be by feigned or no title, there the Queens remainder is not touched; and *Plow. Comm.* 553. agreeth therewith. So if tenant in tail granteth the land to the King in fee with warranty, and the King granteth the ſame for life, tenant in tail dieth, and the iſſue in tail doth recover in a *Formedon* againſt tenant for life, the Kings eſtate ſhall be defeated, as it appeareth by 7 *R.* 2. *Aide del Roy* 61. 22 *E.* 3. *acc.* And ſo it was ſaid, if the diſſeiſee in ſuch Caſe enter, it ſhall defeat the Kings remainder, ſee *Plow Comm.* 489. And note the principal Caſe of the Lord *Lovel*, an eſtate veſted in the King ſhall be defeated by force of a Condition by an Act in Law without Office, or *Monſtrans de droit*. And mark there the Caſes of Remitter put in the end of the Caſe. Againſt which it was argued by the Plaintiffs Councel, That admitting the remainder out of the Queen
[52] to be good, that this tender in *pais* to a Subject ſhall not deveſt the remainder to the Queen. For as *Bracton* ſaith, *Nihil tam inconvens eſt naturali æquitati unumquodque diſſolvi eo ligamine quo ligatum eſt*: And as no eſtate could be veſted in the Queen without matter of record, ſo no eſtate can be deveſted out of her without matter of record, See *Plow. Comm.* 553. in *Walſinghams* Caſe, and *Plow. Comm.* 380. *Nevils* Caſe, 12 *H.* 7. and many other Books. And it was ſaid that when an eſtate ſhall be deveſted out of a common perſon, and veſted in another, without action, entry, or claim, it ſhall be deveſted out of the King without a Petition, or *Monſtrans de droit*, as it is agreed in *Plow. Comm.* 489. in the Lord *Lovel's* Caſe cited by the other ſide, but when in the Caſe of a common perſon the eſtate ſhall not be deveſted out of him without without action, entry, or claim, there it ſhall not be deveſted out of the King without Petition, or *Monſtrans de droit*, *&c.* And the principal Caſe in *Plowdens* Commentaries in the Caſe of the Lord *Lovel* was agreed, for there by force of the condition if it
[*b*] had been in the Caſe of a common perſon the eſtate gained by Eſcheat ſhall be deveſted by Act in Law without entry or claim: And ſo by the ſame reaſon the Caſes of Remainder, and the Caſes in 49 *E.* 3. were well agreed. And alſo in as much as the Executors in 49 *E.* 3. had but a power, they have no other mean but only to ſell, for they could not have a Petition, or *Monſtrans de droit*, or other remedy. But in this Caſe *George Holford* the grantor had clear and apparent remedy, either by Petition or *Monſtrans de droit*. And it was ſaid, that the Queens remainder doth ſo priviledge the eſtate of the Tenant for life, that the grantor cannot enter upon the Tenant for life. And it was ſaid, that if land upon condition commeth to the Queen, the condition is broken, the Queen maketh a leaſe for life, he who hath the condition cannot enter but ought to have a Petition or *Monſtrans de droit*, *&c.* and that appeareth in the Book in 9 *H.* 4. 4. A man bound in a Statute conveyeth land to the King, who leaſeth for life, the conuſee ſhall not extend upon the poſſeſſion of the Tenant for life. And it was ſaid, that if the Caſes put before when he who hath right doth recover againſt Tenant for life, the reverſion or remainder being in the King by defeaſiable title ſhall deveſt the Kings eſtate ſhall be granted, yet they are not to be compared to our Caſe, for in our Caſe, the party himſelf who hath conveyed the land lawfully to the King would defeate the eſtate which himſelf hath made by entry, which as was ſaid he cannot do; but when a diſſeiſor conveyeth land to the King, and the King granteth the ſame over for life, there if the diſſeiſee who is a meer ſtranger by his entry or action ſhall deveſt the Kings defeaſiable title, yet it is not to be reſembled to our Caſe. But this Point was not reſolved, for the Barons gave Judgment upon the two other Points.

But it was agreed in this Caſe, although that the remainder paſſed by bargain and ſale, ſo as in Judgment of Law an uſe paſſed firſt, and although that it were of a thing which lieth in grant and not in livery; and that the words of the condition are that upon paiment of the money that the eſtate ſhall ceaſe

and

and ſhall be void, yet the eſtate ſhall not be reveſted in the grantor without claim; for the eſtate of inheritance cannot be determined by condition without entry or claim. In *Newis* and *Scolaſticas* Caſe in *Plow. Comm.* 413. difference is taken between a Condition and a Limitation; for a limitation ſhall determine an eſtate without entry or claim, otherwiſe of a Condition. See *Browning* and *Beſtons* Caſe, [54] *Plow. Comm.* 133. & 136. Another difference is taken between a rent in *eſſe* granted upon condition, and a rent newly created granted upon condition. And although that an uſe at the Common Law might have ceaſed without claim, yet now the uſe is transferred to the poſſeſſion, for the pleading is, *vigore Statuti, &c. de uſibus in poſſeſſionem transferendis*, ſo that now after the Statute to ſuch qualities to which the eſtates by the Common Law are ſubject to ſuch qualities uſes are ſubject, for the uſe is transferred and incorporated to the poſſeſſion. And Baron *Ewens* ſaid, That upon this reaſon it was adjudged in the Kings Bench, that where one by deed indented, bargained, and ſold to another and his heirs land rendring rent, that the reſervation was good, for now the uſe and the poſſeſſion paſs *tanquam uno flatu*, and therefore it is all one with a grant of the land it ſelf; for if the uſe ſhall paſs firſt, then rent cannot be reſerved out of the uſe, and then the reſervation of the rent ſhould be void. Alſo it was reſolved, that this claim of the remainder by force of the condition ought to have been made upon the land, and that claim made out of the land was not ſufficient. And therefore the ſaid bargain and ſale to *Bruyn* by Deed indented being made at *Weſtminſter* out of the land cannot in this Caſe enure to two effects: *ſcil.* Firſt, to make a claim, and then to paſs the remainder, as it was objected by the Defendants Councel. See *Litt.* 40. If a Villain purchaſe a reverſion, the claim by the Lord ought to be made upon the land. And the Book in 15 *Aſſ.* 12. is good Law, that a diſtreſs upon the land after a condition broken amounteth to a claim of the Seigniory to which it was annexed. So it was concluded, firſt, becauſe the remainder to the Queen was void, by conſequence the common recovery hath barred the remainder to *George*, and by conſequence the Plaintiff claiming under the recovery ought to have judgment to recover. Secondly, admitting the remainder good to the Queen, and that the condition was not diſcharged during *Warrens* life, and that the remainder to the Queen ſhall be defeated without Petition or *Monſtrans de droit*, yet the ſame is not determined till claim made upon the land, and then the grant of the Queen is good, and the ſecond grant of *George Holford* to the Queen is void, and by conſequence the ſecond recovery is a good bar. But againſt the grant by Letters Patents divers Objections were made by the Defendants Councel.

1. For as much as the Queen reciteth that the ſaid bargain and ſale to *Warren*, the remainder to the Queen was upon fraud and covin, and it was not found it was upon fraud and covin. It was ſaid, that the Patent was void becauſe the Queen was deceived in her grant, and then admitting the remainder to the Queen to be good, the land doth yet remain in the Queen, and then the Defendant not guilty to the Plaintiff.

Secondly, the Queen reciteth her eſtate to be upon condition, and in truth at the time of the making of the Letters Patents the condition was diſcharged during the life of *Warren*, And for this cauſe alſo the Patent was void, becauſe the Queen alſo in that was deceived. For peradventure, if the Queen had known that her eſtate was diſcharged of the condition during the life of *Warren*, and had not been ſubject to the pleaſure of *George Holford* to be revoked when he would, the Queen would not have granted the ſame. To the firſt Objection it was reſolved that the grant is good notwithſtanding that for [b] three cauſes:

1. Whether the ſame were upon fraud or no, it was not material, for if the recital be of a thing which ſoundeth to the Queens profit, and is falſe, it maketh the Patent void. But recital of a matter in *pais*, and not of record which is paſt, not material, nor valuable ſhall not impeach the grant.

Secondly, it appeareth to be covenous, and needeth not to be averred, for it appeareth to be made upon a condition to be defeated at his will, and the intent and purpoſe of it was to prevent *Chriſtopher* of his birthright, *ſcil.* of his power which he had to cut off the remainder to *George* by a common recovery.

Thirdly, the Queen reciting the ſame to be upon fraud *prout nobis ſatis liquet*, and the Letters Patents are *ex certa ſcientia & mero motu*, ſo that the Queen takes ſpecial knowledge thereof, and it cometh not upon the ſuggeſtion of the party. And to the ſecond Objection againſt the grant it was reſolved, That notwithſtanding that, the Patent is good: For the Queens recital is true, for at firſt the ſaid bargain and ſale was conditional as it was recited, and it is not affirmed by the recital that it doth ſo remain. Alſo the condition might be determined by matter in *pais*, *ſcil.* by releaſe to *Warren*, or by many other ways; ſo that it ſhall be hard for the Patentee to take knowledge thereof; and a thing which may be done or performed by matter in *pais* ought or needeth not to be recited. And *Warberton* Serjeant at Law, the Attorney general, and *Harris* of *Lincolns* Inn were of Councel with the Plaintiff; And *Williams* Serjeant at Law, *Damport* and others with the Defendant.

Mich.

Mich. 39 & 40 Eliz.

Buckler's Caſe.

[55] THE Caſe between *Buckler* and *Harris* in the Common Pleas, which began *Trinit.* 37 *Eliz.* was ſuch; In an *Ejectione firmæ* it was found by ſpecial verdict, That *Buckler* was Tenant for life, the remainder over in fee; Tenant for life made a Leaſe for four years, in *March* 20 *Eliz.* the leſſee entred, Tenant for life granted *tenementa prædicta* to *C. Habendum tenementa prædicta* from the feaſt of the Nativity of S. *John* the Baptiſt next following for life, after the ſaid Feaſt the leſſee for years attorned; the years expired, *C.* entred and made a leaſe at will to *D.* to whom the Tenant for life levied a fine *come ceo*, &c. he in the remainder in fee entred, and made a leaſe to the Plaintiff, the Tenant at will entred upon him and he brought the *Ejectione firmæ*. And Judgment was given for the Plaintiff. And in this Caſe five Points were reſolved.

1. The grant to *C.* was void, for the Law ſhall make conſtruction upon the whole grant; and an eſtate of freehold cannot begin in *futuro*. And the *Habendum* in this Caſe is not contrary to the premiſſes, for no certain eſtate is contained in the premiſſes, but generally the land given and granted
[*b*] which might be qualified by the *Habendum* to an eſtate for years, or at will. For the office of the premiſſes of a Deed of feoffment is to expreſs the grantor, grantee, and thing to be granted, and the office of the *Habendum* is to limit the eſtate: So that the general implication of the eſtate which ſhall paſs by the conſtruction of the Law by the premiſſes, is always controlled and qualified by the *Habendum*. As a leaſe to two, *Habendum* to one for life, the remainder to the other for life, ſhall alter the general implication of joyntenancy of the freehold which without *Habendum* ſhall be done. And although that the *Habendum* be void, and be in effect as no *Habendum*, yet no eſtate ſhall paſs by implication of Law againſt the expreſs limitation of the party, although his limitation be void; and ſo was it adjudged in the Kings Bench between *Hogge* and *Croſs* for houſes in *London*, *M.* 33 & 34 *Eliz.* in an *Ejectione firmæ*.

Secondly, that the grant being void at the beginning, the attornment after Midſommer ſhall not make the reverſion to paſs; For *Quod ab initio non valet, tractu temporis non convaleſcet*.

Thirdly, when *C.* entreth by colour of this void grant, he is a diſſeiſor. And a differenee was taken betwixt a general grant made by agreement of the parties which ſtands not with the rules of Law, and which never can by any ſubſequent act, as by Livery, or Attornment be made good, and a grant good at the beginning but to have his perfection by a ſubſequent ceremony. As in caſe of a Charter of feoffment, if the feoffee entreth before livery, he is no diſſeiſor, for the Charter is good; and the agreement of the parties accords with the Law, and it may be made good by livery and ſeiſin ſubſequent. Note there is difference between a good beginning or a foundation capable of a building, and an evil, which wanteth foundation upon which no building can ſtand.

Fourthly, It was was agreed, that if the fine had been levied to the diſſeiſor himſelf *come*, &c. he who had the right of remainder might enter for the forfeiture; for it was agreed, that the right of a particular eſtate might be forfeited, and entry given for the ſame to him who had but only a right to the remainder: As if leſſee for years be ouſted, or leſſee for life be diſſeiſed, and the leſſee for years bring an Aſſiſe, or real action, and the leſſee for life bringeth a Writ of right, it is a forfeiture of their right, and he who hath but a right of reverſion may enter for the forfeiture.

Fifthly, It was agreed, that in the Caſe at Bar, the fine levied to the Tenant at will was a forfeiture, and he who had the right of remainder might enter upon the Tenant at will, and by that purge the diſſeiſin; And the Tenant for life, and the Tenant at will alſo ſhall be eſtopped to ſay *quod partes finis nihil habuerant*, and of ſuch eſtoppels which are by matter of Record, and trench to the diſenheriſon of them
[56] in the reverſion or remainder, they ſhall take advantage although they be not parties to it, as of an Aid prayer of a ſtranger, or by acceptance of a fine *ſur conuſans de droit come ceo*, &c. Although that he in the reverſion or remainder be not party to the recovery, yet he is privy in eſtate to take advantage of any forfeiture by any matter of Record done to his diſ-enheriſon.

Sixthly, it was ſaid, That if the diſſeiſee levy a fine to a ſtranger, that in this Caſe the diſſeiſor ſhall hold the land for ever; for the diſſeiſee againſt his own fine cannot claim the land, and the conuſee cannot enter, and the right which the conuſor had cannot be transferred to him, but by the fine the right is extinct, whereof the diſſeiſor ſhall take advantage.

Trin.

Trin. 27 Eliz. *Rot.* 750.

Beckwith's Caſe.

IN a Replevin between *Colgate* and *Blithe* of the taking, &c. in a place called *Rye croft* in *Fooldſtray* in the County of *Lancaſter*, the Defendant made conuſans as Bayly to *Robert Beckwith*, becauſe that [b] *Elizabeth Beckwith* his Mother was ſeiſed in fee, and died ſeiſed, by which the ſame deſcended to him as to her ſon and heir who entred and was ſeiſed, and for damage feaſant the Defendant as Bayly to the ſaid *Robert* did diſtrein, &c. In bar of which avowry the Plaintiff ſaid, that to ſay that the ſaid *Elizabeth* died ſeiſed in fee, the Defendant ſhall not be received, for long time before the diſtreſs, &c. the ſaid *Elizabeth* was ſeiſed in fee, and took to husband *Chriſtopher Kenne*, who levied a fine to the uſe of the ſaid *Chriſtopher Kenne*, and the ſaid *Elizabeth* his wife for their lives, after to the uſe of the conuſees, to the intent that they ſhould ſuffer the ſaid *Robert Beckwith* to take the profits of the tenements in which, &c. for his life, with divers remainders over, &c. Againſt which the Defendant ſaid, that the ſaid fine was levied to the uſe of the ſaid *Elizabeth* in fee, without that that it was levied to the ſaid *Chriſtopher* and *Elizabeth* for their lives, *ut ſupra*; And the Jurors found a ſpecial verdict to this effect: *Chriſtopher Kenne* and *Elizabeth* his wife was ſeiſed of the Tenements aforeſaid in fee in the right of the ſaid *Elizabeth*; And that an Indenture was made by the ſaid *Elizabeth* without the aſſent of her husband, between her by the name of *Elizabeth Beckwith* one of the daughters and heirs of *Roger Cholmley* Knight on the one part, and *William Vaviſour* and other conuſees in the ſaid fine on the other part, bearing date the 14 day of *March* in the 14 year of the reign of our Soveraign Lady the Queen that now is (which ſhe ſealed and delivered as her deed in *Auguſt* after without aſſent of her husband) by which Indenture the ſaid *Elizabeth* alone limits and declares the uſes of a fine which after ſhall be levied, to be in form [57] following, That is to ſay, To the uſe of the ſaid *Elizabeth* for her life without impeachment of Waſt, and after to the uſe of the ſaid Conuſees for their lives, and after to ſuch uſes as in the Replication is alledged: And further found, that the ſaid *Chriſtopher Kenne* after the marriage, and before the fine levied, made another Indenture without the conſent of the ſaid *Elizabeth* his wife, bearing date the 13 of *February* in the year of the ſaid Queens Reign the 22. by which it was mentioned, that the ſaid Indenture was made between the ſaid *Chriſtopher* and *Elizabeth* his wife on the one part, and one *Robert Wrote* and *Nicholas Brook* and others of the other part, which Indenture was ſealed and delivered by the ſaid *Chriſtopher* only as his deed. By which Indenture it was declared, That the uſes of the ſaid fine ſhould be unto the uſe of the ſaid *Chriſtopher* and *Elizabeth* for their lives without impeachment of Waſt, and after to the uſes of the Conuſees, as in the Replication was alledged. And further it was found, that afterwards the ſaid fine mentioned in the ſaid bar was levied by the ſaid husband and wife of the Tenements aforeſaid to the ſaid Conuſees in the Indenture of the wife, and that there were no other uſes of this fine. And if upon the whole matter aforeſaid, the ſaid fine was levied to the uſe of the ſaid *Chriſtopher* and *Elizabeth* for their lives was the Queſtion. And it was adjudged, that both the ſaid limitations and declarations of the uſes in both the Indentures were void, and that the ſaid fine was by conſtruction of Law unto the uſe of the ſaid *Elizabeth* and her heirs as if no uſe had been declared: And in this Caſe theſe Points were reſolved:

1. If the husband and wife levy a fine of the land whereof they are ſeiſed in the right of the wife, and the husband only declare the uſe of the fine, this declaration of the uſe ſhall bind the wife if her diſaſſent doth not appear, although that her aſſent to the declaration of the uſes cannot appear. For when ſhe joyneth with her husband in the fine it ſhall be intended, if the contrary cannot appear, that ſhe joyned alſo with him in agreement in declaration of the uſes of the fine,

Secondly, it was reſolved, that if the husband and wife ſell the wives land to another for money by word, and afterwards levy a fine to the vendee and his heirs, in this Caſe it is good, and ſhall [b] bind the wife without any writing proving her aſſent, *a multo fortiori* when the uſe is declared by the husbands deed, and no other declared by the wife, it ſhall bind; *Vide* 12 *Eliz. Dier* 290. Husband and wife were ſeiſed of a Tenement in *London* to them and to the heirs of the husband, and the huſband covenanted by Indenture in conſideration of 20 l. that he and his wife would ſuffer a common Recovery by Writ of Right according to the cuſtom of *London* which bindeth as a fine at Common Law, and that the recovery ſhould be to the uſe of the recoverors until they had made a good and ſufficient Leaſe by Indenture for 40 years, and after the making of the ſaid Leaſe then to the uſe of the husband and wife, and the heirs of the husband, and the recovery was had accordingly; And the opinion of all the Judges was, That the Leaſe was good and not defeiſable by the wife who ſurvived her husband, and ſo was the opinion of all the Juſtices in the Kings Bench, and yet in ſuch Caſe the huſband was only party to the deed, which declared the uſes, and the ſame bound the wife for the reaſon aforeſaid.

Thirdly, it was reſolved, that every one may declare and diſpoſe the uſe of the land according to the eſtate which he hath in the land, for the declaration and diſpoſition of the uſe doth follow the ownerſhip of the land, as the ſhadow followeth the body, and now by the Statute of 27 *H.* 8. the ſhadow or the acceſſory draweth to it the body and the principal, that is to ſay, the uſe draweth to it the eſtate of the land, and therefore in all reaſon the owner of the land ought to limit the uſe, for by it the eſtate of the land it ſelf ſhall be transferred to the uſe; and therefore in the principal Caſe the wife

wife alone although that she is owner of the land, yet for as much as she is *sub potestate viri*, she cannot in respect of her coverture without her husband limit the use; and on the other side the husband who hath not any estate in his own right cannot against the agreement of the wife limit the use, for he is not owner of the land: So one is not *sui juris* and hath the estate, and the other is *sui juris* and hath not the estate, and therefore when they differ in the limitation it is void. And it is to be noted, that when the husband and wife levy a fine of the wives land, that all the estate passeth from the wife, and the conusee is by the wife only; and if the fine be reversed for the nonage of the wife, all the estate which passed by the fine shall be restored to the wife presently, for all the estate passeth from the wife, as it was [58] adjudged in the Kings Bench in *Worsley's* Case: And therefore it shall be against all reason that the husband against the agreement of the wife should limit the uses of the wives land. And if the husband may declare the use of his wives land great inconvenience would follow, and wives might be dis-inherited and deceived by their husbands, which shall be inconvenient; As if they perswade their wives that the uses shall be in one form, and therefore draws them to consent to levy a fine, and after the husband alone declareth other uses varying altogether from the uses to which the wife agreed, and so deceive and dis-inherit their wives; And truly if the Law require such ceremony of secret examination of married women before a Judge touching their voluntary and free assent, as if she were sole, it shall be against reason, that the husband against the assent of the wife do dispose of the use of the wives land, which is all the fruit of the land now. And it was said, that if an infant do levy a fine and declare the use thereof, this declaration shall bind him as long as the fine remaineth in force; for in as much as he hath been admitted by the Judges as a man of full age to levy a fine, the Law as long as the fine remaineth in force permitteth him to limit the use thereof, so is it of a man *non compos mentis*.

Fourthly, It was resolved, that although that the variance was in the first particular use (the wife limiting it only to her alone for her life, and the husband limiting it to him and his wife for their lives) and all the other uses in remainder limited in both the Indentures are according to both their consents, yet all the uses are void: But if there be two joyntenants, or two having several estates joyn in a fine, and one declare the use in one manner, and the other in another manner, the same is good for each of their parts, for the declaration of the use shall be directed and governed according to their estates and interests, but between husband and wife, the estate is only in the wife, and so the difference. But if the husband and wife agree in the limitation of the use of part of the land, and vary in the limitation for the residue of the land, it is good for part, and void for the residue.

So note Reader, a difference between variance, touching the limitation of the use of part of the estate of the land, and touching the limitation of the use of part of the land it self. And it was said, that if a man at this day seised of land on the part of the Mother maketh a feoffment in fee without consideration, he shall be seised as he was before on the part of the Mother. And if there be two joyntenants, one for life, and the other in fee, and they levy a fine without declaration of any use, the use shall be to them of the same estate they had before in the land. So if *A.* Tenant for life, and *B.* in reversion or remainder levy a fine generally, the use shall be to *A.* for life, the reversion or remainder to *B.* in fee, for each granteth that which he may lawfully grant, and each shall have the use which the Law vesteth in them according to the estate which they convey over. If *A.* seised in fee of an acre of land, and he and *B.* levy a fine of it to another without consideration, the use implied shall be to *A.* only and his [b] heirs; for an use is but only a trust and confidence, and a thing in equity and conscience shall be by operation of the Law to him who in truth was owner of the Land without having regard to estoppels or conclusions which are averse to truth and equity. So it was adjudged in the principal Case. When husband and wife levy a fine without declaration of any use (which was sufficient in Law) the Law shall revest the use in the wife only, because that the estate of the land passeth only from her, and the husband joyneth with her but for conformity.

Note Reader, that although the husband may dispose of the wives lands during the coverture, yet in this Case for the reasons beforesaid his declaration was meerly void, *quod nota.*

Mich. 40 & 41 Eliz. *in the Kings Bench.*

Julius Winnington's Case.

James Pilkington brought an *Ejectione firmæ* upon a demise made by *Thomas Winnington*, of a house and land in *Binchees* in the County of *Chester* before the Judge there, and upon Not guilty pleaded, the [59] Jurors gave a special verdict to this effect: *Robert Winnington* had issue three sons, *John* who had issue *Julius*, one of the Defendants, *Robert* who died without issue, and *Thomas* the lessor of the Plaintiff; *Robert* the Father was seised of the Tenements in which, &c. in fee, and thereof did enfeoff by deed indented 1 *Eliz.* *Richard Birket* to have and to hold to him and his heirs upon condition that the feoffee or his heirs should reinfeoff the feoffor for life, the remainder to *John* his son and heir apparent and his heirs, by force whereof the feoffee was thereof seised in fee, *post quod quidem feoffamentum*, the Jury found that the feoffee entred and took the profits *absque contradictione, sive agreamento* of the feoffee; and afterwards 11 *Eliz.* the feoffor by deed indented made a Lease to *D.* and *P.* for 21 years, and yet the

the feoffor continued in poſſeſſion. *Birket* the feoffee 19 *Eliz.* acknowledged a Statute Staple to one *I.* the feoffor. The feoffor 24 *Eliz.* did enfeoff divers perſons to the uſe of himſelf for life, the remainder to *Robert* the ſecond ſon in tail, the remainder to *Thomas* his third ſon in tail. The feoffor 27 *Eliz.* died, *Birket* the feoffee after his death entred and enfeoffed *John* the eldeſt ſon and his heirs. *Robert* the ſecond ſon died without iſſue, *John* had iſſue *Julius* and died. *Thomas* entred and made the Leaſe to the plaintiff, upon whom *Julius* entred and ejected him. And upon this ſpecial verdict Sir *Richard Shutleworth* Juſtice of *Cheſter* gave Judgment for the Defendant, upon which the Plaintiff brought a Writ of Error in the Kings Bench. And in this Caſe theſe Points were moved and reſolved by the whole Court.

Firſt, When the feoffor entred after the feoffment and took the profits, and made a leaſe for years, upon all this matter the Law doth adjudge it a diſſeiſin, although the intent of the parties was, that the feoffee ſhould make a demiſe to him for his life; For this entry by wrong and taking of the profits without the agreement of the feoffee, is a diſſeiſin. And the Caſe is the ſtronger becauſe he took upon him as the owner of the land to make a leaſe.

Secondly, It was agreed, that when he maketh a leaſe for years by deed indented, he hath thereby diſpenſed with the Condition during the term, ſo that during the term he cannot for any cauſe take advantage of the Condition.

Thirdly, When the feoffor diſſeiſeth the feoffee upon condition, and during the diſſeiſin the feoffee acknowledgeth a Statute or Recogniſance, the ſame is no diſability to him, or any cauſe for the feoffor to reenter; for the feoffee having but a right, the poſſeſſion in the hands of the diſſeiſor is not ſubject to his Statute or Recognizance, and therefore no cauſe of entry for any diſability is given to the feoffor in this Caſe: But when the feoffee being in poſſeſſion taketh a wife, or granteth a Rent charge, or acknowledgeth a Statute, there the land is preſently ſubject to the title of Dower, and charged with the Rent or Statute: But when the feoffee is diſſeiſed, and taketh a wife, or acknowledgeth a Statute, there the land is not tied therewith. And although it was ſtrongly objected, that it was not poſſible that the feoffee could perform the Condition if he do not enter, and if he do enter the land is charged, ſo he hath diſabled himſelf to perform the Condition; yet it was reſolved, that it was not any diſability until he enter in *facto*, ſo that the poſſeſſion of the land be charged. But if the wife die, or the conuſee releaſe the Statute, then the feoffee may enter and perform the Condition without any diſability; then when the feoffor maketh [60] a feoffment over, he hath extinguiſhed the Condition, ſo that when the feoffee entreth and enfeoffeth *John* the eldeſt ſon, he hath good and rightful eſtate in the land which deſcendeth to the Defendant; and ſo the Judgment given by Sir *Richard Shuttleworth* was affirmed. The Attorney general and *Tamfield* were of Counſel with the Plaintiff, and *Hesket* Attorney of the Wards and *Damport* with the Defendant.

Hill. 41 Eliz. *in the Common Pleas.*

Wiſcot's Caſe.

IN an *Ejectione firmæ* between *Giles* Plaintiff, upon a demiſe made to him by the Husband and Wife, [b] and *Wiſcot* Defendant, upon the general iſſue a ſpecial verdict was found, upon which the Caſe was ſuch: *A.* tenant for life, the remainder to *B.* and three other for life, the reverſion to *C.* and his heirs expectant, *C.* levieth a fine *Sur conuſans de droit come ceo* to *A.* and *B.* unto the uſe of *A.* for life, and after his death to the uſe of *B.* in fee, *A.* dieth, and afterwards *B.* dieth; and if the Joynture were ſevered or not, ſo that after the death of *A. B.* was Tenant in common, was the Queſtion. And it was reſolved, that the Joynture was ſevered, and this difference taken, when the fee is limited by one and the ſame conveyance, there the one may have the fee ſimple, and the other an eſtate for life joyntly; but when they are firſt Tenants for life, and afterwards one of them doth get the fee ſimple, or the fee ſimple doth deſcend to one, there the Joynture is ſevered. As if a man make an eſtate to three, and to the heirs of one of them, there one of them hath fee ſimple, and yet the Joynture doth continue, for all is but one entire eſtate created at the ſame time, and therefore the fee ſimple cannot drown the Joynture which took effect with the creation of the remainder in fee; but when there are joyntenants for life, and one purchaſeth the fee, or the fee deſcendeth to him, there the fee ſimple drowneth the eſtate for life, for the eſtate for life was in *eſſe* before, and might be drowned or ſurrendred, and ſo cannot the [61] eſtate for life in the firſt Caſe. But in the ſame Caſe that is to ſay, when an eſtate is made to three, and to the heirs of one of them, and he who hath the fee dieth, and one of the ſurvivors purchaſeth the remainder, the Joynture is ſevered, *cauſa qua ſupra*; And when one Tenant for life purchaſeth the reverſion in fee, if the Joynture ſhould remain he ſhould have a reverſion in fee, and an eſtate for life alſo in part, which reverſion in fee he may grant over, and his eſtate for life ſhould remain in part, which ſhould be abſurd and againſt reaſon; for in the firſt Caſe when an eſtate is made to three, and to the heirs of one, he who hath the fee cannot grant over his remainder and continue in himſelf an eſtate for life, as it holden in 12 E. 4. 2. *b.* But if there be tenant in tail, the remainder to his right heirs, he may grant his remainder over, or deviſe it, as it is holden in 27 *Aſſ.* 60. for an eſtate tail cannot drown, nor be ſurrendred

nor be extinct by acceſſion of a greater eſtate. *Vide* 42 *E.* 3. 9. *b.* 29 *H.* 8. *Mortdaunceſter* 59. 11 *H.* 4. 55. & 31 *E.* 3. *Scire facias* 19. by the better opinion of all the Books, he who hath the fee dying, and afterwards tenant for life dying, it is in election of the heire to have a *Mortdanceſter*, (which proveth that his anceſtor died ſeiſed in fee) or a *Scire facias*, or a *Formedon* in remainder at his pleaſure. It is agreed 39 *H.* 6 2. *b.* if the reverſion be granted to Tenant for life and another in fee, the reverſion is extinct for a moity, for Tenant for life cannot purchaſe or get the reverſion or remainder of the ſame land, but the eſtate for life ſhall be drowned, having regard unto the eſtate which he hath gotten in reverſion.

Note Reader, It ſeemeth by the reſolution of this Caſe, that if Tenant for life granteth his eſtate to him in the reverſion and a ſtranger, that the ſame is a ſurrender for one moity, for it appeareth here, that by getting of the reverſion, and the particular eſtate at ſeveral times, the reverſion expectant upon his particular eſtate for life cannot remain diſtinct in him, and grantable over, but the one ſhall drown the other, and benefit of ſurvivorſhip not regarded, as it appeareth in the Caſe at Bar, and ſo the doubt in 7 *H.* 6. well reſolved as I think. And then it was moved in Arreſt of Judgment, that the leaſe was made by the husband and wife generally, without alledging the ſame to be by Deed, as it ought to be, as appeareth *Dier* 1 *Mar.* 91. *b. Vide* 26 *H.* 8. 2. *a.* 15 *E.* 4. 18. *a.* & 21 *H.* 6. 24. *b.* But upon a ſight of a Judgment given *Trin.* 36 *Eliz.* in the Kings Bench, between *Bateman* and *Allen Rot.* 339. And of another preſident ſhewed by Maſter *Brownlow* chief Preignotary, between *Moſeley* and *Guilbert*, *Paſch.* 33 *Eliz.* in the Common Pleas; And of another Judgment between *Digges* and *Withers* in the Kings Bench,
[*b*] in all which precedents Judgment was given for the Plaintiff upon a demiſe made by the husband and wife, without alledging the ſame to be by deed; Upon the view of the precedents Judgment was given in the Caſe at Bar for the Plaintiff.

Hill. 43 Eliz. *in the Kings Bench.*

Tooker's Caſe.

[66. *b.*] IN an Action of Treſpaſs for breaking of his Cloſe, in the Kings Bench, between *William Rud* Plaintiff and *Edward Tooker* Defendant, which began *Mich.* 36 & 37 *Eliz. Rot.* 136. upon Not guilty pleaded, a ſpecial verdict was found, and upon the whole matter the Caſe was ſhortly ſuch: *John Arundel* Eſquire was ſeiſed of the Barton of *Sprecomb* in *Morthoe* in the County of *Devon* in fee, and demiſed the ſame to *John Tooker*, and to the ſaid *William Rud* for the term of their lives, and died; after whoſe death the reverſion deſcended to Sir *John Arundel* as ſon and heir, who by deed indented granted to the ſaid *Edward Tooker* the reverſion of the ſaid Barton for term of his life, to with grant the ſaid *John Tooker* then being joyntenant ſeiſed of the ſaid Barton with the ſaid *William Rud* did attorn; And afterwards the ſaid *John Tooker* by his deed ſurrendred to the ſaid *Edward Tooker* all his eſtate, title, and intereſt in the ſaid Barton, and died: The ſaid *Edward Tooker* entred into the ſaid Barton claiming to hold in common with the ſaid *William Rud*, and if his entry were lawful or not, was the Queſtion. And the Point was, if by the attornment of one Tenant for life, the reverſion was veſted in *Edward Tooker* or not. For if the attornment of one doth not veſt the reverſion in him, then the ſurrender aforeſaid made to him was void. And after many Arguments at the Bar by the parties Councel, at the Bench by the Juſtices, Judgment was given againſt the Plaintiff. And in this Caſe two Points were reſolved by the Court.

Firſt, That the attornment of one Tenant for life ſhall veſt the whole reverſion in the grantee for divers cauſes, becauſe the eſtate of joynt leſſees is intire; for every joyntenant is ſeiſed throughout the whole, and by conſequence the reverſion which is dependant and expectant upon ſuch eſtate is intire alſo.

[67] Secondly, The attornment is a lawful act; 3. The attornment doth not paſs any intereſt from him who attorneth, but only perfecteth a grant made by another. See 7 *H.* 6. 34. 8 *E.* 3. 38. *Fitz. Dower* 110. 10 *E.* 2. *Dower* 139. If one joyntenant aſſign Dower, the ſame is good. So Dower aſſigned by an Abator or Diſſeiſor ſhall not be avoided by the diſſeiſee, as it is agreed 12 *Aſſ.* 20. for theſe are lawful acts. So it was ſaid by the ſame reaſon: If a diſſeiſor attorn, or giveth ſeiſin unto the grantee of a Seigniory, it ſhall bind the diſſeiſee, yet the grantee of the Seigniory cannot compel the diſſeiſor to attorn to him, or to give him ſeiſin, if he had not ſeiſin before within time of limitation. See for that 8 *H.* 6. 17. 8 *Aſſ.* 16. 8 *E.* 3. 52. 11 *H.* 4. 29. 39 *H.* 6. 2. And it was ſaid, that if the leſſor diſſeiſe his two leſſees for life, and enfeoffeth another, and one leſſee reentreth, this act of the one is an attornment in Law for both. *Ergo*, an expreſs attornment of one ſhall bind both. So if one joyntenant give ſeiſin of the rent to the Lord, it ſhall bind his companion, as it is agreed in 39 *H.* 6. 2. If a leaſe be made unto two, and after the reverſion is granted to one of them, and he accept the deed, *Baldwin* 28 *H.* 8. *Dier* 12. *b.* holdeth that a good attornment in Law for both, which opinion was affirmed for good Law by *Popham* chief Juſtice and the whole Court. And in 4 *E.* 3. 22. in *Hollands* Caſe it is ſaid, that the attornment of one joyntenant is the attornment of the other. *Littleton* Ch. *Attornment* 129. holdeth, that if there be Lord and two joyntenants by certain ſervices, and the Seigniory is granted over, and one joyntenant attorn, it is as good as if both had attorned, becauſe the Seigniory is intire, which opinion

of

of *Littleton* in his Book (which is the ornament of the Common Law, and the moſt perfect and abſolute work that was ever written in any humane Science) the Court did prefer before the ſubtile opinions in 39 *H.*6.2. & 33 *E.* 3. *Quid juris clamat* 5. But if the reverſion of two Tenants for life, or the rent, or Seigniory of two joyntenants be granted by fine, there in a *Quid juris clamat*, *Quem reddium reddit*, or *Per que ſervitia* againſt ſuch joyntenants, the one ſhall not be ſuffered to attorn without his companion for two cauſes:

1. Becauſe the Plaintiff ought to have attornment in the ſame manner as he hath demanded it, as it is holden in 9 *H.* 6. 21.

2. If one attorn only he may prejudice his companion; as if he will not claim to be unpuniſhed for waſt, or a condition to have fee, or future term, &c. for upon general attornment in a Court of Record, the leſſee ſhall loſe all advantages which are not claimed of Record; for the Queſtion is demanded of him, *Quid juris clamat?* and therefore he ſhall not have more then he claimeth of Record; and for this cauſe one joyntenant ſhall not be ſuffered to attorn of record for the manifeſt prejudice which might grow to his companion if it ſhould be the attornment of both. But in the Caſe of a grant by deed, no ſuch prejudice can happen, and therefore the attornment of the one ſhall bind the other, becauſe it cannot prejudice his companion. So, and for the ſame cauſe, if one joyntenant attorn in *pais* to the conuſee where the grant is by fine, it ſhall bind both. And in proof that the reverſion in the Caſe at Bar was intire, to follow the reaſon of *Littleton* it was ſaid, If husband and wife be joyntenants for life, and the leſſor granteth the reverſion of the land which the husband holdeth for life, the grant is void, as it is agreed in 13 *E.* 3. *Grants* 63. The ſame Law as it was agreed by *Popham* chief Juſtice, and the whole Court of two joyntenants leſſees. See 32 *E.* 3. *Quid juris clamat* 5. So if a man hold three acres by 12 d. and the Lord granteth the ſervices of the third acre, the grant is void, as it is agreed in 27 *E.* 3. 79. and 7 *E.* 4. 25. [b]

Secondly, It was reſolved by the whole Court, that if the Tenant having perfect notice of the grant (as he by Law ought to have, as it was agreed in *Vivians* Caſe 13 *Eliz. Dier* 302.) there, if the Tenant give his aſſent, or attorn for any part, the ſame is good for all, for in as much as an attornment is but an aſſent to perfect the grant of another, he who attorneth cannot apportion, divide, or alter the grant, but the attornment ought to be according to the grant, and therefore if he attorn in part, it ſhall not be taken void, but ſhall be taken ſtrongeſt againſt him, and ſhall be in Law an attornment for the whole, and therewith agreeth *Littleton Attorn.* 127. And therefore if a reverſion or Seigniory be granted to two, and the Tenant attorneth to one of them, it is good to both againſt the opinion of *Huſſey* and *Danvers* 11 *H.*7.12. So if the reverſion of 3 acres be granted, and the leſſee attorneth for one of them, it is good for all, *vi.* 18 *E.* 3 *Var.* 63. and 22 *E.* 3. 18. So if a reverſion be granted for 40 years, and the leſſee attorneth for part of the years, it is good for all. So if it be granted for life, with divers remainders over, if the leſſee attorn to the grantee for life only, it ſhall enure to all in the remainder. But if a reverſion be granted for life, the remainder in fee by deed, and the grantee for life dieth, the attornment to him in the remainder is void, for it is not according to the grant: Otherwiſe if the grant be by fine, for there by the fine the eſtate was veſted in them, and the attornment was only to make privity; but if the reverſion be granted to two, and one dieth, there the attornment to the ſurvivor is good. So if a reverſion be granted to *J. S.* and *Ja. G.* and afterwards they entermarry, and the Tenant attorneth, now they ſhall not have moieties according to the purport of the grant, but the ſame is by the act of the grantees themſelves. And if the leſſee attorn upon condition ſubſequent, the condition is void; for if the reverſion be once ſettled it cannot be deveſted by any condition annexed to attornment, becauſe that the grantee is not in but by the grantor; but if one attorn upon condition precedent, there is no attornment till the condition be performed. But in all the Caſes aforeſaid, if the Tenant hath notice that the Seigniory was granted but to one, or that the reverſion was granted but of an acre, or that the reverſion was granted for fewer years, or that the reverſion was granted for life only with no remainder over, there general attornment without true notice of the grant is void, for the uſual pleading (the ſure Oracle of Law) is, to which grant he attorneth, and therefore if he have no notice of the grant, or if he hath not true notice of the grant which is all one, his aſſent which he giveth to it, which in truth was but part of of the grant, the Law (which abhorreth falſity) ſhall not conſtrue the ſame to be attornment to the true grant. [68]

And *Popham* chief Juſtice ſaid, that every act done by one joyntenant in benefit of him and his companion is good, as payment of rent, &c. to the Lord by one, doth diſcharge the other: But one joyntenant cannot prejudice his companion as to any matter of inheritance or freehold, but as to the profits of the freehold the one may prejudice the other, for there is a privity and truſt between joyntenants; and therefore if one taketh all the profits of the land, or the whole rent, &c. the other hath no remedy, for it was his folly to joyn himſelf in eſtate with ſuch a perſon as would break the truſt. And he ſaid, if two joynt Lords and Tenant be by Knights ſervice, and the Tenant dieth his heir within age, now the Lords have election to ſeiſe the Ward, or to diſtrain for the ſervices, and ſo wave the Wardſhip, as it is agreed in 1 *E.* 3. But he ſaid, that if one Lord ſeiſeth the Ward, and the other Lord diſtraineth for the Services, he who firſt ſeiſed, or diſtrained, ſhall bind the other. Alſo in perſonal Actions, one joyntenant may releaſe all, but if the perſonalty be mixt with the realty it is otherwiſe. As in Aſſiſe by two, the releaſe of all Actions perſonal by one is no bar againſt the other; for although the Aſſiſe is an Action mixt in the realty, and perſonalty, yet *omne majus trahit ad ſe minus*, as it is adjudged in 30 *H.* 6. *Bar* 49. So in a Writ of right of Ward for the body brought by two, the releaſe of the one ſhall not prejudice the other, but ſhall give his companion the whole Ward as it is holden in 45 *E.* 3. 10. & 30 *H.* 6. *Bar* 59. But in an Action of Waſt brought by two, the releaſe of one ſhall bar the other as it is holden in 9 *H.* 5. 15. *per Curiam.* for in Waſt the perſonalty is the principal. But note Reader, if in a *Quid juris clamat*, the Defendant as to parcel be ready to attorn, and as to the reſidue claimeth fee, there he ſhall be admitted to attorn for parcel, becauſe he ſhall never attorn for the reſidue; for if it be [b]

found with the Plaintiff, he ſhall enter for the forfeiture, and if it be found with the Defendant, he ſhall never attorn, but when to parcel he is ready to attorn, and as to the reſidue pleadeth ſuch a plea, that if it be found againſt him he attorn, there the attornment ſhall not be taken by parcels, 11 *H.* 6. 47. 11 *R.* 2. *Attornment* 9. 22 *E.* 3. 18. And it is true, that to every attornment true notice of the grant is requiſite, but it is to know, that there is notice in *fait*, and a notice in Law. For in ſome Caſes the Law ſhall imply notice without any expreſs notice given by any perſon as in the Caſe of *Littleton*, *Attornment* 130. If he in the reverſion ouſteth his leſſee for life, and maketh a feoffment in fee, and the leſſee reentreth, it is a good attornment, and yet perhaps he had not notice neither of the feoffment, nor of the eſtate given by the feoffment. And *Littleton* giveth two reaſons thereof.

1. Becauſe that the leſſee by the Law ſhall not be miſconuſant (Note the Law implieth notice) of feoffments which are made of and upon the land.

[69] 2. By his entry, he cauſed the reverſion to be to him to whom the feoffment was made, who was ſeiſed in demeſn, and had not any reverſion before. And with *Littleton* agreeth the whole Court in 9 *H.* 6. 16. And that the agreement of the leſſee there pleaded upon his reentry was not material, for without it the Juſtices were agreed, that the reverſion and the rent were in the feoffee, and 18 *E.* 3. *Feoffments & Faits* 62. *acc.* by *Wilby* and all the reſt. And although that *prima facie* in 2 *H.* 5. 4. the Court ſeemed that it was not an attornment; yet after in 5 *H.* 5. 12. it is adjudged, that the reentry is a good attornment, and that the Action of Waſt brought by the feoffee was maintenable, 46 *E.* 3. 32. *b.* & 34 *H.* 6. 6. *b. acc.* And there it is ſaid, that if the leſſee for life recovereth in Aſſiſe againſt the feoffee, that the ſame ſhall not be ſaid attornment. And if the Tenant hath notice of the grant by a ſtranger, he may attorn, and aſſent to the grant in the abſence of the grantee. And *Popham* chief Juſtice ſaid, that it hath been ſo adjudged againſt the opinion in 28 *H.* 8. *Br. Attornment* 40.

And note Reader a difference between an attornment which is an agreement, for that may be done in the abſence of the grantee, but in Caſe of a diſagreement it ought to be done to the party himſelf, as it appeareth in *Wheelers* Caſe, 14 *H.* 8. 23. And the reaſon and cauſe of the difference is, becauſe that in caſe of diſagreement, the party might perſwade and move the other by reaſon, by entreaty, or other means to give his conſent, or good will; and therefore the Law requireth that the diſagreement be made to the party for the prejudice, which otherwiſe might happen to him; but in the caſe of conſent (and namely in caſe of attornment, which is to ſettle and perfect the eſtate of the grantee, and ſo for his benefit) there the ſame being done in his abſence, is as well as if it were made in his preſence.

Hill. 34 Eliz. *in the Common Pleas.*

The Lord *Cromwel's* Caſe.

[*b*] IN an Aſſiſe brought by *Edward* Lord *Cromwel* againſt *Edward Androwes* of *Grays* Inn *Eſquire*, and others, of lands and tenements in *Alaxton* in the County of *Leiceſter*, upon *nul tort nul diſſeiſin* pleaded, the recognitors of the Aſſiſe gave a ſpecial verdict to this effect: *John Blunt* Eſquire ſeiſed of the Mannor of *Alaxton* in the County of *Leiceſter* whereof the lands and tenements put in view are parcel, to which Mannor the Advowſon of the Church of *Alaxton* was appendant by deed indented 10 *Aprilis* 1 & 2 *Phil. & Mar.* between him and *Anthony Androwes* (father of the ſaid *Edward*) did grant, bargain, and ſell the ſaid Mannor with the appurtenances, by the name of the Mannor of *Alaxton*, and of the Advowſon of *Alaxton* appendant to the ſaid Mannor to *Anthony Androwes*, To have and to hold to him and his heirs, to the uſe of him and his heirs in the ſame manner and form as in the ſaid Indenture is

[70] mentioned. And *Blunt* by the ſaid Indenture covenanted, that the Mannor was of the value of 42 l. *per ann.* and that he was thereof owner of an eſtate of inheritance, and that it ſhall be diſcharged of incumbrances, except Leaſes, upon which the ancient rent was reſerved. And further, *Blunt* covenanted that he would permit *William Rud* and *Richard Elſon* to recover by common recovery the ſaid Mannor with the appurtenances againſt him, which recovery ſhall be to the uſes and intents following, *ſcil.* To the uſe of *Anthony Androwes* and his heirs, rendring for the ſaid Mannor with the appurtenances 42 l. *per ann.* to have and receive to *Blunt* and his heirs at two Feaſts, &c. according to the covenants in the Indenture, and 10 l. *Nomine pœnæ*, and diſtreſs for both. And further it was covenanted and agreed by the ſame Indenture between the ſaid parties, and each covenanteth aad granteth with other in manner and form following, that is to ſay, as well for the aſſurance of the ſaid Mannor with the appurtenances unto *Anthony Androwes* and his heirs, as of the ſaid rent to *Blunt* and his heirs: *Blunt* before *Eaſter* then next following ſhould levy a fine of the ſaid Mannor with the appurtenances to *Anthony Androwes* and his heirs, and that by the ſame fine *Anthony Androwes* ſhould rent a rent of 42 l. in fee, payable at two feaſts with *nomine pœnæ* and diſtreſs. Provided always that the ſaid *Anthony Androwes* ſhall dy his deed ſufficient in the Law give the Advowſon and Parſonage of the ſaid Church to the ſaid *John Blunt* during his life, and if it happen not void in his life, then one turn to his Executors. And further it was covenanted and agreed by the ſame Indenture, between the ſaid parties, and the ſaid *Anthony Androwes* doth covenant with the ſaid *Blunt*, to give unto *Blunt* 840 l. for the ſaid Rent and Patronage, to be paid within a year after

after notice that he will ſell it the notice to be within 7 years after the ſaid ſale. And further it was covenanted, granted, and agreed, between the parties by the ſame Indenture, That all manner of eſtates, aſſurances, and conveyances after to be made and conveyed of the ſaid Mannor and other the premiſſes, ſhall be to the uſes and intents compriſed in that Indenture, and to no other uſe or intent; and that is the order and courſe and the effect of all the covenants and clauſes of the ſaid Indenture.

And afterward *Ter. Paſch.* next following, a Recovery was had by *Rud* and *Elſon* againſt *Blunt* of the ſaid Mannor with the appurtenances according to the ſaid Indenture. By force of which *Anthony Androwes* was ſeiſed of the ſaid Mannor with the appurtenances (*prout lex poſtulat*) And afterwards *Octab. Mich. 2 & 3 Phil. & Mar. Blunt* and *Androwes* levied a fine to *Richard Perkins* and his heirs of the ſaid Mannor with the appurtenances, and he granted and rendred a rent of 42 l. *per ann.* out of the ſaid Mannor to *Blunt* in tail, with the remainder to the Lord *Mountjoy* in fee with clauſe of diſtreſs and *nomine pœnæ*, to be paid as the firſt rent was limited to be paid, and granted and rendred the Mannor with the appurtenances to *Anthony Androwes* in fee, and proclamations were made according to the Statute. And further it was found by the Recognitors of the Aſſiſe, that this fine was not levied for a new ſum of money, or upon any new conſideration, but was levied to the uſes in the Indenture mentioned. *Anthony Androwes* in his life doth not grant the Advowſon according to the Indenture; and afterwards *Anthony Androwes* died, and after his death, in the life of *Blunt* the Church became void; *Edward Androwes* ſon and heir of *Anthony Androwes* entred into the Mannor; *Blunt* doth not requeſt *Anthony Androwes* in his life to grant to him the ſaid Advowſon according to the ſaid Proviſo, *Blunt* entred into the Mannor for the condition broken. And *6 December 16 Eliz.* in conſideration of 848 l. by deed indented and enrolled in the Common Pleas, granted, bargained, and ſold the ſaid Mannor with the Advowſon to *Henry* Lord *Cromwell* in fee, by force whereof he entred, upon whom the ſaid *Edward Androwes* entred; and afterwards *Henry* Lord *Cromwel* died, and the ſaid *Edward* Lord *Cromwell* his ſon and heir entred upon the ſaid *Edward Androwes*, who with the other Defendants entred upon him and put him out of poſſeſſion; And if this entry were a diſſeiſin to the Plaintiff or not was the Queſtion. [b]

And this Caſe was oftentimes argued in the Common Pleas by *Telverton*, *Glanvill*, and *Williams* Serjeants on the Plaintiffs part, and by *Drew* the Queens Serjeant and others on the Defendants part. And afterwards it was argued *Mich.* 39 & 40. *Eliz.* by the Lord *Anderſon*, *Walmſley*, *Beamond*, and *Owen* Juſtices at two ſeveral days in the Common Pleas, and the Court was divided in opinion. And thereupon the Caſe was argued before all the Judges of *England* in the Exchequer Chamber by Serjeant *Williams*, and *Coke* Attorney General for the Plaintiff, and by *Fleming* Sollicitor General, and *Francis Bacon* for the Defendant. And afterwards the Caſe was openly argued in the Exchequer Chamber by all the Juſtices of the one Bench and of the other, and by the Barons of the Exchequer. And it was there adjudged, that Judgment ſhould be given for the Plaintiff. And *Mich.* 42 & 43 *Eliz.* Judgement was given by the Juſtices of the Common Pleas according to the ſaid Reſolution. And for avoiding prolixity I will omit all the Arguments at the Bar, and Report only thoſe matters in Law that were reſolved by the Juſtices in this Caſe, and the reaſons and cauſes of their Judgment: Four matters were reſolved in this Caſe.

Firſt, That the ſaid Proviſo maketh a Condition; for the Law hath not appointed any place in a deed proper or peculiar to a Condition, but his place is where it pleaſeth the parties. And it appeareth by *Littleton*, that *Proviſo* is as apt a word to make a Condition, as *ſub Conditione*, or any other word of Condition; But notwithſtanding that, when this word (Proviſo) ſhall make an eſtate or intereſt conditional, three things are to be obſerved. 1. That the Proviſo do not depend upon another ſentence, nor participate thereof, but ſtand originally of it ſelf. 2. That the Proviſo be the word of the bargainor, feoffor, donor, &c. 3. That it be Compulſory to enforce the bargainee, feoffee, donee, &c. to do an act; and becauſe that they all concur in this Caſe, it was reſolved that it was a Condition in what place ſoever it be placed: But that this Proviſo ſhall not make a Condition in the Caſe at Bar divers Objections were made. [71]

1. That the Indenture in which the Condition is contained was not enrolled, ſo that no eſtate paſſeth it, and then (as it was objected) the Condition cannot be annexed to an eſtate which after was conveyed by the Recovery, for the Indenture was ſealed and delivered in *February*, and the Recovery paſſed in *Eaſter* Term, and the Condition could not precede the eſtate, but a Coudition ought to be in the ſame conveyance, or compriſed in another delivered at the ſame time, as the Books are agreed in 17 *Aſſ.* 2. and 43 *Aſſ.* for *Quæ incontinenti fiunt, ineſſe videntur.* 2. It was objected, that *Androwes* had nothing but Covenants of *Blunts* part, and therefore it ſhall be equal that *Blunt* have like remedy, *ſcil.* Covenants on *Androwes* part. 3. It was objected, that the precedent ſentence as it appeareth before is to this effect. And further it is covenanted and agreed between the ſaid parties, and each of them covenanteth with the other in manner and form following. And then the fine upon grant and render is appointed, and immediately after that the Proviſo is added, and next after the Proviſo this clauſe followeth. And further it is covenanted and agreed between the ſaid parties, containing covenant for purchaſe of rent. And it was ſaid, that *ex antecedentibus & conſequentibus fit optima interpretatio*; but it appeareth by the precedent clauſe that all which followeth after that ſhall be but Covenants; but the Proviſo followeth, and therefore ſhall be but a covenant. Then the ſubſequent ſentence explaineth it alſo, for there it is ſaid, And further it is covenanted and granted between the ſaid parties, &c. *Ergo*, the next clauſe before was but a Covenant, for ſo much this word (further) implieth. 4. It was objected, that if the Proviſo ſhall be a Condition it ſhall refer to the clauſe next precedent, *ſcil.* to the fine to be levied according to the purport of the Covenant next before, and not to the recovery which is more remote and diſtant from it by the interpoſition of the ſaid Covenant concerning the fine, *Et ad proximum antecedens fiat relatio niſi impediatur ſententia.*

As

As to the firſt Objection it was anſwered and reſolved, That the intent of the parties was not, that that the eſtate ſhould paſs by the bargain and ſale, but that the eſtate ſhould be conveyed by the recovery; and that the Indentures ſhould direct the uſes and intents as well of the recovery, as of all other conveyances after to be made: Then it is apt and natural that the Indentures which direct the uſes which cannot be raiſed till the recovery be had and executed ſhould comprehend the Conditions and Limitations annexed to the uſes; and as well as the Indentures may direct the uſes of the recovery ſubſequent, ſo may they declare the Conditions and Limitations alſo to the ſame uſes: And the Statute of 27 *H.* 8. doth execute the eſtate according to the manner, condition, and quality of the uſe, ſo that by force of the ſaid Act the eſtate it ſelf is conditional, and that is approved by the general allowance and experience in all the conveyances of the whole Realm. [*b*]

To the ſecond Objection it was anſwered and reſolved. That it was not unjuſt or unequal that the bargainor ſhould annex ſuch condition as pleaſed him to the eſtate of the land, for the land moveth from him, *Et cujus eſt dare, ejus eſt diſponere*, and the bargainee hath accepted it.

To the third Objection it was anſwered and reſolved, that neither the precedent, nor the ſubſequent covenant do take away the force of the Proviſo; for although that words of covenant have been contained in the ſame clauſe of the Proviſo it ſelf, yet Proviſo being in judgment of Law a conditional word, ſhall not loſe his force. And therefore it hath been adjudged between *Simpſon* and *Titterel* in the Common Pleas, where the Caſe was, That Serjeant *Bendloes* 13 *Nov.* 26 *Eliz.* deviſed unto *Titterel* certain lands in *Eſſex* for 40 years, Provided always and it is covenanted and agreed between the ſaid parties, that the leſſee, &c. ſhould not alien, and it was adjudged, that it was a condition by force of the Proviſo and a covenant alſo by force of the other words. Alſo it was adjudged in the Kings Bench *Paſch.* 36 *Eliz. Rot.* 351. between *Henry* Earl of *Pembroke* Plaintiff, and Sir *Henry Barkley* Knight, and *Symons* Defendants; And the Caſe was, that the Earl of *Pembroke* granted the Office of Lieutenantſhip of the weſt part of the Foreſt of *Fronſelwood* in the County of *Somerſet* to Sir *Morice Barkley* (father of the ſaid Sir *Henry*) in tail, Provided always, and the ſaid Sir *Morice Barkley* for him, &c. doth covenant and grant to and with the ſaid Earl, that neither he the ſaid Sir *Morice*, nor any of the heirs males of his body ſhall cut down any wood growing upon any part of the premiſſes; And it was reſolved by all the Judges of *England* upon argument before them at Serjeants Inn, that although the Proviſo were coupled with the expreſs covenant of the grantee, and every condition ought to be created by the words of the grantor, donor, feoffor, &c. yet in the Judgment of Law this word (Proviſo) was a condition created by the grantor, although that all the reſt of the ſentence was the words of the grantee, for Proviſo being an apt word of condition, the ſame ſentence doth contain the words of the grantor purporting a condition, and the words of the grantee comprehending a covenant, which Judgment was afterwards reverſed in the Exchequer Chamber for defect in the declaration, and not for the matter in Law, for that was reſolved by all the Juſtices. And in this Caſe at Bar the ſpecial *Habendum* was obſerved, *ſcil.* To have and to hold to *Androwes* and his heirs in the ſame manner and form as afterwards in the ſaid Indenture is mentioned; by which it appeareth, that the intent of the parties was that the eſtate of *Androwes* ſhall be *ſub modo*, which ſhall not be, if the ſaid Proviſo make not a condition, or conditional limitation, as *Popham* chief Juſtice called it. Note in this Caſe 27 *H.* 8. 18. *a. Dockwrays* Caſe, *Littleton Chap. Conditions*, 14 *Eliz. Dier* 311. 4 & 5 *Phil.* & *Mar. Dier* 152. that this word (Proviſo) maketh a Condition, but when Proviſo dependeth upon another ſentence, or hath reference to another part of the deed, yet it maketh not a condition but a qualification or limitation of the ſentence or part of the deed to which it is referred. As in 5 *Eliz. Dier* 122. between *Eyre* and *Orme*, a notable Caſe. 17 *H.* 9. a leaſe without impeachment of Waſt, Proviſo that he ſhall not do voluntary Waſt, *Litt. Chap. Rents.* Grant of a rent, Proviſo that the grantee ſhall not charge his perſon. *Tramingtons* Caſe in the Kings Bench *Paſch.* 16 *Eliz. Rot.* 273. there a Proviſo tending to qualifie and explain a ſentence precedent maketh not a condition 2 & 3 *Phil.* & *Mar. Dier* 150. *Parkers* Caſe. Proviſo amounteth to a Covenant, 28 *H.* 8' *Dier* 13. *b.* [72]

Note Reader, the Caſe in 35 *H.* 8. *Br. Condit.* 159. commonly cited to prove that a Proviſo makes not a condition when it cometh *inter alias conventiones*, doth not warrant it, but if it be well obſerved, the opinion there is good Law, and ſtandeth well with the Judgment. For there it is ſaid, *Nota pro lege*, that Proviſo put (this is to be performed or not done) upon the part of the leſſee upon the words of the *Habendum* was a condition, yet contrary of a Proviſo (to be performed or not done) on the part of the leſſor: As if it be covenanted in the Indenture, that the leſſee ſhall make the reparations, *Proviſo ſemper* that the leſſor ſhall find great Timber, it is not a Condition. Nor by ſome is it a Condition when it cometh *enter alias conventiones*, upon the part of the leſſee, although it is covenanted after the *Habendum*, and after the *Reddendum*, that the leſſee ſhall ſcour the ditches, or the like, *Proviſo ſemper* that the leſſee ſhall carry the dung to ſuch a field, it is not a condition to forfeit the Leaſe, (and it is true, for that depends upon a precedent Covenant, and without the precedent Covenant could not ſtand) Contrary if ſuch Proviſo be immediately after the *Habendum* which maketh the eſtate, and after the *Reddendum* (and true it is alſo, for then as much as it ſtandeth upon it ſelf and doth not depend upon a precedent clauſe it maketh a Condition) and all this is good Law, and ſtandeth well with the reſolution of the ſaid Juſtices, and ſo the *quære* which *Brook* made there is now reſolved, and made without Queſtion. [*b*]

To the fourth Objection it was anſwered and reſolved, That the Proviſo being a Condition ought to do the proper office of a condition, and that is to make the eſtate conditional, and therefore in what place ſoever it be put, it having the force of a Condition ſhall have reference to the eſtate, and ſhall be annexed to it; And it was ſaid, *Quod Proviſo eſt providere præſentia & futura, & non præterita.* The ſecond Point which was reſolved by the Juſtices was, that after the recovery ſuffered, the Statute of 27 *H.* 8. did execute the eſtate of the ſaid Mannor to *Androwes* according to the limitation of the uſe directed by the ſaid Indentures ſubject to the ſaid Condition or Proviſo: And alſo by force of another clauſe of the

the ſaid Act created a rent of 42 l. *per ann.* in *Blunt* and his heirs, for it is provided by a ſpecial branch of the ſaid Act of 27 *H.* 8. as followeth, That where divers perſons ſtand and be ſeiſed of and in lands, &c. in fee ſimple, or otherwiſe, to the uſe and intent that ſome other perſon and perſons ſhall have and perceive yearly to his or their heirs one annual rent out of the ſame lands, &c. in every ſuch caſe ſuch perſon, &c. be adjudged and in poſſeſſion and ſeiſin of the ſame rent, &c. as if a ſufficient grant, &c. had been made, &c. by ſuch as were or ſhall be ſeiſed to ſuch uſe or intent, &c. 20 *Eliz. Dier* 362. *acc.* And although in the Caſe at Bar the uſe of the recovery was firſt limited to *Androwes* and his heirs by the Indentures, and then came the clauſe, Yeelding for the ſaid Mannor 42 l. *per ann.* to *Blunt* and his heirs; and although that it was objected, that the rent ought to be limited out of the eſtate of the recoverors, and not out of the poſſeſſion which *Androwes* had executed to him by the Statute according to the uſe limited to him by the Indenture, yet it was agreed that *Blunt* ſhould have the ſaid rent by force of the ſaid clauſe of the Act of 17 *H.* 8. for the intent of the parties appeareth, that *Blunt* ſhould have the rent, and then the Law ſhall make ſuch conſtruction notwithſtanding the *Reddendum* cometh after the limitation of the uſe that he ſhall pay the ſame who ought to pay it, *ut res magis valeat quam pereat.*

Thirdly, It was reſolved, that the fine levied to *Perkins* by *Blunt* and *Androwes* hath not extinct the Condition, and that was the great Queſtion and doubt of the Caſe; and although it is true which the Philoſopher ſaith, *Quod fucatus error nuda veritate in multis eſt probabilior, & ſæpenumero rationibus vincit veritatem error*, and although as much was objected againſt the Condition as the art and wit of any man could invent or imagine, yet it was reſolved that the Condition remained for many notable reaſons; and all the Objections were well and fully anſwered and ſatisfied. [73] Firſt, becauſe that by the general Covenant it is declared, that all manner of eſtates, aſſurances, and conveyances after to be made of the ſaid Mannor ſhall be to the uſes and intents compriſed in the Indenture, and to no uſe, or intent, within which Covenant the fine levied to *Perkins* is included, for that is one manner of eſtate of conveyance and aſſurance, and therefore ought to be the uſe and intent of the Indenture, and the uſe and intent of the Indenture was that the Condition ſhould remain, and that the eſtate of *Anthony Androwes* ſhould be ſubject to the ſame Proviſo; and therefore the firſt general reaſon of their reſolution was, that by the Common Law the fine was ſo directed by the general Covenant to have ſuch ſpecial operation according to the intent of the parties in this Caſe of a common aſſurance that the Condition ſhall not be touched thereby, but that the fine ſhall extinct all other rights and titles to the Mannor ſaving the ſaid Condition only, which ſhall not be extinguiſhed thereby, and that is proved by the like Caſes at the Common Law. And therefore in 9 *E.* 3. 1. *b.* & 12 *E.* 4. 3. the Lord by deed may releaſe all his right in the land, ſaving to him his rent. So 2 *E.* 2. *Voucher* 108. one may enter into the warranty ſaving to him his rent; And 50 *E.* 3. 12. a man may enter into warranty ſaving to him his Condition. And *Putnams* Caſe 4 & 5 *Phil.* & *Mar. Dier* 157. was cited; where *Putnam* by deed indented did enfeoff *Duncombe* and his heirs of the Mannor of *Duncombe*, rendring to *Putnam* and his heirs a rent with a clauſe of diſtreſs, and for not payment a reentry, &c. And by another Indenture of the ſame date, *Putnam* covenanted with *Duncombe* to levy a fine of the ſaid Mannor before ſuch a feaſt, &c. which fine ſhould be to the uſes, intents, and purpoſes and conditions expreſſed in the former Indenture, and to no other; And after the fine was levied accordingly by *Putnam* to *Duncombe come ceo*, &c. with uſual words of releaſe of all his right. And it was reſolved, that neither the condition nor the rent were touched by the fine levied of the land by reaſon of the former Indenture which ruled the fine: And there it is ſaid, that it is like a releaſe made by the Lord to the Tenant of the land *Salvo ſibi dominio*; and all this appeareth in the Reports of the Lord *Dier*: [b] The like judgment was given *Trinit.* 23 *Eliz.* as the Lord *Dier* there reporteth *per opinionem omnium Juſticiar' de banco*, upon an evidence to a Jury in *Eſſex*, between *Tuſſer* Plaintiff, and others Defendants, notwithſtand a general entry into the warranty by *Bradborne* and his life upon a voucher in a Writ of Entry in the Poſt, and the iſſue was *utrum recuperatio præd' fuit ad opus & uſum dict'* the Recoveror *tantum*, &c. but *ad uſum etiam* that a rent reſerved by the husband and wife by fine before the recovery by them to *Tuſſer* levied, ſhall be aſſured to *Bradbourn* and his wife in fee, and not to be extinguiſhed, upon which *propter opinionem Curiæ Tuſſer* was Nonſuit. So there it appeareth by the opinion of the Court, that the aſſent and agreement of the parties did preſerve the rent notwithſtanding the general entry into the warranty; and by the eſpecial agreement of the parties the recovery is ſo directed that the rent is not touched by the general entry into the warranty. And it was adjudged in the Kings Bench *Trinit.* 34 *Eliz.* between *Clever* and *Childe Rot.* 805. according to the reſolution in *Putnams* Caſe; and ſo for the ſame reaſon was it adjudged in this very Caſe now in Queſtion, *Paſch.* 14 *Eliz. Dier* 311. in a *Quare impedit* for the Advowſon of *Alaxton* that the Condition was not extinct by the ſaid fine; ſo that as is commonly ſaid, *Modus & conventio vincunt legem*, and the Covenant and agreement of the parties hath power to raiſe an uſe, as in *Baintons* Caſe *Plow. Comm.* 2. To declare uſes upon a fine or recovery as common experience hath allowed: 3. To preſerve rents and conditions, and to direct fines and recoveries, &c. to enure to certain purpoſes, as in *Putnams* and other Caſes before hath been cited.

Againſt which it was objected, 1. That the condition or rent cannot be ſaved by the Indenture, for no ſaving can be in a collateral deed or record, but ought to be ſaved in the ſame deed or record, as in the Caſe ſet before, where the Lord releaſeth to the Tenant, it ought to be ſaved by a ſaving in the ſame deed, and not by any covenant or ſaving in any collateral deed or record: And ſo the Books are in 50 *E.* 3. 12. 2. & 4 *E.* 2. *Voucher*, that a man may enter into the warranty, ſaving to him his rent or action, but the ſame ought to be in the ſame record, for it cannot be ſaved in any collateral record or deed. And therefore if a man by deed covenanteth that he will make a feoffment, and that the feoffment ſhall be upon condition that if the feoffee do not pay a certain ſum before ſuch a Feaſt that he ſhall reenter, and after he maketh a feoffment without comprehending any condition

dition in it, the feoffment ſhall be abſolute, and ſhall not be ſubject to the condition compriſed in the firſt deed.

To that it was anſwered and reſolved, 1. That the general Covenant ſhall rule and direct the fine to have his operation to extinct his right and title whatſoever ſaving the ſaid Condition, although that the ſaving be not within the ſame record, and that for divers reaſons.

1. The Objection which hath been made might have been made againſt the Reſolution of the Juſtices in the time of Queen *Mary* in *Putnams* Caſe, and of the Court of Common Pleas in the Queens
[74] time in *Bradburies* Caſe, *Clevers* Caſe, and in this very Caſe; for in all theſe Caſes it was agreed, that neither the condition nor the rent were extinct or touched, but continued, notwithſtanding the fine *ſur conuſans de droit come ceo, &c.* and the general entry into the warranty; but it appeareth alſo in our Books, that it is not of neceſſity that the ſaving be always in the ſame record or deed, but in ſome Caſes may be contained in another deed, although that by the Law it might have been ſaved in the ſame deed or record. As in 17 *Aſſ.* 2. & 43 *Aſſ.* 12. if the diſſeiſee releaſe his right to the diſſeiſor, the ſame may be defeated by a condition contained in another deed delivered at the ſame time. So the ſame Law of ſaving. And F. *N. B.* 205. if a woman make a feoffment in fee by deed, rendring rent, and hath no other deed to ſhew that the intent of the feoffment was, that the feoffee ſhould marry her, the ſame is good, and that by reaſon of the collateral deed, and ſhe may have a Writ of *cauſa matrimonii prælocuti*, or ſhe may enter if ſhe will, and that is in the Caſe of a particular aſſurance, but in the general Caſe of common aſſurances, that is to ſay, in the Caſe of a common Recovery, he who entreth into the warranty may ſave his rent, and yet if he enter into the warranty generally it may be ſaved by covenant and agreement in an Indenture made before the recovery, as it appeareth before in *Braburies* Caſe, and that in favour of common Recoveries which are the common aſſurances of the land, the uſual form of which ſhall not be altered by a ſpecial manner of entry ſaving his rent or condition, but may be ſaved by an Indenture *debors*: And conveyances which are uſed for common aſſurances of land ſhall be expounded and conſtrued according to common allowance without looking into them with Eagles eyes. And therefore *Paſch.* 35 *Eliz.* in *Dormers* Caſe it was adjudged in the Kings Bench, that a common recovery might be had of an Advowſon. So it was adjudged in the Exchequer in Sir *William Pelhams* Caſe, that if a common Recovery be ſuffered by Tenant for life it is a forfeiture of his eſtate. And the reaſon of both the ſaid Judgments was, becauſe that a common recovery is by uſage a common conveyance as a fine or feoffment, &c. And it is ſaid in *Plow. Comm.* in *Trivilians* Caſe 514. that in common Recoveries the common uſage and intent of the parties is to be reſpected; for a common recovery had againſt husband and wife ſhall bar the wife of her Dower, and yet the wife ſhall not have any recompence in value, and therefore in ſtrictneſs of reaſon it is hard to maintain it, but common uſage and the
[b] intent of the parties maketh it a bar. And therefore it is wiſely ſaid of a Lawyer, *Non eſt recedendum a communi obſervantia, & minime mutanda ſunt quæ certam interpretationem habuerunt.* But the Caſe of fine in our Caſe is ſtronger then the Caſe of Recovery; for in the Caſe of a Recovery the vouchee may enter ſpecially ſaving his Action, Rent, Condition, &c. and yet becauſe the uſage before this time hath allowed it, it may be ſaved by covenant and agreement precedent, as it hath been ſaid; but in the Caſe of a fine, no ſaving can be contained in it, and therefore for neceſſity (and according to common uſage always allowed) it may be ſaved by the direction and rule of a precedent covenant and grant. And therefore it is adjudged in 6 *R.* 2. *Eſtoppel* 2. That if a man and his wife enfeoff two by deed, to have and to hold to them and their heirs, and afterwards the feoffor and his wife levy a fine *ſur conuſans de droit* to them and the heirs of one of them, that the ſame is no concluſion, but that both ſhall have the fee ſimple as they had before: And there *Skipwith* chief Juſtice of the Common Pleas, *ex aſſenſu Belknap, & ſociorum ſuorum*, gave four reaſons of their Judgment.

1. Becauſe they had fee before by the feoffment, and therefore that the fine ſhould enure but as a releaſe.

2. The conuſans to them and the heirs of one of them *come ceo, &c.* might well ſtand with the eſtate which they had before, for whereas the fine acknowledgeth it to be the right of one (this is the fee of one) it is true, for the tenements were the right of the one and other, *Ergo* the right of one.

3. We cannot take other fines, for the fee ſimple ought to be determined in one perſon certain by the fine.

4. The fine is not executory but to extinct the right of the wife only, wherefore it is no eſtoppel. Note from this, that the precedent feoffment doth rule and direct this ſubſequent fine; Alſo for as much as the fine by Law cannot be levied in other form, it ſhall be ruled and directed according to the precedent agreement and covenants of the parties. So if two Parſons of two ſeveral Churches by one Inſtrument in writing change their Benefices, by way of exchange, and to that purpoſe reſign them into the hands of the Ordinary, and the Patrons preſent accordingly, and one of the Parſons is admitted, inſtituted, and inducted, and the other is admitted and inſtituted, and dieth before induction, although the induction of the other were abſolute, yet it was directed by the precedent agreements which was by way of exchange, which ought to be executed on both parts in the life of the parties; and the inſtitution and induction cannot be upon expreſs condition, nor in other form then was done, *vide* 45 *E.* 3. *Eſtoppel* 10.

Secondly, it was anſwered, that in this Caſe, that the bargain and ſale, the recovery and the fine,
[75] although they be made, ſuffered, and levied at ſeveral times, yet all of them by the mutual agreement of the parties make but one aſſurance of the Mannor according to the ſame original bargain and contract, and therefore each of them doth tend to perfect the ſaid bargain, none of them to deſtroy any part of it, or to overthrow the true intent and meaning of the parties in any thing, but ſhall be taken as one aſſurance made at one time. As if a man make a leaſe by Indenture for life, of lands lying in ſeveral Counties,

Counties, and maketh livery of the land in one County, yet one entire rent ſhall iſſue out of the lands in both Counties, and yet the livery by which the eſtate paſſed was made at ſeveral times, and therefore it might be argued that preſently by the firſt livery, the rent ſhall iſſue out of that, but the Law ſhall not adjudge by parcel in ſubverſion of the intent and agreement of the parties, but when all acts are done in performance of the original contract and agreement of the parties, the Law ſhall judge upon them as executed at one time: So if a man maketh a deed of feoffment with warranty, and delivereth the deed to the feoffee, and afterwards at another time maketh livery *ſecundum formam chartæ*, the warranty is good, and yet it may be objected, that when the deed was delivered, no eſtate paſſed to which the warranty could be annexed; nor no eſtate was in the feoffee upon which the deed might enure as a releaſe with warranty, but the deed which comprehended the warranty took effect preſently by the delivery of the deed before the livery of ſeiſin; and ſo by nice conſtruction upon diſtinction of time, the warranty ſhould be overthrown, but the warranty is good for the cauſe aforeſaid. And in theſe common aſſurances *praxis juriſperitorum* is to be obſerved, and the ſentence of *Theophraſtus* in *Metaph.* is true, *Qui rationem in omnibus quærunt, rationem ſubvertunt*; and for as much as the end of the Law is to ſettle, repoſe, and make peace between man and man concerning their poſſeſſions, it ſhall be a dangerous thing to make any conſtruction againſt the general allowance of common aſſurances, for thereupon would riſe infinite contentions, quarrels and ſuits, which would be inconvenient.

The ſecond Objection which was made againſt it was, that this fine was upon a grant and a render, and therefore without writing could not be averred to be to an uſe, for that implieth conſideration in it ſelf, and therefore by naked averment by word, cannot be averred to be to any other uſe or intent then is compriſed in the fine it ſelf, but by deed it may be; Alſo the finding of the Jury is not material, for their finding ought to ſubmit to the judgement of the Law, as in *Amy Townſends* Caſe *Plow. Comm.* it is agreed. So holdeth *F.N.B.* 205. *b.* If a woman maketh a feoffment in fee by deed rendring rent, ſhe cannot by word averr that it was *cauſa matrimonii prælocuti*, for it appeareth by the deed that [b] the reſervation was the cauſe of the feoffment, but if ſhe hath a deed to ſhow that the deed was to the intent that he ſhould marry her, then ſhe may well maintain a Writ *cauſa matrimonii prælocuti*, but without ſhe cannot, as it is adjudged in 8 E. 2. *Vouch.* 78. ſee 8 *Aſſ.* 34. and thereupon the Caſe of *Wilks* 1 *Ma. Dier*, and many other Caſes were cited to this purpoſe; but they did rely upon the opinion of the whole Court of Common Pleas 14 *El. Dier* 311. in this very Caſe, That without writing a fine upon a grant and render cannot be averred to be to any uſe or intent then the fine it ſelf doth import; And then they object in this Caſe, that for as much as the Indentures which ſhould direct this fine were levied by *Blunt* and *Androwes* to *Perkins*, who rendred a rent to *Blunt*, and the Mannor to *Androwes*, the ſaid Indentures cannot declare any uſe or intent of the land from *Perkins*, who is a ſtranger to the Indentures, and of a fine levied to him, by which he rendreth a rent to one, and the land to the other, as is aforeſaid, which cannot be directed by any naked averment, for the expreſs conſideration and intent after in the fine, and no deed to which *Perkins* was not party can direct it, becauſe that now by the mutual agreement of *Blunt* who had the condition and the rent, and of *Androwes* who had the land, this fine is levied to *Perkins*, by which they make him abſolute owner of the land, and that he ſhould render a rent to *Blunt*, and the Mannor to *Androwes*, ſo that now *Blunt* hath the rent of the grant of *Perkins*, and *Androwes* hath the Mannor by the grant and render of *Perkins* alſo, *Ergo*, the eſtate of *Perkins* cannot be ſubject to any uſe or intent compriſed in the Indentures made before between *Blunt* and *Androwes*, but ought to have a deed to which *Perkins* ſhall be party, and this Objection was urged by many reaſons.

1. It was ſaid, that notwithſtanding the ſaid general Covenant, if *Blunt* or *Androwes* had made a feoffment, or levied a fine upon any new agreement or conſideration, although that ſuch a new agreement were but by word, that the general Covenant ſhould not rule any conveyance or aſſurance made upon new conſideration or agreement, and therefore if *Blunt* and *Androwes* had enfeoffed *Perkins*, or levied a fine to him for any ſum, or other conſideration, this feoffment or fine ſhall not be ruled or directed by the general Covenant, nor the general Covenant ſhall direct or rule any conveyance, but thoſe which are made upon the firſt conſideration, and in performance of the firſt bargain, and not for any new conſideration, *quod fuit conceſſum*; then *a conceſſis*, they object, That this fine levied imports in it ſelf a new agreement and conſideration, and that for divers cauſes.

1. This fine, as it hath been ſaid, importeth an expreſs conſideration in it ſelf, *ſcil.* in conſideration of a fine levied by *Blunt* and *Androwes* to *Perkins*, he granteth and rendreth a rent to *Blunt*, and the Mannor to *Androwes*, and no averment by word ſhall be received to ſhew that this fine was levied to other uſe or intent then is contained in the fine, ſo that the manner of the fine importeth a new [76] agreement.

2. This is a fine by both to a ſtranger to the Indenture, whoſe eſtate cannot be ſubject to declarations and covenants made between *Blunt* and *Androwes*, and this new perſon maketh a new agreement.

3. The firſt bargain and ſale and original contract between the parties is altered in ſubſtance and effect: for by the firſt bargain *Blunt* was to have a rent of 42. l. to him and his heirs, and by this fine the rent is rendred by *Perkins* to him in tail, the remainder over to a ſtranger, ſo that this eſtate tail which is new, and limited in remainder to a new perſon in fee, doth manifeſt that there was a new agreement between the parties, then *ex conſequenti* the ſaid Indentures cannot rule or guide the intent or uſe of this fine, the averment by word cannot be by Law, and the finding of the Jury is not material, for here is a new agreement of record, and none will affirm, that there ſhall be two rents to *Blunt*, one in fee, and the other in tail, for that ſhall be againſt the intent of the parties, and againſt all Law and reaſon.

To this it was anſwered and reſolved, that it is true that a fine upon a grant and render, if not in ſpecial Caſes, cannot be averred by word to be to another uſe or intent then it expreſſed in the fine, feoffment or other conveyance: But there is difference between uſe and conſideration, for when a fine, feoffment, or other conveyance importeth an expreſs conſideration, a man may averr by word another conſideration, which ſtands with the conſideration expreſſed; But yet in ſome Caſes a fine upon a grant and render may be ruled and directed in part to an averment by word. And therefore when the original bargain and contract between the parties is by Indenture or other deed, as where it is agreed by Indenture that a fine ſhall be levied of certain lands, by the name of certain number of acres to divers perſons, and that they ſhall grant and render the land again in fee ſimple which ſhall be to certain uſes; the fine is levied of the land, but ſome variance is in the number of the acres compriſed in the fine, or the fine is levied to one of the parties only who granteth and rendreth the land, ſo as there is variance betwixt the Covenant and the fine in number and perſon; and yet God defend but that this fine ſhall be averred to be to the uſe of the Indenture, for the original bargain and agreement of the parties was declared by writing, and although ſome ſmall variance be in quantity, perſon, time, or the like, betwixt
[*b*] the fine and the Indenture, yet the Law (which in common aſſurances hath great reſpect and regard to the intent of the parties, and to the ſubſtance and effect of their original bargain and agreement) will ſuffer an averment to agree to the fine and the Indenture, notwithſtanding theſe petit circumſtances of number, perſon, time, and the like, when the party averreth that there was not any new conſideration, nor any new agreement between the parties, but that the fine was levied according to the Indenture, and to the uſes and intents contained therein; And it is agreeable to Juſtice and Equity, and principally in common aſſurances of lands between party and party that ſome petit variance or circumſtance ſhall not overthrow all the ſubſtance and agreement of the parties in their Indentures to the diſ-enheriſon of one of them. And it was agreed in *Taverners* Caſe now of late referred to the Juſtices out of the Chancery, that if *A.* hath 10. acres in *D.* and *B.* hath 10. acres in the ſame Town, and *A.* levieth a fine to *B.* of 20. acres, and *B.* granteth and rendreth 20. acres to *A.* in fee, yet *A.* ſhall not have the 10. acres of *B.* if not that there were a ſpecial agreement between them to ſuch purpoſe, for otherwiſe the conuſee ſhall not be ſaid to render more then he received.

And to that which is ſaid, that *Perkins* is a ſtranger to the Indenture, and that *Blunt* and *Androwes* cannot limit the uſe or intereſt of the land, which by the fine was abſolutely the Indenture of *Perkins*, and that *Perkins* only hath the power to limit the uſe and to diſpoſe of the land and no other; To that it was anſwered and reſolved, that the ſcope and purpoſe of the Indenture, and of the original agreement of the parties was, that *Androwes* ſhall have the Mannor, and *Blunt* a rent out of it, and for performance of it, it was adviſed, that both ſhould joyn in a fine to *Perkins*, and that he ſhould render the rent to *Blunt*, and the Mannor to *Androwes*, ſo that it appeareth *Perkins* was but an inſtrument to perform the original agreement of the parties, and had not any power to limit any uſe, or to make other diſpoſition of the land then *Blunt* and *Androwes* had directed him, for if he had not agreed to make the render in the ſame fine as it was demiſed by *Blunt* and *Androwes*, they would never have levied the fine to him, ſo that he is but an inſtrument to perform the agreement of the parties, and all ſhall be ſaid to be done by the order and diſpoſition of *Androwes* and *Blunt* according to their original bargain and agreement, As in the Caſe in 2 *Eliz. Dier* 172. *Lane* held of the Mannor of *Walgrave* by Knights ſervice, whichMannor was holden over of the King *in Capite*, *Lane* levied a fine of the Tenancy to one, who granted and rendred it to *Lane* for life, the remainder to his wife for life, the remainder to the right heirs of
[77] the husband. And it was reſolved in the Court of Wards, that although that the wife were immediately in by the render of the conuſee, yet becauſe that it appeareth that he was but an inſtrument to render the land as *Lane* ſhould direct him, it was by the judgment of the Law the diſpoſition of the husband for the advancement of the wife. And it appeareth, that *Perkins* in the Caſe at the Barr was but an inſtrument to perform the original contract and agreement of the parties, and that he had not any power to overthrow the ſaid contract and agreement of the parties, which would be more apparent if firſt the parties of the fine, and then the ſeiſin of *Perkins* be examined and conſidered.

As to the firſt, if any part of the fine ſhall deſtroy the Condition, it ſhall be the conuſans of the fine, for that is made by *Blunt* who hath the condition, and by *Androwes* who hath the Mannor; put caſe then, that *Perkins* had refuſed to make any render, then it ſhall be clear that this conuſans to *Perkins* might be directed by the firſt covenants in the ſaid Indenture, although that *Perkins* were a ſtranger to it, and that is proved by the common aſſurances. For if *A.* by deed indented between him and *B.* bargain and ſell lands to *B.* and his heirs, and it is covenanted between them that *A.* ſhall levy a fine to *B.* and that *C.* who is a ſtranger ſhall recover the ſaid lands againſt *B.* in a common recovery, which recovery ſhall be to the uſe of *B.* and his heirs, the ſame is good without queſtion, for that hath been agreed by them who have argued on the contrary part; That the ſaid Recoverors in the Caſe at Barr, although they were ſtrangers to the Indenture, yet their eſtate was ſubject to the uſes of the Indenture: And it is uſual if Tenant in tail with remainder will bargain and ſell the land by deed indented and enrolled to his friend and his heirs, who ſuffer a common recovery with double voucher in which the bargainor is vouched, and yet all that is to the uſe of the Tenant in tail and his heirs, and ſo is uſual to be averred; for now upon the matter the bargainee is but an inſtrument to be Tenant to the *Præcipe* in the recovery which ſhall be ſuffered to bar the eſtate tail and all the remainders, and the bargain and ſale was only to this purpoſe; then if no render had been made, this conuſans might have been ruled and directed by the Indenture: Then it is to be conſidered what ſeiſin *Perkins* had, and truly he had not ſeiſin but at one inſtant, and only to this purpoſe to make the render, for his wife ſhall not be endowed, nor the land ſubject to his Recogniſances or Statutes; and the render is to *Androwes* who was party to the Indenture, ſo as the render of *Perkins* cannot extinct the condition which *Blunt* had,

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but the conuſans of *Blunt* ſhall extinct it if any thing ſhall extinct it, becauſe that *Blunt* at the time of the making thereof was abſolute owner of the Mannor, and had abſolute power to declare to what uſes and intents the ſaid recovery and all other aſſurances (without new agreement as hath been ſaid) ſhall be. Alſo although that *Perkins* were a ſtranger, yet the render was to *Androwes* who was party. [b]

Further it was ſaid, that in this Caſe *Blunt* joyned with *Androwes* in the fine for neceſſity; for if he had not been party to the fine, the render of the rent could not be made unto him, ſo that for this ſpecial purpoſe to have aſſurance of the rent by the render of the fine he joyned with *Androwes*, ſo that he might ſhew the whole ſpecial matter, by which it appeareth to what intent and purpoſe he joyned in the fine. And the reaſon of the Book of *6 R. 2.* is to be obſerved. For there the Juſtices (to avoid an Eſtoppel) regard the ſcope and purpoſe of the parties which levied the fine; And although that the fine be of ſo high nature that it will not ſuffer a bare averment againſt the purport and conuſans of the fine, yet when the Law requireth one of neceſſity, and for conformity to joyn with another in a fine, the Law will ſuffer him to ſhew the truth of the matter to avoid prejudice and concluſion: *Mich. 30 & 31 Eliz.* in a Writ of Error, between *Worſely* and his wife Plaintiff, and *Charnocke* Defendant for the reverſing of a fine levied by the husband and wife, it was adjudged, that the fine being reverſed for the nonage of the wife, the husband and wife ſhould have preſent reſtitution, and the conuſee ſhould not keep the land during the coverture, and the reaſon and cauſe of the Judgment was, becauſe that when the huſband and wife joyn in a fine, yet all the eſtate paſſeth from the wife, and the husband joyneth of neceſſity and for conformity, and therefore the Law doth permit that the truth of it be ſhewed, and the whole eſtate ſhall be reſtored to the wife during the life of the husband, againſt the opinion of *Chandiſh 50 E. 3. 6. & Hill. 33 Eliz.* in the ſame Court: And for the ſame reaſon between *John Harvey* Plaintiff, in an *Ejectione firmæ* againſt *Rafe Thomas* Defendant, for lands in St. *Madryn* in the County of *Cornwall*, it was adjudged, That where the husband is ſeiſed of land in the right of the wife, and the husband made a leaſe to the Defendant for 21 years, and afterwards he and his wife levied a fine *ſur conuſans de droit come ceo, &c.* to *Thomas Saint Tawbyn* and his heirs, the husband died, that the leaſe was ended by his death, and the conuſee ſhould avoid it, for the husband joyned but for conformity and of neceſſity; And there it was ſaid, that it was adjudged in the Common Pleas, where a recovery is had againſt the husband and wife of the lands of the husband whereof he is ſeiſed in tail, with a voucher over, the intent and purpoſe of joyning of the wife might be ſhewed; *ſcil.* to bar her of her Dower, and yet the whole recompence in value ſhall go to the iſſue in tail; and the Caſe before of *6 R. 2.* ſerveth to this purpoſe. [78]

And to the Objection which hath been made, that for as much as now the rent is rendred in tail with remainder over, that for this cauſe the fine doth import a new agreement of record, it was anſwered and reſolved, that as to the ancient rent it was extinct, becauſe another rent of another eſtate, and in another manner, by the mutual agreement of the parties was granted and rendred, for two *Blunt* ſhall not have; and the eſtate tail cannot be by expreſs limitation to the uſe of another, as it appeareth *24 H. 8. Br. Feoffm. al uſes* 40. *27 H. 8.* 10. where it is ſaid, that ſo it was of late adjudged by the advice of all the Juſtices according to the ſaid Reſolution in *24 H. 8.* And according to that it is adjudged in Parliament, as it appeareth by the Statute of *1 R. 3.* And ſo it was reſolved by the greater part of the Juſtices in this Caſe; but although that the rent was altered, yet it is no cauſe for alteration of the eſtate of the land, for the Jurors have found that there was not any new conſideration or new agreement for the land, but that the fine was to the uſe and intent of the firſt Indentures; and *Perkins*, *Androwes*, or any other hath not any prejudice by it, for *Blunt* contenteth himſelf with an eſtate tail in a rent which was of ſuch ſum, as he had in fee before, and therefore appointed *Perkins* to limit the remainder in fee over to himthat he ſhall nominate to him, but the ſame is not any cauſe to alter the quality and condition of the eſtate of *Androwes*; for *Blunt* hath not any benefit, nor *Androwes* any prejudice by the alteration of the render of the rent; and *Androwes* hath not given any conſideration to have an eſtate abſolute, or to extinguiſh the Condition.

And another reaſon to maintain the Reſolution in *Putnams* Caſe, *Bradburies* Caſe, and *Clevers* Caſe was made upon the Statute of *27 H. 8.* of uſes; for before that Statute, if *Blunt* had by deed enfeoffed another of the Mannor to the intent that he himſelf ſhould have a rent of 42 l. to him and his heirs, and that the feoffee ſhould ſtand ſeiſed to the uſe of *Androwes* and his heirs upon certain conditions to be performed by *Androwes*; and further it was covenanted and agreed between the ſame parties, That all aſſurances after to be made ſhall be to the uſes and intents of the ſame Indentures, and afterwards *Blunt* had levied a fine accordingly; this fine ſhall not extinct the rent or the condition, for that ſhould be againſt the original agreement of the parties, and the fine which they intended to perfect the former aſſurance, if the rent or condition ſhould be extinct, ſhould deſtroy the intent and meaning of the parties, and ſhould be againſt all equity and conſcience; and therefore the rent or uſe, being but a thing of truſt and confidence, for which there was not any remedy in Court of Equity, ſhall not be by ſuch fine levied to former uſes and intents extinct: Then if it ſhall not be extinct by the Common Law, now the Statute of *27 H. 8.* doth execute the poſſeſſion to the uſe in the ſame manner, quality, and condition as he had in the uſe. [b]

And further it was ſaid, That at the Common Law before the ſaid Act, if a man had made a feoffment by deed indented to another rendring rent, and with condition to reenter, and further it were covenanted and agreed between the parties, that notwithſtanding any fine or other conveyances made by the feoffor to the feoffee, by which the Rent and Condition ſhould be extinct, that the feoffee and his heirs ſhall be ſeiſed to the intent that they ſhall pay the like rent, and to be ſeiſed of the land upon the like condition as before, in this Caſe if the feoffor had levied a fine, or releaſed his right, or made any other conveyance unto the feoffee, by which the rent or condition were extinct, yet by original agree-

ment of the parties, a new rent and a new condition annexed to the uſe of the land ſhould riſe, and the feoffor ſhould have remedy in equity preſently for the rent: And when the Condition was broken, the uſe of the land ſhall be newly raiſed to the feoffor by the breach of the Condition, and by original agreement of the parties, notwithſtanding his releaſe, or other conveyance. And the ſame is touched and moved in *Putnams* Caſe in part cited before; And if the ſame might have been done before the Statute, now the poſſeſſion is executed to the uſe by the ſaid Act in the ſame manner, quality, and condition as he had in the uſe; And therefore although that a fine which enureth by way of releaſe, or which goeth by *Mitter le droit*, or by way of extinguiſhment, cannot be (without more) to an uſe, no more than the ſurrender of a particular eſtate may be, yet after ſuch releaſe which extinguiſheth the firſt rent or condition, another may be by original agreement of the parties then owners of the land, and who had the abſolute diſpoſition to raiſe and direct it as is aforeſaid. And *Popham* chief Juſtice ſaid, that always the declaration of the uſe made by the owner of the land ſhall be preferred before the declarations of all other; and therefore if the diſſeiſor and the diſſeiſee levy a fine, and the diſſeiſee limit the uſe to *A.* and the conuſee of the fine to the uſe of *B.* and the diſſeiſor to the uſe of *C.* and *A.* limit the uſe to one, the recoveror to another, and the vouchee to a third, the limitation of *A.* ſhall ſtand.

Fourthly, it was reſolved that by the death of *Androwes* the Condition was broken, for when the feoffee or grantee upon condition is to make an eſtate to the feoffor or grantor, and no time is limited, regularly it is true that the feoffee hath time to do it during his life, if the feoffor or grantor do not
[79] haſten it by requeſt, and upon requeſt and day or time limited when he will have it, the feoffee or grantee ought to make it, and if no requeſt be made, and the feoffee or grantee who ought to perform the condition dieth, the condition is broken, for he hath not performed the condition within the time preſcribed to him by the Law, which was during his life: But yet this general rule doth admit of divers exceptions and limitations. For in this Caſe of an Advowſon *Androwes* had not time during his life, although no requeſt were made, but upon contingent, that is to ſay, if no avoydance fell in the mean time, for if the grantee ſhall ſtay till the avoydance fall, then *ipſo facto* the condition is broken, becauſe *Blunt* cannot have all the effect which by the grant he ought to have, and that is to have all the preſentations during his life, and the Advowſon is become in another plight then it was: So if *A.* enfeoff *B.* 1 *Maii* upon condition that he grant to *B.* an annuity, or rent during his life payable yearly at the feaſt of S. *Michael* and the Annunciation, in this Caſe the feoffee hath not time during his life to make this grant, but he ought to make it before the feaſt of S. *Michael*, or otherwiſe he ſhall not have the annuity or rent during his life. And that may be gathered upon the Book of 14 *E.* 3. *Det* 138. that in Caſe of grant of a rent he ſhall not have time during his life: And if two not married be enfeoffed upon condition to reinfeoff the donor or feoffor, and one of them dieth, yet the other may perform the condition, but if he who ſurviveth hath a wife, the condition is broken, for if he ſhall make the reinfeoffment, his wife ſhall be endowed: And in all the ſaid Caſes when the condition is that the feoffee ſhall make the eſtate, and the feoffee dieth, there the condition is broken, and none can perform it, for the condition extendeth only to the feoffee, but if the condition be that the feoffee or his heirs ſhall make an eſtate to the feoffor and no day is limited, there although the feoffee dieth, the condition is not broken, for the feoffee only is not bound by the condition during his life to make the feoffment, ſo as by his death the time appointed to perform the condition ſhall be paſt, but the condition doth extend alſo to his heirs indefinite without limitation of time, and the Condition in ſuch Caſe being without limitation of time or perſon cannot be broken by not making the eſtate; but upon requeſt
[b] made by the feoffor and his heirs, and with that agreeth the Book in 3 & 4 *Phil. & Mar. Dier* 138, 139. the Earl of *Surries* Caſe; for the condition there (admitting it to be a condition) being without limitation of perſon and time, was not to be performed before requeſt: But in the Caſe at Bar, if day had been limited before which *Androwes* ſhould grant the Advowſon by the Proviſo, there if before the day *Androwes* had died the condition ſhould not be broken, for when the parties by their mutual agreement give a certain time within which the condition ſhall be performed, and within that time he who ought to perform it dieth, ſo that the condition becometh impoſſible by the act of God, there the eſtate doth remain abſolute diſcharged of the condition. See 15 *H.* 7. 13. 33 *H.* 6. 26, 27. 2 *Eliz. Dier* 262. and Sir *Thomas Wrothes* Caſe, *Plow. Com.* 456. And therefore it is requiſite in ſuch Caſes that when a day is limited that the condition do extend not only to the feoffee or feoffees, but to their heirs for fear of death before the day: but if one intend to enfeoff another upon condition that the feoffee before ſuch Feaſt, or within a year, &c. ſhall give back the land to the feoffor, &c. it is requiſite that the condition be that the feoffee or his heirs before ſuch feaſt, &c. give back, &c. otherwiſe if the feoffee dieth before the Feaſt the condition is become impoſſible, and the feoffor hath not remedy by the Law to compel the heirs of the feoffee to give back the land.

Another difference was alſo agreed, when the eſtate is to be made by the condition to the feoffee, and when to a ſtranger; for when the eſtate is to be made to a ſtranger, the feoffee ought to make the ſame within convenient time, for he to whom the feoffment is to be made being a ſtranger ought not to make any requeſt, as the feoffor who is party ought to do. And in ſuch Caſe when a ſtranger is to be enfeoffed, the feoffee ought within convenient time to require the ſtranger to appoint a time when he will have the feoffment made to him, and at that time he ought to make it; and ſo the feoffees ought to give notice to the ſtranger, and requeſt him to appoint a time as is aforeſaid. And therewith agreeth 44 *E.* 3. 9. 9 *E.* 4. 22. 2 *E.* 4. 3. & 4. 19 *H.* 6. 67, 73, 76. And in the Caſe of *Littleton fol.* 82. where a feoffment is made upon condition that the feoffee ſhall enfeoff many, &c. there it doth not appear that thoſe who ſhould be enfeoffed were ſtrangers, or if they were ſtrangers, whether they died before the feoffee could enfeoff them.

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Another difference was taken by ſome when the feoffee dieth, and when the feoffor dieth before any eſtate made according to the condition, in the one Caſe the condition is broken, and in the other not. As if *A.* enfeoff *B.* upon condition that *B.* ſhall give back the land to *A.* and his wife, and to the heirs of their two bodies begotten, the remainder to *C.* in fee, in this Caſe if *B.* dieth the condition is broken, as afore is ſaid; but if *A.* dieth the condition is not broken, for the feoffee hath time during his life if he be not haſtned by requeſt, by the feoffor, his heirs, &c. and that appeareth by *Littleton* in his Chapter of Conditions, *fol.* 82. for in the ſame Caſe *Littleton* ſaith, that if ſuch feoffee will not make ſuch eſtate when he is reaſonably required by them who ought to have the eſtate by force of the condition, then may the feoffor or his heirs enter, by which it appeareth, that as long as the feoffee liveth the condition cannot be broken by the death of the feoffor; For *Littleton* put in his Caſe that the feoffor was dead. But againſt that 18 *Aſſ. ultimo* was cited; where the Caſe was, That the Lord *Clifford* held his Barony and the Sheriffwick of *Weſtmerland* of the King by grand Serjeanty in *Capite*, and the King gave a licence to the Lord *Clifford* that he might thereof enfeoff two Chaplains in fee, ſo that they gave back the ſame to the ſaid Lord *Clifford* and the heirs males of his body the remainder over. The Lord *Clifford* according to the ſaid licence did enfeoff the Chaplains, and before they had given the ſame back again the Lord *Clifford* died, his ſon and heir within age, and in Ward to the King by reaſon of other lands; and all the ſaid matter was found by Writ of *Diem clauſit extremum*, and returned into the Chancery, out of which, and of the Charter of licence a *Scire facias* iſſued againſt the ſaid Chaplains, if they could ſay any thing why the ſaid lands ſo occupied by them in diſ-heriſon of the heirs and from taking the Wardſhip thereof from the King, ſhould not be ſeiſed into the Kings hands; who appeared and pleaded the Kings licence, and the feoffment of the Lord *Clifford*, and ſo they were the Kings Tenants by his licence; and as to the reinfeoffment it was at their will to do it, with that that they were always ready to have made the eſtate to the Lord *Clifford* in his life, and that he would have it by fine, and thereupon brought a Writ of Covenant, and died pendant the Writ; and after his death they endowed the wife of the Lord *Clifford*, and were always ready if they had the Kings licence to make the re-gift to the ſon and heir to make the eſtate according to the condition: And Judgment was given that the tenements ſhould be ſeiſed into the Kings hands, and that he ſhould have the profits thereof from the death of the Lord *Clifford*. But note Reader (as I conceive) the ſaid Judgment doth not contradict the opinion of *Littleton*; for *Sadlier* who pronounced the Judgment gave two reaſons and cauſes of the ſaid Judgment. [80]

1. Becauſe that by the licence of the King which is here of Record, and by the office alſo returned, it appeareth upon Record that the Chaplains had not other eſtate then upon condition.

2. That it appeareth by their plea that they had time in the life of the Lord *Clifford* to have performed the condition; the effect of the firſt reaſon is, for as much as the land was holden in *Capite*, and the licence was ſpecial to enfeoff the Chaplains, ſo as they gave back to the feoffor in tail, &c. if they had made the gift in tail to the Lord himſelf they had preſerved the licence, but when the Lord himſelf died, they could not by force of the ſaid licence make the gift to his ſon: Then for as much (as it appeareth by the ſecond reaſon) that they had time in the life of the Lord *Clifford* to have performed it, and the not doing of it drew a charge to the heir to purchace a licence, and perhaps the King would never give licence, and then the eſtate never (without charge, and cauſe of ſeiſure for want of licence) ſhould be made, and all that in default of the feoffees who had time to make it, and if they had preſerved the licence they ought to have made the regift to the Lord himſelf; and therefore it is as much as if the feoffees had bound themſelves in a Statute or Recogniſance, which after their feoffment ſhould charge the land; ſo if they without licence ſhould give it back to the heir, his lands ſhould be ſeiſed into the Kings hands for alienation without licence; for this cauſe the entry of the heir was lawful. And note in the ſaid Caſe, that the feoffees in their plea ſaid, That they were alway ready to have enfeoffed the heir if they had had licence ſo to do, by which it appeareth that the ſaid licence did not warrant them to make the gift to the heir. [b]

Alſo it is ſaid in the ſaid Caſe by *Hampton*, That if the King ſeiſe the land, it ought to be in his own right, and the heirs of the Lord *Clifford* diſ-inherited, for at this time he thought as it ſeemeth, that land holden by grand Serjeanty aliened without licence ſhould be forfeited to the King: For that ſee the Statute *de Prærogativa Regis cap.* 7. *de Serjeantiis alienatis ſine licentia Regis conſuevit Rex arrentare hujuſmodi per rationabilem extentum inde faciendum.* And agreeing to this I have ſeen a precedent, 26 *E.* 1. *Exam' Rememorat' dominæ Reginæ in Scaccario*, That land in *Cheſterton* in the County of *Warwick*, and *temps E.* 1. of lands in *Hadnet* in the County of *Shrewsbury* were ſeiſed and granted in fee by Juſtices in *Eyre*, for alienation without licence, for then Juſtices in *Eyre* might have granted ſuch land in fee rendring rent, as a Juſtice of a Foreſt (which in effect as to this purpoſe are Juſtices in *Eyre*) at this day may of lands encloſed within a Foreſt without the Kings leave. And *Wilby* in 14 *E.* 3. *Quare impedit* 54. ſaith, That if land holden by grand Serjanty be aliened without licence they are forfeited by the Common Law, becauſe that ſervice of body cannot be transferred to another.

But note Reader, at this day it is without queſtion, that land holden by grand Serjanty ſhall not be forfeited for alienation without licence; for if it were admitted that they were forfeited as *Wilby* ſaid at the Common Law, yet it is declared contrary, and remedied by the Act of 1 *E.* 3. *cap* 12. by which it is provided, Whereas divers people of the Realm complain themſelves to be grieved by that that lands and tenements holden of the King in chief (as all which are holden by grand Serjanty are) and aliened without licence have been ſeiſed heretofore and holden as forfeit, in ſuch Caſe a reaſonable fine ſhall be taken. And ſo at all times after that Statute, when land holden by grand Serjanty hath been aliened without licence, a fine hath been taken and no ſeiſure made for the forfeiture; *Et optimus legum interpres conſuetudo.* And ſo it was holden *M.* 38 & 39 *Eliz.* by the two chief Juſtices *Popham* and *Anderſon*, *Periam* chief Baron, and all the other Juſtices. And the reaſon for which I collect [81]

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the land was holden by grand Serjanty is, firſt, beccauſe the Book ſaith, that he aliened great part of his heritage, and the Sheriffwick of *Weſtmerland* which is parcel of his Barony; and every Barony in ancient time was holden by grand Serjanty. Secondly, *Hampton* there (either forgetting the Statute of 1 E. 3. or not conceiving the ſame to extend to grand Serjanty) ſaith, That the King ſeiſed in his own right, and diſ-inherited the heirs (*ſcil.* If an eſtate ſhall be made without licence) which without queſtion by the expreſs letter of the Act of 1 E. 3. could not be, if it were holden in *Capite* and not by grand Serjanty. So it appeareth that the Book of 18 *Aſſ.* is reſolved upon other reaſons, and doth not oppoſe the opinion of *Littleton*, who without queſtion had ſeen the Book. And I perceiving the Book of 2 *H.* 4. 5. to agree with *Littleton*, cauſed ſearch to be made for the record of the Caſe: *Et inter recorda de Theſaur' recept' Scaccarii ſub cuſtodia Theſaur' & Camer' remanen' inter placit' de juratis & Aſſ. de ann.* 1 *H.* 4. *in Com. Devon.* the Record of the ſaid Caſe was found, and the Caſe was, That *Robert French* brought an Aſſiſe againſt *William Dean* and *Thomaſine* his wife, and others, of his freehold in *Chudleigh*, and the Aſſiſe was taken by default, and a ſpecial verdict found, that is to ſay, *Quod quidam Thomas Glaſier fuit*
[b] *ſeiſitus de præd' tenementis cum pertinentiis in eorum viſu poſitis in dominico ſuo ut de feodo, & ſic inde ſeiſit' exiſtens eadem tenementa cum pertinen' dedit & conceſſit quibuſdam Jo. Prous & Rogero Cockſhead, habend' ſibi & hæredibus ſuis, ſub conditione quod iidem Johannes & Rogerus ipſum Thomam & prædict' Thomaſinam adtunc uxorem ipſius Thom' de eiſdem tenementis refeoffaret, habend' eiſdem Thomæ & Thomaſinæ & hæredibus de corporibus ſuis exeuntibus, remanere rectis hæredibus ipſius Thomæ; virtute cujus iidem Johannes & Rogerus de tali ſtatu fuerunt inde ſeiſiti, & poſtea prædictus Thomas obiit ſine hærede de corpore ſuo & de corpore ipſius Thomaſinæ exeunt' abſque aliquo refeoffament' eiſdem Thom' & Thomaſ. juxta conditionem præd' fac', ſive per ipſum Thomam in vita ſua exact', poſt cujus mortem præd' Thomaſina cepit in virum præd' Will. Dean: Poſtmodumque iidem Will. Deane & Thomaſina petierunt a præfato Johanne & Rogero feoffamentum eidem Thomaſinæ de præd' tenementis juxta conditionem præd' fieri: Super quo iidem Johannes & Rogerus per quoddam ſcript' ſuum indentatum anno* 14 R. 2. *conceſſerunt & confirmaverunt præfatis Willielmo Deane & Thomaſinæ præd' tenementa cum pertinentiis habend' & tenend' eiſdem Willielmo & Thomaſinæ, ad totam vitam ipſius Thomaſinæ, remanere inde rectis hæredibus præd' Thom' ſecundum formam conditionis præd': ſuper quo Johannes Vyen & Mariotta uxor ejus, in jure ipſius Mariottæ, ut ſororis & hæredis præd' Thomæ ſupponend' prædict' feoffamentum prædict' Will. Deane & Thomaſinæ de tenemen' præd' in forma præd' factis fuiſſe contra formam conditionis præd' in tenementa illa intraverunt, & inde præd' Robertum French per cartam ſuam, &c. feoffaverunt, &c. virtute cujus idem Robertus in tenementa præd' intravit, & iidem Willielmus Deane & Thomaſina ipſum inde recenter amoverunt; Et ſi amotio illa diſſeiſina adjudicari debeat necne, dicunt quod ipſi omnino ignorant, & petunt diſcretionem Juſticiar', &c.* And Judgment was given for the Plaintiff.

Out of this Record I obſerve four things; Firſt, that in the ſpecial verdict there is no mention made at what time the feoffment was made upon Condition, ſo that (if the time were material) it might appear how long time was paſt between the feoffment upon condition and the death of the feoffor; and that anſwereth the Objection which ſome make, That in the ſaid Caſe of *Littleton* that thoſe to whom the eſtate by the condition ſhould be made, died preſently, ſo that the feoffees had not convenient time to make the eſtate according to the condition; for if the Law ſhould be ſuch, then the time ſhould be material, and by conſequence the verdict which found no time was imperfect, upon which no judgment could be given. But the contrary appeareth by the ſaid Book of 2 *H.* 4. 5. for there it appeareth, that by the advice of all the Judges Judgment was given for the Plaintiff, by which it appeareth that the death of the feoffor at what time ſoever that it be, is no breach of the condition, if no requeſt were made by him, for ſo it appeareth by the ſaid Record.

Secondly, That the feoffees needed not make the eſtate either to the feoffor in his life, or unto any other after his death until requeſt made, becauſe that the ſecond husband and his wife made a requeſt, as it is expreſly found by the Aſſiſe.

Thirdly, That although by the Law the eſtate made to the wife for life ought to have been with-
[82] out impeachment of Waſt, as it appeareth by *Littleton fol.* 82. and that the wife is covert, and it trencheth to her prejudice, yet for as much as it was the folly of the wife being ſole to take ſuch a husband who would accept of ſuch eſtate; and alſo becauſe the eſtate for life is the ſubſtance of the eſtate which ſhould be made by the feoffee, and the priviledge to be without impeachment of Waſt is a thing collateral, and only for the benefit of the husband and wife, and the omitting of it being for the benefit of the heir of the feoffor, it is not any breach of the condition to give him cauſe of reentry, for then the wife ſhould loſe her eſtate alſo, which ſhould not be reaſonable.

Fourthly, That although the moſt ſure way had been that the eſtate ſhould be made to the wife alone, yet the eſtate being made to the ſecond husband and the wife, for the life of the wife, it is no breach of the condition, for none is prejudiced thereby; And if the eſtate had been made only to the wife, the husband ſhould have had as much power and benefit as he now hath, and therefore it is all one in ſubſtance and effect.

Trin. 43 Eliz. *which began Mich.* 41 & 42 Eliz. *Rot.* 144.

Bingham's Caſe adjudged in the Kings Bench.

IN an *Ejectione firmæ* between *George Strode* Eſquire Plaintiff, upon a demiſe made by *William Albert* againſt Sir *Raphe Horſey* Knight, and others Defendants; upon the general iſſue a ſpecial verdict was found to this effect; *Robert Bingham* the Grandfather, *Robert Bingham* the Father, *Richard Bingham* the ſon within age. *Robert Bingham* the Grandfather held the Mannor of *Binghams Melcum* by Knights [91] ſervice of Sir *John Horſey* Knight as of his Mannor of *Horſeys Melcum*. And *anno* 12 *Eliz.* levied a fine of the ſaid Mannor of *Binghams Melcum* unto the uſe of himſelf and *Jane* his wife, and of the heirs of the ſaid *Robert* the Grandfather: 20 *Eliz.* the ſaid *Robert* the Grandfather levied another fine of the ſaid Mannor of *Binghams Melcum* unto the uſe of himſelf for life, and after to the uſe of *Robert* the Father (being his ſon and heir apparent) in tail, and for default of ſuch iſſue to the uſe of the right heirs of the Grandfather: *Robert* the Father 30 *Eliz.* died, *Richard* his ſon and heir then and yet within age, by which the remainder in tail deſcended to him. 31 *Eliz.* Sir *John Horſey* ſuffered a common recovery of his Mannor of *Horſeys Melcum* unto the uſe of himſelf and *Dorothy* his wife in tail, and after to the uſe of the Defendant Sir *Raphe Horſey* and *Edyth* his wife in tail, and after to the uſe of the right heirs of Sir *John*. 32 *Eliz.* Sir *John* and *Dorothy* his wife died without iſſue, Sir *Raphe* the Defendant entred into the Mnanor of *Horſeys Melcum*; 36 *Eliz.* *Robert Bingham* the Grandfather died, by which the reverſion in fee deſcended to *Richard* the ſon; 41 *Eliz.* *Jane* wife of *Robert Bingham* the father died, *Richard Bingham* within age entred into the ſaid Mannor of *Binghams Melcum*, and made a Leaſe of part of the demeans thereof to *Albert* by deed indented for 7 years, yeilding 40 *l.* rent *per ann.* who demiſed to the ſaid *George Stroude* who entred, upon whom Sir *Raphe* and the other Defendants entred, againſt whom the Plaintiff brought the *Ejectione firmæ* for part of the demeans of the ſaid Mannor of *Binghams Melcum*: And upon great deliberation and conference had with divers other Juſtices, Judgment was given for the Plaintiff. And in this Caſe four Points were reſolved.

Firſt, when *Robert Bingham* the Grandfather 20 *Eliz.* levied a fine to the uſe of himſelf and *Jane* his wife for life, and after to the uſe of *Robert* the father in tail, and after to the uſe of the right heirs of the Grandfather, the Grandfather had a fee expectant upon the eſtate tail as a reverſion and not as a remainder. And therewith agreeth 32 *H.* 8. *Br. Garde* 93. 4 *H.* 6. *tit. Done & Remainder* 15. 28 *H.* 8. *Dier* 7. *Bucknam's* Caſe. And ſo it was adjudged *Mich.* 31 *Eliz.* in the Kings Bench between *Fenwick* and *Mytford*, where the Caſe was, That *Anthony Mytford* ſeiſed of land in fee, levied a fine thereof unto the uſe of *Margaret Mytford* for life, and after to the uſe of *Jaſper Mytford* in tail, and after to the uſe of the right heirs of the ſaid *Anthony*; and afterwards tenant in tail died without iſſue, *Anthony* in the life of *Margaret* made a leaſe to one *Robert Holman* for a 1000 years and died, and if this leaſe were good or not againſt the heir was the Queſtion. And it was adjudged that the leaſe was good, for *Anthony* had it as a reverſion. And ſo was it reſolved in the like Caſe by all the Judges of *England* in the Caſe of the Earl of *Bedford* in the Court of Wards.

Secondly, it was reſolved, That Sir *Raphe Horſey* ſhall not have the Wardſhip of the land, becauſe a reverſion in fee is expectant upon it, and the reverſion is immediately holden of the Lord and not the eſtate tail: But it was objected, that in this Caſe by the death of *Robert* the grandfather, the reverſion in fee deſcended to *Richard*, who is alſo the heir of the donee in tail, and the land is holden by Knights ſervice, and ought to be in Ward to ſome, or otherwiſe many Lords may be defeated of the Wardſhip of lands holden of them: and *Richard* cannot hold the eſtate tail of himſelf, and therefore Sir *Raphe Horſey* in this Caſe ſhall have the Warſhip of the land. As if tenant by Knights ſervice maketh a gift in tail, and afterwards releaſeth to the donee and his heirs, now the donee hath the eſtate tail, and the reverſion expectant; in this Caſe if the donee dieth, his iſſue within age, the Lord ſhall have the Wardſhip of the body and of the land: And in proof thereof the Book in 38 *E.* 3. 7. was cited, where in a Writ of Ward of the land and of the heir of *R. C.* the Defendant pleaded that *R. C.* levied a fine to the Defendant, *come ceo, &c* who granted and rendred the land to him in tail, ſaving the reverſion to the Defendant, and ſo *R. C.* the donee held of him; To which the Plaintiff replied, That the Defendant releaſed to *R. C.* all his right, and ſo *R. C.* became his tenant; To which the Defendant by way of rejoynder ſaid, That he did not releaſe, upon which they were at iſſue: And it was held no good iſſue, for which he ſaid he did not releaſe but continued his eſtate all times in tail by force of the fine, and thereupon iſſue was taken; and upon that it was inferred, that for as much as the Writ of Ward was brought as well for the land as for the heir, that the replication ſhall not be good, if not that the Lord have the Wardſhip of the land in the ſame Caſe: But the Court upon conſideration of the ſaid Book gave no great regard to it, as well becauſe the ſaid point as to the Wardſhip of the land was not moved in the Caſe, as becauſe it appeareth by the joyning of the iſſue that it was pretended that by the releaſe the eſtate tail was extinct, for the iſſue is, whether he continued his eſtate tail by force of the fine, and that without queſtion he did, although the releaſe were made. Note Reader, if the ſaid Book were agreed to be Law, yet it is not to be likened to the Caſe at Bar, for when the donor doth releaſe to the donee in tail, the ſame doth enure by increaſing of his eſtate. And therefore if the Law ſhall be, that the Lord in the ſame Caſe ſhall have the Wardſhip of the heir and land of the donee, for as much as [92]

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the heir claimeth both the eſtates by deſcent from one and the ſame anceſtor: Yet in the Caſe at the Bar, when the donee hath an eſtate tail by deſcent from his father, and the reverſion as heir to his grandfather; and ſo two diſtinct eſtates deſcend to him from two ſeveral anceſtors, the land ſhall not be in Ward to the Lord, for the father held the eſtate in tail of the grandfather, and the grandfather his reverſion of the Lord. But it was holden by the whole Court, that if tenant in tail be with the reverſion expectant to him and his heirs of land holden by Knights ſervice of a common perſon, and afterwards he dieth his heir within age, he ſhall be in Ward for his body, but the Lord ſhall not have the Wardſhip of the land, for the Wardſhip is holden immediately of him, and not the eſtate tail. And if he grant over the reverſion, he ſhall hold the eſtate tail of his grantee, and although that the Seigniory of the eſtate tail is ſuſpended, yet the donee hath two diſtinct eſtates in him, that is to ſay, the eſtate tail
[*b*] and the reverſion in fee; and the reverſion is as a Meſnalty betwixt the Lord and the donee, and it cannot be ſaid, that in this and other the like Caſes the Lord may be defeated of the Wardſhip of the land, for as much as the Law doth not give in ſuch Caſes any Wardſhip of the land to the Lord, and the Law doth wrong to no man. But if it were admitted that the tenure between the donee and him in the reverſion, by unity were determined, yet nothing ſhall be holden of the Lord but the reverſion, and in ſome Caſe the donee in tail ſhall hold of no body; for where the Tenant of the Archbiſhop of *Canterbury* made a gift in tail, the remainder to the King in fee, the donee held of no body, as it was holden 4 & 5 *Phil. & Mar. Dier* 154.

Thirdly, it was reſolved, that if the Caſe were admitted that *Robert* the grandfather was Tenant for life, the remainder to *Robert* the father in tail, and *Robert* the father had iſſue *Richard* within age and died, and afterward Sir *John Horſey* the Lord conveyed the Seigniory to Sir *Raphe Sadler* the Defendant, and afterwards *Robert* the grandfather died, that *Raphe* the Defendant ſhall not have the Wardſhip of *Richard*, becauſe *Robert* the father held not of him (nor any of his anceſtors whoſe heir he is) the day of his death, nor was the land within the fee or Seigniory of Sir *Raphe* the Defendant or any of his anceſtors whoſe heir he is, at the time of the death of *Robert* the ſon; and a man ſhall never have the Wardſhip of the heir, when the land was not in his fee or Seigniory, or of ſome of his anceſtors at the time of the death of the Tenant, and the ſame is proved by the words of the Writ of Ward, that is to ſay, *Præcipe quod reddat cuſtodiam terræ & hæredis C, quæ ad ipſum pertinet, eo quod C. terram illam de eo tenuit die quo obiit.* And of ſuch effect are the words of the Writs of *Diem clauſit extremum*, and *Mandamus*: And although that during the life of the Tenant for life, the heir of him in the remainder ſhall not be in Ward, becauſe the Tenant for life is Tenant to the Lord paramont, and the Lord ſhall not have the Wardſhip ſo long as he hath a Tenant for life; yet the death of the Tenant for life is not the cauſe of the Wardſhip, but is a removal of the impediment for which for the time he was not in Ward: As it was holden *Paſch. 39 Eliz.* in the Common Pleas in a Writ of Waſt betwixt *Paget* and *Cary*, That if there be Tenant for life, the remainder for life, the remainder in fee, and the Tenant for life committeth Waſt, and afterwards he in the remainder for life dieth, now he in the remainder in fee ſhall have an Action of Waſt, for the mean eſtate for life which was the impediment is removed. Alſo it was ſaid, when to the perfection of a thing two accidents are requiſite, and one happeneth in the time of one, and
[61] the other in the time of another, in ſuch Caſe neither the one nor the other ſhall take benefit of it, becauſe that both do not happen in the time of any of them, and both are requiſite to the conſummation of the thing. As if Lord and Tenant be by certain rent, and the Tenant ceaſeth for one year, and then the Lord granteth over his Seigniory, and then the Tenant ceaſeth for another year, in this Caſe none of them ſhall take benefit of this ceſſer, *quod fuit conceſſum.*

And a Caſe was adjudged in this Court, *Trinit. 25. Eliz.* in *Lacy*'s Caſe, That whereas *Lacy* ſtrook *Peacock* and gave him a mortal wound upon the Sea, of which *Peacock* did at *Scarborough* in the County of *York*, and *Lacy* was diſcharged of it, for thoſe of the County of *York* could not enquire of his death, without enquiry of the ſtroke, and of the blow they could not enquire becauſe it was not done within any County: and thoſe of the Admiralty could not as a felony enquire of the ſtroke, without enquiry of the death, and they could not enquire of the death becauſe it was not *infra corpus comitatus*; And it was ſaid, when divers accidents are requiſite to the conſummation of a thing, the Law in many Caſes will rather reſpect the original cauſe then any other. As *6 E. 3. 41.* if a man preſent one to a Church in the time of War, and upon it the preſentee is admitted and inſtituted in the time of Peace, the Law giveth regard to the original act, that is to ſay, the preſentment, and all that followeth thereupon, although it were in time of Peace, ſhall be avoided: And now upon the whole matter this uſurpation ſhall be conſtrued to be in time of War, and ſhall not put the right Patron out of poſſeſſion. And upon the ſame reaſon was *Shelley*'s Caſe adjudged in this Court. And it appeareth alſo by the Caſe of Dower in *4 H. 8.* and cited in *5 Eliz. Dier* 224. if the husband levieth a fine with Proclamations and dieth, and five years paſs after his death, the wife is barred of her Dower againſt the opinion in *Plow. Comm.* 373. for although to the conſummation of Dower three things are requiſite, that is to ſay marriage, ſeiſin, and the death of the husband; and although that at the time of the fine levied, his title was not conſummate, yet the Law reſpecteth the firſt and original cauſes, *ſcil.* marriage and ſeiſin. So in the Caſe at Bar, it may be ſaid, that the Law ſhall look back to the death of him in the remainder, and the deſcent from him to one within age which is the original cauſe of the Wardſhip, then unto the death of the Tenant for life who is but the *cauſa ſine qua non*, and rather a removal of the impediment as hath
[*b*] been ſaid then a cauſe. But it was reſolved, as it hath been ſaid, that neither the one nor other for the cauſe aforeſaid in this Caſe ſhall have the Wardſhip.

And it was ſaid, that if there be Tenant for life, the remainder in fee to a ſtranger of a Seigniory, and Tenant for life, the remainder in fee of the Tenancy holden by Knights ſervice, and he in the remainder in fee of the Tenancy dieth his heir within age, and afterwards the Tenant for life of the Seigniory dieth, he in the remainder in fee of the Seigniory ſhall have the Wardſhip, becauſe that th

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land at the time of the death of the Tenant in remainder was in his fee and Seigniory: So for the ſame reaſon, if there be Tenant for life, the remainder in fee of lands holden as above, and the Lord granteth his Seigniory for life, and afterwards he in the remainder in fee dieth his heir within age, and afterwards the grantee for life of the Seigniory dieth, and then the Tenant for life dieth, he in the reverſion of the Seigniory ſhall have the Wardſhip: So if he in the remainder dieth, his heir within age as above is ſaid, and afterwards the Lord dieth, and then the Tenant for life dieth, the heir of the Lord in this Caſe ſhall have the Wardſhip, for an Act in Law ſhall not prejudice any one; and his Executor cannot have it, for it was but a Chattel in the Teſtator. And of ſuch opinion as to this third Point in the principal Caſe were Sir *Edward Anderſon*, and *Walmeſley* Juſtices of the Common Pleas, upon conference with them as the Lord *Popham* reported.

Fourthly, it was reſolved, That Sir *Raphe* the Defendant ſhall not have two parts of the lands by the Statutes of 32 & 34 *H.* 8. For although that *Robert* the grandfather hath limited the uſe to *Robert* the father which is within the ſaid Statutes, yet when *Robert* the ſon dieth in the life of the grandfather, the ſaid Statutes do not extend further, for the heir of the father who is in by deſcent ſhall be in Ward by the Common Law, and not by the ſaid Statutes. And if the Statute ſhall extend to the ſon and heir of him in the remainder, *pari ratione* it ſhall extend to all the heirs of him in the remainder *in infinitum*. As if a common perſon be Lord and Tenant by Knights ſervice, and the Tenant maketh a gift in tail to his younger ſon and dieth, and the reverſion deſcendeth to the eldeſt, in this Caſe *hac vice* the Lord ſhall have the Wardſhip of two parts of the land of the donee: But if the donee dieth, now the eldeſt, ſon having the reverſion, ſhall have the Wardſhip of the heir of the donee, and the Statutes do not extend but only to the child firſt advanced if he overlive the father, and be then owner of the land. For if the father conveyeth the land to the uſe of another of his ſons, and the ſon ſo advanced, alieneth or maketh any eſtate of the land *bona fide* in the life of the father, the King or the Lord of whom the land is holden ſhall not have the Wardſhip by force of the ſaid Statutes; for the Statutes are expounded to give two parts to the King or Lord when the advancement continueth in the perſon advanced without alteration by act in Law as by deſcent, or by act of the party as by conveyance.

The ſame Law is, when land is conveyed for the advancement of the Tenants wife, or for payment of his debts, if after the land be aliened *bona fide* before the death of the Tenant, the King nor other Lord ſhall have the Wardſhip. And ſo was the Statute of *Marlebridge Cap. 6. de his quem qui primogenit' feoffare ſolent, &c.* expounded: Fo if the father had enfeoffed his ſon, yet if the ſon in his fathers life had aliened *bona fide*, it was out of the remedy of that Statute, and in ſuch Caſe the Lord ſhall not have the Wardſhip, as appeareth by 33 *H.* 6. 16. in *Andrew Woodcocks* Caſe. So in the ſame Caſe if the ſon had died in the life of the father: But otherwiſe it is, if the conveyance made by the ſon be after the death of the Tenant, for then the Lord had his own cauſe of Wardſhip, and therefore the alienation after ſhall not take away his benefit from him. [94]

Alſo for another reaſon Sir *Raphe* cannot take benefit of the conveyance to the uſe of the ſon, becauſe *Robert* the father hath conveyed the land to the uſe of his wife for her life who ſurvived him, and ſo the Statute once ſatisfied. *Vid.* 14 *Eliz. Dier* 308. *Accord.* And ſo it was reſolved in the Caſe of one *Northcote Paſch.* 32 *Eliz.* in the Court of Wards, that if the King by force of the Acts be intituled to have two parts of the land conveyed to one ſon in tail after his death without iſſue, he ſhall not have the benefit of the Statute again againſt any ſon in remainder: And ſo the doubt in *Shawes* Caſe, 2 & 3 *Phil. & Mar. Dier* 130. is adjudged and reſolved. The Attorney General, *John Doderidge*, and *John Strode* and others were of Councel with the Plaintiff: And *Laurence Tanfield*, *Laurence Hide* and others with the Defendant.

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THE REPORTS OF Sir Edward Coke Kt. &c.

PART III.

Trin. 25 Eliz. *between the Queen and the Marquess of* Winchester, *which began Mich.* 21 & 22 Eliz.

The Marquess of *Winchester*'s Case.

[1] THE Queen brought a Writ of Error against the Marquess of *Winchester*, the effect of the writ of Error was, That *John Horne* and others by their deed bearing date the 10 day of *July*, *an.* 6 *H.* 8. gave to *Lionel Norreis* Esquire, and to one *Anne Milles*. the Manor of *Marleston* with the appurtenance in *Marleston* in the County of *Berk*. To have and to hold to the said *Lionel* and *Anne*, and to the heirs of the body of the said *Lionel*, and for default of such issue the remainder to *Henry Norreis* and to the heirs males of his body: And that *Term. Pasch.* 19 *H.* 8. the Bishop of *Winchester* and divers others did recover (in the life of the said *Anne*) the said Manor of *Marleston* in *Marleston*, against the said *Lionel* in a Writ of Entry in the Post, in which the said *Lionel* did vouch one *Thomas Chappian* then the common vouchee, and Judgment was given and execution had according to the usual form of common Recoveries: And afterwards the said *Henry Norreis* having issue *Henry* now Lord *Norreis* of *Ricote* (who is now living) *Pasch.* 28. was attainted of high Treason; and afterwards the 22 day of *May* in the same year was executed. And afterwards at a Parliament holden the 18 day of *June* in the same year it was enacted, That the said [b] *Henry Norreis* the father for divers Treasons by him done, should forfeit to the said King *H.* 8. his Heirs and Successors, all such Mannors, Messuages, Lands, Tenements, Rents, Reversions, Remainders, Uses, Possessions, Offices, Rights, Conditions, and all other his Hereditaments which he or any other person to his use then had or ought to have of any estate of Inheritance in fee simple, fee tail, in use or in possession the day of his Treasons committed or at any time after: And afterwards the said *Anne* died, and afterwards the said *Lionel* died without issue of his body; and thereupon the Queen brought a Writ of Error against the Marquess of *Winchester* the heir of the survivor of the Recoverors; And the Error which was assigned was, because that the Original Writ of Entry in the Post failed, and the Record which was removed out of the Common Pleas of the Mannor of *Marleston* with the appurtenances was general, and not restrained to any Town. And the said Marquess in bar of the said Writ of Error pleaded, That the Queen that now is (if she had any right to any Writ of Error in the Case aforesaid) by her Letters Patents bearing date in the 14 year of her reign, of her special grace, certain knowledge, and meer motion did give, grant, and restore for her and her Successors to the said *Henry* Lord *Norreis*, the said Mannor with appurtenances; and also all her right, estate, title, claim, interest and demand in the said Mannor, To have and to hold to him and his heirs. And upon this Plea *Popham* the Queens Attorney did demur in Law, And this Case was argued by *Popham* the Queens Attorney, and *Egerton* the Queens Sollicitor in maintenance of the Writ of Error; and by *Ployden* and *Coke* for the Defendant. And the Defendants Councel took five Exceptions to the Writ of Error.

1. That the Writ of Error was brought to reverse a Judgment for all the Mannor, where it should be but of a moity, for it appeareth by the Writ that the Recovery was void for a moity, because that *Anne Miller* the other joyntenant was not named with *Lionel* in the writ, by which one moity was forfeited to the Queen by his Attainder, the which the Queen by her Letters Patents hath granted over to the said

said Lord *Norreis*, and so for as much as the Register hath one form of writ for the whole, and another form for the moity, three parts, &c. this writ brought of the whole, where it should be brought of the moity ought to be abated. And principally as it was said by one of the Defendants Councel, because it cometh of the Plaintiffs own shewing, and not by the shewing of the other side, nor by the Enquest of the Jury as in *36 H. 6.* 27. it is agreed, that in maintenance if it appear by the shewing of the party himself, that the maintenance be several, the writ shall abate, otherwise if it be found by verdict, *Vid.* 10 *E.* 4. 8. 11 *H.* 7. 6. 11 *Ass.* 9. 19 *Ass.* 14. 22 *Ass.* 86.

The second Exception was, because it was not shewed that *Henry Norreis* to whom the remainder was entailed had the remainder at the time of the recovery, for the gift in tail was made in *6 H.* 8. and the recovery was in *19 H.* 8. and no continuance of estate, either of the estate tail in possession, or in remainder is alledged; and that the said estates shall not be intended to continue, the Book in *7 H.* 7. 3. *Stradling*'s Case, *fol.* 199. & 10 *H.* 7. 28. in *Hewbade*'s Avowry were cited. [2]

The third Exception was, because that the Record of the said recovery was of the Mannor of *Marleston cum pertimentiis*, and the writ of Error was to remove a recovery of the Mannor of *Marleston* in *Marleston cum pertimentiis*, and so the true Record was not removed by the writ of Error, as the like Case is agreed in *9 H. 6.* 1. where it is said, that in all Cases where a man is to execute a Record, or to defeat a Record, there no variance ought to be between the Writ and the Record, and with that agree the Books in *7 Ass.* 5. & *26 Ass.* 31.

The fourth Exception was because the Act of *28 H.* 8. upon which the writ of Error was founded, gave to the King all the Mannors, &c. which the said *Henry Norreis* then before attainted had the day of his Treason committed, or at any time after; and it is not shewed when the Treasons were committed, nor that then he had any thing in the Mannor, which ought to have been averred precisely, as it is agreed in *Nichol*'s Case in *Plow. Comm.*

The last Exception was because, that although all the rights, &c. hereditaments, &c. which the said *Henry Norreis* had, &c. were given to the King, yet it doth not appear without Office, whether he had any right to this Mannor: And note, that although that after the said *Henry Norreis* was executed, so as by reason of his attainder he died without heir, yet this writ of Error cannot be in the King without office, for by the Common Law such hereditament as a writ of Error shall not be forfeited, nor can escheat, and therefore this Case is out of the reason of the Book in *19 H.* 7. for there the land escheated, and a freehold cannot be in suspense. But the Court did not deliver any opinion touching any of these Exceptions to the writ of Error, but only that it was unanimously agreed, that by this writ of Error the Record of the Recovery was removed into the Kings Bench; for Judgment was given against the Queen upon the substance of the matter. And in this Case two Points were resolved by Sir *Christopher Wray* chief Justice, and Sir *Thomas Gawdie* Knight, and the whole Court of Kings Bench.

First, that this writ of Error was not given to the King by any of the words of the said Act of *28 H.* 8. for three causes, First, because that in this Case, the Terre-tenant is in by title, and the entry of the person attaint is not congeable; and therfore this right of Action if he had any was not given to the King by any of the said words. So if the said *Henry Norreis* the father had right of *Formedon* in the *descender* after discontinuance made by his father; or if *Henry* the father had been disseised, and the disseisor had died seised before the said Act, such right of Action was not given to the King by any of the said words; but if the Act had been made after the disseisin and before the descent, such right had been given to the King by the Act. For the Justices said, That such right for which the party had not any remedy but by action only to recover the land is a thing which consisteth only in privity, which cannot escheat, nor be forfeited by the Common Law, 3 *R.* 2. *Entre congeable* 38. 32 *H.* 6. 27. 2 *H.* 4. 8. 7 *H.* 4. 6. & 17. 7 *H.* 5, 9. 21 *E.* 3. 47. *a.* 27 *Ass.* 32. 49 *E.* 3. 13. 49 *Ass.* 4. *F. N. B.* 144. *Stamford* 188. So that by the general words of an Act of Attainder of all rights, &c. and hereditaments, &c. (although that in truth the party attainted had a right which also is an hereditament,) shall not be given to the King; for that shall because of great vexation and inconvenience, that estates of purchasors and others after many descents and long possession shall be impeached at the Kings suit by such general words against the reason and rule of the Common Law, where all the words may by reasonable intendment be well satisfied, *scil.* such rights, &c. which may lawfully escheat, or be forfeited. And it was observed by the Justices, That by no Act of Attainder that ever hath been made, Actions were given, but rights of Entries, &c. Also the Statutes of *27 H.* 8. & *31 H.* 8. of Monasteries, and the Statute of *1 E.* 6. of Chauntries, give to the King all rights, entries, &c. which give not Actions to the King. And therefore it was agreed by the Court, That a right of Action after discontinuance, descent, &c. where the entry was not lawful, was not given to the King by the general words of any of the said Acts. So it was said, have the said Statutes always been expounded. The same construction hath been made upon the Statutes of *33 H.* 8. *cap.* 28. by which it is enacted, That the Kings Majesty, his Heirs and Successors shall have as much benefit and advantage of such attainders of Treasons, as well of uses, rights, entries, conditions, as possessions, reversions, remainders, and all other things, as if it had been done and declared by Parliament. That a right which consisteth only in Action where the entry is taken away, is not given to the King by that Act. [b]

It was also agreed by them, That before this Act of *33 H.* 8. by the general words of any Act of Attainder of all hereditaments, a Condition was not given to the King; and therefore by the same Act by express words, conditions are given to the King, and yet without question a condition is an hereditament. Also although that an use were an hereditament (for there shall be a *possessio fratris* of it) yet by the general words of all hereditaments, an use was not given to the King by any Act of Attainder, but the condition, nor the use were things forfeitable by the Common Law; and therefore by the general words of all hereditaments, they were not given to the King by any Act of Attainder.

Note a diverſity between Inheritance and Chattels; for as it hath been ſaid, a right of Action concerning inheritance is not forfeit by Attainder, but Obligations, Statutes, Recognizances, &c. and other ſuch things in Action are forfeited to the King by Attainder or Outlawry. And it was agreed by the whole Court, That if *Lionel* had made a feoffment in fee without warranty, that had been a diſcontinuance for a moity, for by the feoffment the Joynture was ſevered. And note, that in this Caſe at Bar, conditions and uſes are given by expreſs words, for the makers of the Act know, that they would not be given by general words of hereditaments.

The ſecond Reſolution was, That in this Caſe *Henry Norreis* had not any right in the moity of the ſaid Mannor, for although the recovery were erroneous for want of an original (for it was agreed it was not void, but voidable by Error) that notwithſtanding as long as the recovery ſtood in its force, he in the remainder had not any right to the remainder in reſpect of the intended recompence, but till the recovery be reverſed by Writ of Error, the remainder is barred for one moity, and he in the remainder hath not any right unto it. And therefore if Tenant in tail ſuffer a common recovery erroneouſly, and afterwards diſſeiſeth the recoveror and dieth, his iſſue ſhall not be remitted, for as long as the recovery remains in its force, the eſtate tail is barred, *quod fuit conceſſum per totam Curiam.* And it was ſaid by one of the Defendants Councel, that neither Action without right nor right without Action with a decent, &c. ſhall make a remitter, the firſt is apparent and reſolved by the Court in the Caſe at Barr. As to the ſecond it was ſaid, That a man ſhall never be remitted, but where if the right and poſſeſſion were in ſeveral perſons, he who had the right might have an action to recover the poſſeſſion. And that appeareth by *Littleton* 147. for he ſaith, That one of the principal cauſes for which the eſtate in tail ſhall be remitted is, becauſe there is no perſon againſt whom he can bring his Writ of *Formedon*, and for this [b] cauſe the Law ſhall adjudge him in his remitter in ſuch plight as if he had lawfully recovered the land againſt another, 5 *H.* 7. 38. A man ſhall not be remitted to an advowſon appendant (although he hath right to it) before he hath recontinued the Mannor to which, &c. becauſe that before he hath recovered the Mannor, he hath not an action to recover the advowſon. So if a man purchaſe an advowſon in fee, and ſuffereth an uſurpation, and ſix months to paſs, now he hath right, but for as much as he hath not remedy for it, he ſhall never be remitted to it, although the advowſon be caſt upon him either by deſcent, or any other act in Law, *& ſic de ſimilibus.* And it was reſolved by the Court, that in as much as *Henry* had no right, *a fortiori*, this writ of Error being a bare action which conſiſteth more in privity then an action which is accompanied with a right, is not given to the King by the general words of the Act. It is adjudged in *Paſch.* 3 E. 3. 74. that whereas all the poſſeſſion of the Templers were by Act of Parliament *anno* 17 E. 2. given and tranſlated to the Hoſpitlers, to hold them in the ſame manner as the Templers held them, yet they had not by the ſaid general words a Rectory which was appropriate to the Templers, for that was an inheritance inſeparable in privity annexed to them. So it is holden in 35 *H.* 6. 56. that upon the ſaid words of the ſaid Act, To hold them as the Templers held, they ſhall not hold by Frankalmoigne, becauſe that that tenure conſiſteth only in privity, and for that cauſe without ſpecial words, ſhall not be againſt the rule and reaſon of the Common Law created. The ſame Law of a Writ of Error. And although the ſaid *Anne Milles* was joyntly ſeiſed with the ſaid *Lionel* for her life, ſo that as well *Lionel* as the vouchee might have abated the Writ, yet when the vouchee entreth generally into the warranty, and thereby admitteth the writ good, and *Lionel* recovereth in value againſt the vouchee who entreth according to the eſtate of him who voucheth with the remainder over: For this cauſe it was reſolved, that for one moity the recovery ſhall be a bar to the eſtate tail, and to the remainder alſo, becauſe that by the recovery againſt *Lionel* the Joynture was ſevered. And it was ſaid, That common recoveries by a benign interpretation of the Law ought to be maintained, becauſe they are the common aſſurances of the land. But it was agreed, that for the other moity whereof *Anne Milles* was Tenant for life, the recovery was not any bar either to the eſtate tail which *Lionel* had expectant upon the eſtate of *Anne Milles*, or to the remainder of *Henry*, becauſe that for this moity *Lionel* was not Tenant to the *Præcipe*; but the recovery had his operation againſt him by eſtoppel and concluſion, which ſhall not bind the iſſue in tail who claimeth *per formam doni.*

The third cauſe was becauſe that *Henry* at the time of his attainder was not entituled to have any writ of Error. And as to that it was agreed, that he who had the remainder expectant upon the eſtate tail ſhall have a Writ of Error upon a Judgment given againſt Tenant in tail, although there were no ſuch remainder at the Common Law; for when the Statute of *Donis conditionalibus* doth enable the donor to limit a remainder upon an eſtate tail, all actions which the Common Law gave to privies in eſtate are by the ſame act as incidents *tacite* given alſo, according to the rule of the Common Law; and therefore as thoſe in reverſion or remainder expectant upon an eſtate for life had a Writ of Error by [4] the Common Law upon a Judgment given againſt Tenant for life, although they were not made parties, by aid preyer, voucher, or receit: So after the Statute of *Donis*, &c. ſhall he have who hath a reverſion or remainder expectant upon an eſtate tail. 2. It was agreed by them, that in none of the ſaid Caſes he in the reverſion who was not party to the firſt record by voucher, &c. ſhould have any Writ of Error by the Common Law till after the particular eſtate determined, for then he in the reverſion or remainder ought to have the land in poſſeſſion, and take the profits; but if he in the reverſion or remainder be made a party to the Record by aid preyer, receit, or voucher, then he ſhall have a writ of Error preſently during the life of the Tenant for life, in reſpect that he was party to the record, *Vide* 4 *Aſſ.* 7. 17. *Aſſ.* 24. 18 E. 3. 25. 30 E. 3. *Error* 2. 32 E. 3. *Error* 73. 43 *Aſſ.* 41 8 *H.* 4. 4. 21 *H.* 6. 29. 22 E. 4. 31 *F.N.B.* 21. *c.* 99. *e.* And by the ſaid differences you may reconcile all the ſaid Books and many other, betwixt which, to ſome who obſerve not the ſaid diſtinctions, ſeemeth to be contrariety; but when erroneous Judgment was given againſt Tenant for life, by that his reverſion or remainder was deveſted, ſo that he could not grant or tranſfer it by any means to another. And it was doubted he could

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not punish Waſt after the recovery, and divers other miſchiefs, and yet he had no remedy to reverſe it during the life of the Tenant for life, 45 *E.* 3. 21. *b.* 8 *H.* 6. 13. *b.* *F. N. B. for Waſt.* For the remedy of which miſchiefs the Statute of 9 *K.* 2. *cap.* 3. was made, by which it is provided, That if tenant for life, tenant in Dower, tenant by the Curteſie, or tenant in tail after poſſibility of iſſue extinct loſe in a *Præcipe*, &c. that he in the reverſion his heirs or ſucceſſors ſhall have an Attaint or a Writ of Error, as well in the life of ſuch tenants as after their deaths, and that the tenant for life if the Judgment be reverſed ſhall be reſtored to the poſſeſſion of the tenements ſo loſt with the profits in the mean time, &c. Provided always, that if the party ſuing will alledge that the tenant for life was of covin and aſſent with the demandant who recovered, that ſuch tenements ſhould be loſt, that then although ſuch tenants be living, yet reſtitution ſhall be made to the party ſuing for the poſſeſſion with the mean profits, &c. upon which Act two Points were reſolved by the Court.

Firſt, that although the Statute ſpeaketh only of reverſions, yet remainders are taken to be within the purview thereof.

Secondly, that a reverſion or remainder expectant upon an eſtate tail is out of the words, and alſo out of the meaning of the ſaid Act. For in as much as the makers of the Act by ſpecial words have provided remedy for thoſe in reverſion expectant upon eſtates for life, or in Dower, or by the Curteſie, or in tail after poſſibility of iſſue extinct, by this preciſe numbring of thoſe four particular eſtates for life (*Vide* 33 *H.* 6. 22. the like point in Caſe of receit) their meaning appeareth to exclude reverſion and remainder expectant upon eſtate tail to have a writ of Error during the continuance of ſuch eſtate, which by ſpecialty may continue for ever. Note Reader, upon the Proviſo of the ſaid Act, that if tenant for life ſuffer a recovery in a *Præcipe* by covin and aſſent, if he in the reverſion or remainder reverſe the recovery, he ſhall be reſtored to the poſſeſſion and mean profits: *Unde colligo*, that the Parliament did adjudge ſuch recovery by covin and aſſent to be a forfeiture. For otherwiſe it ſhall be hard to reſtore him not only to the poſſeſſion, but alſo to the mean profits; and with that agree the Books in 5 *Aſſ.* 3. 14 *E.* 3. *Receit* 135. 22 *Aſſ.* 31. 9 *H.* 5. 14. Now for as much as it appeareth in the Caſe at Bar, that *Lionel* ſurvived *Henry* who was in remainder, it was reſolved, that *Henry* had but a poſſibility to have a writ of Error, that is to ſay, If *Lionel* had died without iſſue in the life of *Henry*, and becauſe *Lionel* ſurviveth him, this poſſibility was deſtroyed. Alſo no word of the ſaid Act doth extend to give a poſſibility to the King. Secondly, admitting in this Caſe the writ of Error had been given to the Queen, yet it was reſolved, that by the general grant of the ſaid Manor of *Marleſton*, and of all her intereſt, claim, and demand in it, although that it were *de gratia ſpeciali, & ex certa ſcientiâ, & mero motu*; that the writ of Error did not paſs, becauſe if the King may grant it, it ſhall be by his prerogative, for no common perſon can do it, and therefore it ought to be granted by expreſs words. And it was ſaid, it was adjudged in *Cromers* Caſe 8 *Eliz.* that whereas by the attainder of a diſſeiſee, a right of certain land eſcheated and was forfeited to the Queen, and after the death of the diſſeiſee, the Queen by her Letters Patents *de gratia ſpeciali, ex certa ſcientiâ, & mero motu*, granted all the lands, tenements, rights, and hereditaments which ſhe had by the attainder of the diſſeiſee, that in that Caſe ſuch a bare right ſhould not paſs by the ſaid general words of the King; but if it may be granted at all, it ought to be granted with a ſpecial recital by expreſs and ſpecial words; which Caſe was affirmed to be good Law by the whole Court. And therewith agreeth 33 *H.* 8. *Br. Choſe in Action* 14. If an Abbot before the diſſolution was diſſeiſed, and the King after the diſſolution granteth over the land by general words, the right ſhall not paſs. And Sir *Chriſtopher Wray* ſaid, that he had conferred with the Lord *Anderſon* chief Juſtice of the Common Pleas, and Sir *Roger Manwood* chief Baron of the Exchequer, and with divers other Juſtices, and they were all of their opinion. And afterwards for as much as it appeared to the Court, that the ſaid common recovery was erroneous for want of an original; for that cauſe a ſpecial Judgment was entred, that is to ſay, becauſe upon the matter no writ of Error in this Caſe was given to the Queen, *Ideo domina Regina nihil capiat per breve.*

Note Reader, for the ſaid payment of [illegible] mmon Recovery there was a Caſe in the Common Pleas, *Trin.* 27 *Eliz. Rot.* 276. between *Owen* and *Morgan*, and the Caſe was ſuch; *George Owen* brought a *Scire facias* againſt *Edward Morgan* to execute a remainder of certain lands limited to him by fine, and ſhewed, That *Rice Owen* was ſeiſed of the ſaid land in fee, and levied a fine thereof to *Richard Owen* and *Thomas Momington*, and to the heirs of *Richard*, who granted and rendred the ſame to *Rice* and *Lettice* his wife (who was not party to the writ or conuſans) and to the heirs of the body of the ſaid *Rice*, and *Lettice* died, and afterward *Rice* died without iſſue, for which he prayed to have execution. The Defendant pleaded in bar a common Recovery had againſt the ſaid *Rice* as tenant with voucher over of the common vouchee, which recovery was to the uſe of the Defendant and his heirs, and that *Rice* ſurvived *Lettice*: The Plaintiff replied and ſaid, That the ſaid *Lettice* was alive at the time of the ſaid Recovery, upon which the Defendant did demur in Law. And it was adjudged for the Plaintiff. And in this Caſe two Points were reſolved.

1. Although that *Lettice* was not party neither to the Writ nor to the Conuſans, and although it appeareth in the ſame Record that ſhe was a ſtranger and not party; yet the grant and render by fine to her was not void but voidable by Error.

2. That this Recovery againſt the husband only ſhould not bind the remainder, for between husband and wife there are no moities, and the husband hath not power to ſever the Joynture, nor to diſpoſe of any part of the land, and he during the wives life is not ſeiſed by force of the tail, and by no act that he can do, can he execute it for any part, ſo that the *Præcipe* being brought againſt him alone, the recompence cannot for any part enure to the eſtate tail, or to the remainder, for to the whole eſtate it cannot enure, becauſe the wife hath a joynt eſtate with him in poſſeſſion at the time of the Recovery who was not party to it, and for a moity it cannot be good, for there are no moities between husband and wife, and the eſtate of him in the remainder doth depend upon the entire eſtate made to the husband

band and wife, and not upon any part made to the husband alone, or which resteth in the dispose of the husband for any part; and therefore the recompence recovered only by the husband in this Case cannot enure to him who hath the remainder, which dependeth upon a joynt and undivided estate made to the husband and wife, and the joyntenancy between the husband and wife cannot be severed by the judgment given against the husband, and although the husband hath the sole estate of inheritance, yet because by no possibility it can be executed, nor the joynture severed during the wives life, for this cause it is as much as if the husband had had a remainder in tail expectant upon an estate for life, in which Case a common recovery had against him shall not bind, because he was not tenant to the *Præcipe*, nor seised by force of the tail, but the recovery as to the estate of the husband took his effect by estoppel and conclusion: And therewith agreeth 12 *E.* 4. 14. that against a common Recovery against the ancestor in tail, the issue may say, That the ancestor was not tenant *tempore brevis*.

Also if tenant in tail do discontinue the tail, and take back an estate to himself, and afterwards a writ of Right is brought against him, and he vouch the common vouchee, and Judgment be given accordingly, in this Case it is adjudged, *scil.* in 12 *E.* 4. 19. 14 *E.* 4. 1. that the issue in tail shall not be barred for the first intail, because that his father was not at the time of the Recovery seised by force of that intail, in lieu whereof recompence can enure: So if lands be given to the husband and wife, and the heirs of their two bodies begotten, and the husband alone suffereth a common Recovery, it shall not bind the estate tail *causa qua supra*. And although that the husband who suffered the common Recovery in the principal Case of *Morgan* and *Owen* survived the wife, it is not material, for the Law shall adjudge upon the Case, as it was at the time of the Recovery.

Pasch. 44 Eliz. *in the Court of Wards, upon the Point of common Recovery, between* Thomas Cuppledike *the Queens Ward, Plaintiff, and* Edward Cuppledike *Defendant. The Case was such;*

Cuppledike's Case.

[6] *Francis Cuppledike* and *Elizabeth* his wife were seised of the Mannor of *Harrington* in the County of *Lincoln*, to them and to the heirs males of the body of *Francis*, the remainder to *Thomas Cuppledike*, father of *Thomas Cuppledike* the now Ward to the Queen in tail, with a remainder over in tail, the reversion to *Francis* and his heirs: *Francis* levied a fine, *Oct. Mich.* 36 & 37 *Eliz.* to *Thomas Seaton*, *Robert Becket*, and to the heirs of *Thomas*, unto the use of them and their heirs: *Hill.* 37 *Eliz. Curtise* and *Dudley* by writ of Entry in the Post recovered against *Seaton* and *Becket* the said Mannor, who vouched *Francis*, who vouched over the common vouchee, and Judgment and seisin had accordingly, the said *Elizabeth* then being alive, which recovery was to the use of *Francis* for life, and after to the use of *Elizabeth* for life, and after to the use of the said *Francis* and his heirs: *Francis* by his Will in writing devised the said Mannor to the said *Edward Cuppledike*, and died without issue male: And now the Question was, If by this common Recovery the remainder in tail were barred or not, for as much as the wife who had an estate with *Francis* was not vouched. And after argument before the two chief Justices *Popham* and *Anderson*, *Pepis* Surveyor, and *Herbert* Attorney of the Court of Wards, it was resolved, that this Recovery should bind the remainder, for here was a lawful tenant to the *Præcipe*; and although that *Francis* who had the estate tail be only vouched and not *Elizabeth* who had joynt estate with him, yet *Francis* coming in as vouchee, he comes in in privity of the estate tail, and not of any other estate, and the recovery in value gave recompence to the tail which *Francis* had, and to the remainders over: So it was holden. If *A.* be tenant in tail, the remainder to *B.* in tail, the remainder to *C.* in tail, the remainder to *D.* in fee, *A.* maketh a feoffment in fee, the feoffee suffereth a Recovery in which *B.* is vouched, and he voucheth the common vouchee, in this *A.* is not bound but *B.* and all the remainders are barred. For although by the feoffment of *A.* all the remainders were discontinued, and the estates of *B. C.* and *D.* become converted to meer rights, and although that the remainders can never be remitted before the particular estate in possession be continued; yet in Case of a common Recovery, which is the common assurance of the land, he who cometh in as vouchee shall be in judgment of Law in privity of estate which he had, although the precedent estate upon which the estate of the vouchee dependeth be devested or discontinued.

So in the Case at Bar, although that the estate of the wife be not recontinued, yet the husband as vouchee shall be in judgment of the Law in of his estate tail, and the Case is the stronger, for as much as the estate of the wife was put to a right, so that now the husband cometh in as sole tenant in tail, and cannot be joyntly seised with his wife, for as much as she is not vouchee, and cannot be in of another estate, because once he had a estate tail, and now cometh in as vouchee. But if the husband and [b] wife had had a joynt estate to them and to the heirs of their two bodies with the remainder over, and the husband only had been vouched, there it may be doubted if the estate tail shall be barred, because the wife hath a joynt estate of inheritance with him, but here the inheritance was only to the husband. And the Case which *Plowden* puts *arguendo* in *Mannels* Case 8. that if a gift be made to *J.* and

to

to the heirs males of the body of his wife begotten, and he hath iſſue a ſon, and afterwards the wife dieth, and he diſcontinueth, and taketh an eſtate back to him and to the heirs females of the body of his ſecond wife, and he diſcontinueth again, and taketh an eſtate back to him and to the heirs females of his body, and afterwards diſcontinueth again, againſt which laſt diſcontinuee a common Recovery is had, in which the tenant in tail is vouched and voucheth over the common vouchee, and afterwards dieth, and his three iſſues bring ſeveral *Formedons* in the deſcender, they ſhall be all barred by the recovery; for in judgment of Law when he generally entreth into warranty, he cometh in of all his ſeveral eſtates, which ſhall be all barred in reſpect of one and the ſame recompence: It was agreed for good Law by the two chief Juſtices; but the opinion of *Ployden* in the other Point, If tenant for life be, the remainder or reverſion over in tail, that if a common Recovery be had againſt him in the remainder or reverſion, that it ſhall barr the eſtate tail was denied by them all; for there, there is not any tenant to the *Præcipe*, but only by admittance and concluſion, which ſhall not bind the iſſue in tail. And this Caſe at the Bar is not to be likened to the Caſe of *Owen* and *Morgan*, for in this Caſe thoſe againſt whom the *Præcipe* is brought are lawful tenants to the *Præcipe*; and when the husband who hath the eſtate only is vouched, he comes in as ſole tenant in tail, and all the eſtate is in him, and nothing then remaineth in the wife but a right, and when he who hath the eſtate tail is vouched, he cannot be in of another eſtate being vouchee, as it appeareth before. *Vide* 8 *Eliz. Dier* 225. *Knivertons* Caſe, which in effect was, That tenant for life, and he in the remainder in tail ſuffered a common Recovery, in which they both vouched the common vouchee, it ſhall not bind the eſtate tail, for he in the remainder in tail is not tenant to the *Præcipe*, but the tenant for life, and in truth the land is recovered againſt the tenant for life only, and the recompence cannot veſt in him in the remainder only, for as much as the land is in truth recovered againſt the tenant for life, and he in the remainder was never ſeiſed by force of the tail. And according to that it was adjudged in the Common Pleas between *Leach* and *Cole* in a *Replevin M.* 41 & 42 *Eliz. Rot.* 1703.

Paſch. 26 *Eliz.* which began Paſch. 20 *Eliz.* Rot. 140. in the Exchequer.

Heydon's Caſe.

IN an Information upon an intruſion in the Exchequer againſt *Heydon*, for intruding into certain lands in the County of *Devon*: upon the general iſſue the Jurors gave a ſpecial verdict to this effect: [7]

Firſt, they found that parcel of the lands in the Information were ancient Copiholds of the Mannor of *Otlery*, whereof the Warden and Canons regular of the late Colledge of *Otlery* were ſeiſed in the right of the ſaid Colledge; and that the Warden and Canons of the ſaid Colledge 22 *H.7.* at a Court of the ſaid Mannor granted the ſame parcel by Copy to *Ware* the father, and *Ware* the ſon for their lives at the will of the Lord according to the cuſtom of the ſaid Mannor; and that the reſt of the land in the information was occupied by *S.* and *G.* at the will of the Warden and Canons of the ſaid Colledge for the time being, in the time of *H.* 8. And further that the ſaid *S.* and *G.* being poſſeſſed, and the ſaid *Ware* and *Ware* ſo ſeiſed as aforeſaid, the ſaid Warden and Canons by their deed indented, *dat.* 12 *Jan. ann.* 30 *H.*8. did leaſe to *Heydon* the Defendant the ſame for 80. years, rendring certain rents ſeverally for ſeveral parcels; and found that the ſaid ſeveral rents in *Heydons* leaſe reſerved were the ancient and accuſtomed rents of the ſeveral parcels of the lands, and found that after the ſaid leaſe they did ſurrender their Colledge and all the poſſeſſion thereof to King *H.*8. And further found the Statute of 31 *H.*8. and the branch of it, *ſcil.* by which it is enacted, That if any Abbot, &c. or other Religious and Eccleſiaſtical houſe, or place within one year next before the firſt day of this preſent Parliament hath made or hereafter ſhall make any leaſe or grant for life, or for term of years, of any Mannors, Meſſuages, Lands, &c. and in the which any intereſt or eſtate for life, year, or years, at the time of the making of ſuch grant or leaſe, then had his being or continuance, and not determined at the making of ſuch leaſe, &c. Or if the uſual or old rents and forms accuſtomed to be yeelden and reſerved by the ſpace of 20. years next before the firſt day of this preſent Parliament, is not, or be not, or hereafter ſhall not be thereupon reſerved or yielded, &c. that all and every ſuch leaſe, &c. ſhall be void. And further found that the particular eſtates aforeſaid were determined, and before the intruſion *Heydons* leaſe began; and that *Heydon* entred, &c. And the great doubt which was often debated at the Bar and Bench in his Caſe was, If Copyhold eſtate of *Ware* and *Ware* for lives, at the will of the Lords according to the cuſtom of the ſaid Mannor, in judgment of Law ſhall be ſaid an eſtate or intereſt for lives within the ſaid general words and the meaning of the ſaid Act. And after all the Barons openly argued in Court in the ſame Term, *ſcil. Paſch.* 26 *Eliz.* And it was reſolved by Sir *Roger Manwood* chief Baron, and the other Barons of the Exchequer, That the ſaid leaſe made to *Heydon* of the ſaid parcels whereof *Ware* and *Ware* were ſeiſed for life by copy of court roll was void; for it was agreed by them, that the ſaid Copihold eſtate was an eſtate for life within the words and meaning of the ſaid Act. And it was reſolved by them, that for the ſure and true interpretation of all Statutes in general (be they penal or beneficial) reſtrictive or enlarging of the Common Law, four things are to be diſcerned and conſidered. [b]

1. What

1. What was the Common Law before the Act.

2. What was the miſchief and defect for which the Common Law did not provide.

3. What remedy the Parliament hath reſolved and appointed to cure the diſeaſe of the Commonwealth.

And 4. The true reaſon and remedy; and then the Office of all the Judges is always to make ſuch conſtruction as ſhall repreſs the miſchief, and advance the remedy, and to ſuppreſs ſubtil inventions and evaſions for continuance of the miſchiefs, and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act *pro bono publico*. And it was
[8] ſaid that in this Caſe the Common Law was, That Religious and Eccleſiaſtical perſons might have made Leaſes for as many years as they pleaſed, the miſchief was, that when they perceived that their Houſes ſhould be diſſolved, they made long and unreaſonable Leaſes: Now the Statute of 31 *H.* 8. doth provide the remedy, and principally for ſuch Religious and Eccleſiaſtical Houſes which ſhall be diſſolved after the Act (as the ſaid Colledge in our Caſe was) that all Leaſes of any land whereof any eſtate or intereſt for life or years was then in being ſhall be void; and their reaſon was, That it was not neceſſary for them to make a new leaſe ſo long as a former had continuance, and therefore the intent of the Act was to avoid doubting of eſtates, and to have but one ſingle eſtate in being at a time: For doubting of eſtates imputeth in it ſelf deceit, and private reſpect, to prevent the intention of the Parliament. And if the Copihold eſtate for two lives, and the leaſe for 80. years ſhall ſtand together, here ſhall be doubting of eſtates *ſimul & ſemel*, which ſhall be againſt the true meaning of Parliament.

And in that Caſe it was debated at length, in what Caſes the general words of Acts of Parliament ſhall extend to Copihold or Cuſtomary eſtates, and in what not; and therefore this Rule was taken and agreed by the whole Court, That when an Act of Parliament doth alter the ſervice, tenure, intereſt of the land, or other thing in prejudice of the Lord, or of the cuſtom of the Mannor, or in prejudice of the Tenant, there the general words of ſuch an Act of Parliament ſhall not extend to Copiholds: But when an Act of Parliament is generally made for the good of the Weal publick and no prejudice can accrue by reaſon of alteration of any intereſt, ſervice, tenure, or cuſtom of the Mannor, there many times Copihold and Cuſtomary eſtates are within the general purview of ſuch Acts. And upon theſe grounds the chief Baron put many Caſes, where he held, that the Statute of *Weſt.* 2. *De donis conditionalibus* did not extend to Copiholds; for if the Statute alter the eſtate of the land, the ſame ſhall be alſo alteration of the tenure, which ſhall be prejudicial to the Lord; for of neceſſity the donee in tail of land ought to hold of the donor, and to do him ſuch ſervices (without ſpecial reſervation) as his donor doth to the Lord.

2. *Littleton* ſaith *lib.* 1. *cap.* 9. That although that ſome Tenants by copy of Court Roll have an eſtate of inheritance, yet they have but at will of the Lord according to the courſe of the Common Law. For it is ſaid, that if the Lord put them out, they have not other remedy but to ſue to their Lord by Petition, and ſo the intent of the Statute of *Donis Conditionalibus* was not to extend (in prejudice of Lords) to ſuch baſe eſtates, which as the Law was then taken, was not but at the will of the Lord. And the
[b] Statute ſaith, *Quod voluntas donatoris in carta doni ſui manifeſte expreſſ. de cætero obſervetur*: So that which ſhall be entailed ought to be ſuch an hereditament, which is given, or at leaſt might be given by deed or charter in tail.

3. For as much as great part of the land within the Realm is granted by Copy it ſhall be a thing inconvenient, and cauſe of great ſuit and contention, that Copiholds ſhall be entailed, and yet neither fine nor common Recovery barr it; ſo as he who hath ſuch eſtate cannot (without the aſſent of the Lord by doing of a forfeiture and of taking a new eſtate) of himſelf diſpoſe of it, either for the payment of his debts, or the advancement of his wife, or of his younger children; for which it ſeemed to him, that the Statute of *Donis conditionalibus* did not extend to Copihold, *quod fuit conceſſum per totam Curiam.* But it was ſaid, that the Statute without ſpecial cuſtom doth not extend to Copiholds; but if the cuſtom of the Mannor doth warrant ſuch eſtates, and a remainder hath been limited over and enjoyed, or plaints in the nature of a *Formedon* in the Deſcender brought within the Court of the Mannor, and land ſo entailed by Copy recovered thereby, then the cuſtom co-operating with the Statute maketh it an eſtate tail; ſo that neither the Statute without the Cuſtom, nor the Cuſtom without the Statute can create an eſtate tail.

And to this purpoſe is *Littleton lib.* 1. *cap.* 8. for he ſaith, That if a man ſeiſed of a Mannor, within which Mannor there hath been a cuſtom which hath been uſed time out of mind of man, that certain tenants within the ſame Mannor have uſed to have lands and tenements, to have to them and their heirs in fee ſimple, or fee tail, or for term of life, &c. at the will of the Lord according to the cuſtom of the ſame Mannor; and a little after, That *Formedon* in Deſcender lieth of ſuch Tenements, which Writ as it was ſaid was not at the Common Law.

To which it was anſwered by the chief Baron, That if the Statute (without cuſtom) ſhall not extend to Copiholds, without queſtion the cuſtom of the Mannor cannot make it extend to them: For before the Statute, all eſtates of inheritance, as *Littleton* ſaith *lib.* 1. *cap.* 2. were fee ſimple, and after the Statute no cuſtom can begin, becauſe the Statute being made in 13 E. 1. is made within time of memory, *Ergo* the Eſtate tail cannot be created by cuſtom; and therefore *Littleton* is to be intended (in as much as he groundeth his opinion upon the cuſtom, That Copiholds may be granted in fee ſimple or fee tail) of a fee ſimple conditional at the Common Law: For *Littleton* well knew, that no cuſtom can
[9] commence after the Statute of *Weſtm.* 2. as it appeareth in his Book *lib.* 2. *cap.* 10. and 34 *H.* 6. 36. And where he ſaith that *Formedon* in Deſcender lieth, he alſo ſaith that it lieth at the Common Law. And it appeareth in our Books, that in ſpecial Caſes a *Formedon* in the Deſcender lay at the Common Law before the Statute of *Weſt.* 2. which ſee 4 E. 2. *Formedon* 50. 10 E. 2. *Formedon* 55, 21 E. 3. 47. *Plowd. Com.* 246. *b. &c.*

And

And where it was further objected, That the Statute of *West.* 2. cannot without custom make estate tail of Copiholds, because without custom such estate cannot be granted by Copy, for it was said, That estates have been always granted to one and his heirs by Copy, that a grant to one and the heirs of his body is another estate not warranted by the Custom: So that in such Mannors where such estates of inheritance have been allowed by Custom, the Statute doth extend to them, and makes them which before were fee simple conditional, now by the Statute they are estates tailed, and that the Statute cannot, as hath been agreed before, alter the custom, or create a new estate not warranted by the custom.

To that it was answered by the chief Baron, That where the custom of the Mannot is to grant lands by Copy in *feodo simplici* (as the usual pleading is) without question by the same custom lands may be granted to one and the heirs of his body, or upon any other limitation or condition, for these are estates in fee simple, *& eo potius*, that they are not so large and ample as the general and absolute fee simple is, and therefore the generality of the custom doth include them, but not *e converso*, *ad quod non fuit responsum*. But it was agreed by the whole Court, That another Act made at the same Parliament, *cap.* 18. which gave *Elegit*, doth not extend to Copiholds, for that shall be prejudicial to the Lord, and against the custom of Mannor, that a stranger shall have interest in the land holden of him by Copy, where by the custom it cannot be transferred unto any without surrender made to him, and by the Lord allowed and admitted. But it was agreed by them, and other Statutes made at the same Parliament which are beneficial for the Copiholder, and not prejudicial to the Lord, may be by a favourable interpretation extended to Copiholds, as *cap.* 3. which giveth to the wife *Cui in vita*, and Receit, and *cap.* 4. which giveth to the particular tenant *Quod ei deforceat*; and therewith agreeth 10 *E.* 4. 2. *b.*

And in this Case it was resolved, That although it was found that the said rents were the usual rents, and accustomed to be reserved within 20 years before the Parliament, yet in as much as they have found, that the accustomable rent was reserved, and a custom goeth to all times before, for this cause it shall be intended, that that was the accustomable rent within the 20 years, and so shall it be intended, if the contrary be not shewed of the other side. And Judgment was entred for the Queen.

Trin. 26 Eliz. *adjudged in the Exchequer.*

Dowtie's Case.

IN an Information upon an Intrusion in the Exchequer against *John Dowtie*, who intruded into five [b] Messuages or Cottages in the Parish of S. *Sepulchres* in *London*; upon Not guilty pleaded, the Jurors gave a special verdict to this effect: That *John* late Viscont *Lisle* (who after was Duke of *Northumberland*) was seised of the said Messuages in fee, and so seised, by his deed indented and enrolled within six months, in consideration of mony did bargain and sell unto the Lady *Johan Lea*, all his Tenements and Cottages scituate in the Parish of S. *Andrews* in *Holborn* in the occupation and tenure of *William Gardiner*, To have and to hold to the said Lady *Johan* for her life, the remainder to *Katherine* her daughter and to her heirs: And further found, that by force of the said bargain and sale the said Lady *Johan* did enter into the said five Messuages or Cottages, and was thereof seised, *prout lex postulat*, and took to husband Sir *Thomas Challener*; And afterwards the said Sir *Thomas* and Dame *Johan*, 18 *Aprilis* 5 *E.* 6. demised the said five Messuages to one *Pahen* for 21 years, by force of which the said *Pahen* entred, and took the profits. And afterwards, *scil.* the first year of the reign of Queen *Mary*, the said Duke was attainted of high Treason, &c. And afterwards Queen *Mary* died; and afterwards, *scil.* 20 *Julii*, 18 *Eliz.* the Queen by her Letters Patents under the Great Seal granted the said five Messuages to *John Farneham* and his heirs, with a Proviso in the same Letters Patents, That if the said Tenements, Rents, and profits were not from the Queen that now is, or from her sister Queen *Mary*, or from *E.* 6. concealed, subtracted, or unjustly detained, and so remained till the first Inquisition or Certificate, that then the Letters Patents shall be void; and the Defendant claimed under the said Letters Patents: And further found, that the said five Messuages or Cottages lay in the Parish of S. *Sepulchres*, and that at the time of the said bargain and sale they were in the occupation of the said *William Gardiner*. And if upon [10] the whole matter, the Queen granted by the said Letters Patents the Tenements aforesaid to the said *Farneham*, then they found the Defendant not guilty; and if the Queen did not grant the said five Messuages or Cottages by the said Letters Patents, then they found the Defendant guilty. And upon many Arguments at the Bar and Bench, Judgment was given for the Queen by Sir *Roger Manwood* chief Baron, and all the Court of Exchequer. And in this Case three Points were unanimously resolved.

First, that nothing passed by the said bargain and sale, for notwithstanding that the later certainty, *scil.* in the tenure of *William Gardiner* was true, yet because that the first certainty, *scil.* in the Parish of S. *Andrewes* in *Holborne* was false, for this cause the bargain and sale was utterly void. But other had it been, if true certainty had been in the first place, as if he had bargained and sold (the tenements, &c. in the tenure of *William Gardiner* in the Parish of S. *Andrews Holborne*) there it was agreed that the tenements shall pass well enough notwithstanding the addition of the fallity, for *utile per inutile non vitiatur*:

But in the Case at the Bar it was agreed, that the bargain and sale was void, and that the said Lady *Lee* was a disseiseress; But the great doubt of the Case was, When the disseisee is attainted of high Treason, if the land it self shall be presently in the actual possession of the King by force of the Statute of 33 *H.* 8. or if the King until seisure, &c. shall have only a meer right: And the doubt riseth upon the purview and words of the Act; for by the same Act, all rights, &c. are given to the King. And further it is enacted, that the King shall be in actual possession without any office found thereof, &c. saving to all strangers all such rights, &c. possession, &c. as if the Act had not been made: And it was declared, that there were three causes of making of the said branch of the Act of 33 *H.* 8. First, by the Common Law for lands in fee simple, and by the Statute of 26 *H.* 8. *cap.* 13. for lands in tail, the actual possession was not in the King by attainder before Office, for the words of the Act are, That every offender shall lose and forfeit to the King all such lands, &c. by which words the lands shall not be in the actual possession of the King until office; and with that agreeth the judgment in *Plowd. Comm.* 486. 15 *Eliz. Dier* 326. Sir *William Say's* Case, 28 *H.* 8. *Br. Office* 17. 4 E. 4. 22. 29 *H.* 8. *Br. Charter of Pardon* 52. But when tenant in fee simple is attainted of Treason and dieth, there the fee and the freehold [b] without any office found is cast upon the King for necessity that the freehold shall not be in suspense, and therewith agreeth 9 *H.* 7. 1. And it was also agreed in the same Case, that although the land which such person attainted hath in fee simple be not holden of the King but of a Subject, yet presently by the death of the person attainted, and without any office, the fee and freehold shall be presently vested in the King, and shall not escheat to the Lord of whom the land is holden till office found (as *obiter* it is said in *Nichol's* Case) for the escheat of all lands for high Treason appertaineth to the King only and to no other, as well of lands holden of others as of himself, as it is declared and adjudged in Parliament *anno* 23 E. 3. *cap.* 2. so that the land cannot escheat to the Lord, for escheat in such Case is not by the Law given to him, nor descend to the heir, because the blood is corrupted, and in abeyance it cannot be. *Ergo* it shall vest in the King: But it was agreed, That if Tenant in tail be attainted of high Treason, and dieth, the land shall not vest in the King before office, but it shall descend to the issue in tail till office is found, for the Act of 28 *H.* 8. giveth the forfeiture of it. But neither the Act nor the attainder doth make any corruption of blood as to descent of land in tail: For *Popham* Attorney General said, that so it was agreed in the Case of the Lord *Lumley*, that where there was Grandfather, father, and son, and the Grandfather was Tenant in tail, and the father was attainted of high Treason, and died in the life of the Grandfather, and afterwards the Grandfather died, that the land should descend to the son notwithstanding the attainder of the father, which Case was affirmed for good Law by the whole Court; for the father had not the land, neither in possession nor in use, in which two Cases the Act of 26 *H.* 8. gave the forfeiture only, and his attainder is not any corruption of blood for the land in tail: But now the Statute of 33 *H.* 8. in all the said Cases doth transfer, and vest the actual possession in the King presently by the attainder as well in the life, as after the death of the person attainted, and as well of lands in tail as of land in fee simple, which was one of the causes of the making of the said Act. Another cause was, that the Act of 26 *H.* 8. extended only to lands, &c. which the person attainted had in possession or in use, and did not extend at all to Rights, Conditions, &c. And lastly the Act of 26 *H.* 8. extended only to attainders of Treason by confession, verdict, or process of utlagary, and by the same attainders by Parliament, or when the party stood mute (in which Case such Judgment shall be given as if he had confessed the Treason, or that he had been found guilty by verdict) were out of that Act. But the Act of 33 *H.* 8. extendeth to all manner of attainders of Treason.

Secondly, it was resolved, that although it be provided by the Statute of 33 *H.* 8. that the King shall be in actual possession without any office found thereof, &c. yet when the disseisee is attainted of high Treason, presently by his attainder, the King had not but a right, for the said words shall have such construction, *scil.* That the King shall be in actual possession without office, *id est*, as if an office had been found thereof. And at the Common Law if the disseisee had been attained of Treason; and the seisin and disseisin had been found by office, the possession should not be in the King without a *Scire facias* sued, [11] &c. or seised at the least, because that when a stranger is seised at the time of the office found, the King shall not be in possession until seisure; and therewith agreeth *Stamf. Prærog.* 54. 17. E. 3. 10. 29 *Ass.* 30. 21 E. 4. 1. Also all possessions, &c. are saved by the said Act, as if the said Act had not been made; and therefore the possession of the disseisor is saved thereby in the same manner as if a special office had been fobud by the Common Law.

Thirdly, it was resolved, that the Queen having but a right, that it shall not pass by the grant of the five Messuages, as in the like Case it was adjudged in the Marques of *Winchester's* Case in the Kings Bench. And *Popham* the Attorney General, and *Coke* and others were of Councel with the Queen. And *Robert Atkinson*, *Henry Beamont* and others with the Defendant. And a special office was found of the seisin and disseisin aforesaid; and thereupon a *Scire facias* was brought against him who was found Tenant-tenant, and thereupon Judgment was given, and the Tenant seised into the Queens hands: And afterwards the Queen by new Letters Patents granted the said Tenements to one *Saxie* and his heirs, who had purchased the estate of the said *Katherine*, and had newly built the said tenements, and was expelled by the said *Dowtie* by colour of the said Letters Patents made to *Farnham*. And after this Judgment and the said Letters Patents *Saxie* peaceably enjoyed the Tenements.

Mich.

Mich. 26 & 27 Eliz. *in the Exchequer.*

Sir *William Harbert's* Caſe.

Mathew Harbert 4 E. 6. acknowledged a Recogniſance of 3000 l. to the King in the Court of Augmentation; and after his death a *Scire facias* iſſued 18 *Eliz.* out of the Court of Exchequer againſt the Executors *teſtamenti & ultimæ voluntatis præd' Mathæi & hæred' terrarum & tenementorum quæ ſua fuerunt, &c.* And upon that the Sheriff returned, that *Mathew Harbert* had no Executors within his Bailywick; and further *quod Scire fecit Will. Harbert militi, filio & hæredi dicti Mathæi Harbert per I. D. & D. R. quod ſit coram Baronibus, &c.* And at the day of Retorn the ſaid *William Harbert* made default, upon which the Barons gave Judgment, *Quod dicta domina Regina recuperet verſus dict' Will Harbert dicta tria millia lib. & quod ipſe idem Willielmus de eiſdem* 3000 l. *erga dictam dominam reginam nunc oneratur, & ei inde ſatisfaciat.* And thereupon the ſaid Sir *William Harbert* brought a Writ of Error, and aſſigned three Errors: 1. In the *Scire facias.* 2. In the Retorn. The 3. in the Judgment. And this Term the Erros were moved by *Plowden* of Councel with Sir *William Harbert* before Sir *Thomas Bromley* Lord Chancellor of *England*, and the Baron of *Burleigh* Lord Treaſurer of *England*, and the two chief Juſtices *Wray* and *Anderſon* in the Exchequer Chamber. And in that Caſe divers Points were reſolved. [b]

Firſt, That at the Common Law, where a common perſon ſueth a Recogniſance or a Judgment for debt or damages, he ſhall not have the body of the Defendant, nor his lands (if not in ſpecial Caſe) in execution: But at the Common Law he ſhall have execution in ſuch Caſe only of his goods and chattels, and of corn, and the like preſent profit which ſhall grow upon the land, to which purpoſe the Common Law gave to him two ſeveral Writs: 1. A *Levari facias*, by which Writ the Sheriff was commanded, *Quod de terris & catallis ipſius A. &c. Levari faciat, &c.* and another Writ called *Fieri facias*, which was only *de bonis & catallis*, both which Writs ought to be ſued within the year after the Judgment, or the Recogniſance acknowledged; and if he had not the one or the other within the year, the Plaintiff or the conuſee was put to his Action of debt. And now by the Statute of *Weſt.* 2. *cap.* 45. a *Scire facias* is given; and by the Statute of *Weſt.* 2. *cap.* 18. *cum debitum fuerit recuperatum, &c.* the *Elegit* is given of the moity of the land, which was the firſt Act which ſubjected land to the execution of a Judgment, or of a Recogniſance, which is in the nature of a Judgment, and therewith agreeth *F. N. B.* 265. *g.* And by the Statute of 13 E. 1. *de Mercatoribus.* 27 E. 3. *cap.* 9. & 23 *H.* 8. *cap.* 6. it is provided, That in caſe of a Statute Merchant, and Statute Staple all the lands which the conuſor had at the day of the conuſance ſhall be extended in whoſe hands ſoever they after come, either by feoffment or other maner. But in debt againſt the heir upon obligation made by his anceſtor, the Plaintiff by the Common Law ſhall have all the land which deſcendeth to him in execution againſt him, and yet he ſhould not have execution of any part of the land againſt the father himſelf; but the reaſon thereof was, becauſe the Common Law gave an Action of debt againſt the heir; and in ſuch caſe if he ſhould not have execution of the land againſt the heir, he ſhould not have any fruit of his Action: for the goods and chattels of the debtor do belong to his Executors and Adminiſtrators, and ſo for neceſſity in ſuch caſe only land was liable to execution of the debt of a common perſon at the Common Law. Alſo the body of the Defendant was not liable to execution for debt at the Common Law, *vide* 13 *H.* 4. 1. But the Common Law which is the preſerver of the common peace of the land did abhor all force as a capital enemy to it: and therefore againſt thoſe who committed any force the Common Law did ſubject their bodies to impriſonment which is the higheſt execution, by which he loſeth his liberty till he agree with the party, and pay a fine to the King; and therefore it is a rule in Law, That in all Actions *Quare vi & armis*, *Capias* lieth, and where *Capias* lieth in proceſs, there after Judgment *Capias ad faciendum* lieth, and there the King ſhall have *Capias pro fine*; with that agreeth 8 *H.* 6. 9. 35 *H.* 6. 6. 22 E. 4. 22. 40 E. 3. 25. 49 *E.* 3. 2. and many other Books. Then by the Statutes of *Marlebridge cap.* 23. and *Weſt.* 2. *cap.* 11. *Capias* was given in accompt, for at the Common Law proces in accompt was diſtreſs infinite, and after by the Statute of 25 E. 3. *cap.* 7. the like proceſs was given in debt as in accompt, for before that Statute the body of the Defendant was not liable to execution for debt, for the reaſon and cauſe aforeſaid; but it was reſolved, that at the Common Law the body, the land, and the goods of the accomptant, or the Kings debtor were liable to the Kings execution, for *Theſaurus Regis, eſt vinculum pacis, & bellorum nervi.* And therefore the Law gave to the King full remedy for it; and therewith agreeth 5 *Eliz. Dier* 224. and *Plow. Comm.* 321. Sir *William Cavendiſhes* Caſe who was Treaſurer of the Chamber. 24 E. 3. *Walter de Chirtons* Caſe, and infinite precedents in the Exchequer, to prove that for the Kings debt the body and the land of the debtor ſhall be liable by the Common Law before the Statute of 33 *H.* 8. *cap.* 39. [12] [b]

Secondly, it was reſolved, that in Caſe of a common perſon, the heir of the conuſor, or he againſt whom the Judgment is given in debt ſhall be only charged, and ſhall not have contribution againſt the Terre-tenant in ſome Caſes, and in ſome Caſes he ſhall have contribution, and ſhall not be only charged. As if a man be ſeiſed of three acres of land, and acknowledgeth a Recogniſance or a Statute, and enfeoffed *A.* of one acre, *B.* of another, and the third deſcendeth to his heir, in this Caſe if execution be ſued only againſt the heir, he ſhall not have contribution, for he cometh to the land without conſideration, and the heir ſits in the ſeat of his anceſtor. *Et hæres eſt alter ipſe, & filius eſt pars patris*, and as it

is said, *Mortuus est pater, & quasi non mortuus, quia reliquit similem sibi*; and therefore the heir shall not have contribution against any purchasor, although in truth the purchasor cometh to the land without valuable consideration, for the consideration of the purchase is not material in such case. And so it was of late resolved in the Case of *Thomas Gawdie* late Marshal of the Kings Bench, that the heir can only be charged, and shall not have contribution against purchasors. For although in Case of Recognisance, Statute, or Judgment, the heir is charged as Terre-tenant and not as heir, as it appeareth by 27 *H.* 6. *Execution* 135. 15 *E.* 3. *Age* 95. and the reason is, because that by Recognisance or Statute the heir is [13] not bound, but the conusor *concedit quod dict' pecuniæ summa de terris, &c. levetur*, yet he shall not have contribution against a purchasor, against the opinion of *Finchden* 48 *E.* 3. 5. *b.* But yet in some Cases the heir shall have contribution, and shall not be only charged; and therefore if a man be seised of two acres, one of the nature of Borough English, and bindeth himself in a Statute, or Recognisance: Or if Judgment in debt be given against him, and he dieth, having issue two daughters who make partition, in this case if one only be charged she shall have contribution; for as one purchasor shall have contribution against others, and against the heir of the conusee also, so one heir shall have contribution against another heir, for they are *in æquale jure*, *Trin.* 24 *E.* 3. 28. in a *Scire facias* to have execution of damages recovered in a Writ of intrusion of a Ward, the Sheriff returned that the Defendant against whom the Judgment was given is dead, for which a Writ issued to warn the Tenants of the lands who were Defendants at the time of the Judgment, who were returned warned, one of the Tenants said that his cousin (who was another then him against whom the Judgment was had) died seised whose heir he is, and is within age, and preyed his age, and that the parol might demur against all the other Terre-tenants till he was of age. *Unde colligo*, That if there be Grandfather, father, and two daughters, and Judgment is given for debt or damages against the Grandfather, and he dieth, and the father dieth, one of the daughters within age, and the other of full age, partition is made, the eldest sister shall not be only charged, but shall take advantage of the infancy of her sister, for both heirs are in one degree. The same Law if a man be bound in a Recognisance, and hath issue two daughters and dieth, they make partition, one alone shall not be charged, but shall have contribution, and if one be within age, the other shall take benefit thereof, for in such Case although he be charged as Terre-Tenant, yet he shall have his age. See for this 11 *E.* 3. *Age* 4. 15 *E.* 3. *Age* 95. 29 *Ass.* 37. 29 *E.* 3. 50. 47 *Ass.* 4. in Sir *Richard Walgraves* Case. So if a man be bound in Recognisance, and after his death some of the land descendeth to the heir on the part of the father, and some to the heir on the part of the mother, in this Case the one alone shall not be charged, and if he be, he shall have contribution against the other. And so therewith agreeth 11 *H.* 7. 22. *Br. in Dower*, That if the tenant vouch the heir in three several wards, every one shall be equally charged, as it is agreed in 48 *E.* 3. 5. But it was resolved in the Case at Bar, that although the heir in this Case was charged as Terre-tenant, yet for the causes aforesaid, the Writ which issued against him only, and not against the other Tenants was good enough by the rule of the Court. Note Reader, if two, four, or more men be severally seised of lands, and they all joyn in a Recognisance, in this case the conusee cannot extend the lands of any of the conusors only, but all ought equally to be charged: For although the lands of the conusor it self may be only charged, when divers men have purchased any of the land subject to the Recognisance, because the purchasor is in other degree then the conusor himself, yet one of the conusors shall not be only charged, for he standeth in equal degree with the other conusors, and that appeareth by 29 *Ass.* 37. and 29 *E.* 3. 50. Sir *John* [b] *Langford's* Case, where the Case was, That four were bound in a Recognisance of debt acknowledged in the Court of *Chester* to Sir *John Langford*, and afterwards one of the conusors died his heir within age; Sir *John Langford* brought a *Scire facias* against the other three survivors to have execution, who pleaded that the heir of the conusor who was dead was within age, and in as much as during his minority he cannot be charged, and the survivors only ought not to be charged, they demanded Judgment, &c. And because Sir *John Langford* did not deny it, it was awarded that the parol should demur; upon which Sir *John Langford* brought a Writ of Error in the Kings Bench, which Judgment was there affirmed. Out of which Judgment I observe:

1. That amongst the conusors themselves there shall be an equal charge, and the land of any of them shall not be only extended,

2. That the heir of any of them shall not have greater priviledge in Law then the conusor himself, for it appeareth by that Judgment that he shall be equally charged with the conusors themselves, which well agreeth with the said Resolution, that he shall not have contribution against a purchasor.

3. That the heir is not charged only as Terre-tenant, but in some respect as heir, for otherwise he should not have his age, as it was adjudged in that Case. It is a rule in 17 *E.* 3. 43. that the heir of the conusor shall have *Audita querela* before execution sued, as well as the conusor himself, and shall have a *Supersedeas*, but so shall not have a strange purchasor until he be ousted by execution, and therewith agreeth 17 *Ass.* 24. & 18 *E.* 3. 25. And with the said Judgment in 29 *Ass.* agreeth 19 *E.* 3. *Execution* 81. that if Judgment be given against two disseisors in Assise for the land and damages, and one disseisor dieth, the execution shall not be awarded against the surviving disseisor who was party to the wrong, but as well the heir as the disseisor shall be equally charged: Now for as much as no land was subject to execution for the debt of a common person at the Common Law, but only by the said Statutes; It is worthy consideration what shall be the reason of the said differences concerning contribution, and by what Law the purchasor shall have greater priviledge then the conusor himself, or his heir, and that one heir only shall not be charged, but all the heirs together, *& sic de cæteris*; As to that, it is to know, that the Judges and Sages of the Law have always expounded general Statutes according to the rule of the Common Law, which is built upon the perfection of reason, and not according to any private or sudden conceit or opinion: And because in as much as the said Statutes have subjected

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the land to execution for his debt, the Judges and Sages of the Law conſidered the rule and reaſon of Law in caſe of the heir of an obligor, in which Caſe the land was ſubject to execution at the Common Law. And it appeareth to them, that if a man bind himſelf and his heirs in an obligation, and dieth ſeiſed of land as well on the part of the mother as on the part of the father, in that Caſe the Law doth require equality, and neither the heir on the part of the father, nor the heir on the part of the mother ſhall be only charged, and therewith agreeth 11. *H.* 7. 12. *e.* [14]

So in the Caſe in 48 *E.* 3. when the heir is vouched in the Ward of three ſeveral heirs, every one ſhall be equally charged *pro rata*. So if two men alien lands with warranty, the lands of one only ſhall not be rendred in value, nor if one dieth, the land of the ſurvivor ſhall not be only rendred in value, but the charge ſhall be equal upon them. For a joint lien which bindeth the land ſhall not ſurvive, or lie only upon the ſurvivor, as in Caſe of a joynt warranty, where two for them and their Heirs warrant lands unto another and his heirs, the ſurvivor ſhall not be only vouched. And the Sheriff cannot deliver the land of the one or the other at his pleaſure; for in executions which concern the realty, and charge the lands, the Sheriff cannot do execution upon the land of one only. And ſo if two bind themſelves to warranty, and both die, both their heirs ought to be vouched, and they ſhall be equally charged: But againſt this two Objections were made:

1. That becauſe each of them warranteth the whole, that both their lands, or the lands of the one or the other may be put in execution: And ſo it is *obiter* ſaid in 16. *H.* 7. 13. But to that it was anſwered and reſolved, That although that each be bound to warrant the whole, yet *non ſequitur*, that the recompence in value ſhall be made by one of them only; for if the heir be vouched in the Ward of three ſeveral perſons, one alone ſhall not be charged, but all equally, as is holden 48. *E.* 3. and yet the anceſtor did warrant the whole. And where two are bound in a Recognizance, or Statute, now is each of them bound in the whole, yet the land of one only ſhall not be extended. But it was objected, the Caſe of Recognizance, or Statute, is not like to the Caſe of warranty: For by the Statute or Recognizance the land is preſently bound in whoſe hands ſoever it ſhall come, but ſo it is not in Caſe of a warranty: To which it was anſwered and reſolved, That for as much as by the ſaid Book of 16. *H.* 7. and all other Books it appeareth, that the ſurvivor and the heir ought to be vouched together, and ſo of the heirs of both; And *Littleton* Chapter *Homage Anceſtrel* ſaith, That the land which the vouchee had at the time of the voucher ſhall be liable to render in value, from thence it followeth that the charge ſhall be equal; and that is a ſtronger Caſe than the Caſe of the Statute and Recognizance, for the warrantty extendeth to the render in value lands of inheritance: but if the husband and wife and the heirs of the wife be bound to warranty, and the wife dieth, the lands of the husband may be alone put in execution, becauſe there are no moieties between the husband and wife, and thus are divers opinions in our Books, ſome whereof being ill reported are well reconciled, 17 *E.* 3. 41. 29 *E.* 3. 46. 12 *H.* 7. 3. *b.* 16 *H.* 7. 13. *a.* 22 *E.* 3. 1. 17 *E.* 3. 8. 30 *E.* 3. 40. 19 *H.* 6. 55. But in a binding perſonal it is otherwiſe. As if two be bound in an obligation, there the charge ſhall ſurvive: So it appeareth by theſe Caſes, that when land ſhall be charged by any tie, the charge ought to be equal, and one ſhall not bear all the burthen; and the Law in this point is grounded upon great equity: But in all the Caſes at the Common Law, if the party who ſhould be charged hath aliened the land *bona fide* before any Action brought, the lands in the hands of the purchaſor was not ſubject to any charge or execution; and that was the reaſon that the Judges and Sages of the Law in conſtruction of the ſaid Statutes, although that the Lands of purchaſors after the Judgment, Recogniſance, or Statute were ſubject to execution, yet that gave greater privilege to them, than to the conuſor himſelf or to his heir. [b]

Alſo the Statute of *Weſt.* 2. *cap.* 18. doth provide, *Quod vicecomes liberet ei medietatem terræ*, which ought to be intended of his land; ſo the Statute of 13 *E.* 1. enacteth, That all the lands of the conuſor ſhall be delivered to Merchants, *&c.* and that is another reaſon that the land of one Terre-tenant only ſhall not be charged with the whole debt, for as much as by the ſaid Statute all the land is liable. And the reaſon wherefore the Conuſor himſelf at the will of the conuſee may be only charged, is becauſe he himſelf is the perſon who was the debtor, and who was bound, and therefore it is ſubject to execution, and it is reaſon that he may be only charged; the ſame Law of his heirs for the reaſons before rehearſed.

Note Reader, when it is ſaid before, and often in our Books, That if one purchaſor be only extended for the whole debt, that he ſhall have contribution; it is not thereby intended that the others ſhall give or allow unto him any thing by way of conſideration, but ought to be intended, that the party who is only extended for the whole, may have *Audita querela* or *Scire fac'* as the Caſe requireth to defeat the execution, and thereby ſhall be reſtored to all the mean profits, and drive the Conuſee to ſue execution of the whole land, ſo in this manner every one ſhall be contributory, that is, the land of every Ter-tenant ſhall be equally extended: And afterwards the Council of Sir *Will. Herbert* moved three Errors within the Record.

The firſt was, that the Writ of *Scire facias* was *Scire facias hæred' terrarum & tenementorum, &c.* which was improper and againſt Law; for always one is ſaid heir to his anceſtor, and not to the land, for anceſtor and heir are *relativa*, and it cannot be ſaid that one is *filius*, or *conſanguineus & hæres manerii de Dale*: but that *A.* was ſeiſed of the Mannor of *Dale* in fee, and died ſeiſed, after whoſe death the Mannor of *D.* deſcended to *B.* as *conſanguineo & hæredi prædicti A.* (and ſhew how) and not *prædicti manerii.* [15]

The ſecond Error was, admitting the Writ good, then for as much as the Writ requireth *quod Scire fac' hæred' terrarum & tenementorum, &c.* the return of the Sheriff, *quod Scire fecit Willielmo Harbert Militi, fil' & hæred' prædict. Matthæi*, is not good, becauſe he doth not return him heir of any lands or tenements as the Writ requireth; for his warrant is not to ſummon the heir of the ſaid *Matthew*, but the heir of the lands and tenements of the ſaid *Matthew*, and every return ought to anſwer the point of the Writ.

The

The third Error, admitting the Writ and the Return good, was, That the Judgment it ſelf was erroneous. For the Judgment is given generally againſt Sir *William Harbert*, *Quod dicta Domina Regina recuperet verſus præd' Will' Harbert dicta tria millia librarum; Et quod ipſe idem Willielmus de eiſdem tribus millibus librar' erga dictam dominam Reginam nunc oneretur, & ei inde ſatisfaciat.* And it was moved by the Defendants Council, that the Judgment ought to have been ſpecial, for by this general Judgment his own land ſhall be liable, where by the Law, the land only which came to him by his father ſhall be liable; and as hath been ſaid, he is charged as Terre-tenant, for the conuſee cannot have an Action of debt upon Recogniſance againſt the heir, for the Recogniſance is, *Quod tunc vult & concedit quod dicta pecuniæ ſumma, de bonis & catallis, terris & tenementis, &c. levetur:* So that the charge is impoſed upon his goods and lands; ſo that debt doth not lie upon it againſt the heir, no more than in a Recovery in debt, for there *Scire facias* lieth againſt the heir, but no Action of debt: Then although that the heir maketh default, yet the Judgment ought to have been ſpecial, for it was ſaid in this Caſe, if the heir had appeared, and pleaded a falſe plea, yet the Judgment ought to have been ſpecial, for he is not charged merely as heir, but rather as Terre-tenant. And with that agreeth 33 E. 3. *Execution* 162. in debt the Plaintiff recovered, and before execution the Defendant died, the Plaintiff prayed a *Scire facias* againſt *A.* who was Terre-tenant of the Defendants lands, and had it, who came and counterpleaded the execution, and they were at iſſue, and afterwards did not follow it, for which execution was awarded againſt [b] him, and the Plaintiff prayed execution as well of his own lands which he had the day he pleaded, as of the debtors lands in his hands, becauſe he pleaded a falſe plea. But by the rule of the Court he could have but only the lands of the debtor. *Vide* 16 E. 3. 15. But theſe Points were not reſolved by the Court, but afterwards, upon a Petition made to the Queen, Sir *William* compounded with her. *Plowden* and *Coke* were of Council with Sir *William Harbert*; And note well the new Writ of Error after the entry of the firſt was not brought, *quod coram vobis reſidet*, becauſe the Record is not removed out of the keeping of him who had the cuſtody thereof before, but it remained in the ſame cuſtody after the Writ of Error purchaſed as it was before.

Hill. 29 Eliz. Rot. 790. *in the Kings Bench, between* Hinde *and* Ambray.

Boraſton's Caſe.

[19] BEtween *Richard Hinde* Plaintiff, and *William Ambrey* Defendant, in an *Ejectione firmæ* in the King's Bench, of lands in *Aldenham* in the County of *Hertford* upon a Leaſe made by *Thomas Brand* and *Conſtance* his Wife, and *William Davies* and *Margaret* his wife to the Plaintiff for ſeven years. The Defendant pleaded, Not guilty, and the Jury gave a ſpecial verdict to this effect: *Thomas Boraſton* was ſeiſed in fee of the Lands aforeſaid, and held them in Socage, and had iſſue *Humphrey Boraſton* his eldeſt ſon, *Henry Boraſton* his younger ſon; and *Humphrey* had iſſue *Conſtance* the wife of the ſaid *Brand*, and the ſaid *Margaret* wife of the ſaid *Davies*; and the ſaid *Henry Boraſton* had iſſue *Hugh*. And afterwards the ſaid *Thomas Boraſton* 12. *Auguſt*, 1559. by his Will in writing deviſed the Tenement in theſe words, *viz.* *Item*, I give to *Thomas Amery* and *Amphillis* his wife, all that my upper part of my Cloſe called *Reading* for eight years next after my deceaſe. And that the ſaid *Thomas Amery*, nor his aſſigns ſhall during the ſaid Term, fell none of the ſaid Wood or Timber in or upon the ſaid upper part, but ſhall preſerve the woods to the uſe and behalf of the heir in remainder: And after the term of the ſaid [b] eight years, the ſaid upper part to remain to my Executors until ſuch time as *Hugh Boraſton* ſhall accompliſh his age of 21. years, and the mean profits to be employed by my Executors towards the performance of this my laſt Will and Teſtament: And when the ſaid *Hugh* ſhall come to his full Age of 21 years, then I will he ſhall enjoy the ſaid upper part to him and to his heirs for ever.

And afterwards the ſaid *Thomas Boraſton* 14 *Auguſti anno* 1 *Eliz.* died, and the ſaid *Hugh* died before his full Age of 21 years, about the Age of 9 years. And that *Philip Boraſton* was brother and heir of *Hugh Boraſton*; and the ſaid *Philip* after the end and expiration of the ſaid terms, that is to ſay, of *Thomas Amery* and *Amphillis* his wife, and of the ſaid Executors entred into the ſaid lands as brother and heir of *Hugh Boraſton*, and demiſed the ſaid Lands to the ſaid *William Ambrey*, *&c.* by force whereof he was poſſeſſed, upon whom the ſaid leſſors of the Plaintiff in the right of their wives entred in the ſaid lands; And by Indenture bearing date the ſame day and year mentioned in the Declaration demiſed to the Plaintiff, *prout* in the Declaration, by force whereof he was poſſeſſed, till the Defendant by the commandment of the ſaid *Philip*, entred upon him, *&c.* And if the ſaid entry of the Defendant were lawful or not was the doubt which was referred to the conſideration of the Court. And this caſe was argued by the Council of the Plaintiff. And it ſeemed to them, that no remainder was veſted in the ſaid *Hugh Boraſton* until he attained his age of 21 years, and in the mean time, that the lands did deſcend to the daughters of the eldeſt ſon who are general heirs to the deviſor; and for as much as *Hugh* did never accompliſh his ſaid age, for this cauſe the land ſhall never ſettle in him, but remain in the heirs general; and in proof that the remainder doth not veſt in *Hugh* before his ſaid age, they ſaid, that it appeareth by the words of the Will that he ſhall not have it until his ſaid age of 21 years. For the words are, And when the ſaid

Hugh

Hugh ſhall accompliſh his ſaid age of 21 years, then I will he ſhall enjoy the ſaid upper part to him and to his heirs for ever: So that it fully appeareth, that this deviſe to *Hugh* doth depend upon a contingent, that is to ſay, upon the accompliſhment of *Hugh*'s full age of 21 years, and that ought to precede before the remainder can begin, and whether *Hugh* ſhall attain to his age is ſo incertain that no man can know, but it dependeth upon the providence of God. And it was ſaid, that if *Thomas Boraſton* in this Caſe had made a leaſe till *Hugh* attain his full age, *Hugh* then being of the age of 9 years, the leſſee ſhould not have an abſolute leaſe for twelve years: for if *Hugh* ſhall die before his full age, the leaſe ſhall be ended, *Quod fuit conceſſum per curiam.*

It was alſo ſaid, That when a particular eſtate (which doth ſupport a remainder) may determine before the remainder can begin, there the remainder ſhall not preſently veſt, but ſhall depend in contingency: as if one make a Leaſe to *J. S.* for life, and after the death of *J. D.* to remain to another in fee, this remainder doth depend in contingency; for if *J. S.* die before *J. D.* the particular eſtate is determined before the remainder can begin. So and upon the ſame reaſon it is adjudged in *Colthirſt* and *Beaufhings* Caſe in *Plow Com.* where the Caſe in effect is, That a leaſe is made to *A.* for life, the remainder to *B.* for life, and if *B.* die before *A.* that it ſhall remain to *C.* for life, this is a good remainder upon contingent if *A.* ſurvive *B.* which Caſe is all one in reaſon with the common Caſe which is very often agreed in our Books. A leaſe is made to one for life, the remainder to the right heirs of *J. S.* this remainder is good upon a contingent, that is to ſay, if the leſſee for life overlive *J. S.* otherwiſe not. So and for the ſame reaſon, if a man having iſſue a ſon of the age of 9 years, make a leaſe until his ſon ſhall attain to his full age, and after that he ſhall accompliſh his full age, that it remain over to another fee, nothing veſts (without queſtion preſently) in him in the remainder, which was granted by the Court. And it was ſaid by the Plaintiffs Council, that ſuch remainder is utterly void, and yet may take effect: For in as much as the remainder ought to paſs out of the leſſor preſently, either to him in the remainder, or to be in abeyance or cuſtody of the Law, and a freehold cannot in ſuch Caſe be in abeyance, for this cauſe the remainder is utterly void; As if a man make a leaſe to *A.* for 21 years, if *B.* live ſo long, and after the death of *B.* that it remain over in fee, this remainder is void: So if a leaſe for years be made, the remainder to the right heirs of *J. S.* this remainder is utterly void, *quod fuit conceſſum per curiam.* [20]

Alſo it was ſaid, That when the remainder is limitted to take effect upon the doing of an act, which act ſhall be the determination of the particular eſtate, yet if the act depend upon caſualty and meer incertainty whether it ſhall ever happen or not, there alſo the remainder doth depend in contingency, and ſhall not preſently veſt: As if *A.* make a feoffment to the uſe of *B.* until *C.* come from *Rome* into *England*, and after ſuch return from *Rome* into *England*, to remain over in fee, this remainder doth depend in contingency: for it is incertain whether *C.* ſhall ever return into *England* or not, which was granted by the whole Court. And ſo it was concluded by the Plaintiffs Council, that for all theſe cauſes Judgment ought to be given for the Plaintiff. Againſt which it was argued by the Defendants Council, and they conceived that the remainder did ſettle in *Hugh* preſently by the death of the deviſor, and by his death without iſſue the land did deſcend to *Philip* his brother who leaſed to the Defendant. For it was ſaid, that in this Caſe, that although that *Hugh* died before his full age, yet the intereſt and term of the Executors did not ceaſe; and their reaſon was becauſe that in Wills the intent of the deviſor is to be conſidered; and when he deviſeth his lands to his Executors until *Hugh* his ſon ſhall come to full age for payment of his debts, and to perform his Will, it is to be intended, that he hath made computation, that the profits to be taken of his lands by his Executors during the minority of his ſon (which was for the ſpace of 12 years) would ſuffice to pay his debts, and to perform his Will, and that he did not intend to determine it by the death of his ſon; for then the means which he preſcribeth to ſatisfie his debts, and to perform his Will ſhall be defeated, and by conſequence, his debts ſhall remain unſatisfied, and his Will unperformed; and therefore this Caſe of a deviſe doth differ from a leaſe or a grant made in the like manner. For the deviſor is intended to be *inops conſilii*, and therefore the Law ſhall be his counſel, and according to his intent appearing in his Will ſhall ſupply the defect of the words: And therefore where the deviſor ſaith, Until ſuch time as *Hugh Boraſton* ſhall accompliſh his full age of 21 years, the Law which favoureth the performance of Wills (according to the intent of the deviſor) in conſtruction ſhall make it, until ſuch time as *Hugh Boraſton* ſhould have come to his full age of 21 years: For when the deviſor by apt words might have by good advice made his Will good and ſufficient in Law according to his true intent, there, although that the deviſor being hindred by ſickneſs, or that he wanteth good advice, make his Will in a diſordered manner, and in barbarous and unfit words, the Law in ſuch caſe ſhall reduce the words which want order into order, and ſentence his unfit words to words ſufficient in Law according to his intent as appeareth by his own words. As *Mich.* 32 & 33 *Eliz.* in the Kings Bench it was adjudged between *Wellocke* and *Hamond* in Treſpaſs, upon Not guilty pleaded the Caſe upon ſpecial verdict was ſuch: A Copiholder in fee of land diſcendible in Borough Engliſh, having three ſons and one daughter deviſed his land to his eldeſt ſon, paying to his daughter and to every of his other ſons 40 s. within two years next after his death, the deviſor made a ſurrender according to the cuſtom of the Mannor to the uſe of his Will, and died, the eldeſt Son is admitted, and doth not pay the mony within two years, the youngeſt ſon now Plaintiff entred into the Land, and it was adjudged that his entry was lawful: And in this Caſe two Points were reſolved. [b] [21]

1. Although the yearly profits of the lands for two years exceed the money to be paid to his ſons and daughter, yet the eldeſt ſon hath a fee ſimple: for the recompence and conſideration, although it be not to the value of the land, in caſe of a Will doth make it in conſtruction a fee ſimple; And in the Book of 4 *E. 6. Eſtates Br.* 18. & 29 *H.* 8. *Teſtaments* 18. 22 *Eliz. Dier* 371. no mention is made of the value of the land, no more than in the Caſe of Bargain and Sale of land in 4 *E. 6. Eſtates* 78. yet the fee ſimple of the uſe ſhall paſs.

2. It

2. It was reſolved, That in the Caſe of a Will this word (paying,) maketh a condition; yet in this Caſe the Law ſhall conſtrue this unapt word (paying) to a limitation, for if it ſhall be a condition, then it ſhall deſcend upon the eldeſt ſon, and then it ſhall be at his pleaſure whether the brothers or ſiſter ſhall be paid or not; and therefore it was adjudged, that in that caſe the Law ſhall conſtrue it for a limitation, of which the youngeſt ſon in Borough Engliſh might take advantage, and to amount to as much as if he had made the deviſe of the land to his eldeſt ſon until he ſhal make default of payment, &c. and ſo the doubt of 14 *Eliz. Dier* 317. moved by *Manwood* is well reſolved. Upon which it was concluded in the Caſe at Bar by the Defendants Council, that the Executors had a good term for 12 years, which was not determined by the death of *Hugh Boraſton*, which was granted by the whole Court. And the general Rule put by the Council of the other ſide was agreed, That the Remainder ought to commence in poſſeſſion when the particular eſtate endeth, as well in Wills as in Grants, and there cannot be a mean time between them, but that did not concern the Caſe at Bar, for here in as much as the term did not end by the death of *Hugh Boraſton*, the remainder did begin in poſſeſſion at the end of the term. And as to the incertainty it was ſaid, that the Caſe at Bar is no other in effect, but that a man deviſeth his lands to his Executors (for the payment of his debts) until his ſon ſhall or ſhould have come to his age of 21 years, the remainder to his ſon in fee; for although that theſe are adverbs of time, when, &c. and then, &c. yet they do not amount to make any thing to precede the ſetling of the remainder no more than in the common Caſe. A man leaſeth land for life or years, and after the deceaſe of the leſſee, or term ended, the remainder to another, yet it ſhall remain preſently; for when theſe adverbs refer to a thing, which of neceſſity ought to happen, there they make no contingency, and it is certain that
[b] every man ſhall die, for *Statum eſt hominibus ſemel mori*, and every term ſhall end; for *Tempus edax rerum*: And in the Caſe at Bar, certain it is, that *Hugh* ſhall accompliſh, or might have accompliſhed his age of 21 years, which are in this Caſe of a Will all one in conſtruction of Law. And ſo theſe adverbs (Then and When) in our Caſe are demonſtrations of time, when the remainder to *Hugh* ſhall take effect in poſſeſſion, as in the ſaid Caſes of a leaſe for life, and leaſe for years, and not when the remainder ſhall veſt, *quod fuit conceſſum per totam Curiam.* And Judgment was given, That the Plaintiff ſhould take nothing by his Bill.

Egerton, the Queens Sollicitor, and *Thomas Foſter* and others were of Council with the Plaintiff, and *Coke* and others with the Defendant: and note in the Declaration it doth not appear which husbands and wives made the leaſe to the Plaintiff by deed, and no exception taken to it.

Paſch. 29 Eliz. *between* Walker *and* Harris *in the Kings Bench.*

Walker's Caſe.

[22] THE Caſe was thus in effect; *Walker* leaſed certain lands to *Harris* for years, the leſſee aſſigned all his intereſt to another, *Walker* brought an Action of debt againſt *Harris* for rent behind after the aſſignment, and if the Action were maintainable or not was the queſtion. And it was objected againſt the Action that the land was debtor, and not the perſon but in reſpect of the land; and a difference was taken between a perſonal contract and a real contract, for if a man let a ſtock of Cattel and other goods for years, rendring rent at ſeveral days, he ſhall not have an Action of debt till all his days be incurred. So if a man make an obligation or other contract to pay ſeveral ſummes at ſeveral days, he ſhall not have an Action of debt till all the days are paſt. But in the Caſe of a leaſe for years which is a real contract, the leſſor ſhall have an Action of debt after every day as it appeareth by 45 *E.* 3. 8. 2 *E.* 4. 11. which proveth that the leſſee is not charged in reſpect of any perſonal contract, but in reſpect of reality. And therefore when the leſſee aſſigneth over all his term or intereſt, all the realty which always followeth the land is gone. Alſo if a man ſelleth goods to be paid at ſeveral days, in ſuch Caſe, although that the goods be taken by one who hath right before the day, yet the ſeller ſhall have an Action of debt in reſpect of the contract: But if a man make a leaſe for years rendring rent,
[b] if before the day incurred the land be evicted by title paramount, the leſſor ſhall not have an Action of debt, becauſe the ſame is a real contract, and followeth the eſtate of the land, and the rent iſſueth out of the land, and the perſon is not the debtor but in reſpect of the land, for if the leſſee grant over all his intereſt the leſſor may have an Action of debt againſt the Aſſignee with whom there was no contract by deed. But for as much as the rent iſſueth out of land, the aſſignee who hath land, and is privy in eſtate is debtor in reſpect of the land: So that if a man leaſe three acres rendring rent, and the leſſor ouſt the leſſee of one acre, he ſhall not have an Action of debt for any part, but if the leſſor recover part in an Action of Waſte, or enter in part by forfeiture, or by ſurrender, or by ſpecial condition for entry in part, or if part of the land be evicted by title paramount, in all theſe Caſes the rent reſerved upon the leaſe for years which is a rent ſervice, ſhall be apportioned. *Ergo*, the contract followeth the land, for otherwiſe the leſſor might in all theſe Caſes have an Action of debt for the whole rent in reſpect of the contract, as he ſhall not have upon a ſale of goods; for which matter ſee 23 *H.* 6. 23. 9 *E.* 4. 1. 21 *E.* 4. 29. which Book is to be intended of a lawful entry as for forfeiture, or by ſurrender, and not of a tortious entry

4 *H.* 7. 6. *Apporcionment Br.* 26. 25 *H.* 8. 36. 13 *H.* 8. 30 *H.* 8. *Apporcionment Br.* 7. 3 *H.* 7. 17. And ſo all the Books are well reconciled. So it appeareth, that although in every leaſe for years there is a contract between the leſſor and leſſee, yet that contract is annexed to an eſtate and followeth the land. So on the other ſide if the leſſor grant over his reverſion, the contract runneth with the eſtate, and therefore the grantor ſhall not have any Action of debt for rent due for his aſſignment, but the grantee ſhall have the ſame, for the privity of the contract followeth the eſtate of the land, and is not annexed to the perſon, but in reſpect of the eſtate: As where there be divers parceners of an Advowſon, the eldeſt hath prerogative to make the firſt preſentment, but it is not in reſpect of her perſon only, but as it is annexed to her eſtate. For as 5 *H.* 5. 10. is agreed, her husband who is Tenant by the curteſie ſhall have it: So if one coparcener hath a rent granted to her for owelty of partition, ſhe may diſtrain for the ſame of common right without any words of diſtreſs, and ſo ſhall her grantee, for it was not annexed to her perſon only, but to the eſtate alſo, as it is holden in 21 *H.* 6. 11. So the grantee of reverſion, and the Lord by eſcheat ſhall have an Action of debt for the rent as it is holden in 5 *H.* 7. 18. for the contract is incident to the eſtate: But upon great deliberation and conference with others, it was adjudged by *Wray* Lord Chief Juſtice, Sir *Thomas Gawdie*, and the whole Court of Kings Bench, That the Action would lie.

And firſt for the true apprehending of the reaſon of this Caſe, and of all the other Caſes which have been urged on the other ſide (for the Law always and in all Caſes, is conſonant to it ſelf) It is to know, that as to the matter now in Queſtion there are three manner of privities, *ſcil.* privity in reſpect of eſtate only, privity in reſpect of contract only, and privity in reſpect of eſtate and contract together: Privity in eſtate only; as if the Leſſor grant over his reverſion (or if the reverſion eſcheat) between the grantee (or the Lord by eſcheat) and the leſſee is privy in eſtate only, ſo between the leſſor and the aſſignee of the leſſee, for no contract was made between them. Privity of contract only is perſonal privity, and extendeth only to the perſon of the leſſor and to the perſon of the leſſee, as in the Caſe at Bar, when the leſſee aſſigneth over his intereſt, notwithſtanding his aſſigning the privity of contract remaineth between them, although the privity of eſtate be removed by the act of the leſſee himſelf, and the reaſon thereof is. [23]

Firſt, becauſe the leſſee himſelf ſhall not prevent by his own act ſuch remedy which the leſſor hath againſt him by his own contract, but when the leſſor granteth over his reverſion, there againſt his own grant he cannot have remedy, becauſe he hath granted the reverſion to another to which the rent is incident.

Secondly, the leſſee may grant the term to a poor man who ſhall not be able to manure the land, and who will for need or for malice ſuffer the land to lie freſh, and then the leſſor ſhall be without remedy either by diſtreſs or by action of debt, which ſhall be inconvenient, and ſhall in effect concern every man (for, for the moſt part every man is a leſſor or a leſſee) and for theſe two reaſons all the Caſes of entry by wrong, eviction, ſuſpenſion and apportionment of rent are anſwered: For in ſuch Caſes either it is the act of the leſſor himſelf, or the act of a ſtranger; and in one of the ſaid Caſes the ſole act of the leſſee himſelf ſhall prevent the leſſor of his remedy, and bring in ſuch inconvenience as hath been ſaid.

The third privity is of contract and eſtate together, as between the leſſor and the leſſee himſelf; And *Wray* chief Juſtice and Sir *Thomas Gawdy* ſaid, That as he who is a baſtard born hath not any couſin, ſo every Caſe doth import ſuſpition of its legitimation, if he have not another Caſe which ſhall be as a couſin German to ſupport it, and prove it. And therefore it was agreed by the whole Court, that if there be Lord and Tenant, and the Tenant maketh a feoffment in fee, in this Caſe betwixt them for the arrearages due as well before the feoffment as after till notice, &c. is only privity as to Avowry, and not any privity in eſtate, or in tenure, which privity ſhall not go with the eſtate, and yet it is more in the realty than the Caſe at Bar, *a fortiori* in the Caſe at Bar, when the leſſee aſſigneth his intereſt, yet privity of contract between the leſſor and leſſee as to the Action of debt remaineth. And at the Common Law before the Statute of *Quia emptoris terrarum*, if the Tenant maketh a feoffment in fee to hold of the chief Lord, the feoffee by no tender that he can make ſhall compel the Lord to avow upon him, but the Lord always may avow upon the feoffor as it appeareth in 33 *E.* 3. *Avowry* 255. For by his own act he cannot change the Avowry of his Lord, which is a ſtronger Caſe than the Caſe at Bar: And in the ſame Caſe if the Lord grant over his Seigniory, or if the feoffer dieth, there the privity as to avowry is deſtroyed, for it is perſonal and holdeth only between the Lord himſelf, and the feoffee himſelf: So if after the aſſignment of the leaſe, the leſſor grant over his reverſion, the grantee ſhall not have an Action of debt againſt the leſſee, for the privity of contract as to the Action of debt held only betwixt the leſſor himſelf, and the leſſee himſelf: So in ſuch Caſe if the leſſee dieth, the leſſor ſhall not have an Action of debt againſt his Executors, for the privity conſiſteth only between the leſſor and the leſſee. See for the Caſe of Avowry, *Littleton* Chap. *Releaſes* 106, 107. 4 *E.* 3. 22. 2 *E.* 4. *b.* 34 *H.* 6. 46. 37 *H.* 6. 33. 7 *E.* 4. 28. 29 *H.* 8. *tit. Avowry Br.* 111. [b]

So if Tenant in Dower, or Tenant by the Curteſie grant over their eſtate, yet privity of contract remaineth between the heir and them, he ſhall have an Action of Waſt againſt them for Waſt after the aſſignment: But if the heir grant over the reverſion, the privity of the Action is deſtroyed, and the grantee cannot have any Action of Waſt, but only againſt the aſſignee; for between them is privity in eſtate, and between the grantee and the tenant in Dower or Tenant by the Curteſie is no privity at all. See *F. N. B.* 56. *f. Temp. E.* 1. *Waſt.* 122. 18 *E.* 3. 3. 30 *E.* 3. 16. 36 *E.* 3. 23. 11 *H.* 4. 18. And it was agreed, that if the leſſor enter for condition broken, or if the leſſee ſurrender to the leſſor, the eſtate and term is determined, and yet the leſſor ſhall have an Action of debt for the arrearages due before the condition broken, or the ſurrender made, as it appeareth by *F. N. B.* 120. 30 *E.* 3. 7. 6 *H.* 7. 3. *b. F. N. B.* 122. (againſt the Book of 32 *E.* 3. *Bar* 262. which is not Law, and that in reſpect of the contract

between the leſſor and the leſſee. Note Reader, that ſo great was the authority and conſequence of this Judgment, that after this time not only the Point hath been adjudged and confirmed after, but all the differences in this Caſe taken by *Wray* chief Juſtice and the whole Court have been adjudged, as you may learn by the Caſes following, *Hill.* 36 *Eliz.* in the Kings Bench, 420. between *Vngle* and *Glover* it was adjudged, That if the leſſee for years aſſign over his term, and the leſſor by deed indented and enrolled according to the Statute, bargain and ſell the Reverſion to another, that the bargainee ſhall not have an Action of debt againſt the leſſee, for there is no privity betwixt them. But it was agreed by [24] *Popham* chief Juſtice, *Clench*, *Gawdy* and *Fenner* Juſtices, that after the aſſignment the leſſor himſelf may have an Action of debt againſt the leſſee for rent due after the aſſignment. *Trinit.* 37 *Eliz.* in the Kings bench, *Rot.* 1042. between *Overton* and *Sydhall* two Points were reſolved by *Popham* chief Juſtice and the whole Court.

1. That if the Executor of a leſſee for years aſſign over his intereſt, that an Action of debt doth not lie againſt him for rent due after the aſſignment.

2. If the leſſee for years aſſign over his intereſt, and dieth, the Executor ſhall not be charged for rent due after his death, for by the death of the leſſee the perſonal privity of contract as to the Action of debt in both Caſes was determined. And *Mich.* 40 & 41 *Eliz.* between *George Brome* Eſquire Plaintiff, and *Hore* Defendant, the Caſe in effect was ſuch; A. leaſed to *C.* three acres of land for years rendring rent, the ſaid *C.* aſſigned all his intereſt in one acre to another, *A.* ſuffered a common recovery to the uſe of *B.* in fee who brought an Action of debt againſt the firſt leſſee, and it was adjudged by *Popham* chief Juſtice and the whole Court, that the Action did lie; for in as much as the leſſee hath aſſigned his intereſt but in part, and remaineth poſſeſſed of the reſidue, that not only the leſſor, but alſo his aſſignee, or he who claimeth under him ſhall have an action of debt for the whole rent againſt the leſſee, for there was not privity of contract only, but alſo privity in eſtate and contract together, and therefore the action in this Caſe ſhall go with the eſtate; As if at Common Law, if before the Statute of *Quia emptores terrarum* the tenant had made a feoffment in fee of part of the tenancy, there was not any apporcionment, but the Lord, or his grantee ſhall avow upon the feoffor, for as much as he remaineth tenant in reſpect of the reſidue: But if he had made a feoffment of the whole, then the grantee of the Lord ſhall not avow upon him, as it hath been ſaid before: See 22 *Aſſ.* 52. 24 *H.* 8, 4. *b.* 32 *H.* 8. *Br. Acceptance* for this matter. And *Popham* chief Juſtice in this Caſe ſaid, That in Caſe when rent upon a leaſe for years ſhall be apporcioned, if in an Action of debt the leſſor demand more *quam oportet*; yet upon *Nihil debet* the leſſor ſhall recover as much as ſhall be apporcioned and aſſeſſed by the Jury, and ſhall be barred for the reſidue. And *Paſch.* 41 *Eliz. Rot.* 2485. in the Common Pleas, *Samuel Marrow* brought an Action of Debt againſt *Fr. Turpin*, and *W. Turpin* Executors of *George Turpin*, and declared upon [*b*] a demiſe made by the Plaintiff by deed indented of certain land to the inteſtate for years rendring rent, and for rent behind after the death of the inteſtate the Action was brought; The Defendant pleaded that before the rent behind, one of the Defendants had aſſigned all his intereſt to *Thomas Boorde*, of which aſſignment the Plaintiff had notice, and accepted the rent by the hands of the aſſignee due at a day after the aſſignment, and before the day at which the rent now in demand was due, upon which the Plaintiff did demur. And it was adjudged againſt the Plaintiff, becauſe that the privity of the contract as to the Action of debt was determined by the death of the leſſee; and therefore after aſſigment made by the adminiſtrator, debt did not lie againſt the adminiſtrator for rent due after the aſſignment according to the Judgment given in *Overton* and *Sydhals* Caſe before.

Alſo it was ſaid, that if the leſſee aſſign over his term, the leſſor may charge the leſſee or his aſſignee at his election; and therefore if the leſſor accept the rent of the aſſignee, he hath determined his election, and ſhall not have an Action againſt the leſſee after for rent due after the aſſignment, no more then if the Lord once accept of the rent of the feoffee, he ſhall not avow upon his feoffor: And by theſe Judgments and Reſolutions you ſhall the better underſtand your Books, betwixt which *prima facie* ſeem to be ſome diverſity of opinions, *Vide* 44 *E.* 3. 5. & 44 *Aſſ.* 18. 9 *H.* 6. 52. by *Paſton*, which agree with the Judgment of Sir *Criſtopher Wray*. See 8 *Eliz. Dier* 247. and the *Quære* there made, is now well reſolved.

Mich. 32 & 34 Eliz. *in the Kings Bench.*

Butler and *Baker*'s Caſe.

[25] IN an Action of Treſpaſs brought by *John Butler* againſt *Thomas Baker* and *Thomas Delves* Defendants for Treſpaſs in parcel of the Mannor of *Thoby* in the County of *Eſſex*, and upon Not guilty pleaded, the Jury gave a ſpecial Verdict to this effect; *William Barners* ſeiſed of the Mannor of *Hynton* in the County of *Glouceſter*, had iſſue *William* his eldeſt ſon, *Thomas* and *Leonard Barners*, and that *William* the ſon married *Elizabeth Eden*; and afterwards 2 & 3 *Phil. & Mar. William* the father in conſideration of the ſaid marriage, and for a Joynture for the ſaid *Elizabeth*, did enfeoff of the ſaid Mannor of *Hynton Robert Rocheſter* Knight, and others unto the uſe of the ſaid *William* the ſon and *Elizabeth* his wife and the heirs of their two bodies begotten; And afterwards *William* the father died,

by

by which the reverſion of *Hynton* deſcended to *William* the ſon; and that *William* the ſon was alſo ſeiſed of the Mannor of *Thoby* (whereof the place in which is parcel) and of certain lands in *Fobbing* in the County of *Eſſex* in fee, and had iſſue *Thomas* and *Griſild* now the wife of *Baker* one of the Defendants; And afterwards *William* the ſon by his laſt Will in writing deviſed, that *Elizabeth* his wife ſhould have and hold during her life the Mannor of *Thoby* in conſideration of her Joynture and Dower in all his other Mannors and lands; Provided always, that if the ſaid *Elizabeth* ſhall take her ſelf to any former Joynture of any lands of *William* the ſon, that then the ſaid Will of the Mannor of *Thoby* as to the ſaid *Elizabeth* ſhould be void: And after the death of the ſaid *Elizabeth*, the ſaid Mannor of *Thoby* ſhould remain to *Thomas* his ſon, and to the heirs males of his body, the remainder to the heirs males of the body of the ſaid *William* the ſon, the remainder to *Thomas* his brother for life, the remainder to his eldeſt ſon in tail, the remainder to *Leonard Barners*, and to the heirs males of his body, the remainder to *Richard Barners* in tail, the remainder to the right heirs of *William Barners* the ſon. And that *William* the ſon ſo [b] as aforeſaid ſeiſed of all the premiſſes, died thereof ſo ſeiſed; and that the Mannors of *Thoby* and *Hynton* were holden of the Queen in *Capite* by Knights ſervice, and that after the death of *William* the ſon, his wife by word in the Country did wave her eſtate in *Hynton*, and agreed to the Mannor of *Thoby* and entred into it; And that the Mannor of *Hynton* and the lands in *Fobbing* were an entire third part of all the lands and tenements whereof *William* the ſon died ſeiſed. And that *Thomas* ſon of *William*, and *Thomas* ſon of the father were dead without iſſue, by which *Leonard* entred into the Mannor of *Thoby*, and took to wife *Mary Gedges* and died, *Anthony* his ſon aſſigned the Mannor of *Thoby* to the ſaid *Mary* for her Dower now the wife of *Butler* the Plaintiff. And that *Thomas Delves* one of the Defendants by the command of *Baker* the other of the Defendants entred, &c. And if the entry of the ſaid *Delves* were lawful is the doubt; and the Caſe in effect is ſuch: *William* ſeiſed of *Thoby* and *Fobbing*, and *William* and *Elizabeth* his wife ſeiſed of *Hynton* to them and to the heirs of their two bodies begotten by eſtate made to them before the marriage for the Joynture of the wife, the reverſion to *William* in fee, *Thoby* amounting to the value of two parts, and *Fobbing* and *Hynton* to a full third part. *Thoby* and *Hynton* are holden in *Capite*; *William* by his Will deviſeth in writing *Thoby* to his wife for her life, upon condition that ſhe ſhall not take her former Joynture, with divers remainders over and dieth; The wife in the Country refuſeth her former Joynture in *Hynton*. If the Will be good for the whole of *Thoby*, or but for part. And two Queſtions were moved in this Caſe.

1. If the refuſal in the Country ſhall deveſt the eſtate tail which was ſetled in the Wife.

2. Admitting the refuſal in the Country ſhall deveſt it, if the refuſal ſhall have ſuch relation that the Will ſhall be good for the whole Mannor of *Thoby* by the Statutes of 32 & 34 *H.* 8. or ſhall be void for part. And this Caſe was argued in the Kings Bench by *Egerton* the Queens Sollicitor and *Thomas Buckley* for the Plaintiff, and by *Popham* the Queens Attorney and *Coke* for the Defendant. And afterwards *Mich.* 33 & 34. *Eliz.* the Caſe was argued by the Court, and *Fenner* and *Clench* argued for the Plaintiff, and *Wray* chief Juſtice, and *Gawdy* for the Defendant. And after the ſame Term the Caſe was argued by the Councel of the one and the other ſide in the Exchequer Chamber before all the Juſtices of *England*; and *Wray* chief Juſtice told me, that *Anderſon* chief Juſtice of the Common Pleas, [26] and *Manwood* chief Baron did agree with him; And afterwards *Wray* chief Juſtice the laſt day of *Eaſter* Term 34 *Eliz.* died, who was a moſt reverend Judge, of profound and judicial knowledge, accompanied with a ready and ſingular capacity, grave and ſenſible elocution, and continual and admirable patience; and Sir *John Popham* the Queens late Attorney General did ſucceed him. And afterwards in *Michaelmas* Term 34 & 35 *Eliz.* Sir *Roger Manwood* chief Baron died, who was alſo a reverend Judge of great and excellent knowledge in the Law, and accompanied with a ready invention and good elocution; and Sir *William Periam* Knight, late one of the Juſtices of the Common Pleas ſucceeded him. And afterwards the Caſe was oftentimes argued as well in the Exchequer Chamber as at Serjeants Inn before all the Juſtices of *England* and Barons of the Exchequer; and after many conferences between themſelves, Judgment was commanded to be entred for the Defendant, which was done in the Kings Bench accordingly; and in this Caſe divers Points were reſolved.

Firſt, That at the Common Law, if lands be given to the husband and wife in tail, or in fee, and the husband dieth, there the wife cannot deveſt the freehold out of her by any verbal waver or diſagreement in the Country: As if before any entry made by her, ſhe ſaith that ſhe utterly waveth and diſagreeth to the ſaid eſtate, and will never take, or accept thereof; yet the freehold doth remain in her, and ſhe may enter when ſhe pleaſeth: So if before her entry, ſhe reciting her eſtate, had ſaid by word in *pais* that ſhe doth aſſent and agree to the ſaid eſtate, or as much, yet after ſhe might wave the ſame in a Court of Record; for a verbal aſſent and agreement in *pais* as it was holden by divers in ſuch Caſe is not of any effect in Law, for the Law doth more reſpect an act without words, then words without act, and therefore if ſhe enter into the land and taketh the profits, although ſhe ſaith nothing, it is a good agreement in Law, for the Law doth reſpect deeds, but words without deeds are not in this Caſe regarded in Law, as it is adjudged in *M.* 34 *E.* 1. *Avowry* 232. That if a man take a diſtreſs for one thing, yet when he commeth into a Court of Record he may avow for what thing he pleaſeth, *a multo fortiori* [b] where a freehold is veſted in him the ſame cannot be deveſted by bare word in the Country, and therewith agreeth 17 *E.* 3. 6. & 17 *Aſſ.* where the husband alieneth his land, and taketh back an eſtate to him and his wife in tail, the husband dieth, the Lord of whom the land was holden by Knights ſervice ſuppoſing the husband died ſole ſeiſed, by word aſſigned Dower to the wife which ſhe accepted, yet it was adjudged that the refuſal of the eſtate of inheritance, and acceptance of her Dower in *pais*, ſhall not deveſt the freehold out of her. Alſo in 13 *R.* 2. *Jointenancy*, the Caſe was; A Charter of feoffment was made to four, and ſeiſin was delivered to three in the name of all, and after the ſeiſin was given, the fourth came and ſaw the Deed, and ſaid by word that he would have nothing in the land nor agree to the Deed, but diſagree; and it was adjudged that this diſagreement by word in *pais* ſhould

not deveſt the freehold out of him. And *Thorpe* in 35 E. 3. *tit. Diſclaimer* ſaith, that in ſuch Caſe the Tenancy doth remain in all notwithſtanding diſagreement in a Court of Record. Another reaſon was alledged, That a freehold ſhall not ſo eaſily be deveſted by bare word in *pais*, to the end that the Tenant to the *Præcipe* may be the better known: But as an act in *pais* may amount to an agreement, ſo an act in *pais* may amount to a diſagreement, but that is always of one ſame thing: As if Lord and Tenant be, and the Tenant by deed doth enfeoff the Lord and a ſtranger, and maketh livery to the ſtranger in the name of both, in this Caſe if the Lord by word diſagree to the eſtate, it is nothing worth; and on the other ſide, if he entreth into the land generally and taketh the profits, this act ſhall amount to an agreement to the feoffment; but if he enter into the land, and diſtrain for his Seigniory, this act amounteth to a diſagreement to the feoffment, and ſhall deveſt the freehold out of him, and therewith agreeth 10 E. 4. 12. by all the Juſtices: And yet in ſome Caſe a claim by word ſhall direct an entry to be an agreement to one eſtate, and a diſagreement to another. As if lands be given to the husband and wife in tail, and after the Statute of 32 *H.* 8. the husband alieneth the land to the uſe of him and his heirs, and afterwards deviſeth the ſame to the wife for life and dieth, the wife entreth claiming by word the eſtate for life, this is a good diſagreement to the eſtate of inheritance, and a good agreement to the eſtate for life, and therewith agreeth 18 *Eliz. Dier* 351. *b.* for there is not any doubt of Tenant to the *Præcipe*, and the act and words work together. But if the wife before her entry agree by word to an eſtate, and diſagree to the other, it is nothing worth; But if *A.* maketh an obligation to *B.* and delivereth the ſame to *C.* to the uſe of *B.* this is the deed of *A.* preſently: But if *C.* offer it to *B.* there *B.* may refuſe the ſame in *pais*, and thereby the obligation ſhall loſe its force (but perhaps in ſuch Caſe *A.* in an Action brought upon this obligation cannot plead that it was not his deed, becauſe it was once his deed) and therewith agreeth *Hill.* 1 *Eliz. Rot.* 442. in *Tawes* Caſe Reported by Serjeant *Bendloes*, and by the Lord *Dier Hill.* 1 *Eliz.* 167. The ſame Law of a gift of goods and chattels, if the deed be delivered to the uſe of the donee, the goods and chattels are in the donee preſently before notice or agreement, but the donee may make refuſal in *pais*, and by that the property and intereſt ſhall be deveſted, and ſuch diſagreement need not to be in Court of Record. Note Reader by this Reſolution, leſt you be drawn to error by certain opinions delivered by the way in 7 *E.* 4. 7. *&* 19. *b.* 8 E. 4. 29. 8 *H.* 7. 13. 39 *H.* 6. 44. *b.* and divers other Books *obiter*.

[27]

Secondly, it was reſolved, that though the eſtate is created by limitation of uſe, by limitation made after the Statute of 27 *H.* 8. which Statute hath transferred the uſe unto poſſeſſion, for ſo is the uſual pleading, *de uſibus in poſſeſſionem transferendis*, and although that an uſe might have been waved by word in *pais* before the ſaid Statute, yet now the Statute doth incorporate the uſe and poſſeſſion of the land, and hath coupled them together with an indiſſoluble conjunction, and therefore no more then an eſtate created by feoffment, gift, or grant can be waved in *pais*, no more can ſuch eſtate created by limitation of uſe, which matter upon theſe words of the ſaid Act (in ſuch manner, form, and condition) is well and at large explained and reſolved in *Dillon* and *Freins* Caſe, and in *Corbet*'s Caſe: And therefore it was reſolved in this Caſe at Bar, the refuſal in *pais* to have the Mannor of *Hynton*, and the entry and agreement to the Mannor of *Thoby* was a good agreement to one, and a refuſal to the other, and by the inheritance was deveſted, and that by force of the Statute of 27 *H.* 8. *cap.* 10. *verſus finem*, concerning Joyntures of wives, by which it is provided, That if any wife ſhall have any Mannors, &c. unto her given, or aſſured, after marriage for term of her life, &c. that then ſuch wife over living her husband, ſhall and may at her liberty after the death of her ſaid husband refuſe to have, and take the lands, &c. and to have, demand, and take her Dower, any thing in this Act to the contrary notwithſtanding. By which words it was unanimouſly agreed by all the Juſtices and Barons of the Exchequer, That the wife may refuſe her Joynture in *pais*, and be endowed by conſent in *pais*, or by Writ of Dower. And therewith agreeth *Whorewoods* Caſe 33 *H.* 8. *Dier* 61. *b.*

The third Point, and the great doubt of the Caſe was upon a branch of the Statute of 34 & 35 *H.* 8. of Wills, by which it is enacted, That the Act of 32 *H.* 8. of *Wills*, Shall be extended and expounded, and taken as hereafter enſueth, that is to ſay, That the King ſhall have and take for his full third part of all ſuch Mannors, lands, &c. whereunto he is or ſhall be intituled by the ſaid former Act, and by this preſent Act ſuch Mannors, lands, and tenements as ſhall by any means deſcend, or come by deſcent, as well of eſtate of inheritance in fee tail as fee ſimple, or in fee tail only, &c. immediately after the death of the ſame deviſor or owner thereof. And that the Will, &c, ſhall ſtand good and effectual in Law albeit the ſame Will, &c. be had and made of all his fee ſimple lands, &c. or of the more part of them, And if in this the refuſal of *Hynton* hath ſuch relation or operation in Law, that now upon the matter, *Hynton* and *Fobbing* do deſcend immediately after the death of the deviſor; And it was ſtrongly objected, that now upon the matter *Hynton* and *Fobbing* deſcend immediately after the death of the deviſor within the intention and meaning of the ſaid branch of the Act of 34 & 35 *H.* 8. and that for divers reaſons and cauſes.

[*b*]

1. Becauſe this Caſe doth conſiſt upon conſtruction of an Act of Parliament, and of a Will or Teſtament, both which are always conſtrued and expounded according to the intent and meaning of the parties thereto, and not by any ſtrict or ſtrained conſtruction.

2. This refuſal ſhall have ſuch relation and operation in Law, that now upon the matter *Hynton* immediately deſcend, and now *ab initio* the husband was ſeiſed ſole of the Mannor of *Hynton*. And many Caſes were put upon the general ground of relations. But I will report thoſe only which I conceive to be moſt material. It was ſaid, that of a joynt eſtate a woman ſhall not be endowed: But if lands be given to husband and wife, and the heirs of the husband, or the heirs of their two bodies, or to their heirs, and afterwards the husband dieth; now if ſhe will wave and refuſe the joynt eſtate, the wife may bring her Writ of Dower, and thereby by Judgment of Law the husband ſhall be ſaid ſole ſeiſed *ab intio*, for otherwiſe the wife cannot be endowed, and yet in truth the husband and wife

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were joyntenants during all the coverture; but now the refuſal ſhall have ſuch relation, that in judgment of Law the husband was *ab initio* ſole ſeized: And therewith agreeth the Book in 11 *E.* 3. *tit. dower* 63. where the Caſe was, Lord and Tenant of a houſe holden by homage and 10 s. rent, the Tenant enfeoffed *W.* the Lord granted the Seigniory to the husband and wife in tail, *W.* attorned, the husband died, the Lord ſurvived the wife, and ſhe brought a Writ of Dower, in barr of which the Lord pleaded acceptance of homage, by which it was admitted that the Writ of Dower did lie. In an Action of Waſte brought by *Robert Thetford* againſt *Andrew Thetford*, *Paſch.* 28 *Eliz. Rot.* 122. in the Common Pleas, the Plaintiff counted that *J. A.* gave to *John Thetford* and *Thomaſin* his wife, and to the heirs of their bodies (whoſe heir the Plaintiff is) and that *John* and *Thomaſine* 3 & 4 *Phil. & Mary* made a demiſe unto the Defendant for 21 years, and that the donees were dead, and that the Plaintiff was heir in tail, and that [28] the Defendant had done Waſte: The Defendant pleaded *quod prædicti' Johannes & Thomaſina non demiſer', &c.* upon which they were at iſſue; The Jury found, that the ſaid *John* and *Thomaſine* by their Deed indented made the leaſe to the Plaintiff for 21 years *ut ſupra*, and that *John* died, and after his death *Thomaſine* entred and diſagreed to the ſaid leaſe; and the iſſue was found for the Plaintiff, for as much as it was found that both made the leaſe, as the Plaintiff had counted, which was the point of the iſſue; or if it were found for the Defendant by matter *ex poſt facto*, that is to ſay, by the diſagreement of the wife, that was the Queſtion.

And after great conſideration, and many arguments at the Bar and Bench, the Juſtices of the Common Pleas gave Judgment for the Defendant; for now by the diſagreement of the wife, in judgment of Law it was the leaſe of the husband only, and yet in truth during the life of the husband it was the leaſe of both, as it appeareth by 7 *H.* 4. 13. *in Waſt.* 3 *H.* 6. 53. *in Waſt.* 22 *H.* 6. 24. But now by the diſagreement ſubſequent, and by relation and operation of Law it was *ab initio* the leaſe of the husband only, for if it *ab initio* had not been the leaſe of the husband only, the iſſue had been found for the Plaintiff: and the Caſe of *Whorewood* 38 *H.* 8. *Dier* 61. was ſtrongly urged, where the Caſe was, That *W. Whorewood* the Kings late Attorney General being ſeiſed of the inheritance of lands of the value of 630 l. in which the wife is joynt purchaſor with the husband of 60 l. by his laſt Will in writing declared, That his wife ſhall have during her life the third part of all his lands and tenements, with the ſaid lands which ſhe had in Joynture, the ſaid part to be aſſigned by his Executors, and died, the wife refuſed her Joynture, and demanded a third part of the whole land, that is to ſay, 120 l. as a legacy, and 80 l. *per ann.* as a third part of the reſidue for her Dower: And it was ordered and decreed in the Court of Wards that ſhe ſhould have her legacy, *ſcil.* the third part of the whole: by which it appeareth, that the refuſal of the wife ſhall have relation *ab initio* to make the husband ſole ſeized of the whole, or otherwiſe the ſaid deviſe cannot extend to that whereof ſhe was joyntly ſeized. And ſo in the Caſe at Bar, the refuſal of the wife hath ſuch relation and operation in Law, that now upon the matter the husband was *ab initio* ſole ſeiſed of the Mannor of *Hynton*, had by conſequence the ſame doth deſcend after the death of the husband, and ſo the deviſe of the whole Mannor of *Thoby* good and effectual in Law; for now it amounts to ſo much as if the uſe had been limited only to *William*, and to his heirs on the bo- [*b*] dy of *Elizabeth* begotten; And where the Statute of 34 *H.* 8. ſpeaketh of deſcent, immediately after the deceaſe, &c. the ſame is true, for now upon the matter the Mannor of *Hynton* deſcends immediately, for now the impediment, that is to ſay, the eſtate of the wife is removed *ab initio*; and yet this word (immediately) ſhall not have ſuch ſtrict conſtruction, that it ought to be *in ipſo articulo temporis*, but ſhall be ſatisfied if it be done in convenient time: As in 18 *E.* 4 22. a man is bound to make an obligation immediately, yet he ſhall have convenient time to do it: But it was anſwered and reſolved, That the ſaid refuſal in the Caſe at Bar ſhall not have ſuch relation or operation in Law, that the deviſe ſhall be good for the whole Mannor of *Thoby*, and that for two general cauſes:

1. Upon the reaſon of the Common Law, and 2. upon the Statutes of 32 & 34 *H.* 8. As to the firſt it was reſolved, that relation is a fiction of Law, to make a nullity of a thing *ab initio* (to a certain intent) which *in rei veritate* had eſſence, and the rather for neceſſity, *ut res magis valeat quam pereat*; And therefore in the ſaid Caſe of Dower in 11 *E.* 3. to this intent that the wife ſhall have Dower, which it is not poſſible for her to have, if her refuſal ſhall not have relation *ab initio*; for this cauſe, and for neceſſity the Law ſhall make a nullity of it; but as to any other collateral intent, the Law ſhall not make any nullity thereof: As if a man make a gift in tail to husband and wife, and afterward granteth the reverſion of the lands and tenements which the husband and wife held in tail, and after the husband dieth, and the wife to have her Dower wave and diſagree to the eſtate tail; Now as to her there is a nullity of the eſtate *ab initio*, and to ſuch intent the Law feigneth that the eſtate was made only to the husband; but as to the grantee of the reverſion, which is a collateral act, the refuſal ſhall not have any ſuch relation, for ſhe may be endowed, although this act ſtand, and ſo no neceſſity, and therefore without neceſſity *ut res magis valeat quem pereat*, the Law ſhall not feign any nullity, but in deſtruction of a lawful eſtate veſted, the Law will never make any fiction. So in the Caſe at Bar, for the Mannor of *Hynton* only the Law ſhall make ſuch a fiction, but for the Mannor of *Thoby* which is a collateral thing, no ſuch fiction ſhall be made, for *relatio eſt fictio juris, & eſt intenta ad unum*, and that was the firſt reaſon. And as to *Whorewood*'s Caſe it was ſaid, that the decree was made by agreement, as it appeareth by the ſaid Caſe; and the ſcope of the caſe was, that ſhe would have the third part as a legacy, and her Dower alſo, and by agreement ſhe took compoſition for the whole; and it doth not appear by the ſaid Caſe, whether the wife were joynt purchaſor for life, in tail, or in fee, nor whether any part of the land were holden in *Capite*, or by Knights ſervice. The ſecond reaſon was, that relations in many Caſes ſhall help acts in Law, [29] as in the Caſe of Dower, &c. but ſhall never help acts of the parties, that is to ſay, to make void acts of the parties good, by relation, or fiction of Law; and therefore if a man doth enfeoff an infant, or a feme covert, and afterwards give, or grant, or deviſe the land, or any other thing out of the land to another, and afterwards the infant, or the husband diſagree, the ſame without queſtion ſhall have relation between

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the parties *ab initio*, to this intent that the infant or husband ſhall not be charged in damages, or receive any prejudice; but as to the void grant or deviſe of the party it ſhall never make the void grant, gift, or deviſe, good. Alſo if one deviſe land to one by deed for life, the remainder to the King in fee, and the King granteth the remainder over in fee, and afterwards the deed is enrolled, in this Caſe the enrolment ſhall have relation for neceſſity, and *ut res magis valeat quam pereat*, that the remainder *quaſi ab initio* ſhall paſs by fiction of Law, for otherwiſe it ſhould never paſs, and therefore to this intent only it ſhall have relation: but to make the Patent (which was void at the time of the grant) good, it ſhall have no relation. So if a diſſeiſor maketh a feoffment in fee by deed to *A.* and *B.* and maketh livery to *A.* in the name of both, and afterwards *A.* dieth, in this Caſe *B.* to diſcharge himſelf of damages may refuſe it, as hath been ſaid; and it ſhall have relation *ab initio* to diſcharge him of damages; but to make any leaſe, gift, or grant, or deviſe good, or any other act of the party good, it ſhall not have relation.

And it was ſaid, that as relations ſhall extend only to the ſame thing, and to one and the ſame intent, ſo they ſhall extend only between the ſame parties, and ſhall never be ſtrained to the prejudice of a third perſon who is not party, or privy to the ſaid act. And therefore if a man maketh a feoffment of a Manor by deed, or without deed, and long time after the livery the Tenants attorn to the feoffee, in this Caſe the Attornment for neceſſity, and *ut res magis valeat* ſhall have relation by fiction of Law to paſs *ab initio*, for otherwiſe they can never paſſe. And if they ſhall not paſs *ab initio* by a fiction of Law, they ſhall not be parcel of the Mannor according to the intent and purpoſe of the feoffment, if they ſhall paſs at ſeveral times: But yet this relation ſhall not charge the tenants for the arrearages in the mean time: So if feoffee upon condition grant a rent charge out of the land, and afterwards the Grantee bringeth a Writ of Annuity, now *ab initio* it was an Annuity between the grantor and grantee; but as to the feoffor who by the grant was entituled to enter for the condition broken, it ſhall not have any relation to his prejudice. So it is adjudged in 30 *E.* 3. 17. in a *Dum fuit infra ætatem* againſt *Richard Spellow*, the Tenant [b] ſaid that his father was ſeiſed and died ſeiſed, and prayed his age, the Defendant counterpleaded the age, becauſe that his father and he himſelf were joyntly enfeoffed, and to the heirs of the father: And it was adjudged, that he ſhall not have his age, for although that this refuſal ſhall have relation as to himſelf, yet as to the demandant who is a ſtranger, it ſhall not have relation to delay his Action, when in truth he had the free-hold by purchaſe. Further it was ſaid, that no relation ſhall make that torcious which was lawful; for as it hath been ſaid, relations are fictions in Law, which will never do wrong: Upon all which matter it was concluded, That this refuſal ſhall have relation only as to the Mannor of *Hynton*, and not as to the Mannor of *Thoby*, and to the intent only that the wife ſhall not be prejudiced for any thing concerning the Mannor of *Hynton*; and this relation ſhall not prejudice the heir who is a third perſon, upon whom by the death of the deviſor part of the Mannor of *Thoby* did deſcend, and it ſhall not deveſt that which the Law by deſcent hath lawfully ſetled by the death of the deviſor in the Mannor of *Thoby*: But as the Will took effect at the time of his death, it ſhall remain, for *omne Teſtamentum morte conſummatum eſt*, and the refuſal of the wife as to the Mannor of *Hynton* cannot make the deviſe as to the third part of the Mannor of *Thoby* good, which was void when the deviſe took effect, *ſcil.* at the time of the death of the deviſor.

Note Reader, not only in this Caſe of relation, which is a fiction of Law, but alſo in all other fictions of Law they are to certain reſpects and purpoſes, and extend only to certain perſons. As the Law ſuppoſeth, that the vouchee is Tenant of the land, whereas in truth he is not, but the ſame is as to the demandant himſelf, and to enable him to do all things as to the demandant, as which the demandant may do to him: and therefore a fine levied by the vouchee to the demandant, or a fine or releaſe from the demandant to the vouchee is good; but a fine levied by the vouchee to a ſtranger is void, and therewith agreeth 7 *E.* 4. 13. So if the Tenant hanging a *Præcipe* againſt him maketh a feoffment as to the demandant, the Law doth ſuppoſe him Tenant of the land, and he ſhall plead all pleas which the Tenant of the land may plead; but *in rei veritate* the feoffee is Tenant of the land as to ſtrangers: So if donee in tail maketh a feoffment in fee, *in rei veritate* the donee hath not *neque jus in rei veritate*, *neque jus ad rem*, and yet the donee may extinguiſh or diminiſh his rent by releaſe or confirmation made to him; as [30] it is agreed 14 *H.* 4. 38. 1 *H.* 5. *Grants* 53. in all which Caſes, and other the like the Law ſhall never make any fiction, but for neceſſity and in avoidance of a miſchief, for if the vouchee ſhall not be tenant as to the demandant, or that the tenant after the feoffment ſhall not be as to the demandant tenant of the land, the demandant in the one Caſe and the other can never have the effect of his ſuit but ſhall be for ever delayed; And in the latter Caſe notwithſtanding the feoffment the donee ſhall remain Tenant as to him, and for neceſſity he ſhall avow for his rent upon him, for he cannot avow upon the diſcontinuee, for then upon his own ſhewing, the reverſion to which the rent is incident ſhould be deveſted out of him by the feoffment, and by conſequence he cannot maintain his Avowry for the rent, and therefore for neceſſity he ſhall avow upon the donee, and his feoffment which is his own act, and by which wrong is done ſhall not avail him to bar the donor of his rent, for a man ſhall never take benefit of his own wrong, and that is (as to this Point) as it ſeems to me the better opinion of the Books. As to the Statutes of 32 & 33 *H.* 8. it was reſolved, that after the Statute of 27 *H.* 8. and before the Statute of 32 *H.* 8. the Mannor of *Thoby* was not deviſable; and becauſe that *William Barners* the deviſor hath not followed the power and authority (which the Statute of 32 *H* 8. and the Statute of 34 *H.* 8. which explaineth it) hath given to him, it was reſolved, that the Will was void for part of the Mannor of *Thoby*. And the ſame was collected upon four parts of the ſaid Acts, the effect of which I have abridged as followeth.

The firſt Branch of the Act of 34 *H.* 8.

1. That all and every perſon having a ſole eſtate in fee ſimple of any Mannors holden in chief, &c. ſhall have full and free liberty, power and authority to give or diſpoſe by his laſt Will in writing as much as in him of right, as much of, &c. as ſhall amount to the full and clear yearly value of two parts in three parts to be divided.

The ſecond Branch.

2. The ſame diviſion to be ſet out by the deviſor, owner, or in default thereof by Commiſſion to be granted out of the Court of Wards.

The third Branch.

3. And that the King ſhall take for his full third part ſuch Mannors, &c. of eſtate of inheritance, as well in fee tail as in fee ſimple, as ſhall deſcend, or come by deſcent, &c. immediately after the death of ſuch deviſor.

The fourth Branch.

4. And if in Caſe the Mannors, &c. which ſhall immediately after his death deſcend, &c. ſhall not extend to the value of a full third part, the King may take, &c. to make up, &c.

And upon theſe four parts it was concluded for divers notable reaſons, That the deviſor had not [b] power to deviſe the whole Mannor of *Thoby* by force of the ſaid Statutes: And to this purpoſe four reaſons were collected upon the ſaid firſt Branch.

Firſt upon this word (having) and therefore it was demanded, *quis poteſt ligare?* The makers of the Act anſwer, Every perſon having Mannors, &c. ſo that it is not ſaid every perſon generally, but every perſon having, &c. And this word (having) importeth two things, *ſcil.* ownerſhip, and time of ownerſhip, for he ought to have the land at the time of the making of his Will, and the Statute giveth to ſuch perſon having, &c. authority to deviſe two parts of his lands which he hath, and more he cannot deviſe, for his authority doth not extend to more: And in our Caſe the deviſor had not the Mannor of *Hynton*, for he and his wife were joynt-tenants of it during the coverture, between whom are no moieties: ſo that he and his wife had it, but himſelf had it not, and is not owner thereof, nor is it to be accounted any of his lands: And every deviſor ought to be a perſon having, &c. at the time of the making of his Will within the purview of this Act. This appeareth 4 & 5 *Phil. & Mar. Dier* 158. a man ſeiſed in fee of land of Socage tenure, aſſured the ſame to his wife in Joynture in *anno* 32 *H.* 8. and 8 years after in 2 *E.* 6. he purchaſed lands in fee holden in *Capite* in Knights ſervice, and of two parts thereof made his Will, and died his heir within age; and it was reſolved, that the Queen ſhall not have any part of the joynture of the wife, and that by force of theſe words in the Act of Explanation of 34 *H.* 8. and having no lands holden by Knights ſervice, becauſe he was not a perſon having any lands holden of the King by Knights ſervice in *Capite* at the time of the Joynture made. It was reſolved upon the ſame reaſon in the Court of Wards, and in *Trinit.* 29 *Eliz. Carre*'s Caſe, was reſolved by the chief Juſtices *Wray* and *Anderſon*, upon conference with divers other Juſtices, and the Caſe was ſuch: King *E.* 6. by his Letters Patents granted the Mannor of *Congresbury* unto *G. Owen* in fee Farm, to hold of the Mannor of Eaſt *Greenwich* in Socage; and rendring the annual rent of 95 l. *per ann.* And afterwards Queen *Mary* in the firſt year of her reign granted divers Mannors which came to the Crown by the attainder of *Margaret* Counteſs of *Salisbury*, and alſo 54 l. *per ann.* parcel of the ſaid rent of 95 l. to *Francis* Earl of *Huntington* and to *Katharine* his wife, and to the heirs males of the body of the ſaid *Katharine*, the remainder *to Winifred Haſtings* in tail, to hold in Socage, the reverſion of the fee being in the Crown: And afterwards King *Philip* and Queen *Mary* recited the ſaid grant made by the ſame [31] Queen, as to the ſaid rent, granted the reverſion of the ſaid rent, to the ſaid Earl of *Huntington* and *Katherine* his wife, and to the heirs of the ſaid *Katherine* to hold in chief by the 20th part of a Knights fee; and afterwards *G. Owen* being ſeiſed of the Mannor of *Congresbury* purchaſed the ſaid rent of 54 l. *per ann.* by which it was extinct; And afterwards *G. Owen* died ſeiſed of the ſaid Mannor, and the ſame deſcended to *Richard* his ſon in fee, who by his Will in writing deviſed the ſame to divers perſons for payment of his debts, and died his heir of full age; and although the ſaid rent was extinct between the parties, yet it was ſaid that in conſideration of Law, it was in being as to the King for the benefit of his tenure: As in 26 *Aſſ.* there the King was ſeiſed of the Honor of *Pickering*, and granted the Bayliwick thereof in fee, and afterwards the Baily forfeited his Office of Bailywick, after the ſaid Honor was granted over to another, whereof the Patentee took advantage, for which it was utterly void: But as to the King for the preſervation of the rent it had continuance: 11 *H.* 7. a meſnalty deſcends to the tenant paravail, and although it be extinct, yet the Lord paramount ſhall have the Ward, 31 *E.* 3. *tit. Aſſets*, a rent extinct ſhall be Aſſets, 10 *E.* 3. *Mortmain* 17. 38 *Aſſ.* 17. *F. N. B.* 223. A rent extinct by releaſe to an Abbot is Mortmain; yet it was reſolved, and ſo decreed, that the deviſe was good for all the land in reſpect of this word (having) for *Richard Owen* was not a perſon having the rent at the time of the making of his Will, but he was a perſon having the Mannor, and therefore he might deviſe the ſame; and for as much as it was holden in Socage the deviſe was good in all; and that was the reaſon

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of the Lord *Dier* in *Brets* Caſe *Plowd. Com.* That the deviſe there in the principal Caſe was not good, becauſe that the deviſor had not the land at the time of the deviſe, and grounded his reaſon upon this word (having.) And *Wray* chief Juſtice in his argument (which was the laſt argument that ever he made) held that this word (having) importeth, That the deviſor ought to have the land, either to the time of the making of his Will, or at the publication thereof, which amounteth in Law to a making.

And that the Statute of 34 *H.* 8. which is but an Act of explanation of the Act of 22 *H.* 8. ſhall not be conſtrued by any ſtraining ſenſe againſt the letter of the Act; for if any expoſition ſhall be made againſt the direct letter of the expoſition made by Parliament, there ſhall never be end of expounding; and therefore he ſaid, he hath not ſeen any Caſe adjudged, that the Act of 34 hath been interpreted againſt the letter by other conſtruction than the makers of the Act have made; and therefore he ſaid, that if a man hath lands holden in *Capite* of the yearly value of 20 l. and land in Socage of the yearly va-
[b] lue of 10 l. that he may deviſe all the land holden in *Capite*, for the ſame is within the expreſs words of the Act; and therefore he denied the opinion of the Juſtices of the Common Pleas concerning *ex improviſo* in 21 *Eliz. Dier* 366.

Note Reader, the reaſon of ſuch opinion (as I conceive) was becauſe, that if the deviſe ſhall be good for all the land holden in *Capite*, the King as it ſeemeth *prima facie*, ſhall not have in ſuch Caſe, neither Wardſhip, nor Primer ſeiſin, becauſe that the heir hath not any land holden in *Capite* whereof he may ſue Livery, for only the land in Socage deſcendeth to him. And therefore the Judges there ſaid, that if the deviſe ſhall be good for all the land holden in *Capite*, the Statutes of 32 & 34 *H.* 8. ſhould be fruſtrate and defrauded. But as I conceive, the opinion of *Wray* chief Juſtice is good Law; for although the deviſe be good for all the lands holden in *Capite*, yet the Queen ſhall have Wardſhip and Primer ſeiſin as the Caſe requireth, by force of the ſavings of the ſaid Acts: For if in ſuch Caſes the Tenant by Act executed, had conveyed all the land holden in *Capite*, unto the uſe of his wife, or for the preferment of any of his children, or for the payment of his debts, in this Caſe the heir ſhall ſue Livery for one acre of land holden in *Capite*, and yet none of the land holden in *Capite* deſcendeth to the heir: And ſo it was reſolved and decreed in the Court of Wards in *Calthrop*'s Caſe 20 *Eliz.*

And he ſaid, that two things are requiſite to the perfection of a Will, by which land ſhall paſs; that is to ſay, the writing, for that is *initium*, and the death of the deviſor, and that is *finis vel conſummatio*; and he ſaid, that *initium* ought to be *plenum & perfectum*, or otherwiſe it is worth nought; And therefore if one command another to make his Will, and by the ſame to deviſe *W.* acre to *J. S.* and his heirs, and *B.* acre to *J. N.* and his heirs, and he writeth the deviſe to *J. S.* in the life of the deviſor, and before the other is written the deviſor dieth, yet it is a good Will to *J. S.* But if he command one to make his Will, and to deviſe *W.* acre to *J. S.* and his heirs upon condition, and the deviſor dieth, this deviſe is void, for in no Caſes the deviſes are ſeveral and diſtinct, and in ſuch Caſe the deviſe to *J. S.* is full and perfect, but in the latter Caſe the deviſe is not full, but maimed and unperfect, for the whole deviſe as to *J. S.* was not fully put in writing, and ſo *initium* in ſuch Caſe *non fuit plenum.*

So it was reſolved in the Caſe at Bar, That neither the beginning, nor the end of the Will was full or perfect; For at the time of the writing, and at the time of the death of the deviſor, he had not power in reſpect of the joynt eſtate in *Hynton* to diſpoſe all the Mannor of *Thoby* which amounted to the
[31] value of two parts of the whole, *& omne Teſtamentum morte conſummatum eſt*, and becauſe that by the death of the deviſor *Hynton* ſurvived to the wife, part of *Thoby* preſently by the death of the deviſor deſcended to the heir; and as the deviſe in this caſe took effect by the death of the deviſor, ſo it ſhall continue.

The ſecond reaſon out of the firſt Branch, was upon the word (ſole) for the Teſtator ought to have a ſole eſtate, as well in the land which he leaveth to deſcend to the heir, as in the land which he deviſeth: But in the Caſe at Bar, the deviſor neither at the time of the making of his Will, nor at the time of his death, had a ſole eſtate in the Mannor of *Hynton*, which he did intend ſhould deſcend to his heir, but he had a joynt eſtate in tail with his wife, and the wife had not any power to diſagree during the coverture, but her time of diſagreement came after the death of her husband, as it is holden 19 *Eliz. Dier* 358. ſo that without queſtion the deviſor had not a ſole eſtate in the Mannor of *Hynton*, neither at the time of making of his Will, nor at the time of his death; and therefore the deviſor had not power by the Act to deviſe but two parts of the reſidue, that is to ſay, whereof he was ſole ſeiſed, either at the time of the making of his Will, or at leaſt of his death.

The third reaſon upon the firſt Branch was upon theſe words (ſhall have full and free liberty, Power and authority, by Will to deviſe or diſpoſe of two parts of the ſaid Mannors, &c.) by which words it appeareth, That the intent of the makers of the Act was, to give liberty and authority to the party (who peradventure had not time to make diſpoſition by act executed in his life) to deviſe the ſame by his Will: But without queſtion that which he cannot diſpoſe of by act executed in his life time, the ſame ſhall not be taken for any of his Mannors, &c. whereof he may deviſe two parts by authority given him by this Statute: But here in our Caſe the deviſor by reaſon of his individed eſtate with his wife, cannot make any diſpoſition of the Mannor of *Hynton*, but only during the Coverture.

The fourth reaſon upon the firſt Branch, upon conſideration of both Statutes, the deviſor hath liberty to deviſe two parts of the clear yearly value, and the third part of the clear yearly value is ſaved to the King, &c. In which it was noted, that the words as to two parts, and as to the third part are all one as to the clear yearly value; ſo that it appeareth fully by the letter and intention of the Act, that the King ſhall have owel and equal benefit for his third part as the deviſee ſhall have for his two parts: yea, the Statute adds more ſpecial words for the value of the third part, than for the two parts, for he ſhall have
[b] clear yearly value of the third part without any diminution, &c. or ſubſtraction of the third part of the full, &c. profits thereof, as the words of the Statute of 32 *H.* 8. are. But in our Caſe, the King ſhall

not

not have equal benefit; yea, the King ſhall be in worſe caſe, for the deviſee ſhall have his two parts abſolutely, and the King ſhall have but a poſſibility of his third part, and that ſhall depend upon the will of the wife, whoſe will and pleaſure is not reſtrained to any time, ſo that againſt the expreſs letter and intent of the Acts, and and againſt all reaſon, the deviſee ſhall have two parts preſently of the clear yearly value, and the King ſhall not have the poſſeſſion of *Hynton*, but ſhall have a poſſibility to have it if the wife will diſagree, and that ſhall be an injurious and unequal conſtruction; for *Cato* ſaith, *Ipſæ etenim Leges cupiunt ut jure regantur*; and this very Statute hath been ſo conſtrued, that owelty and equality ſhall be obſerved, and inequality avoided, 35 *H.* 8. *tit. Teſtaments Br.* 19. If a man hold three Mannors of three ſeveral Lords by Knights ſervice, he cannot deviſe two Mannors, leaving the third, for it ſhall not be equal to the two other Lords, but two parts of each Mannor. And upon theſe words (clear yearly value) it was ſaid, That of inheritances which are not of any annual value ſome are deviſable, and ſome are not deviſable within the Statute. And therefore if the Queen grant to one and his heirs, *bona & catalla felonum & fugitivorum*, or *utlagatorum*, *fines*, *amerciamenta*, &c. within ſuch a Town or Mannor, in this Caſe he cannot deviſe thoſe to another, nor leave them to deſcend for a third part, becauſe they are not of any annual value, and therefore the ſaid Statute doth not extend to them.

But if a man be ſeiſed of Mannor to which a Leet, or Waiſe and ſtray, or any other hereditament which is not of any annual value is dependant or appurtenant, there by the deviſe of the Mannor with the appurtenances, theſe ſhall paſs as incidents to the Mannor, for in as much that the Statute enableth him by expreſs words to deviſe the Mannor, by conſequence it ſhall enable him to deviſe the Mannor with all incidents and appurtenances to it: And it was never the intent and meaning of the Parliament, that when the deviſor had power to deviſe the principal, that he ſhould not have power to deviſe that which was incident and appendant to it, but the Mannor, &c. ſhould be diſmembred, and fractions made of things which by lawful preſcription had been united and annexed together. And it was ſaid that all was reſolved by *Anderſon* chief Juſtice of the Common Pleas, and *Periam* then one of the Juſtices of the ſame Court upon a conference had with divers other Juſtices, *Paſch.* 25 *Eliz.* in *Baker*'s Caſe, concerning di- [33]
vers franchiſes and liberties within the Mannor of *Cranford*, which Report was made to the Lords of the Council in the ſaid Term after dinner in the Star-chamber. And with their reſolution agreeth the opinion of *Priſot* in 32 *H.* 8. 22. in the like Caſe: It is enacted by the Statute of 1 *H.* 4. *cap.* 6. that thoſe who demand of the Kings lands, or tenements, offices, &c. make expreſs mention of the value of them; But *Priſot* there held, that if the office be of a certain value, there he behoveth to make mention of the value, but if it be of a caſual thing there it needeth not; As if the King grant to me a Market, I need not to ſet the value thereof, becauſe it is not yearly certain; ſo that when the King requireth, that value be mentioned, it is to be intended of a thing which is of a certain yearly value: But if a man hath a Hundred, with the goods of felons, outlaws, fines, amerciaments, return of Writs, and ſuch like caſual hereditaments within the Hundred, and ſuch Hundred with the ſaid caſual hereditaments have been accuſtomably let to farm for a yearly rent, then the ſame may be demiſed within the purview of the ſaid Acts; upon which differences it was concluded, that the third part of the yearly value ought to be left to the heir, and not any thing which dependeth upon incertainty. For if the franchiſe to have the goods and chattels of felons and perſons outlawed, which were never demiſed for a certain rent, are left to the heir for his third part, in that the Statute is not followed, and yet it may be that they may happen every year; *a fortiori* in the Caſe at Bar, as to the Mannor of *Hynton*, the ſame doth depend upon incertainty, for it may be the wife will not refuſe, and no time is limitted when ſhe ſhall refuſe, and therefore the Statute is not followed by reaſon of the incertainty.

Alſo it was ſaid, that if a man ſeiſed of three acres, each of the yearly value of 12 d. and he deviſeth rent of 3 s. out of all 3 acres the deviſe is void for all, and ſhall not be good for two parts, becauſe he hath not purſued the Statute of 34 *H.* 8. by which it is enacted, that he may deviſe any rent, common, or other profit out of the ſame two parts, *viz.* of his Mannors, Lands, Tenements and Hereditaments, or out of any part thereof, as much thereof as ſhall amount to the full clear yearly value of two parts thereof: So when he deviſeth a rent out of all, he doth not purſue the power and authority which the Statute preſcribeth, but in ſuch caſe, if he deviſe a rent of 3 s. which is to the value of all out of two parts, it is good, for in this branch the value doth extend to the land, and not to the rent, for the words [b]
are, any rent, without any reſtraint: And it was obſerved upon the Statute of 32 *H.* 8. That if a man deviſe all his land it had been good for a third part, as it was adjudged in *Unton* and *Hyde*'s Caſe, *Dier* 150. becauſe that the land was ſeverable, and might be divided by the deviſor during his life, or by commiſſion after his death: But a rent deviſed out of land is an entire thing, and power to deviſe it is given only by the Statute of 34 *H.* 8. for the Act of 32 *H.* 8. doth not extend to it; and therefore when the Statute enableth him to deviſe a rent out of two parts, if he ſhall deviſe it out of the whole, he doth not purſue the Statute: And it was concluded upon the firſt Branch, that the deviſor in the Caſe at Bar at the time of the making of his Will, was not a perſon having, and having ſole eſtate who had power and authority to diſpoſe two parts of the ſame lands of clear yearly value, and the King, &c. ſhall have the third part of clear yearly value without any diminution, &c. but as to the Mannor of *Hynton* he was joyntly ſeiſed with his wife as is before ſaid.

Their reaſon upon the ſecond Branch was, That the deviſor by any thing in his life cannot aſſign the Mannor of *Hynton* for the third part, nor after his death can the ſame by Commiſſion be aſſigned for the third part, for during all the coverture the wife was joyntly ſeiſed with him, and after his death it ſurvived to his wife, and the words of the Act are, The ſame diviſion to be ſet out by the deviſor or owner, &c. and in default thereof by Commiſſion; in which Branch this word (owner) is alſo to be obſerved, which he added, to ſhew that every deviſor ought to be owner, and he who ſhall make any diviſion of the three parts, &c. ought to be owner, which he is not in our Caſe of the Mannor of *Hynton*, and therefore he cannot aſſign the ſame to the King for his third part.

Their reaſon upon the third and fourth Branches, was upon this word (immediately) which for the enforcing of the intent of the makers of the Act is twice inſerted; And by the words of the third Branch it is enacted, That the third part ought (in two ſeveral cauſes) immediately deſcend after the death of the deviſor, or owner; immediately is as much as to ſay without any mean time: But in our Caſe the Mannor of *Hynton* ſurviveth to the wife, and till diſagreement nothing thereof doth deſcend. *Ergo*, it doth not deſcend immediately. And in that the judgment of the Law upon this Will, and of the eſtate of the ſe Mannors and lands after the death of the deviſor, and before the diſagreement are to be conſidered; and without queſtion in the mean time the Mannor of *Hynton* doth ſurvive to the wife, and therefore of neceſſity in the mean time, a part of the Mannor of *Thoby* ſhall deſcend, for if before this diſagreement office had been found of all this matter, without queſtion the Queen ſhould have had part of the Mannor
[34] of *Thoby*, and then for as much as every deviſe ought to take effect by the death of the deviſor, as it is holden in *9 H. 6.* and many other Books, becauſe that *omne Teſtamentum morte conſummatum eſt*, for this cauſe the deviſe being void at the time of the death for part of *Thoby*, and lawfully veſted in the heir by deſcent, it cannot be made good and deveſt by the ſubſequent diſagreement of the wife; But this word (immediately) maketh it clear, for add it to the words precedent, *viz.* that the King ſhall have a third part of clear yearly value immediately after the death of the deviſor or owner, all theſe words, and principally the word (immediately) prove that the King ought to have the third part preſently by the death, and ſhall not ſtay or expect upon any incertainty, as in our Caſe he ſhall do, if he ſhall expect it upon the refuſal of the wife, for peradventure ſhe will not refuſe within a year, peradventure two years, &c. *Littleton* ſaith, if a woman diſſeiſereſs take a Husband, and hath iſſue and dieth, and afterwards the Tenant by the Curteſie dieth, this dying ſeiſed ſhall not take away an entry, for the iſſue came not to his lands immediately after the death of his mother.

And it was agreed, That if a man be ſeiſed of three acres by Knights ſervice in *Capite*, and maketh a leaſe of one acre for life, and afterwards deviſeth other two acres and dieth, and afterwards Tenant for life dieth, yet the deviſe is void for the third part of the two acres, becauſe the third Acre did not deſcend immediately after the death of the deviſor to the heir, as the Statute ſaith; that is to ſay, by deſcent immediately after the death of the deviſor. In *17 Eliz. Dier*, the Earl of *Arundel*'s Caſe, where a gift in tail was made upon condition, that if the donee or his iſſues, *aliquam rem facerent, &c. quo minus prædict' maner' præfato Comiti & hæredibus ſuis, &c. immediate reverti debeat, &c.* In this Caſe they held clearly, that if the donee do any act by which when he dieth without iſſue the donee ſhall be put to ſuit, or to entry, ſo that the Mannor immediately ſhall not revert, he is without any mean time, &c. that the donor may reenter: And as to the Caſe in *18 E. 4.* the ſame was affirmed for good Law, when a man is to do an act immediately after an award, in this Caſe in as much as the party is bound to do an act of neceſſity, he ought to have ſuch time for the doing thereof as the doing of the thing does require. And therefore there of neceſſity there ought to be a mean time between the award and the performance of the thing, but here in the Caſe at Bar immediately by the death of the deviſor, land without any mean time may deſcend, and that was the intent of the makers of the Act: For as the deviſee
[b] ſhall have two parts immediately, ſo the heir ſhall have his third part immediately, *8 E. 4. 71.* & *21 E. 3. 27.* that he who is immediate heir doth exclude all mean heirs; the ſame Law of an immediate Tenant.

And againſt the opinion of *Wray* chief Juſtice, it was after objected in the Exchequer Chamber, That the Statute of *34 H. 8.* hath been conſtrued by equity againſt the letter; And to this purpoſe a Caſe *Trin. 26. Eliz.* in the Common Pleas, *Rot. 1916.* between *Ive* and *Stacie* was cited, the effect of which Caſe was, That a man ſeiſed of lands, part holden in *Capite*, and part in Socage, made a feoffment of his lands holden in *Capite* unto the uſe of himſelf and his wife for life, with divers remainders over, and afterwards (the ſaid *Capite* lands being full two parts) deviſed the Socage land; It was adjudged the deviſe was void; and yet it was ſaid, the ſame is againſt the letter of the Act. To which it was anſwered and reſolved, that the reaſon of the ſaid Caſe was, becauſe it appeareth by the words of the ſaid Act, that the Statute gave authority to one to make diſpoſition, either by act executed, or by his Will of two parts, ſo that if he hath executed his authority by act executed of two parts to the uſe of the wife, he hath not any authority by the Statute to make any deviſe of the third part, for by the conveyance in his life, he hath executed the power and authority which the Statute gave to him, and therefore he cannot make any deviſe of the reſidue, which was applied to prove that he ought to purſue the authority which the Statute gave him, &c.

Another Caſe was cited out of a Reading, That the King granted certain lands to one and his heirs during the life of the Grantee by Knights ſervice in *Capite*, and after his death in Socage, in this Caſe he may deviſe all this land; and yet it was ſaid, it was againſt the letter of the Act, for at the time of the making of his Will and day of his death he held by Knights ſervice, which Caſe was agreed to be good Law. For although that the Statute ſpeak at the beginning generally of lands holden by Knights ſervice, yet there is a ſaving of Ward, &c. to the Lord; ſo that it appeareth fully by the letter of the Act, that there ought to be ſuch a Tenure by Knights ſervice by which the Lord ſhall have Ward, &c. or otherwiſe it is not any Tenure within the Act; But in the ſaid Caſe the Lord was not to have any Wardſhip, becauſe the Tenure determined by his death, and the reaſon of Wardſhip failed, *ſcil.* that an infant within age cannot do Knights ſervice, as *Littleton* ſaith, *fol. 22.* So *e converſo*, if land be given to hold in Socage during his life, and after his death by Knights ſervice, there ſhall not be any Wardſhip, becauſe the Tenure by Knights ſervice beginneth in the ſon, and the father during his life held in Socage.

[35] And another Caſe was cited out of a Reading alſo, *ſcil.* A man ſeiſed of lands holden in *Capite*, and of other lands holden in Socage, deviſeth the land in Socage, and afterwards alieneth the land holden in *Capite bona fide*, this deviſe is good for all the land holden in Socage; which Caſe was alſo agreed for good

Law

Law for all the land in Socage, when no title of the Wardſhip, &c. doth accrue to the Lord in reſpect of other land. And it was objected, That if the Statute of 34 *H.* 8. ſhall not be taken by equity, then the Statute may be eaſily defrauded; For if a man held one acre of land by Knights ſervice in *Capite*; and 1000 acres in Socage, and is diſſeiſed of the acre holden in chief, and then maketh his Will of all the land in Socage and dieth, in this Caſe according to the letter of the Act the deviſe ſhall be good for all the land holden in Socage: And thereupon they did infer upon theſe words, Every perſon having a ſole eſtate in fee ſimple, &c. holden by Knights ſervice in chief, and in this Caſe he had not any land holden in chief at the time of the making of his Will, or at the time of his death, but only a right to the land, and ſo out of the letter of the Act, of which he cannot make any diſpoſition or deviſe; and yet if this Caſe ſhall not be taken by equity, all the Act ſhould be to little or no purpoſe; to which it was anſwered, That the ſaid Caſe was within the letter of the ſaid Act, for the diſſeiſee in the judgment of Law hath the land to many purpoſes.

For firſt, he hath the land to forfeit, and therefore if he be attainted of Treaſon or Felony he ſhall forfeit the land.

2. If he dieth without heir the land ſhall eſcheat to the Lord, 37 *H.* 6. 1. 6 *H.* 7. 9. 32 *H.* 6. 27. 2 *H.* 4. 13.

3. The diſſeiſee ſhall compel the Lord to avow upon him as his very Tenant, *Litt. Releaſes* 106. *b.* And *Littleton* there ſaith, that the diſſeiſee is Tenant in Law.

4. If he die his heir within age, the Lord ſhall have the Wardſhip; and the Lord ſhall have a Writ of right of Ward, and the Writ ſhall ſay, *terram illam tenuit*; and therewith agreeth *F. N. B.* in the Writ of Eſcheat 144. *Litt.* 107. 36 E. 3. *Gard.* 10. And ſo in the judgment of Law the diſſeiſee had the land holden in *Capite*, ſo that he may deviſe all his Socage land. And as to the Caſe in 4 & 5 *Phil. & Mar. Dier* 155. that if lands in *London*, or lands which are deviſable by cuſtom are holden in *Capite*, yet all may be deviſed. To that it was anſwered, That that was not by force of the Statute, but becauſe the lands were deviſable by cuſtom before the Statute, and the Statute is in the affirmative, and doth not take away any cuſtom: But it was agreed, that in the ſaid Caſe, the ſaving in the Act gave in ſuch Caſe the third part to the King for Wardſhip, &c. and yet the heir ſhall be barred by the cuſtom.

And after that the Caſe had been argued 21 times ſeverally, *ſcil. Paſch.* 37 *Eliz.* Judgment was given according to the ſaid Reſolutions againſt the Plaintiff. You have (good Reader) many notable Rules and Caſes of Relations put in this Caſe, by which you may better underſtand your Books which treat of Relations, to which I will add one Caſe now of late, *ſcil. Trin.* 37 *Eliz.* adjudged in the Common Pleas in an *Ejectione firmæ* between *Jennings* and *Bragge*, where upon a ſpecial verdict found the Caſe was ſhortly thus; A diſſeiſee made an Indenture purporting a leaſe for years, and delivered the ſame to a ſtranger off of the land as an eſcroul, and commanded him to enter in the land, and to deliver the ſame upon the land as his deed to the leſſee, which was done accordingly, it was adjudged it was a good leaſe. And in this Caſe, [b]

1. This difference was agreed, when the perſon at the firſt delivery hath not power or ability in Law to make the leaſe and contract, and before the ſecond delivery he attaineth to it, there the leaſe or contract is void: But when the perſon at the firſt delivery hath power and authority in Law to contract, but cannot perfect the ſame till an impediment be removed, there if the impediment be removed before the ſecond delivery, the contract is good. As if at the time of the firſt delivery the leſſor be an infant, or feme covert, and at the time of his ſecond delivery he came to his full age, or to be ſole, in both the ſaid Caſes the deed ſhall not bind, for at the time of the firſt delivery he was not a perſon who had ability in Law to make a contract; But in the Caſe at the Bar the leſſor was able to make a contract as well in reſpect of his perſon, as of his right and intereſt in the land, but was hindred only by the diſſeiſin, which being removed before the ſecond delivery the contract is good.

2. It was reſolved that to ſome intent, the ſecond delivery hath relation to the firſt delivery, and in ſome not, and yet in truth the ſecond delivery hath all its force by the firſt delivery; and the ſecond is but an execution and conſummation of the firſt: And therefore in ſuch Caſe of neceſſity, *ut res magis valeat quam pereat*, it ſhall have relation by fiction to be made his deed *ab initio* by force of the firſt delivery; and therefore if at the time of the firſt delivery the leſſor be a feme ſole, and before the ſecond delivery ſhe take husband, or if before the ſecond delivery ſhe dieth, in this Caſe if the ſecond delivery ſhall not have relation to this intent to make it the deed of the leſſor by *ab initio*, but only from the ſecond delivery, the deed in both Caſes ſhould be void; and therefore in ſuch Caſe for neceſſity, and *ut res magis valeat quam pereat*, to this intent by fiction of Law, it ſhall be a deed *ab initio*, and yet in truth it was not his deed till the ſecond delivery: But in the Caſe at the Bar, if it ſhall have relation by fiction of Law to the firſt delivery, then the ſame ſhall avoid the leaſe, for then it ſhall be made by one who was out of poſſeſſion, and as one ſaid *fictio legis inique operatur alicui damnum vel injuriam*; and therefore to this intent it ſhall not have relation but according to the truth to be a deed from the time of the ſecond delivery, *ut res magis valeat quam pereat*, and by that appeareth, that the reaſon of the Law (which to ſome intent the ſecond delivery ſhall have relation, and to other intent no relation) is all one, *ſcil.* for neceſſity, and *ut res magis valeat quam pereat.* [36]

3. It was reſolved, that as to collateral acts there ſhall be no relation at all; for if the obligee do releaſe before the ſecond delivery, ſuch releaſe is void, *vide* 18 *H.* 6. 9. & 27 *H.* 6. 7. Note Reader, that if in the Caſe of the infant after the ſecond delivery, full age ſhall make the gift good, then it ſhall be in the power of him to whom it was delivered to make it bind or not at his pleaſure, for if he deliver it during the minority it ſhall not bind, and if he deliver it after full age, it ſhall bind; and it ſhall be inconvenient that he who to this purpoſe was but a ſervant ſhould have *ligandi, & non ligandi poteſtatem.*

And touching Wills, whereof you have much good matter in the said Case of *Butler* and *Baker*, my advice to all who have lands, is, That by advice of learned Council by Act executed you make assurances of your lands according to your true intents in full health and memory, to which assurances you may add such Conditions, or Provisoes of revocation as you please. For I find great doubts and controversies daily arise upon devises made by last Wills, sometimes in respect of Tenures of lands, sometimes by pretences of revocations which may be made so easily by word; also in respect of obscure and insensible words and repugnant sentences, the Will being made in haste; And some pretend that the Testator in respect of long sickness was not *Compos mentis*, and divers other scruples and questions are moved upon Wills. But if you please to devise your lands by Will,

1. Make it by good advice in your perfect memory, and inform your Council truly of the estates and Tenures of your lands, and by Gods grace the resolution of the Judges in this Case will be a good direction to learned Council to make your Will according to Law, and thereby prevent Questions
[*b*] and Controversies.

2. It is good, if your Will concern inheritance to make it indented, and to leave one part with a friend, lest after your death it be suppressed.

3. At the time of the publication of the Will, call credible Witnesses to subscribe their names to it.

4. If it may be, let all the Will be written with one hand, and in one parchment or paper, for fear of alteration, addition or diminution.

5. Let the hand and seal of the devisor be set to it.

6. If it be in several parts, let his hand and seal and the names of the witnesses be subscribed to each part.

7. If there be any interlining or rasure in the Will, let a *Memorandum* be made of it.

8. If you make any revocation of your Will, or of any part of it, make it by writing by good advice, for upon revocation by word, follow controversies, some of the Witnesses affirming it to be in one manner, some in another manner.

Hill. 34 Eliz. *in the Kings Bench.*

Ratcliffe's Case.

[37] *Luke Norton* brought an *Ejectione firmæ* against *William Rowland* of a dimise made by *Edward Ratcliff* 10. *Decemb.* 31 *Eliz.* of the moiety of a house, 100 acres of land, 40 acres of meadow, 100 acres of pasture, and 40 acres of wood in *Wye* and *Braborn* in the County of *Kent*, &c. And upon special pleading of the Act of 4 & 5 *Phil. & Mar. cap.* 8. *&c.* the issue was, Whether *Elizabeth Ratcliffe* wife of *Ralph Ratcliffe* had the custody of *Martha* wife of the said *Edward Ratcliffe* the lessor, at the time of the contract and marriage between the said *Edward* and *Martha*; for if the said *Elizabeth* then had the custody of the said *Martha* within the said Act, then by the pretence of the Defendant, *Martha* by force of the said Act hath lost the inheritance of the said lands, and then Judgment ought to be given against the Plaintiff. And upon the said issue the Jurors gave a special verdict to this effect: *William Wilcocks* Esquire took to wife *Elizabeth Edolfe*, daughter and heir apparent of *John Edolfe* and *Alice* his wife, which *William Wilcocks* had issue on the body of the said *Elizabeth*, *John*, *Elizabeth*, and the said *Martha*; And afterwards, *scil. ultimo Martii* 16 *Eliz.* *William Wilcocks* by his Will in writing devised and appointed the order, custody, education and government of the said *John* his son, and of the said *Elizabeth* and *Martha* his daughters, to the said *John Edolfe* and *Alice* his wife, *durante vita eorundem Johannis & Alicie*, and died. After whose death, *Elizabeth* the relict of the said *William Wilcocks* took to husband the said *Ralph Ratcliffe*; And afterwards *John Edolfe* died, and that the said *Alice* was seised of the said
[*b*] tenements in fee, and held them in Socage, and 20 *Eliz.* by her Will in writing devised the tenements aforesaid to the said *John Wilcocks* in tail, the remainder to the said *Elizabeth* and *Martha* daughters of the said *William Wilcocks*, and to the heirs of their two bodies begotten by equal portions, equally to be divided, the remainder to the said *Elizabeth* the mother, daughter and heir apparent of the said *Alice*, and to her heirs. And afterwards *anno* 26 *Eliz.* the said *Alice* died, and afterwards the said *John Wilcocks*, 1 *August* 28 *Eliz.* died without issue; and that the said *Elizabeth* daughter of the said *William Wilcocks*, 10 *Juiii* 28 *Eliz.* took to husband *William Androwes*, by force whereof the said *William* and *Elizabeth* his wife, and the said *Martha* did enter into the Tenements aforesaid, and were therefore seized accordingly; and afterwards the said *Martha* 8 *October* 29 *Eliz.* then remaining in the house of the said *Ralph Ratcliffe* at *Hitcham* in the County of *Hertford*, and then being above the age of 14 years, and within the age of 16 years, with the consent and good will of the said *Ralph Ratcliffe* voluntarily and of her good accord, between the hours of two of the clock of the same day before noon did leave the house of the said *Ralph Ratcliffe* for the space of 8 miles to *Bramfield* in the said County of *Hertford*, where at the 12 hour of the same day she was espoused and married to the said *Edward Ratcliffe*; and that the said *Edward Ratcliffe* did enter, and made the lease to the Plaintiff, *prout, &c.* But whether upon the whole matter the said *Elizabeth Ratcliffe* had the custody and governance of the said *Martha* at the

the time of the contract and marriage aforeſaid or not, the Jurors pray the advice of the Court. And it was fully agreed by Sir *Chriſtopher Wray* chief Juſtice, and the whole Court, that the ſaid *Elizabeth* had the cuſtody and governance of the ſaid *Martha* at the time of the ſaid contract and marriage, within the intent and meaning of the ſaid Act. And in this Caſe ſix Points were reſolved by the whole Court.

1. That there were two manner of Cuſtodies or Guardianſhips, one by the Common Law, the other by the Statute; and alſo that at the Common Law there are four manner of Guardians, *ſcil.* Guardian in Knights ſervice, Guardian in Socage, Guardian in Nature, and Guardian in Nurture. The firſt two and the laſt are fully deſcribed in our Books; But as to Guardian in Nature, great controverſie was betwixt thoſe who have argued in the Caſe at Bar, and all roſe through the ill underſtanding of both ſides. For ſome held that the father only ſhall have the cuſtody of his ſon and heir apparent within age, and neither the Mother nor the Grandfather, nor any other Anceſtor ſhall have any cuſtody of his heir apparent: Alſo the father ſhall not have the Wardſhip of his daughter and heir apparent, for according to them it ought to be ſuch heir who ought to continue heir and ſole heir-apparent, and that a daughter [38] is not, for a ſon may be born, and then the daughter is not heir. As if lands in Borough Engliſh be holden in Knights ſervice, the father ſhall not have the Wardſhip of his younger ſon, becauſe he may have a younger ſon, no more than the younger ſon can endow his wife of land in Borough Engliſh *ex aſſenſu patris*, for he ought in ſuch Caſe to be heir apparent, who in judgment of Law ſhall continue heir apparent, and not heir apparent who by accident is heir, and by accident may not be heir; And in reſpect the ſole cauſe which gave the Wardſhip in the one Caſe, and enabled the heir to make the endowment in the other Caſe is, becauſe he is heir apparent, the ſame ſhall be intended in Law (which abhorreth incertainty) of a certain and perdurable heir apparent; And they relied principally upon the words of *Littleton* in his Chapter of Knights ſervice, who ſpeaketh only of father and ſon in ſuch Caſe, and not of daughter or any other heir: And on the other ſide, it was affirmed, That the father ſhall have the Wardſhip not only of his ſon, but of his daughter alſo as it is agreed 8 *E.* 2. *Treſpaſs* 235. 31 *E.* 1. *Gard* 154. & *F. N. B.* 143. *o.* But alſo every Anceſtor male or female ſhall have the Wardſhip of his heir apparent male or female; and all that was ſaid appeareth not only by the Regiſter of Writs, within which foundations (as Juſtice *Fitzherbert* in his Preface to his Book called *Natura Brevium* ſaid) all the Law dependeth, but alſo in our Books by the judgments and opinions of the Sages and Judges of the Law, 32 *E.* 3. *tit. Garde* 32. *in Treſpaſs, Quare I. conſanguineum & hæredem* (the Plaintiff) *cujus maritagium ad ipſum pertinet, tali loco rapuit & abduxit contra pacem.* 31 *E.* 3. *Barre* 257. And 31 *E.* 3. *Brief* 327. The mother although ſhe had no land brought a Writ of Raviſhment of Ward of *I.* her eldeſt ſon and heir raviſhed, againſt the Grandfather of *I.* who had land which might deſcend to *I.* And it was ſaid, that where it was objected, that the father ſhall not have the Wardſhip of his daughter and heir apparent, becauſe peradventure ſhe ſhall not continue heir, or at leaſt ſole heir: The ſame reaſon may be objected againſt the Wardſhip of the eldeſt ſon, for peradventure he ſhall not remain heir apparent, for if the father be attainted of felony or Treaſon, in ſuch Caſe his ſon is not his heir apparent, and then the Lord of whom the land is holden ſhall have the Wardſhip of the ſon in the ſame Caſe as *Littleton* putteth it: For then the ſon is not heir apparent to the Father, and therefore the father ſhall not have the Wardſhip of him, and by conſequence the Lord ſhall have it; for it appeareth by *Littleton* and all the Books, that he ought to be his heir apparent? [b] And the Court reſolved that the one part and the other had erred by miſtaking the true ſenſe of the Books; for it is true that every Anceſtor male or female, ſhall have treſpaſs, or a Writ of Raviſhment of Ward againſt a ſtranger, who wrongfully raviſheth the heir apparent of any perſon, be they male or female, and the Writ ſhall ſay, *Cujus maritagium ad ipſum pertinet*, and the Law in that hath great reaſon, for whereas in truth all the eſtate of the Anceſtor and the eſtabliſhing of his inheritance principally conſiſteth in providing of a covenable marriage for his heir apparent, for that cauſe the Law giveth remedy againſt him, who wrongfully depriveth him by their Raviſhment of the means to accompliſh the ſame: And therefore it is not material of what age the heir apparent in ſuch caſe is, as it appeareth by the ſaid Book in 32 *E.* 3. but ſuch Action lieth not againſt the Guardian in Chivalry by any Anceſtor, but only for the father, and for him the Action lieth againſt the Lord of whom land is holden by Knights ſervice, where his ſon and heir apparent is raviſhed from him, as it appeareth by *Littleton*, and 18 *E.* 3. 25. 30 *E.* 3. 17. 29 *E.* 3. 7. & 19. And the Book in 9 *E.* 4. 53. that a woman ſhall not have a Raviſhment of Ward of her daughter and heir apparent taken and raviſhed is to be intended againſt the Guardian in Knights ſervice, and upon this difference the ſaid Books are well reconciled; But as to the Caſe of the daughter and heir apparent the Court gave not any Reſolution: So in this Caſe, the Court reſolved, that the mother cannot be Guardian in Socage if the land had deſcended to the daughter, nor for Nurture, becauſe the daughter was above the age of 14 years, but the Common Law gave to her remedy againſt every ſtranger who took her away by wrong as is aforeſaid.

2. It was reſolved, that in this Caſe the mother had the cuſtody of the ſaid *Martha* within the proviſion of the ſaid Act; for now the ſaid Act hath ordained two manners of Cuſtodies, *ſcil.* by reaſon of nature, and by aſſignation: By reaſon of nature the father, and after the death of the father the mother, having the governance of ſuch daughter by aſſignation made by the father, either by his Will, or by any Act in his life: And to this purpoſe three Branches of the ſaid Act were conſidered; The firſt Branch doth prohibit the taking of any damoſel under the age of 16 years out of the poſſeſſion, cuſtody and governance, and againſt the will of the father, or of ſuch perſon to whom the father by his Will, or by any act in his life ſhall deviſe, aſſign, or give the order, cuſtody, education or governance of her, which firſt [39] Branch containeth only a prohibition; but by that it is proved that the father may appoint the cuſtody of any of his daughters under the age of 16 years by his Will, or by any act in his life, to ſuch purpoſe only that he who taketh ſuch damoſel out of ſuch cuſtody ſhall incurr the penalty of the Act. The ſecond

Branch

Branch doth inflict puniſhment by fine and impriſonment upon him who taketh ſuch damoſel unmarried out of the poſſeſſion and againſt the will of the father and mother, or of ſuch perſon which then ſhall have byany lawful means the order, cuſtody, &c. of ſuch damſel. And it was agreed, that theſe words (father and mother) ſhall be underſtood father or mother after the death of the father, which is well expounded by the ſubſequent clauſe. The third Branch upon which this Caſe does depend, impoſeth puniſhment and forfeiture, as well upon him who taketh ſuch damoſel and deflloureth her, or againſt the will, or without the knowledge of the father if he be alive, or of the mother having the cuſtody of ſuch damoſel, contracteth matrimony with her; or upon the damoſel if ſhe exceed the age of 12 years, if ſhe aſſent to ſuch contract, by forfeiture of her land during her life: Note this latter Branch doth extend only to the cuſtody of the father and mother having the cuſtody of her, that is to ſay, if the father had not diſpoſed the cuſtody of her to others: and the ſame extendeth to him who taketh any damſel although ſhe were not heir or heir apparent, and although ſhe did depart with his aſſent after the age of 12 years, for which the Common Law gave not any remedy: And it is to be obſerved, that the clauſe which giveth forfeiture to ſuch damſel which conſenteth, referreth only to the third Branch, and not to the firſt or ſecond; ſo that for as much as the father in this Caſe upon the matter had not the diſpoſe of the cuſtody of the daughter, the daughter was in the cuſtody and governance of the mother within the proviſion of this Act; and alſo ſhe was at the time of the ſaid taking heir apparent to the ſaid *Elizabeth*.

3. It was reſolved, that the aſſent of *Ralph Ratcliffe* the husband was not material, for the Statute hath annexed the cuſtody to the perſon of the mother *Jure naturæ*, which is inſeparable, and cannot by the marriage be transferred to the husband, but the ſame after the marriage doth remain only in the mother; for as it is agreed in 33 *H.* 6. 55. *b.* the father who hath the Wardſhip of his ſon and heir apparent *jure naturæ*, cannot forfeit the ſame by outlawry, neither ſhall his Executors or Adminiſtrators have ſuch Wardſhip; And it was ſaid if there be Lord and feme Tenant by Knights ſervice, and the Tenant maketh a leaſe for life, and afterwards the Lord and Tenant entermarry, and have iſſue between them a ſon, and the wife dieth, and afterwards the father dieth the ſon within age, that his Executors ſhall not have the Wardſhip by reaſon of the Seigniory, for the father hath the Wardſhip of his eldeſt ſon *jure naturæ* which is inſeparable, and cannot be waved, and he cannot have the Wardſhip of his ſon by the death of his wife by reaſon of his Seigniory, for that was inſeparably veſted in him as father preſently by the birth of his ſon *jure naturæ*: And *Littleton* ſaith, That the father during his life ſhall have the marriage of his ſon and heir apparent, and not the Lord.

4. It was reſolved, that although that the iſſue was, Whether the ſaid *Elizabeth* had the cuſtody of the ſaid *Martha* at the time of the contract; and it appeareth by the verdict, that ſhe did depart out of the houſe of the ſaid *Elizabeth* ſix hours before the contract; yet in judgment of Law, the ſaid *Elizabeth* had the cuſtody of her at the time of the contract, for as hath been ſaid, this cuſtody is inſeparably annexed to the perſon of the mother.

5. It was reſolved, that in this Caſe *Martha* and *Elizabeth* were Tenants in common in tail, the reverſion to *Elizabeth* the mother and her heirs; for theſe words in a Will (equally to be divided) maketh a Tenancy in common according to the intent of the deviſor, although they never make any partition *in facto*, and his intent appeareth that it ſhall be divided, and by conſequence, that there ſhall be no ſurvivor, and ſo hath it divers times been adjudged before this time.

6. It was reſolved, that upon this Verdict it appeareth, that *Edward Ratcliffe* and *Martha* his wife had good title to the land againſt *Androwes* and *Elizabeth* his wife; and that one daughter as this Caſe is ſhall not take benefit of the forfeiture of the other. For the Statute gave the forfeiture to the next of kin, to whom the inheritance ſhould deſcend, or come after her deceaſe, &c. during the life of ſuch perſon that ſo ſhall contract matrimony. So that firſt there ought to be blood, and 2. he ought to be next of blood to whom the Inheritance ſhall deſcend, or come, &c. And although *Elizabeth* the daughter be of blood, yet in this Caſe by the death of *Martha*, the land if ſhe hath iſſue ſhall deſcend to her iſſue, and if ſhe have no iſſue it ſhall revert to *Elizabeth* the mother, 5 *E.* 4. 5. *Aſſiſe* 27. in the like Caſe upon the Statute of 6 *R.* 2. agreeth with this Reſolution. Then it was moved, if the mother in this Caſe ſhall enter for the forfeiture; and it was objected, that ſhe cannot enter, for ſhe is not of the blood
[40] of the daughter, for the daughter deriveth her blood from the mother, and not the mother from the daughter. And therewith agreeth 5 *E.* 6. *Adminiſtration Br.* 47. where it is holden, That the father or mother are not next of blood, to whom adminiſtration of the goods of their ſon or daughter ſhall be granted; and there it is ſaid, *Quod pueri ſunt de ſanguine parentum, ſed pater & mater non ſunt de ſanguine puerorum*, and that is the cauſe that no land can deſcend from the ſon to the father or mother, but ſhall rather eſcheat to the Lord, becauſe the father or mother are not of the blood of their ſon. Againſt which it was argued, that the mother ſhall take advantage of this forfeiture. And the ſaid Book of 5 *E.* 6. was utterly denied to be Law, and that oftentimes it had been reſolved againſt it, *ſcil.* that adminiſtration may be granted of the goods of the ſon or daughter to the father or mother as to the next of blood; and that is proved by *Littleton* in his firſt Chapter in his firſt Book, where it appeareth, that if there be father, unkle and ſon, and the ſon dieth, that the unkle ſhall be heir to the ſon, and yet the father is more near of blood, which are *Littleton*'s words, which as was ſaid, decide the point in queſtion. And upon the words of *Littleton* it was concluded, that in the ſame Caſe of father, unkle and ſon, if a leaſe be made to the ſon, the remainder to the next of his blood, that the father in this Caſe of purchaſe ſhall have the remainder, for by the judgment of *Littleton* he is the next of blood. And although in every Art and Science there are *principia & poſtulata*, of which it is ſaid, *Altiora ne quæſiveris, & principia probant, & non probantur*, becauſe that every proof ought to be by a more high and ſupreme cauſe, and nothing can
[b] be more high and ſupreme than principals themſelves, and therefore ought to be approved, becauſe they cannot be proved. And *Littleton* ſaith, that it is a Maxim in Law, That inheritance may lineally deſcend, and not aſcend; and that appeareth by *Glanvile* who wrote in the time of *H.* 2. *lib.* 7. *cap.* 1. *fol.* 44. *b.*

quælibet

Quælibet hæreditas, naturaliter quidem ad hæredes hæreditabiliter descendit, nunquam autem naturaliter ascendit; And by *Bracton*, who also wrote in the time of *Hen.* 3. *lib.* 2. *cap.* 29. *Descendit itaque jus quasi ponderosum, quod cadens deorsum recta linea vel transversali, & nunquam reascendit ea via, qua descendit post mortem antecessorum.* And therewith agreeth *Britton* who wrote in the time of *E.* 1. *cap.* 119. *de Successione.* Yet because the Common Law doth differ in this point from the Civil Law, these reasons of this principal of the Common Law were alledged, *scil.* that in this Point as almost in all others the Common Law was grounded upon the Law of God, which was said, was *causa causarum*, as it appeareth in the 27 Chap. of *Numbers*, where the Case which was in Judgment before *Moses* was, that *Salphaad* had 5 daughters, and having divers brothers, died, to whom the Inheritance should descend was the Question, the daughters claiming *de jure propinquitatis*, as their birthright and next heirs to their father; and the brothers claiming the same as heir male *jure honoris*, to celebrate and continue the name of their Ancestors: And this Case seemed of great difficulty to *Moses*, and there for the deciding of that Question *Moses* consulted with God, for the Text saith, *Retulitque Moses causam earum ad judicium Domini, qui dixit ad eum, justam rem postulant filiæ Salphaad: Da eis possessionem inter cognatos patris sui, & ei in hæreditatem succedant: Ad filios autem Israel loqueris hæc: Homo cum mortuus fuerit absque filio, ad filiam ejus transibit hæreditas, si filiam non habuerit, habebit successores fratres suos, quod si fratres non fuerint, dabitis hæreditat' fratribus patris ejus, sin autem nec patruos habuerit, dabitur hæreditas his qui ei proximi sunt, eritque hoc filiis Israel sanctum lege perpetua; sicut præcepit Dominus Mosi.* By which general Law (which extends not only to the said particular Case but to all other Inheritances, to all persons, and at all times) it appeareth that the father himself and all lineal ascension is excluded. [b]

Another reason of the said principal was alledged, for avoiding of confusion in case of descents, if not only lineal and collateral descent shall be allowed, but lineal ascention also, which is one of the causes of such diversity of opinions in Cases of Descents in the Civil Law, and the contrary is one of the causes of certainty of the Rules of the Common Law in Case of Descents and Inheritance, being *ponderosum quoddam*, as *Bracton* said, *jure naturæ descendit*, and not *ascendit*, for *omne grave fertur deorsum.* And it was said at the Bar, That if in this Case he in the reversion had been brother of the half blood to the daughter, that consented, &c. that he might enter as *proximus de sanguine*, as yet he cannot inherit lands in fee simple as heir to his sister in such Case, in which point also the Common Law doth differ from the Civil Law: for by the Common Law of *England*, if a common person hath issue a son and a daughter by one venter, and a son by another venter, and dieth seised of lands in fee simple, and the eldest son entreth into the land and dieth without issue, the sister of the whole blood shall inherit to him, and not the brother of the half blood. And that was the ancient Common Law of this land, and always continued as appeareth by *Glanvile lib.* 7. *cap.* 1. *Bracton lib.* 2. *cap.* 30. and by *Britton cap.* 119.

And the reason of the Common Law is notable, and may be collected by the said ancient Authors of the Law, that every one who is heir to another, *aut est hæres jure proprietatis*, as the eldest son shall inherit before all the other brothers, *aut jure repræsentationis*, as where the eldest son dieth in the life of his father, his issue shall inherit before the younger son, for although that the youngest son is *magis propinquus*, yet *Jure repræsentationis*, the issue of the eldest son shall inherit, for he doth represent the person of his father, and as *Bracton* saith, *Jus proprietatis* which his father had by birthright shall descend to him, *aut jure propinquitatis*, as *propinquum excludit remotum, & remotus remotiorem; aut jure sanguinis*, and by force thereof in the said Case the daughter shall inherit before the son, and that for divers causes, in as much as the blood which is betwixt every heir and his Ancestor makes him heir, for without blood none can inherit: And therefore it is great reason that he who hath full and whole blood should inherit before him who hath but a part of the blood of his Ancestor, for *ordine naturæ, totum præfertur unicuique parti.* And there *Bracton* saith, *Quod propter jus sanguinis duplicatum, tam ex parte patris, quam ex parte matris, dicitur hæres propinquior soror, quam frater de alia uxore.* And *Britton* saith, That the right of blood in this Case maketh the female, and excludeth the male. [41]

2. As none can be begotten but a of father and mother, and ought to have in him two bloods, that is to say, the blood of the father and the blood of the mother, these bloods commixt in him by lawful marriage constitute and make him heir; so that none can be heir to any, if he hath not in him both the bloods of him to whom he will make himself heir, and therefore the heir of the half blood cannot inherit, because he wanteth one of the bloods which should make him inheritable, as *Aristotle lib. Topicorum*; *Parte quacunque integrante sublata, tollitur totum, quod verum est si accipias partem integrantem pro parte necessaria:* As in this Case the blood of the father and of the mother are but one inheritable blood, and both are necessary to the procreation of the heir, and therefore *deficiente uno, non potest esse hæres.* And upon this reason it seems to *Britton cap.* 5 if a man be attainted of felony by Judgment, that the heirs begotten after the attainder shall be excluded of all manner of succession of heritage, as well on the part of the mother, as of the part of the father, and the reason thereof was, that the son begotten after the judment had not two inheritable bloods in him, for at the time of the begetting of him the blood of the father was corrupted, for *ex leproso parente, leprosus generatur filius*; and where the father is attainted of felony, the blood in respect of which he should inherit being corrupted, the son as seemed to him had but a half blood, that is to say, the blood of the mother in him uncorrupted; and therefore he held that such son should not inherit to his mother. And with him agreeth *Bracton lib.* 3. *cap.* 13. *Non valebit felonis generatio, nec ad hæreditatem paternam, vel maternam; Si autem ante feloniam generationem fecerit, talis generatio succedit in hæreditatem patris, vel matris, a quo non fuerit felonia perpetrata*; because at the time of his birth he had two lawful bloods commixt in him, which cannot be corrupted by the subsequent attainder, but only as to him who offendeth.

The

The third reaſon was for avoiding of confuſion, for if as well the half blood as the whole blood ſhall be equally inheritable, then in many Caſes confuſion and incertainty will follow who ſhall be the next heir, and if any would advance any of his half blood, he may eaſily convey ſome of his inheritance to him at his pleaſure; And therefore it was concluded, that the Common Law which preferreth the whole blood before the half blood, was grounded upon greater reaſon then the Civil Law in this Point: *Aut jure ſive ratione doni*, and in that the Common Law doth admit the half blood to inherit. For if a man maketh a gift to one and the heirs of his body, and he hath iſſue a ſon and a daughter by one woman, and a ſon by another woman, and the father dieth, and the eldeſt ſon entreth and dieth, the younger ſon ſhall inherit *per formam doni*, for he claimeth as heir of the body of the donee, and not generally as heir to his brother, and the ſame is the reaſon that *Littleton* ſaith, *Quod poſſeſſio fratris de feodo ſimplici facit ſororem eſſe hæredem*: in which Rule every word is to be obſerved:

1. That the brother ought to be in actual poſſeſſion of the fee and freehold, either by his own act, or by the actual poſſeſſion of another, but if neither by his own act, nor by the poſſeſſion of another, he gain more then deſcendeth to him, the brother of the half blood ſhall inherit; And therefore if land, rent, advowſon, &c. deſcend to the elder brother, and he dieth before any entry by him made into the land, or receive the rent, or preſent to the Church, the younger brother ſhall inherit: And the reaſon thereof is, that of all inheritances in poſſeſſion, he who claimeth ſuch hereditaments as heir, ought to make himſelf heir to him who was laſt actually ſeiſed, as it is holden 11 *H.* 4. 11. 10 *Aſſ.* 27. 34 *Aſſ.* 10. 19 *E.* 3, *Quare Imp.* 177. 45 *E.* 3. 13. and *Littleton cap.* 1. For if there be father, unckle, and ſon, and the ſon purchaſeth land and dieth without iſſue, and the land deſcend to the unckle, if the unckle dieth before entry, the land ſhall not deſcend to the father, for then he ought to make himſelf heir to him who was laſt actually ſeiſed, and that was the ſon; and therefore *Littleton* ſaith in ſuch Caſe, If the
[42] unckle enter, &c. then the father ſhall have the land as heir to the unckle; And in this Caſe the father was laſt actually ſeiſed, and the ſiſter cannot claim the land as heir to the father, for the younger ſon is heir to him: But if the eldeſt ſon enter, and by his own act hath gained the actual poſſeſſion, or if the lands were leaſed for years, or in the hands of a Guardian, and the leſſee or Guardian poſſeſs the land, there the poſſeſſion of the leſſee or Guardian doth veſt the actual fee and freehold in the elder brother, and in ſuch Caſe the ſiſter ſhall inherit as heir to her brother who was laſt actually ſeiſed: But of a reverſion, or a remainder expectant upon an eſtate for life or in tail, there he who claimeth the reverſion as heir, ought to make himſelf heir to him who made the gift, or leaſe, if the reverſion or remainder deſcend to him: Or if a man purchaſe ſuch reverſion or remainder, he who claimeth as heir ought to make himſelf heir to the firſt purchaſor; and all this appeareth, 24 *E.* 3. 24. 37 *Aſſ.* 4. 40 *E.* 3. 9. 42 *E.* 3. 10. 45 *E.* 3. *Releaſes* 28. 49 *E.* 3. 12. 7 *H.* 5. 3 & 4. 8 *Aſſ.* 6. 35 *Aſſ.* 2. 5 *E.* 4. 7. 3 *H.* 7. 5. 40 *Aſſ.* 6. 21 *H.* 7. 33. And by theſe Rules (good Reader) you ſhall well underſtand your Books, and the true reaſon of them; and by that which hath been ſaid it appeareth, That if the King by his Letters Patents create one a Baron, and giveth the Dignity to him and his heirs, and he hath iſſue a ſon and a daughter by one woman, and a ſon by another, and dieth, and afterwards the eldeſt ſon dieth without iſſue, in this Caſe the Dignity ſhall deſcend to the younger, for it cannot be ſaid that the eldeſt ſon was in poſſeſſion of the Dignity, no more then of his blood, for the Dignity is inherent to his blood, and neither by his own act nor by the act of any other doth he gain more actual poſſeſſion (if it may be ſo termed) then by the Law deſcendeth to him; and then the younger brother ſhall make himſelf heir to his father, and not to his brother, ſo that this word (*poſſeſſio*) which is nothing elſe but *pedis poſitio*, extendeth only to things of which a man by his entry or other act may get the actual poſſeſſion.

2. *Littleton* ſaith, *Poſſeſſio fratris de feodo ſimplici*, and theſe words, *feodum ſimplex*, exclude eſtate tail.

3. *Facit ſororem hæredem*, by which is implied, that in this Caſe, *ſoror eſt hæres facilus*, and that the Law without an act doth not make the ſiſter heir; but the younger brother is after the death of the elder brother *hæres natus* to his father. But the act by which the elder brother gaineth actual poſſeſſion *facit*
[b] *ſororem hæredem*, ſo that when the eldeſt ſon hath not actual poſſeſſion, or if it be ſuch an inheritance of which there cannot be gained an actual poſſeſſion, *per pedis poſitionem*, or by ſome other act, the ſame by Law ſhall deſcend to the brother of the half blood; And ſo it was concluded by the Plaintiffs Councel, That the father, or mother, or brother of the half blood, may be next of blood within the purview of the ſaid Act; and that in this Caſe it appeareth by the Verdict, that the mother and not the other ſiſter ought to take advantage of this forfeiture: But the Court reſolved, that the ſaid Points upon the Statute who ſhould be next of blood to enter for the forfeiture, cannot come in judgment in this Caſe, becauſe the iſſue was joyned upon a collateral Point, *ſcil.* Whether *Elizabeth* the Mother had the cuſtody of the ſaid *Martha*, at the time of the ſaid contract; and therefore all the other matter concerning the forfeiture, and who ſhould take benefit thereof was out of the iſſue, and the finding of the Jury (as to that) was without warrant and not material: And for this cauſe although that in truth the Plaintiff, as here appeareth, hath good right againſt the Defendant, yet for as much as the iſſue was found againſt him, Judgment was given that the Plaintiff, *Nihil capiat per billam.*

Coke and others were of Councel with the Plaintiff, and *Godfrey* and other with the Defendant.

Mich.

Mich. 34 & 35 Eliz. *in the Kings Bench.*

Boyton's Caſe.

THomas *Boyton* Clerk, Parſon of *Heſſet* in *Suffolk*, brought an *Audita querela* againſt *William Andrewes* and *Lewes Sympſon*, ſetting forth how the Defendants in the Kings Bench had recovered againſt the Plaintiff 50 l. debt and damages, and that after the Judgment, *ſcil.* 2 *Julii*, 31 *Eliz.* at *Bury S. Edmunds* in the County of *Suffolk*, within the liberty and franchiſe of Sir *Roger Townſhend* Knight, and *William Dixe* Eſquire, by *Purdey* and *Dey*, *Virtute cujuſdam warranti nuper ante eiſdem præd' Roger' & Will' fact', per Philippum Tilney Armig' tunc Vicecom' prædict' Com' Suff. ſub ſigill' officii ſui confect', de & ſuper quoddam breve de Capias ad ſatisfaciendum præfat' Willielmo Andrewes & Lodovico Sympſon de debit' & damnis præd', ad proſecutionem ipſius Will' Andrewes & Lodovic' a præd' curia noſtra coram nobis emanen', & Vic. prædict. Suff. nuper direct', &c.* the ſaid *Thomas Boyton* was taken and arreſted in Execution, till the ſaid *Roger* and *William Dixe* the ſaid *Thomas Boyton* at *Lambeth* in the County of *Surrey*, the ſaid debt and damages not ſatisfied, *extra priſonam prædict' evadere & ad largum quo voluit ire permiſerunt.* The Defendants pleaded, That the ſaid *Roger* and *William*, *non permiſerunt eundem Tho. Boyton extra priſonam præd' evadere, & ad largum ire quo voluit, modo & forma prout, &c.* And thereupon the Jury gave a ſpecial Verdict to this effect: That the Plaintiff was in Execution *prout, &c.* and that the ſaid *Roger* and *William Dixe*, Bayliffs of the ſaid Franchiſe *adduxerunt* him to *Weſtminſter* within the County of *Middleſex*, *ante retorn' brevis de Capias ad ſatisfaciend'*, (the day of the Return being *die Lunæ poſt craſtin' animarum*) ſo that the Bayliffs miſtook the day of the Return: and that the ſaid Bayliffs in the interim before the return of the Writ, at the requeſt of the Plaintiff carried him to *Lambeth* within the County of *Surry*; which Town of *Lambeth* is next adjoyning to *Weſtminſter*, but out of the way, and not in the way from the County of *Suffolk* to *Weſtminſter*. And at the return of the Writ the Bayliffs did deliver the ſaid *Boyton* to the Priſon of the Kings Bench by virtue of the ſaid Writ; And that the Plaintiff from the time of the arreſt, until the return of the ſaid Writ and delivery of him to Priſon aforeſaid, did remain and continue with the Bayliffs by virtue or colour of their warrant. And if upon the whole matter the Plaintiff were at liberty, and out of Priſon it was the Queſtion: And Judgment was given againſt the Plaintiff; And in this Caſe theſe Points were reſolved by the Court, [43] [b]

Firſt, It was objected, That the command of the Writ of *Capias ad faciendum* was, to have the body of the Plaintiff at the Court of Kings Bench which then was at *Weſtminſter*; and for as much as they carried the Priſoner beyond *Weſtminſter*, that is to ſay, to *Lambeth* in another County which was not warranted by the Writ, of neceſſity it ought to be an Eſcape: For the Writ gave them warrant to bring him to *Weſtminſter*, for there was the Kings Bench; and therefore when they carry them farther to *Lambeth* in another County, it is without warrant, and by conſequence an Eſcape; For the Bayliffs cannot have the cuſtody of him as Bayliffs of the Franchiſe, for that was out of the Franchiſe; and by force of the Writ they cannot have the cuſtody of him, becauſe they have not purſued the Writ; and if the Bayliffs ſhall be ſuffered to bring him to *Lambeth*, by the ſame reaſon they may carry him to *York*, or to any other remote part of the Realm at their pleaſure.

Secondly, It was ſaid, That in as much as the Writ, which is his warrant, was to have his body at the Court of Kings Bench ſuch a day, he ought to bring the body the uſual way to *Weſtminſter* where the Kings Bench was, for ſo much is implied by the Writ; and therefore the carrying of his body to *Lambeth* in another County was without warrant, and by conſequence an Eſcape, and the Plaintiff by that out of their cuſtody.

To which it was anſwered and reſolved by the Court, That, firſt, there was a difference between the cuſtody of one in Execution within the Franchiſe or County where the Common Goal is, or where the Office of the Sheriff or Bayliffs extend; and where the Sheriff or Bayliff hath the cuſtody of one in Execution out of their Franchiſe or County, as in the Caſe at Bar by force of a Writ: For if the Sheriff or Bayliff of a Liberty aſſent that one who is in Execution and under his cuſtody go out of the Goal for a time, and then to return, although that he return at the time, yet the ſame is an Eſcape. So if the Sheriff or Bayliff ſuffer him to go by bail or baſton, for the Sheriff, or Bayliff ought to keep him *in ſalva & arcta cuſtodia:* And the Statute of *Weſt.* 2. *cap.* 11. ſaith, *Quod carceri manucipentur in ferris*, ſo as the Sheriff may keep them who are in Execution in fetters and irons, to the end they may ſatisfie their Creditors. And with that agreeth a Reſolution, *Trin.* 24. *H.* 8. by the advice of *Fitz James* and *Norwich* Juſtices, and *Fitzherbert* and *Spilman* Juſtices, that by the Law, thoſe who are in Execution ſhall not go at liberty within the Priſon, nor out of the Priſon with their Keepers, but ſhall be kept in ſtrict Ward, *Vide Dier* 249. *b.* and the Statute of 2 *R.* 2. *cap.* 12. & *Weſtm.* 2. *cap.* 11. But it was adjudged, where the Sheriff hath one in Execution for debt, and a *Habeas corpus* iſſueth out of the Kings Bench to have the body of him who is in Execution in the ſame Court at a certain day, by force of which Writ the Sheriff before the return of the Writ, bringeth the body to an Inn in *Smithfield* towards *Weſtminſter*, and the Priſoner of his own head go without any Keeper to *Southwark* in the County of *Surrey*, and the next morning cometh again to the Sheriff to *Smithfield*, and at the return of the *Habeas Corpus* the Sheriff delivereth his body in Court, the ſame is no eſcape. [44]

And ſo it was adjudged in this Court 31 *Eliz.* in *Chalnocks* Caſe who was Sheriff of *Bedford*, for the effect of the command of the Writ was performed, *ſcil.* to have his body in the Kings Bench ſuch a day; and the ſame ſtandeth with great reaſon, for the Sheriff, &c. may ſtronger keep his Goal than any Inn or other place through which he travelleth; *a fortiori* in the Caſe at Bar, for he was always under the cuſtody of the Bayliffs. And the Writ doth not command the Sheriff to bring him the direct or uſual way to *Weſtminſter*, &c. but only to have his body at the Kings Bench, &c. ſuch a day. And therefore if one be Sheriff of two Counties, and hath arreſted and taken ſeveral perſons in Execution in the ſeveral Counties by force of ſeveral *Capias* directed to him, he may in this Caſe bring one Priſoner out of one County into another, to carry both together to the Kings Court at *Weſtminſter* without any Eſcape; and what way or place the Sheriff thinketh moſt ſure for him he may take.

And ſome conceived that the Caſe at Bar was ſtronger, becauſe the Priſoner went to *Lambeth* upon his own requeſt, and therefore he ſhall not diſcharge himſelf by *Audita querela* in this Caſe. And for as much as Eſcapes are ſo penal to Sheriffs, Bayliffs of Liberties and Goalers, the Judges of the Law
[*b*] have always made ſuch favourable conſtruction as the Law will ſuffer, in favour of Sheriffs, Bayliffs of Liberties, and Keepers of Priſons, who are Officers and Miniſters of Juſtice. And to the intent that every one bear his own burthen, the Judges ſhall never adjudge one to make any Eſcape by any ſtrict conſtruction.

And therefore if one in Execution eſcape out of Priſon, and fly into another County, it may be argued, that the ſame ſhall be an Eſcape, although he be taken again upon freſh ſuit, becauſe the Sheriff cannot have the cuſtody of him in another County, becauſe he is not Sheriff there, neither doth his authority extend thither. But the Judges ſhall adjudge the ſame to be no Eſcape, if the Sheriff doth all that he can, and by his freſh ſuit hath taken him again, before any Action brought. So in the Caſe at Bar, when the Priſoner is once out of the proper County, although he goeth into another County which is not in the way to *Weſtminſter* where the Kings Bench is, the ſame by a favourable conſtruction cannot be an Eſcape, if at the day of the Return he have the body of the Defendant in Court. And if the Sheriff, &c. ſhall be compelled to bring his Priſoners to the Kings Courts as in *recta linea*, it ſhall be very perilous and dangerous to Sheriffs.

Secondly, It was reſolved, That if one in Execution eſcape of his own wrong and be taken, he ſhall never have *Audita querela* to diſcharge himſelf of the impriſonment, becauſe he ſhall not take advantage of his own wrong; and in ſuch Caſe it was lawful for the Goaler to take him again as it fully appeareth in a Caſe following. And where it was objected, That the Writ was not good, becauſe it doth not appear that the Warrant made by the Bayliffs was in writing; for the words of the Writ are, *Virtute cujuſdam warranti*, and doth not ſay in writing as hath been ſaid. But this Exception was diſallowed by the Court; for the ſentence is, *Virtute cujuſdam warranti per præfat' R. & W. fact' & direct'*; by which words (*fact' & direct'*) is implied that it was in writing.

Another Exception to the Writ was taken, That it doth not appear thereby when the Judgment was given, nor when the *Capias ad ſatisfaciendum*, nor when it was returned, ſo that it may appear that the Defendant was arreſted by force of it after the *Teſte* of the Writ, and before the return thereof: But this Exception was alſo diſallowed by the Court, for as much as it appeareth by the Writ, That the ſaid *Thomas Boyton* the Plaintiff, *virtute brevis præd' captus & areſtatus fuit in executione*, by theſe words is implied, that it was lawfully and duly done. And it was agreed, that Writs are more compendious than Counts, and Counts than other pleadings, for Writs do comprehend the effect and ſubſtance without circumſtance of time or place, and other circumſtances. *Et ideo dicuntur brevia, propter eorum brevitatem.*

Hill. 36 Eliz. Rot. 445.

Sir *George Brown's* Caſe.

[50. *b*] IN an *Ejectione firmæ* by *Thomas Lynch* upon a demiſe made by Sir *George Brown*, againſt *William Spencer*, upon Not guilty pleaded, the Jurors gave a ſpecial Verdict to this effect: Sir *Richard Bridges* ſeiſed of certain lands in fee did thereof enfeoff *Winſcombe* and others, upon Condition that they ſhould give back the ſame to him and his wife, and to the heirs of their two bodies begotten, the remainder to the right heirs of Sir *Richard*, which was done accordingly; Sir *Richard* had iſſue on the body of his wife *Anthony Bridges* and died. *Anthony* in the life of his mother levied a fine (which in truth was with proclamations, although the proclamations were not found) to Sir *George Brown* in fee, the wife living, the ſaid *Anthony* made a leaſe of the land for three lives (which leaſe was not warranted by the Statute 32 *H.* 8. *cap.* 28. upon whom Sir *George Brown* entred, and made the leaſe to the Plaintiff; And if the entry of Sir *George Brown* were lawful or not was the Queſtion; and after many Arguments at the Barr and Bench, Judgment was given for the Plaintiff; And in this Caſe three Points were reſolved.

1. That

1. That the Leaſe made by the wife for three lives, although the leaſe were without warranty was within the Statute of 11 *H. 7. cap.* 20. the words of which Act is; If any woman, &c. have or ſhall hereafter being ſole, or with any other after taken husband, diſcontinued or diſcontinue, aliened, releaſed or confirmed, alien, releaſe or confirm with warranty, &c. For theſe words, with warranty, refer to Releaſes and Confirmations which are no diſcontinuances without warranty; for the intent of the Act was to prohibit not only every bar but every manner of diſcontinuance alſo which put the heir to his real Action, by which ſometimes the heir was diſ-inherited, and always greatly delayed; and for as much as Releaſe and Confirmation do not make diſcontinuance without warranty, for this cauſe the warranty ſhall be referred to them, to make them equivalent to ſuch eſtate which paſſeth by livery, which of it ſelf without a warranty is a diſcontinuance. Note, the Title of the Act is, *Diſcontinuance of right or eſtate*; and afterwards in the Act it is ſaid, Lands, Tenements or Hereditaments being diſcontinued, aliened or ſuffered to be recovered. And after, as if no ſuch Diſcontinuance, Warranty nor Recovery had been had; by which it appeareth that Diſcontinuance ſtood in equal degree with Warranty or Recovery, *Vide Dier Paſch.* 4. *Mar.* 148. *Beamont & Villers* Caſe, & *Plow. Comm* 50. *b.* [51]

2. It was reſolved, if *Anthony* had granted over his remainder in fee only, he might have entred for this forfeiture by the expreſs purview of the Act, the effect of which is; That it ſhall be lawful to every perſon and perſons to whom the intereſt, title or inheritance after the deceaſe of the ſaid woman, of the ſaid Mannor, &c. being diſcontinued, aliened or ſuffered to be recovered in the form aforeſaid ſhould appertain, to enter into all and every the premiſſes, and peaceably to poſſeſs and enjoy the ſame in ſuch manner and form, as he or they ſhould have done, if no ſuch diſcontinuance, warranty or recovery had been had nor made: And if no Diſcontinuance had been made the land ſhould deſcend to the iſſue. And therefore by the expreſs letter of the Act he ſhall enter upon the diſcontinuee, and not the grantee of the remainder.

Thirdly, It was reſolved, that in this Caſe Sir *George Brown* ſhall enter upon the diſcontinuee, for if no diſcontinuance had been made he ſhould enjoy the land againſt the ſaid *Anthony* and all the heirs of his body; for when the iſſue in tail levieth a fine with proclamations in the life of the Tenant in tail to another; and afterwards Tenant in tail dieth, this fine ſhall bar the tail. For the words of the Statute of 32 *H.* 8. *cap.* 36. are in any wife intailed to the perſon or perſons ſo levying the ſame fine, or to any of the Anceſtor or Anceſtors of the ſame perſon or perſons. But it was objected that the fine in the life of the wife doth operate in part by concluſion; for after it the wife doth remain Tenant in tail, and in part by conveyance of an eſtate as to the remainder in fee; And he who hath nothing but by concluſion or eſtoppel ſhall not take benefit of this Act, becauſe that the words are, To whom the intereſt, title or inheritance after the deceaſe of the ſaid woman ſhould appertain: And in this Caſe as to the eſtate tail, the feme being Tenant in tail, the conuſee had nothing but by concluſion, and right or title in this Caſe of entry cannot be given to a ſtranger. But it was reſolved, that in this Caſe Sir *George Brown* ſhall take advantage thereof; for he who hath the immediate title, intereſt or inheritance at the time of the forfeiture ſhall enter by force of this Statute; And now by fine with proclamations the eſtate was barred and extinct, and againſt that *Anthony* nor any of his iſſue inheritable by force of the eſtate tail can enter; and by conſequence, he who hath the remainder in fee ſhall enter, for he is the perſon to whom the intereſt, title and inheritance after the deceaſe of the ſaid woman doth appertain. And now, upon the matter the Caſe is no other, but that the woman Tenant in tail within the Statute of 11 *H.* 7. the reverſion, or remainder in fee, the feme doth make a diſcontinuance, he in the reverſion or remainder ſhall enter for the forfeiture, for he is the perſon to whom the intereſt, title and inheritance after the deceaſe of the ſaid woman doth appertain. The ſame Law in Caſe at Bar, although the fine were without proclamations; yet after the death of the woman, *Anthony* himſelf cannot enter, but the entry of the conuſee is lawful, becauſe he ſhall take the benefit of this Act, by the expreſs words thereof. [b]

And it was ſaid by *Anderſon* chief Juſtice of the Common Pleas, That where it was intended to make evaſion out of this Act, that ſuch woman Tenant in tail ſhould accept a fine upon *conuſans de droit come ceo, &c.* and thereby grant and render the land for 1000 years, pretending that that was within the words of the Act, *ſcil.* which prohibiteth diſcontinuance, alienation, releaſe, &c. That that was an alienation within the intent of this Act, or otherwiſe the Statute ſhould ſerve to little purpoſe; And ſo was it upon conference with the other Judges reſolved by *Wray* chief Juſtice and himſelf in the Court of Wards, and decreed accordingly. And ſo it was holden in the Common Pleas 18 *Eliz.* by Sir *James Dier*, *Manwood* and *Mounſon* Juſtices, as I my ſelf heard. *Vide Dier* 3 & 4 *Phil. & Mar.* 148. *Penicocks* Caſe.

Paſch. 36 Eliz. *in the Kings Bench.*

Rigewaie's Caſe.

[52] IN Debt by *William Grils*, againſt *Thomas Rigeway* late Sheriff of *Devon* of 309 l. 6 s. 8 d. which he had recovered in the ſame Court for Treſpaſs for taking of his goods, againſt *Thomas Chawner* alias *Chaundeler*, and that the body of *Chawner* was taken in Execution 20 *April.* 33 *Eliz.* by the Defendant then Sheriff at *Stoke Cannon* in the ſaid County; and that afterwards the Defendant 10 *Decem.* 34 *Eliz.* then Sheriff of the ſame County ſuffered him to eſcape in *Parochia S. Mariæ de Arcubus in Warda de Cheape London, & ad largum quo voluit ire permiſit, &c.* The Defendant pleaded and confeſſed, that *Chawner* was taken in Execution the ſaid 20 *April.* 33 *Eliz.* and ſo continued in his cuſtody till the eighth day of *December* following, at which day at *Stoke Cannon* aforeſaid he broke the Priſon, *& a cuſtodia ipſius Th. Rigeway contra voluntatem ipſius Th. evaſit, ſuper quod præd' Thomas adtunc & ibidem recenter inſecutus eſt præd' Johannem, & in recenti inſecutione ipſius Johannis in forma præd', præd' Thomas Rigeway* 11 *de Decemb. tunc proxime ſequent' apud Stoke Cannon præd', ratione & virtute executionis præd' & prioris captionis & executionis prædict' cepit & arreſtavit præd' Johannem, &c.* The Plaintiff by way of Replication, by proteſtation that the Defendant did not make freſh ſuit, for plea ſaid, *quod poſt evaſionem præd' & antequam præd' Johannis Chawner receptus fuit, idem Johannes per totum unum diem & unam noctem*, viz. *apud London in parochia & Warda præd. fuit extra viſum ipſius Thomæ, &c.* And thereupon the Defendant did demurr in Law.

1. In this Caſe it was agreed by the whole Court, That although that the priſoner who eſcaped was out
[b] of ſight, yet if freſh ſuit be made, and he be taken in *recenti inſecutione*, he ſhall be in Execution, for otherwiſe at the turn of a corner, or by entry into a houſe, or by ſuch means, the Priſoner might be out of ſight; and although the Priſoner flyeth into other Counties where the Sheriff hath no power, and where it may be objected, the Sheriff cannot have the cuſtody of him, yet for as much as the eſcape was of his own wrong, whereof he ſhall not take advantage, the Sheriff may upon freſh ſuit take him in any other County, and he ſhall be ſaid in Execution. But if the Plaintiff bring an Action againſt the Sheriff for an Eſcape before that the Sheriff can take him; or if the Sheriff doth not make freſh ſuit, yet in both theſe Caſes the Sheriff may take him, and keep his body under his cuſtody, till he hath agreed with him, or may have an Action opon the Caſe for his tortious eſcape. And although the Defendant be taken upon a *Capias ad ſatisfaciendum*, yet if the Writ be never returned, nor filed, the Plaintiff may have a new *Capias ad ſatisfaciendum* againſt him, and take him again, and he ſhall not take advantage of his own wrong, but if the Plaintiff will, he may charge the Sheriff for Eſcape if he have not taken him again upon freſh ſuit before the Action brought; And when the Priſoner eſcapeth of his own wrong, and is taken again, he ſhall never have an *Audita querela* againſt the Sheriff; But otherwiſe it is, when he eſcapeth with the conſent of the Goaler, for then he cannot take him again, and in ſuch Caſe for his diſcharge he ſhall have an *Audita querela*. And upon theſe differences are all the Books, *ſcil.* 8 *E.* 2. *Corone* 40. 6 *E.* 2. *Eſcape Br.* 49. 41 *Aſſ.* 5. 45 *E.* 3. 9. 2 *E.* 4. 6. 10 *E.* 4. 10. 11 *E.* 4. 4. 13 *E.* 4. 8. 21 *E.* 4. 67. 6 *H.* 7. 11. 10 *H.* 7. 25. 28. 13 *H.* 7. 2. 14 *H.* 7. 1. 16 *H.* 7. 2. 12 *H.* 8. 90. *Br. Eſcape* 45. *Plow. Com. Plats Caſe. F. N. B.* 130. *b.* 10 *Eliz. Dier* 275. and other Books.

2. It was reſolved, That the bar was inſufficient, for the Plaintiff hath declared of an Eſcape in *London*, and the Defendant juſtifieth the retaking of him at *Stoke Cannon*, and ſo the eſcape at *London* is not anſwered; but for as much as the Plaintiff not denying the freſh ſuit, but by proteſtation hath only relyed upon that matter, that the Priſoner was out of his ſight, the Court ſhall not intend other matter to maintain his Action than he himſelf hath ſhewed; and now upon the Record it doth not appear that the Plaintiff hath cauſe of Action, for this cauſe the Plaintiff perceiving the opinion of the Court, did diſcontinue his ſuit: But it was agreed that if the Plaintiff had demurred upon the Bar, that he ſhould have had judgment.

3. It was reſolved, That after demurrer there ſhall be no repleader, for the parties have by their mutual aſſent put themſelves upon the Judgment of the Court, and therefore without their mutual aſſent they cannot replead. And ſo was it adjudged between *Kendal* and *Heyer* in the Kings Bench, *M.* 35 & 36 *Eliz.* by *Wray* chief Juſtice, Sir *Thomas Gawdy*, and the whole Court of the Kings Bench. And in the ſame Court in Debt between *Gallis* and *Burbry Mic.* 29 & 30 *Eliz.* againſt the opinion of 9 *H.* 6. 35. in an Avowry, which Record had been ſeen, and did not warrant the Report of the Book.

Mich.

Mich. 37 & 38 Eliz. *in the Common Pleas.* Rot. 81.

Lincoln Colledge Case.

IN a *Formedon* in Descender by *Robert Chamberlain*, Cousin and heir male of the body of *Richard Chamberlain*, against the Rector and Scholars of *Lincoln* Colledge in the University of *Oxford* for the Mannors of *Petsore* and *Ekeney* in the County of *Buckingham*, upon the pleading the Case was such: *Richard Chamberlain* did enfeoff *Corneborough* and others of the said Mannors, to the intent that they should give back the same to the said *Richard Chamberlain* and *Sibill Fowler* whom he intended to marry, and to the heirs male of the body of *Richard*, which was done accordingly. *Richard* and *Sibill* do entermarry, and have issue *Edward*, *Richard* died, *Edward* in the life of *Sibill adtunc tenens liberi tenementi, &c.* which was intended by disseisin, *ann.* 4 *H.* 1. suffered a common Recovery with single voucher by agreements amongst all, to the intent that the Recoverors should enfeoff *Lister* and others to divers uses; and that *Sibill* (for better assurance) should release to them with warranty, which feoffment and release with warranty were made accordingly *anno* 11 *H.* 8. And afterwards *Sibill* died, *Edward* then being alive; and if this collateral warranty shall bar the demandant or not, or shall be void by the Statute of 11 *H.*7. *cap.* 20. was the Question; for in as much as the common Recovery was had against *Edward* in the life of Tenant for life, it cannot be intended, that *Sibill* did surrender her estate, or that *Edward* had entred for the forfeiture, and therefore shall be seised by force of the tail if not that it had been alledged in pleading: But for as much as it was generally alledged that then he was Tenant of the freehold, it shall be intended strong against him who pleadeth, that is to say that it was by disseisin, or by feoffment of a disseisor, so that he was in of another estate, and then the recovery with single voucher will not bind it; And therefore the sole Question was, upon the collateral warranty. And it was strongly objected, That this warranty shall be void, not only within the expres words, but also within the meaning of the Act. [58 b] [59]

For first, there is no doubt but the heir male of the body of *Edward* is a person to whom the inheritance after the death of *Sibill* shall appertain: And the words of the Act are, That such person shall enter, and peaceably possess the land as he ought if no such warranty had been made. And the meaning of the Act was not to save the estate for him only who is heir apparent at the time of the forfeiture, but to preserve the same for the benefit of all the issues inheritable by force of the tail. As if *A.* make a feoffment in fee to the use of himself and his wife, and the heirs of the body of *A. A.* hath issue *B.* and dieth, the wife is disseised, the heir in tail by deed releaseth to the disseisor, and afterwards the wife releaseth also with warranty and dieth, *B.* hath issue *C.* and dieth; although that *B.* hath by his release disabled himself to take advantage of the forfeiture during his life, yet it shall not prejudice his issue, for he is the person to whom the inheritance of the estate tail doth appertain, and now by the Statute he shall enter as if no warranty had been made.

2. It is to be observed, That by the Statute, not only entry is given to him to whom the interest, title, or inheritance shall appertain, as if no warranty had been made; but by the Branch next before the purview, That every discontinuance, alienation, release, or confirmation with warranty, and recovery made or suffered by such woman shall be utterly void and of no effect: And if the warranty in this Case, by the expres letter of the Act be utterly void and of none effect, it is void as to all, and by consequence against every issue in tail, and it is void also as to *Edward* himself, but in respect of the said Recovery he hath barred himself that he cannot enter into the land; And *Doctor* and *Student* was strongly urged, That if a woman tenant in tail suffer a common Recovery, and the issue in tail release to the recoveror, yet his issue may enter, which proveth, that although that he to whom the immediate right of the estate tail doth belong, will by his own act exclude himself from the benefit that the Statute would have given him; yet his issue shall not be prejudiced by it.

And it was further objected, That if any Error had been in the recovery that *Edward* suffered, and had brought a Writ of Error, the collateral warranty of the woman should not be a bar to him, for the Statute by expres words hath made the warranty utterly void, and of no effect; *a fortiori*, the warranty shall not bind the demandant who claimeth as cousin, and heir male of the body *per formam doni*. To which it was answered and resolved, as to the first Branch; That the office of a good expositor of an Act of Parliament is to make construction upon all the parts together, and not of one part only by it self; *Nemo enim aliquam partem recte intelligere possit, antequam totum iterum atque iterum perlegerit:* And although the first branch make the discontinuance, alienation, warranty and recovery utterly void, and of no effect; yet the clause following being connexed to it with this conjunction, And that it shall be lawful, expounds the generality of the words of the precedent branch; And therefore the sense of both together is, that they shall be utterly void and of no effect by the entry of him to whom the interest, title, or inheritance, after the woman doth appertain; but the discontinuance, alienation, warranty or recovery shall not be void between the parties, but shall stand in force between themselves, and against all others, but only against such to whom the interest, title, or inheritance after the death of such woman doth appertain, and they only may make it void, and of no effect by their entry: And so before that time have other Statutes been expounded by the ancient Judges and Sages of the Law. As the Statute of 8 *H.* 6. *cap.* 10. by which it is provided that all outlawries shall be holden for null and void, and that the party, &c. be not indamaged, nor put to loss [b]

of

of his goods and chattels, &c. if not that a *Capias* be awarded againſt the party in the County in which by indictment, or appeal he is expreſſed to be dwelling, yet it ought to be avoided by the means which the Law hath appointed, and the ſame is by Writ of Error.

In the ſame manner in the Caſe at Bar, eſtates of freehold or inheritance cannot be defeated without an entry, and therefore by entry they ought to be made void. So the Statute of 23 *H. 6. cap.* 10. makes an obligation taken in other manner then the Statute preſcribed void; yet it is holden in 7 *E.* 4. 5. that the party cannot plead, *non eſt factum* but it is voidable by plea, with ſuch apt concluſion as the Law doth appoint. So upon the Statute of 1 *Eliz.* which provideth, That all grants, leaſes, &c. made by Biſhops in other manner then is mentioned in the Act ſhall be utterly void, and of no effect to all intents and purpoſes; Notwithſtanding theſe preciſe words it was adjudged in the Common Pleas, *M.* 32 & 33 *Eliz.* in a *Quare Impedit* between *Sale* and the Biſhop of *Coventry* and *Lichfield*, That a grant of the next avoidance of an Advowſon is not void as to the grantor himſelf, but as to the ſucceſſor; for ſo was the intent of the Act to provide for the ſucceſſor and not for the party himſelf. So and upon the ſame reaſon
[60] was it reſolved in the Common Pleas, *Paſch.* 39 *Eliz.* between *Hunt* and *Singleton* for a houſe in *Foſter-lane* in *London* whereof the inheritance was in the Dean and Chapter of *Pauls*, That if the Dean and Chapter make a leaſe not warranted by the Statute of 13 & 14 *Eliz.* in which Caſe it is provided by the ſaid Acts, that ſuch leaſe ſhall be abſolutely void, and of no effect to all intents and purpoſes; In this Caſe of a Corporation aggregate of many perſons which never dieth, it was greatly doubted, if the leaſe ſhall not be utterly void preſently according to the expreſs letter of the Act; but it was at laſt reſolved, for as much as the Act was made for the benefit of ſucceſſors, that the leaſe ſhall not be void till after the death of the Dean who was party to the leaſe: And although the ſucceſſor of the Dean is not ſucceſſor to the whole Corporation who made the leaſe, yet becauſe the whole Corporation never dieth, ſuch leaſe by conſtruction ſhall be void after the death of the Dean who is the principal member of the Corporation, and the Succeſſor with the Chapter ſhall avoid it. So in the principal Caſe, although it be provided by the Statute of 11 *H.* 7. That the diſcontinuance, alienation, warranty, and recovery ſhall be void, yet they are not void preſently, but are to be made void by ſuch perſons to whom after the death of the woman the intereſt, title, or inheritance appertaineth. And with this Reſolution agreeth 27 *H.* 8. 23. upon this Statute of 11 *H.* 7.

2. It was anſwered and reſolved, That this Caſe was out of the intention of the ſaid Act for divers cauſes:

Firſt, Becauſe the intent of the Act was for to reſtrain women to make diſcontinuance, warranty, and recovery in bar, or prejudice of the heir in tail, or of them in the remainder, &c. But when the heir in tail in the Caſe at Bar doth convey and aſſure the land to others, and the releaſe or confirmation of the woman with warranty, is but to perfect, and to corroborate the eſtate which the heir in tail hath made, ſuch warranty is not reſtrained by this Act; for the ſame ſhall be intended to the benefit of the heir, and not to his prejudice; And that was the reaſon that a common Recovery in reſpect of the intended recompence was not reſtrained by the Statute of *Weſt.* 2. And therefore when the iſſue in tail in the Caſe at Bar, hath ſuffered a common Recovery, and the warranty of the woman doth extend but to ſtrengthen the ſame, this warranty is not reſtrained by the Act of 11 *H.* 7.

[*b*] The ſecond reaſon was, that the wife with the heir in tail might have joyned in a fine, and ſo barred the eſtate tail; or if the wife had ſurrendred to the heir in tail, he might have ſuffered a common Recovery, and by that the eſtate tail ſhould be cut off, and ſo they both had power to bar the eſtate tail, and the remainder or reverſion expectant thereupon: Then it was not the intention of the Act to reſtrain the warranty the wife made to him who had the land by conveyance of the heir in tail. And upon the ſame reaſon was it adjudged *M.* 38 & 39 *Eliz.* in the Kings Bench between *Jennings* and *Wiſeman*; and *Hill.* 39 *Eliz.* in the Common Pleas, but the Plea began *Trin.* 38 *Eliz. Rot.* 1302. between *Wiſeman* and *Crowe*, and the Caſe in both Courts was one, *ſcil. Thomas Wiſeman* had iſſue *William* his eldeſt ſon by one woman, and *Thomas* and a daughter by another woman, and ſeiſed of lands in *Eſſex* holden in Socage, deviſed the ſame to *Dorothy* his wife for life, the remainder to *T.* in tail, and died, by which the wife was Tenant for life, the remainder to *T.* in tail, and the reverſion in fee deſcended to *William*, *Dorothy* after the Statute of 14 *Eliz.* ſuffered a common Recovery, in which *Thomas* was vouched, who vouched over the common vodcuee, which Recovery was to the uſe of *Thomas* and his heirs; The daughter married *Jennings*, *Thomas* died without iſſue, now between *Jennings* and *Crowe* his fermor, and *Wiſeman* ſon and heir of *William* was the queſtion for the land; *Wiſeman* objected that the ſaid common Recovery was void by the expreſs letter of the Statute of 14 *Eliz. cap.* 8. Where divers perſons being ſeiſed, &c. of any lands, &c. only for life or lives, or of eſtates determinable upon life or lives have ſuffered other perſons by agreement or covin to recover the ſame lands againſt the ſame particular Tenants, &c. or as vouchees to the great prejudice of thoſe to whom the reverſion or remainder hath appertained, or ought to appertain: Be it enacted, that every ſuch Recovery, as of ſuch perſon in reverſion or remainder thereof, &c. be clearly and utterly void and of none effect: Provided that every ſuch Recovery had by the aſſent of any perſon in reverſion or remainder, ſo the ſame aſſent appear of Record in any Court, &c. ſhall ſtand in force againſt ſuch perſon ſo aſſenting, &c. And the ſaid Recovery was had againſt *Dorothy* being tenant for life; and the ſaid *William Wiſeman* who had the reverſion in fee never aſſented to the ſaid Recovery according to the ſaid proviſo: And therefore the ſaid Recovery ſhall not bind by the expreſs letter of the Act: But it was adjudged in both Courts, that the reverſion in fee was barred by the ſaid Recovery. And the ſaid Act of 14 *Eliz.* did not extend to it: And the principal reaſon was, becauſe it was not the intent of the Act to extend to ſuch Recovery in which he in the remainder in tail was vouched, becauſe that tenant in tail hath an eſtate of inheritance which may continue for ever; and he hath power by a common Recovery to cut off all remainders and reverſions expectant upon his eſtate; and if *Dorothy* had ſurrendred unto him, then without queſtion the Recovery

ſhall

ſhall bar him in the reverſion in fee: So *Dorothy* and *Thomas* had power to bar the reverſion in fee, and neither the Statute of *Weſt.* 2, *cap.* 3. which gave receit extended to him in the reverſion or remainder expectant upon an eſtate tail, 33 *H.* 6. 22. 41 *E.* 3. 12. nor the Statute of 9 *R.* 2. *cap.* 2. which gave the Writ of Error to him in the reverſion, nor the Statute of 32 *H.* 8. *cap.* 31. made againſt common Recoveries had againſt Tenants for life, extend to remainders or reverſions expectant upon an eſtate tail. So in the Caſe at the Bar, for as much as he who hath the eſtate tail hath ſuffered a common Recovery, and the wife hath releaſed to the Recoverors with warranty, the Act of 11 *H.* 7. doth not extend to it, becauſe the heir in tail hath power in himſelf to bar the tail, and the warranty of the wife is but to perfect his conveyance.

Thirdly, It was reſolved, that in the Caſe at Bar when the ſaid *Edward* by the common Recovery had againſt him by his own agreement diſabled himſelf to take benefit of the forfeiture given by the Statute after the death of *Edward*, his iſſue ſhall not take benefit thereof, becauſe his father was in being at the time of the forfeiture, and cannot enter, and a perſon who is not *in rerum natura*, or who hath not immediate intereſt, title, or inheritance at the time of the forfeiture ſhall never take benefit of this Act, when another was in being at the time of the forfeiture, and cannot enter, and yet had power to bar by fine or Recovery him who would claim the benefit of the Act; And the ſame was in effect adjudged in Sir *George Browns* Caſe, where the iſſue in tail in the life of his mother having the reverſion in fee levied a fine without proclamations. And if Error was in the ſaid Recovery, the warranty of the wife ſhall bar *Edward* of his Writ of Error, becauſe by his own act he hath barred himſelf of entry which the Act preſcribed. And the Caſe of *Doctor* and *Student* was affirmed to be good Law; for there preſently by the Recovery the iſſue hath title to enter upon the recoveror, and therefore his releaſe by deed could not bar his iſſue; but in the Caſe at Bar the iſſue in tail firſt ſuffered the Recovery, and ſo diſabled himſelf before the warranty made, as alſo it was done in Sir *George Browns* Caſe, by the fine levied in the life of the mother, and therefore in thoſe Caſes title of entry was never given to the iſſue in tail, as it was in the Caſe of *Doctor* and *Student*; and ſo manifeſt diverſity: But if *Sibill* had releaſed after the death of *Edward*, then the iſſue in tail might have avoided the warranty by force of this Act. [b]

Note Reader, I conceive, that if a man make a feoffment in fee to the uſe of him and his wife in tail, and to the uſe of the husband in fee, and hath iſſue a daughter, his wife with child with a ſon, by which the reverſion in fee deſcendeth to the daughter, the wife before the birth of the ſon levieth a fine, or ſuffereth a common Recovery, in this Caſe although the daughter enter or not, or although the daughter had joyned in the fine, or was vouched in the Recovery, or by any other act hath diſabled her ſelf to take benefit of this Act, yet the ſon after born ſhall take benefit of this Act; and that well agreeth with this Reſolution. For by no act that the daughter can do, can ſhe bar the ſon againſt the eſtate tail, as *Edward* might in the Caſe at Bar; and therefore it ſtands with reaſon and equity that no act which ſhe may do ſhall be prejudicial to the ſon, which was *in utero matris*. And this Caſe is not to be compared to the Caſe in 5 E. 4. 6. For by the Statute of 6 *R.* 2. *cap.* 6. it is provided, *Quod proximus de ſanguine eorundem rapientium & raptorum, cui hæreditas deſcendere, remanere, vel accidere deberet poſt mortem rapientis vel raptæ, habeat titulum immediate ſtatim ſcilicet poſt raptum intrandi ſuper rapientem vel raptum, &c. & tenere de ſtatu hæreditario*; in this Caſe if the daughter enter, ſhe ſhall keep it for ever againſt the ſon after born: But although that the daughter enter by force of the Statute of 11 *H.* 7. yet the ſon born after ſhall enter upon her; and the cauſe and reaſon of this difference is, that the daughter by the Statute of 6 *R.* 2. hath the land meerly as purchaſor, and a perquiſite in fee ſimple: And by the expreſs words of the Act, ſhe ſhall enter and keep the land, for the Statute ſaith, *intrabit, &c. & tenebit de jure hæreditario*. And it is like the Caſe in 9 *H.* 7. 25. if a remainder be limited to the right heirs of *J. S.* and he dieth having a daughter, the daughter ſhall have it as a purchaſor, and ſhall keep the land againſt the ſon born after. But when the daughter entreth by force of the Act of 11 *H.* 7. ſhe is in of an eſtate tail *per formam doni*, and ſo in nature of a deſcent, and not meerly as a purchaſor, and that by the expreſs words of the Statute of 11 *H.* 7. which are, That the perſon to whom the lands appertain after the deceaſe of ſuch woman, ſhall enter into the tenements, and poſſeſs and enjoy them according to ſuch intereſt, title, or inheritance, as they ſhall have if ſuch woman had been dead, and no diſcontinuance, warranty, or recovery had; ſo that the daughter in this Caſe doth not claim the land meerly as a perquiſite, as ſhe doth upon the Statute of 6 *R.* 2. but by force of the Act of 11. *H.* 7. ſhe claims according to her title, ſo if the woman had been dead, and that is *per formam doni*, and *per formam doni* the ſon after born is to be preferred before the daughter: And therefore this Caſe is to be compared to *Shelley*'s Caſe; in which Caſe although the uſe veſted in *Richard* the younger ſon, yet the ſon of the eldeſt ſon after born ſhall enter upon him, becauſe that *Richard* in that Caſe was in the nature of a deſcent, and not meerly as a purchaſor. And if the makers of the Act of 11 *H.* 7. had been asked if in ſuch Caſe the woman may prejudice the ſon ſhe goeth with all of the benefit which they by the Act had provided, they would have anſwered, *abſit quod licitum fuerit matri nocere filio qui in utero ſuo eſt*. And with this opinion agreeth *Montague* chief Juſtice of the Common Pleas, *Plow. Comm.* 56. And the opinion of the Court of Wards 20 *Eliz. Dier.* 362. is not repugnant to it, for there the opinion is, That if the iſſue in tail enter by force of this Act upon a fine levied by his mother, and her ſecond husband, he ſhall not be in Ward, which well may be, for in ſuch Caſe he hath the land but during the coverture, and therefore is in a manner a purchaſor; Alſo although that he ſhould have the land in nature of a deſcent, yet it doth not follow that he ſhall be in Ward: for in the Caſe of Wardſhip, there ought to be death natural, or civil; alſo it behoveth that the Anceſtor die in the Lords homage: And by this difference you ſhall better underſtand your Books. in 9 *H.* 6. 25. 9 *H.* 7. 25. & *Doctor* and *Student*. [62]

4. It

4. It was resolved, That if tenant in tail being in of another estate suffer a common Recovery, and a collateral ancestor of Tenant in tail releasé with warranty to the Recoveror, and afterwards the Recoveror maketh a feoffment to uses which are executed by the Statute of 27 *H.* 8. and afterwards the collateral ancestor dieth, in this case although the estate of the land be transferred in the *Post* before the descent of the warranty, yet the warranty shall bind, and the Terre-tenants may take advantage thereof by way of Rebutter: So if he to whom the warranty is made suffer a common Recovery, and afterwards the ancestor dieth, the Recoveror shall rebut by this warranty; And yet it is adjudged in 22 *Ass.* 37. that if Tenant in Dower doth enfeoff a Villain with warranty, and the Lord of the Villain entreth into the land before the descent of the warranty, and afterwards the wife dieth, this warranty shall not bind the right heir: So it is agreed by the Justices in 29 *Ass.* 34. if a collateral warranty be made to a bastard and his heirs, and living the ancestor, the bastard dieth without issue, and the Lord by escheat entreth, and afterwards the ancestor dieth, this warranty shall not bind. And although in the Case at Bar, as in these two Cases, before the warranty descend the estate of the land is transferred in the *Post*, yet
[*b*] there is a great difference between these two Cases and the Case at Bar; for he who hath the land by limitation of use, and by a common Recovery, cometh to the land by limitation and act of the party; and therefore he who hath a reversion by limitation of use, or by common Recovery, although he be in the *Post* in both Cases; yet he shall take benefit of a Condition as an assignee within the Statute of 32 *H.* 8. *cap.* 34. But when the Lord of a Villain entreth, he cometh to the land in respect of a title paramount, that is to say, in respect of Villeinage, and the Lord by Escheat in respect of a Seigniory which was a title paramount, and both these are in meerly in the *Post*, and not by any limitation or act of the party, and so manifest difference. And although some presume to say that those Books are erroneous, and against Law, and their reasons are, *scil.* because it was holden in the time of *E.* 3. *scil.* in 18 *E.* 3. 10. *a.* That the tenant shall not take advantage of a warranty by way of Rebutter, without shewing how the warranty extendeth to him, which is as much as to say, to make him assignee of the land, so that one who cometh in in the *Post* shall not Rebut. And in 10 *E.* 3. 42. 10 *Ass.* 5. in an Assise the tenant pleaded a warranty made to one *W.* &c. concluded upon the warranty as assignee to *W.* and demanded Judgment, &c. and was charged by the party, and by the Court to shew how he was assignee, and so did: And in 22 *Ass.* 88. in the same year when one of the said Cases was adjudged, it was holden that one shall not take advantage of a warranty made to another and the assignees by way of Rebutter, although he be an assignee in fact, and that in Case of Rebutter, as well as in Case of Voucher he ought to shew as well the deed which comprehendeth the warranty, as the deed which proveth the assignment: And these errors were the cause, as they said, that it was then holden, that neither the Lord of the Villain, or the Lord by Escheat should take advantage of a warranty by way of Rebutter: But I conceive, that the true reason of the said Books is utterly mistaken. For true it is that some Judges in those times thought, that none should take advantage by Rebutter of a warranty made to one, his heirs and assignees, but he who was heir or assignee; And that the Terre-tenant ought in Case of Voucher and Rebutter shew deeds of the same assignments; which opinion had great semblance of reason, because that the warranty extended only to the feoffee his heirs and assigns. And a thing which of its nature cannot be created without deed, cannot be assigned without deed: But I well agree the said opi-
[63] nions were against the true sense and judgment of Law in both points: For he who hath the possession of the land shall Rebut the demandant himself without shewing how he cometh to the possession, for it is sufficient for him to defend his possession, and to bar the demandant; and the demandant against the warranty cannot recover the land: And so was it holden 35 *Ass.* 9. that tenant by the Curtesie shall Rebut. And in 45 *E.* 3. 18. it is adjudged, that the donees in tail, although they be in of another estate shall Rebut the demandant. And in 38 *E.* 3. 26. it is adjudged that the assignee shall Rebut by force of a warranty, made to one and his heirs: And 7 *E.* 3. 34. & 46 *E.* 3. 4. feoffee of the donee in tail shall Rebut: I well agree, that if *A.* enfeoff *B.* his heirs and assignees with warranty, and *B.* enfeoff *C.* without deed, *C.* shall vouch *A.* as assignee, for the warranty extendeth to *B.* and his assignees of the land, and *C.* is his assignee thereof, and the assignment is not made of the warranty, for then it ought to be had by deed, but the warranty cannot be assigned, but extends to assignees of the land; and if the feoffment to *C.* was by deed, it is only of the land, and not of the warranty; and *C.* shall vouch *A.* as assignee of the land, because that the warranty by expres words extendeth to him; that is to say, to *B.* and his assignees of the land; and if the feoffee without deed shall not vouch as assignee, truly the feoffee by deed shall not vouch, for one of them is as well assignee of the land as the other, and none of them hath or can have assignment of the warranty.

And so it was resolved *Pasch.* 39 *Eliz.* in the Kings Bench between *Auder* and *Noke* upon a Writ of Error upon a Judgment given in a Writ of Covenant in the Common Pleas, by *Popham* chief Justice, *Gawdy*, and the whole Court, upon conference had with divers other Justices; That if a man make a lease for years, and covenanted with him and his assignees, his assignee by word shall have an Action of Covenant: So feoffee by word shall vouch as assignee; And therefore the Books which speak of shewing of the Deed comprehending the warranty, and of the Deed of assignment, are to be extended to things which lie in grant, which cannot be assigned without Deed. And so may all the Books be reconciled, 8 *Ass.* 33. 9 *Ass.* 11. 10 *Ass.* 5. 10 *E.* 3. 42. 11 *E.* 3. *Br. Monstrans de faits* 164. 13 *E.* 3 *Voucher* 17. 14 *E.* 3. *Garr.* 33. 12 *E.* 3. *Condition* 11. 17 *E.* 3. 68. 22 *Ass.* 88. 40 *E.* 3. 22, 23. 40 *Ass.* 30. 42 *E.* 3. 19. 3 *H.* 7. 13, & 14. 3 *H.* 6. 21. *Statham Assignee* 1.

But note Reader, that these were not the reasons of the said Books in 22 *Ass.* 37, and 29 *Ass.* 34. which have been alledged, for it appeareth by both the Books, that if the warranty had bound, and had
[*b*] been a bar in right in the one Case against the Villain, *hoc est*, if the warranty had descended before the Lord of the Villain had entred; and in the other Case, if the Ancestor had died before the Tenant (so that the warranty had descended before the Escheat) the Lord by Escheat in the one Case, and the Lord

of

of the Villain in the other Case, should lose advantage of the warranty by way of Rebutter: and that appeareth by the Rules of both Books. And therefore those who condemned the said Books understood not well the reason of them. And I dare not take upon me, or presume to oppose the Authority of the said Books. For Master *Littleton* seemeth to agree with the reason of them in his Chapter of *Discontinuance* 143. for he saith, *Nota*, if there be Lord and Tenant, and the Tenant giveth the tenements to another in tail, the remainder to another in fee; and afterwards the donee maketh a lease for life, and grants the reversion to another in fee, and the Tenant for life attorneth, and afterwards the grantee dieth without heir, by which the Reversion escheateth to the Lord; in this Case if the Tenant for term of life dieth, and the Lord by escheat entreth in the life of the Tenant in tail, it is no discontinuance, because that the Lord is in by way of escheat, and not by the Tenant in tail (and therefore the entry of the issue in tail in such Case was lawful, because that the Lord by escheat cannot take advantage of any warranty which Tenant in tail as was intended had made.) But *Littleton* saith, *secus esset*, if the reversion had been executed in the grantee, in the life of Tenant in tail, for he was in by the Tenant in tail.

Trin. 38 Eliz. *in the Kings Bench, between* Thomas Harvy *and* Walter Oswald.

Pennant's Case.

IN an *Ejectione firmæ* between *Harvy* Plaintiff, and *Oswald* Defendant, of a demise made 37 *Eliz.* by *John Pennant* to the Plaintiff, of certain lands in *Ardeley* in the County of *Essex* for three years, [64] from the feast of *All Saints ann.* 39. The Defendant pleaded, that the said *John Pennant* was seised of the said land in fee. And *anno* 35 demised the same to the Defendant for 10 years, yeilding the yearly rent of 33 l. 10 s. at the feast of S. *Michael*, and the Annunciation of our Lady; and that he was possessed till *Pennant* put him out, and made the lease to the Plaintiff, and he reentred, &c. The Plaintiff replied and confessed the said lease, but further said, that the said lease was upon condition, that if the Defendant, his Executors, or Administrators, at any time without the assent of the said *John Pennant* his heirs or assigns, grant, alien, or assign the said land, or any part thereof, that then it should be lawful for the said *Pennant* and to his heirs to reenter: And that the Defendant *anno* 35. granted to one *Taylor* parcel of the said land for 6 years without the assent of *Pennant*, for which he reentred, and made the lease to the Plaintiff, *prout*, &c.

The Defendant by way of rejoynder, saith, That before the reentry *Pennant* accepted the rent due at the feast of the Annunciation of our Lady after the assignment by the hands of the Defendant *Peter Oswald*: To which the Plaintiff by way of surrejoynder said, that *Pennant* before the receipt of the said rent had notice of the said demise to *Taylor*, upon which plea the Defendant did demur in Law; And *Trin.* 39 *Eliz.* it was adjudged for the Plaintiff. And in this Case these Points were resolved:

1. That the Condition being collateral, the breach of it may be so secretly contrived, that it is [b] not possible for the lessor to come to the knowledge of it, and therefore notice in this Case is material and issuable, for otherwise the lessee shall take advantage of his own fraud, for he may make the grant or demise so secretly, and so near the day in which the rent is to be paid, that it is not possible for the lessor to have notice of it: But if a man make a lease for years rendring rent, upon condition that if the rent be behind, that it shall be lawful for him to reenter; in that Case if the lessor demand the rent, and it is not paid, and afterwards he accept the rent (before the reentry made) at a day after, he hath dispensed with the Condition, for there the Condition being annexed to the rent, and he having made demand for the rent, he well knew that the Condition was broken: But in such Case, although he accept the rent (due at the day for which the demand was made) yet he may enter, for as well before as after his entry he may have an Action of debt for the rent upon the contract between the lessor and lessee, and that was the first difference between a Collateral Condition and a Condition annexed to rent, *vide* 45 *Ass.* 5.

The second difference was, That in Case of a Condition annexed to rent, if the lessor distrain for the same rent for which demand was made, by that also he hath affirmed the lease, for his distress for the rent hath affirmed the lease to have continuance after the rent received; for after the lease determined he cannot distrain for the rent, *vide* 14 *Ass.* 11. *Accord.*

The third was, That as well in Case of Condition annexed to rent, as in Case of a Condition annexed to any collateral act, if the conclusion of the Condition be, that then the lease for years shall be void, there no acceptance of rent (due at any day after the breach of the Condition) will make the void lease good. And so is difference between a lease which is (*ipso facto*) void without any reentry, and a lease which is voidable by reentry; for a lease which is *ipso facto* void by the breach of the Condition cannot be made good by any acceptance after, *Plow. Com.* in *Browning* and *Beston's* Case 133.

The fourth was, As affirmation of a voidable leaſe by word for money (or other conſideration) ſhall not avail the leſſee; ſo the acceptance of a rent (which is not *in eſſe*, nor due to him who accepteth it) ſhall not bind him: As if land be given to the husband and wife, and to the heirs of the body of the husband, the husband maketh a leaſe for 40 years and dieth, the iſſue in tail accepteth the rent in the life of the wife, and afterwards the wife dieth; yet the iſſue ſhall avoid the leaſe, for at the time of the acceptance no rent was *in eſſe*, or due to him, *vide* 32 *H.* 8. *Br. Acceptance.*

The fifth was between a leaſe for life and a leaſe for years, for in the Caſe of a leaſe for life, if the concluſion of a Condition annexed to rent (or other callateral act) be, that then the leaſe ſhall be [65] void, there (becauſe that an eſtate of freehold being created by livery cannot be determined before entry) in ſuch Caſe acceptance of rent due at a day after, ſhall bar the leſſor of his reentry, for this voidable leaſe may well be affirmed by acceptance of rent: And therefore, if a man make a leaſe for years upon Condition that if the leſſee do not go to *Rome*, or any other collateral Condition, with concluſion that the leaſe ſhall be void, in this Caſe, if the leſſor grant over the reverſion, and after the Condition is broken, the grantee ſhall take benefit thereof, for the leaſe is void, and not voidable by reentry; and therefore the grantee who is a ſtranger may take benefit thereof; but if the leaſe be made for life with ſuch Condition, there the grantee ſhall never take benefit of it, for the eſtate for life cannot determine before entry, and entry or reentry in no Caſe (by the Common Law) can be given to a ſtranger, 11 *H.* 7. 17. *Br. Cond.* 245. 10 *E.* 3. 52. *per Stone*, 21 *H.* 7. 12. So if a Parſon, Vicar, or Prebend make a leaſe for years rendring rent, and dieth, the ſucceſſor accepteth the rent, it is nothing worth, for the leaſe was void by his death, otherwiſe is it of a leaſe for life: But if a Biſhop, Abbot, Prior, or ſuch like, maketh a leaſe for years and dieth, if the ſucceſſor accepteth the rent, he ſhall never avoid the leaſe, for the leaſe was voidable, 11 *E.* 3. *Abbot* 9. 8 *H.* 5. 9. 37 *H.* 6. 3. 24 *H.* 8. *Br. Leaſes* 19. *F. N. B.* 50.

But note Reader, I conceive, that in the Caſe of a leaſe for life, if the leſſor accept the ſame rent which was demanded, he hath affirmed the leaſe, for he cannot receive it as due upon any contract, as in the caſe of a leaſe for years, but he ought to receive it as his rent, and then he doth affirm the leaſe to continue; for when he accepteth the rent, he cannot have an Action of debt for it, but his remedy then was by Aſſiſe, if he had ſeiſin, or by diſtreſs. And therefore I conceive in ſuch Caſe, the acceptance of the rent ſhall bar him of his entry: And it appeareth by *Littleton cap. Conditions fol.* 79. *a.* that in ſuch Caſe, if the leſſor bring an Aſſiſe for the rent, he relinquiſheth and waveth the benefit of his reentry, although it be for the rent due at the ſame day; but if he reenter firſt, then he may have an Action of debt for the rent behind, 17 *E.* 3. 73. 18 *E.* 3. 10. 30 *E.* 3. 7. 38 *E.* 3. 10. And afterwards *Mich.* 39 & 40 *Eliz.* in the Common Pleas, the which began *Hill.* 38 *Eliz. Rot.* 1302. in Treſpaſs between *March* and *Curteis*, for land in *Eſſex*, the like Judgment was given by *Anderſon* (chief Juſtice there) *Walmeſly* Juſtice, and the whole Court, That a leaſe for years was made rendring rent, and with [b] condition that if the leſſee ſhall aſſign his term, that the leſſor ſhall reenter, and the leſſee aſſigned his term, that although the leſſor accept the rent by the hands of the leſſee, yet for as much as the leſſor had not notice of the aſſignment, the acceptance of the rent did not conclude him of his entry; So this Point hath been adjudged in both Courts. See for the difference (which lie covertly in our Books) 45 *Aſſ.* 5. the Caſe of Waſt, 22 *H.* 6. 57. 6 *H.* 7. 3. *b. F. N. B.* 120, 122. *Plow. Comm.* 133, 545. 14 *Aſſ.* 11. 40 *E.* 3. *Entry Congeable* 41. 11 *H.* 7. 17. 17 *E.* 3. 52. 21 *H.* 7. 12. 21 *H.* 6. 24. 39 *H.* 6. 27. 26 *H.* 8.

And in theſe two Caſes many good Caſes and differences were taken, when acceptance of a rent (or other thing) ſhall bar him who accepteth it of the arrerages of the Rent, of Reentry, of Action, or of Execution, and the reaſon of the old Books ſhort Reported, and in an obſcure manner, well explained. If he who hath a rent Service or a rent Charge, accept rent due at the laſt day, and thereof make Acquittance, by that all the arrerages due before are diſcharhed: And ſo was it adjudged beween *Hopkins* and *Morton* in the Common Pleas *Hill. Rot.* 950. *Vide* 10 *Eliz. Dier* 271. but there the Caſe is left at large; and therewith agreeth 11 *H.* 4. 24. & 1 *H.* 5. 7. *b.* But note, it appeareth by the ſaid Record of 10 *Eliz.* that the bar unto the avowry ought to be in ſuch Caſe, with concluſion of Judgement, if againſt this deed of acquittance he ought to make avowry; ſo that it appeareth that the acquittance is the cauſe of the barr or eſtoppel in ſuch Caſe. For it appeareth by 8 *Aſſ. ult.* 9 *E.* 3. 9. 29 *E.* 3. 34. that if a man make a leaſe for life rendring rent, or if the Lord and Tenant be by fealty and rent, and the rent is behind for two years; and afterwards the leſſor or the Lord diſſeiſe the Terre-tenant, and afterwards the Tenant recovereth againſt him in Aſſiſe, and the rent which incurred during the diſſeiſin is recovered in damages, yet the Lord, or leſſor ſhall recover in the Aſſiſe the arrerages before the diſſeiſin; and the barr of the latter years is no bar of the arrerages before, *vide* 39 *H.* 6. *Barr* 79. where the principal Caſe of Annuity may be good Law, either becauſe that there the Defendant pleaded the acquittance by the laſt day, and demanded Judgment if Action, where he ought to have relied upon the acquittance. Or becauſe in the Caſe of Annuity he is not bound to pay the Annuity without acquittance: But in the Caſe of rent ſervice, or rent charge, he who receiveth it is not compellable to make an acquittance, but the making thereof is his voluntary act, to which the Law doth not compel him.

[66] If there be Lord and Tenant, and the rent is behind, and the Tenant maketh a feoffment in fee, if the Lord accept the rent or ſervice of the feoffee, he ſhall loſe all the arrerages in the time of the feoffor, although he make no acquittance; for after ſuch acceptance he ſhall not avow upon the feoffor at all, nor upon the feoffee, but for the ſervices which incurred in his time, as it appeareth in 4 *E* 3. 22. 7 *E.* 3. 8. 7 *E.* 4. 27. 28 *H.* 8. *Br. Avowry* 111. But in ſuch Caſe if the feoffor dieth, although that the Lord accept of the rent or ſervice by the hand of the feoffee he ſhall not loſe the arrerages, for now the Lord cannot avow upon other but the feoffee; and that which the Law compelleth one to do, ſhall not prejudice him.

So

So and for the same reason, if there be Lord, Mesn, and Tenant, and the rent due by the Mesn is behind, and afterwards the Tenant doth forejudge the Mesn, and the Lord receive the services of the Mesn, which now issue immediately out of the Tenancy, yet he shall not be barred of his arrerages which issued out of the Mesnalty: So if the rent be behind and the Tenant dieth, the acceptance of the services by the hands of the heir shall not bar him of his arrerages; for in these Cases although that the person be altered, yet the Lord doth accept the rent and services of him who only ought to do them. And all this appeareth in 4 *E.* 3. 22. 7 *E.* 3. 4. 7 *E.* 4. 27. 29 *H.* 8. *Avowry Br.* 111. But acceptance of a rent or services by the hands of the feoffee shall not bar the Lord of the Relief before due, for Relief is no service but a fruit and approvement of services, for if it were part of the services, then an Action of debt should not lie for the same so long as the rent continueth, but it is as a blossom or fruit fallen from the Tree; and for Relief it behoveth not to avow upon any person certain: And the Book in 4 *E.* 3. 22. is to be intended, that the father made a feoffment in fee by collusion and died; And there it is holden that if the Lord hath accepted the services by the hands of the feoffee in the life of the father, he shall lose his Relief.

But note Reader, that Relief was not taken within the equity of the Statute of *Marlebridge*, as it is adjudged in 27 *E.* 3. 63. but now it is remedied by the Statutes of 32 & 34 *H.* 8. of Wills. But in the Case before, the Lord (before acceptance of the rent or service by the hands of the feoffee) might have avowed upon the feoffee for all the arrerages incurred, as well in the time of the feoffor, as in the time of the feoffee, as it is adjudged in 7 *H.* 4. 14. 19 *E.* 3. *Avowry* 222. And by that which hath been said, it appeareth that acceptance of Homage or any other service of the heir, shall not bar the Lord of Relief, *vide temp. E.* 1. *Relief* 13. 15 *E.* 3. *ibid.* 5. 16 *E.* 3. *ibid.* 10. 3 *E.* 2. *Avowry* 190.

And it was further said, That if there be Lord and tenant by Knights service, and the tenant enfeoffeth his son and heir apparent within age by collusion, if the Lord accept of the services by the hands of the feoffee, he shall lose the Wardship: But against that was objected:

1. That the feoffee might compel the Lord for to avow upon him by giving of notice and tender of the arrerages, and that which the Law enforceth one to do, shall not prejudice or estopp him. [b]

2. That acceptance doth not conclude before title accrued, and no title of Wardship in this Case was accrued to the the Lord at the time of the acceptance, but it came after the death of the feoffor.

As to the first, it was answered, That the feoffee by no tender that he can make, can compel the Lord for to avow upon him, for the Lord may shew, that the feoffment was by collusion, against the Statute of *Marlebridge cap.* 6. and therefore he shall maintain his Avowry upon the feoffor, for the Law doth not compel him to avow upon the feoffee to his prejudice.

As to the second it was answered, That the Statute of *Marlebridge* hath made such feoffment made by collusion as void and of no effect as to the Lord: And therefore if the Lord will affirm the feoffment, and wave the benefit of the Act, by accepting of the feoffee for his Tenant, he shall purge the collusion, and lose the Wardship. And the reason of *Prisot* 33 *H.* 6. 16. that such acceptance shall not conclude the Lord was, because that the feoffee in such Case shall compel the Lord to avow upon him, but that is not Law; And against the opinion of *Prisot*, see 31 *E.* 3. *Garde* 154. 32 *E.* 3. *Garde* 33. *F. N. B.* 142. And now the doubt in 36 *E.* 3. *Garde* 11. is well explained.

Mich. 39 & 40 Eliz. *in the Kings Bench, which began Hill.* 34 Eliz. Rot. 169.

Westby's Case.

[71.b.] JOhn *Westby* brought an Action of debt against *Skinner* and *Catcher* late Sheriffs of *London* for an Escape, and the Case was: One *Bustard* was severally in Execution under the custody of the Defendants then Sheriffs of *London*, as well at the suit of one *Dighton*, as at the Plaintiffs suit, and the Defendants at the end of their year delivered over the body of *Bustard* amongst others to the new Sheriffs by Indenture, in which Indenture the Execution of *Dighton* was mentioned, but the Execution at the suit of the Plaintiff was omitted; And afterwards *Bustard* always being in the Gaol in the times of the new Sheriffs escaped. And if the Defendants shall be charged with this Escape was the Question. And it was strongly objected on the Defendants part, that they could not be charged. For they had delivered the body of the Defendant then being in the Gaol to the new Sheriffs, and therefore the escape did begin in their time by which they ought to be charged, and not the old Sheriffs; and for as much as the new Sheriffs had the party in their custodies, they ought at their peril to take notice of all Executions (being matters of Record) against him, and ought to keep him till all are satisfied. But it was adjudged that the Defendants being the old Sheriffs shall be charged, and in this Case four Points were resolved by the Court.

1. Where the body of *Bustard* was delivered to the new Sheriffs as in Execution at the suit of *Dighton* only, by that he was out of custody of the old Sheriffs; and he cannot be within the custody of the new Sheriffs for the Plaintiffs Execution, because he was not delivered to them, nor they charged with him for the Plaintiffs Execution; and although he was within the walls of the Prison, yet it was an escape in [72] Law as to the Plaintiff: For the Plaintiff in whom was no default, ought not to be without remedy in this Case, but because the default was in the Defendants in as much as they omitted the Plaintiffs Execution in the Indentures, for this cause it is reason that they shall be charged: And as to that which was asked, When the Escape began in this Case? It was answered and resolved, That *eo instante*, that the old Sheriffs deliver their Prisoners to the new Sheriffs they cease to have the custody of any of them; and *eo instante* doth the Escape begin as to the Plaintiff. So Reader, you may observe, that the Law doth adjudge one who remaineth in Prison to escape. See *Plow. Comm.* 37. *Plat*'s Case, the opinion of *Chomeley* chief Baron.

2. It was resolved, That the old Sheriffs ought to give notice to the new Sheriffs of all the Executions against any who are in their custody although their Executions be of Record, yet the new Sheriffs shall not take notice of them at their peril, but shall be charged only with such whereof the old Sheriffs gave them notice: For it was observed, that in the general Case of Sheriffs of *England*, when the King maketh a new Patent to another to be Sheriff, although the old Sheriff had his office but *durante beneplacito*, yet it appeareth by the Register, that presently after the Patent a Writ *de Commitatu Commiss.* which is commonly called a Writ of Discharge issueth: The effect of which Writ is, *Rex omnibus ad quors &c. salutem, Sciatis quod commissimus dilecto nobis S.* (who is the new Sheriff) *Com' nostr' N, cum pertinentiis custodiend', quamdiu nobis placuerit, &c. In cujus rei, &c.* And then is another Writ directed to the old Sheriff, and the effect thereof is, *Et mandatum est N. nuper Vic' Com' præd' quod eidem S. Com' prædict' cum pertinen', una cum rotulis, brevibus, memorandis, & omnibus aliis officium illud tangent' quæ in custodia sua existunt, per indent. inde modo debit' conficiend' liberet custodiend' in forma prædict', Teste, &c.* And all this appeareth in the *Register* 295. *a.* & *b.* by which appeareth the great care the Law hath of Executions, which are the fruit of every suit. But it was resolved, that till the Prisoners are delivered to the new Sheriffs, they remain in custody of the old Sheriffs, notwithstanding the new Letters Patents, the Writ of Discharge, and the Writ of Delivery. And although it was said by some in the Case at Bar, That if the old Sheriffs had given notice to the new Sheriffs by word of the Plaintiffs Execution, the same had been sufficient; yet it appeareth by the *Register*, that the new Sheriff [b] may compel the old Sheriff to make the delivery by Indenture. Note in *London* the Major and Comminalty have the Office of Sheriffs of *London* and *Middlesex* by Charter, and two Sheriffs are yearly chosen: So it was agreed that after their Election, and before the delivery over of the Prisoners to the new Sheriffs, they remain in custody of the old Sheriffs.

3. It was resolved, That if the Sheriff hath in his custody divers persons in Execution, and dieth, and afterwards a new Sheriff is made, he ought to take notice at his peril of all the Executions which are against any person which he findeth in the Goal, and that for necessity; for there is no person to make delivery of them to him, or to give him notice: And there is no mischief to the Sheriff if he keep them well, until he have perfect notice of all the Executions, but if he without punishment may suffer them who are in Execution to escape, great inconvenience would hereupon follow.

4. It was resolved, If the Sheriff dieth, and before that another is made, one who is in Execution breaketh Prison and goeth at liberty, it is no Escape; for when the Sheriff dieth, all the Prisoners are in the custody of the Law till a new Shriff be made, and therefore although they were in the *interim* out of the walls of the Prison, yet the Law hath the custody of them, and keepeth them in Execution without any fresh suit in what place soever they are, and they may be taken in Execution at any time after. For no escape can be to the Plaintiffs prejudice, but when some person may be charged for the same; and the Law deceiveth no man.

Mich. 40 & 41 Eliz.

The Case of the Dean and Chapter of *Norwich*.

[73] KIng *H.* 8. by his Letters Patents bearing date 2 *Maii*, *anno* 30. of his reign, *Authoritate sua regia, ac authoritate sua in terra Supremi capitis Ecclesiæ Anglicanæ quæ tunc fungebatur, de gratia sua Speciali, &c. Cœnobium de Priore & Conventu Ecclesiæ Cathedralis Sanctæ Trin' Norwici, in Decanum & Capitulum Ecclesiæ Cathedralis Sanctæ Trin' Norwici transposuit & mutavit.* And by the said Letters Patents the King discharged the Prior and Covent by their special and particulars names, *tam de habitu suo, quam de regula*, (the said Priory being of the Order of S. *Bennet*:) *ipsosque Decanum, Prebendarios, & Canonicos in Ecclesia prædict. realiter posuit & constituit, & concessit eisdem Decano, Prebendariis & Canonicis; Quod ipsi & successores sui sub nomine, & per nomen Decani & Capituli Ecclesiæ Cathedralis Sanctæ Trin' Norwici, sint de cætero imperpetuum unum corpus corporat' in re & nomine; Ac*

Ac eosdem Decanum & Capitul' perpetuis temporibus duratur' corporavit, &c. Et ulterius concessit quod idem Decanus & Capitulum, & successores sui omnia & singula dominia, maneria, terras, &c. & hæreditament' quæcunque, &c. quæ ad prædictum nuper Priorem in jure Ecclesiæ Cathedralis prædict' spectabant & pertinebant, habere, tenere, gaudere, & possidere sibi & successoribus suis imperpetuum, &c. possint & valebant, &c. And further granted, that they shall be the Chapter of the Bishop of *Norwich*, and his successors. [b] And upon the sight of the foundation, and divers other ancient Instruments of the said Priory was great Question who was Founder, *scil.* the King, or *Herbert*, sometime Bishop of *Norwich*. But it was admitted without any prejudice to any party, that *Herbert* was Founder; And afterwards the said Dean and Chapter by their deed enrolled surrender to King *E.* 6. in the second year of his reign their Church and all their possessions: And afterwards the King in the same year doth anew incorporate them, *per nomen Decani & Capituli Ecclesiæ Cathedralis Sanctæ & individuæ Trinitat' Norwici, ex fundatione Regis Edw.* 6. And afterwards the King in the same year doth regrant their Church and all their possessions (except certain Mannors, &c.) to them by the name of Dean and Chapter *Ecclesiæ Cathedralis Sanctæ & individuæ Trinitatis Norwici*, (omitting these words, *ex fundatione Regis Edw.* 6.) and to their successors. And one *William Downing* and other needy and indigent persons who endeavour to repair their poor declining estates by the dissolution of the said Cathedral Church, and of all the possessions of the said Dean and Chapter did pretend, That the said Cathedral Church and all the said possessions were concealed from the Queen. And that they were (in the Queens great deceit under general and obscure words) passed by Letters Patents of concealment. And they did pretend that these possessions were concealed for two causes.

First, That the said Translation was void, and then the old Corporation of Prior and Covent remained till the death of all the Monks (which happened *anno* 18 *Eliz.*) And that by the death of all the Monks, the said possessions came to the Queen by the Statute of 31 *H.* 8. of Monasteries.

Secondly, Admitting that the Translation was good, yet by the said surrender made to King *Edw.* 6. the King was seised of all their possessions, and the regrant aforesaid was void; for the said misnosmer of the Corporation of the Dean and Chapter, *scil.* by reason of the omitting the said words (*Ex fundatione Regis Edw.* 6.) And this great Case concerning a Cathedral Church and all the possessions thereof, and concerning interest mediate and immediate a great number of the farmers and lessees were by the command of the Queen (who was very greatly offended that she was so deceived, and especially of a Cathedral Church which was of the erection of her most happy father) she her self also much favouring the said Cathedral Church referred the consideration of this Case to Sir *Tho. Egerton* Keeper of the Great Seal, *Popham* and *Anderson* chief Justices, and *Periam* chief Baron. And now *Mich.* 40 & 41 *Eliz.* at the Lord Keeper of the Great Seals house, called *York-house*, before them this Case was [74] argued by the Council of the said Concealors; and the effect of their Objections and Arguments here follow.

First, They did admit that the said Priory was of the foundation of *Herbert* late Bishop of *Norwich*; and then they said, that for as much as the Founder was not party to the said Translation, the said Translation was void. And to prove that the Founder of a Priory hath such interest that he ought to joyn, divers Books were cited; that is to say, 39 *H.* 6. 1. 4. 50 *Ed.* 3. 27. 11 *E.* 3. *Quare Impedit* 157. 22 *H.* 6. 25. 9 *H.* 6. 33. 24 *Ed.* 3. 77. *b.* 30 *Ed.* 3. 21. *b.* 6 *E.* 3, 34. A *Quare Impedit* brought by the Founder of a Priory. But as to this Point it was answered by *Coke* Attorny General, That first, if the King be Founder, as he affirmed upon the sight of the Foundation and other Records he was, notwithstanding the admittance in 3 *H.* 7. then the Case is without Question. But admit that the Bishop were Founder, yet the Translation was good; for it appeareth by the old Books, that the Pope might have discharged a Monk, or other dead person in Law of his Profession, as it appeareth in 3 *H.* 6. 23. by *Martin*, 26 *H.* 8. *Nonability*, 14 *H.* 8. 16, *&c.* And by consequence by the Statute of 25 *H.* 8. *cap.* 21. King *H.* 8. might so do. And accordingly he hath discharged the said Prior, and Monks of their Profession, and translated them into Dean and Chapter by the said Letters Patents, and so none of the said Books which were cited by the adverse party may be applied to this Case. Also there is not any prejudice to the Founder, for he remaineth Founder notwithstanding this Translation, and nothing is altered but only the rule and profession; and where the Prior and Covent was the Chapter of the Bishop, now the Dean and Chapter do supply the same. And that this Translation was good the Case of 11 *Eliz. Dier* 280. *Corbets Case* proveth it; where the Case was of the Translation of this same Deanery; and by the judgment of the Parliament in 33 *H.* 8. *cap.* 29. it appeareth, that such Translations made by King *H.* 8. from Prior and Covent into Dean and Chapter were good. Further it appeareth, 17 *E.* 3. 40. & 10 *E.* 3. 1. *b.* that all Chapters were Monks, and notwithstanding the translation of them into Prebends and Canons, and change of their habit, the advowson did remain as it was before; And for such Translations see 9 *H.* 6. 13. 38 *Ass.* 22. 49 *Ass.* 8. 49 *E.* 3. 14. 20 *E.* 3. *Nonability* 9. 22 *R.* 2. *Brevè* 936. 14 *H.* 4. 10. 7 *E.* 4. 32. But admit this Translation were void for this or some other cause; yet the same is made good by the Statute of 35 *Eliz. cap.* 3, in which the preamble which declareth the mischiefs, and the parts of the purview and body of the Act are to be considered. It appeareth by the preamble, that divers doubts and ambiguities had been moved concerning two things: [b]

1. Touching surrenders, grants and conveyances made to King *H.* 8. by Abbots, Priors and other Religious and Eccleastical persons after the fourth day of *February* 27 *H.* 8.

2. Touching the validity of erections of such Deans and Chapters, and Colledges which were erected, ordained, made or founded, by *H.* 8. after the said fourth day of *February*; to explain and remove which doubts two remedies were provided by the said Act. First, to settle and establish all the possessions of such Religious persons in the King. Secondly, to perfect and establish the Deans, Chapters and Colledges, erected, founded, incorporated and endowed by King *H.* 8. as is aforesaid.

And

And this Case is within the latter clause; For first when the King created them into Dean and Chapter, here is a Dean and Chapter newly created and erected by the King: also it is within this word incorporate; for without question the King by his Letters Patents hath incorporated them *per nomen Decani & Capituli, &c.* And in two places of the said Foundation the King useth the same word, *viz.* (Corporations) and it is to be well observed, how beneficially and learnedly the Statute of 35 *Eliz.* is endited, for the remedy of the said doubts and ambiguities. For the Act doth not make all erections, foundations, &c. made by King *H.* 8. &c. good, &c. for then it may be objected, that there was not any erection, foundation, &c. in Law, *Et quod contra legem factum est, pro infecto habetur*: And yet such objection (if the Act had been so penned) had been material: But in our Case to take away all Objections, the words of the Act are; All Letters Patents made, &c. for the erection, foundation, incorporation and endowment of any Dean and Chapter, or Colledge, were and shall be reputed, taken and adjudged to have been good, perfect and effectual in Law, for all things therein contained, according to the true intent and meaning of the same: Any thing, matter or cause to the contrary thereof in any wise notwithstanding.

And without question the said Letters Patents of 30 *H.* 8. were made for the erection and incorporation of the Dean and Chapter. And the said Letters Patents are by the Act adjudged to be good for all things therein contained; and in them is contained not only their incorporation into a Dean and Chapter, but also a grant to them and their successors that they shall enjoy and have all Lordships, Mannors, Lands, &c. as appeareth by the Charter before: So that the incorporation, and all which is contained in the said Letters Patents is adjudged good: and it is also adjudged by Parliament, that they shall enjoy all the Lordships, Mannors, Lands, &c. which
[75] were parcel of the possessions of the Priory aforesaid; and there is no saving but only for rights, &c. before the fourth day of *February anno* 27 *H.* 8. So it is manifest that this Act of 35 *Eliz.* being an Act of explanation (which always is beneficially to be interpreted) adjudgeth the Corporation good, and establisheth their possessions in them against all titles which may accrue to the King or any other after the fourth day of *February, anno* 27 *H.* 8. And therefore all those who pretend any title by any Letters Patents of concealment, are for ever barred of their pretences and claims which they can make to any of these possessions.

Secondly, It was objected, That although the Translation was good, yet the Dean and Chapter had not any estate or right in the said possessions, for by their surrender to King *Edw.* 6. of their Church, and all their Mannors, Lands and Possessions, the King was seised of them in fee; then the King new incorporateth them, *Per nomen Decani & Capituli Ecclesiæ Cathedralis Sanctæ & individuæ Trinitat' Norwicens. ex fundatione Regis Ed.* 6. And afterwards the King regranteth their possessions to them by the name of Dean and Chapter, *Sanctæ & individuæ Trinit. Norwici, &c.* omitting these words, *ex fundatione Regis Edw.* 6. which grant was void, as it was objected, by reason of misnosmer of the Corporation, in as much as the name of the Founder being material, part of the name of the Corporation was omitted.

To which it was answered by the Attorney General, That the said Dean and Chapter had good estate and right in the said Possessions for divers causes.

1. Although they had surrendred their Church and possession, yet their Corporation doth continue, and they remain the Chapter of the Bishop; For although there cannot be a Warden of a Chappel, if the Chappel and all their possessions be aliened as seemeth by 15 *Ass.* 8. because he cannot be Warden of nothing, yet the same is not like, nor can be applied to the Case now in question. And for the better apprehending of that which was said, That in as much as it was impossible that the Church of God should continue without Sects and Heresies, it was in Christian policy thought and rethought necessary, that every Bishop should be assisted with a Council, *scil.* with a Chapter, and that for two causes:

1. To consult with them in matters of difficulty, and to assist them in deciding of controversies concerning Religion, to which purpose every Bishop *habet Cathedram.*

2. To consent to every grant, &c, which the Bishop shall make to bind his successor. For it was not reasonable to impose so great a charge, or to repose such confidence in any sole person, or to give power
[b] to one person only to prejudice his successor. And therefore it appeareth in 25 *Ass.* 8. 17 *E.* 3. 40. 10 *E.* 3. 10. 50 *E.* 3. 16. that at the first all the possessions were to the Bishop, afterwards a certain portion was assigned to the Chapter; *Ergo*, the Chapter was before that they had any possessions. And of common right, the Bishop is Patron of all the Prebends, because that their possessions are derived from him, *Et Præbenda dicitur a præbendo, quia præberet auxilium Episcopo*; So that although the Dean and Chapter depart with their possessions, yet for necessity the Corporation doth remain as well to assist the Bishop in his calling, as to give their assent to their estate, &c. which he shall make, &c. of his Temporalties; and so long as the Bishoprick remaineth, they being his Chapter and Council, they may well remain, although they have not any possessions, and shall be now as they were at the first without any possessions; and especiall when the Episcopacy doth consist of all Spiritualty, as *Stouf* saith in 10 *E.* 4. 1. *b.* in the Case of the Bishop of *Norwich*, and 25 *Ass.* 8. by *Fisher*. And in 17 *E.* 3. 59. The Prior and Friers Carmelites had not any place nor possessions: And *Br. tit. Corporation* 78. *ann.* 32 *H.* 8. *Fitz* holdeth, that if an Abbot, Prior and Covent sell all their possessions, yet the Corporation doth remain, which without question is good Law if they were the Chapter to a Bishop. And in 15 *Ass.* 8. it is holden, That if the body of a Prebend be a Mannor, and no more, and the Mannor be recovered from him by title paramount, yet his Corporation doth remain, for he hath *Stallum in choro, & vocem in Capitulo*, and he is a Prebendary, although he have not possessions; which is all one with our Case, for all the Chapters are Prebends.

Also

Also the Attorney said, that it appeareth in this very Case; that after the Dean and Chapter had granted and surrendred their Church and possessions to King *E.* 6. the King by his Letters Patents doth incorporate them *per nomen Decani & Capituli Ecclesiæ Cathedralis Sanctæ & individuæ Trinitatis Norwicens. ex fundatione Regis E.* 6. And three days after, the King by other Letters Patents granteth their Church and possessions as is aforesaid; by which and many like foundations it appeareth, That there may be a Dean and Chapter without a Church or any possessions; and if the Law should not be so, many great inconveniences would follow. And in 10 *Eliz. Dier* 273. although that the Dean and Chapter of *Wells* by expres words grant and surrender *Diaconatum de Wells, &c.* yet it was not thought sure till the grant and surrender was established and confirmed by Act of Parliament.

And although that all Bishopricks were of the foundations of the Kings of *England*, and therefore in ancient time they were donative, and given by the Kings, as appeareth in 17 *E.* 3. 40. and by the Statute of 25 *E.* 3. *de Provisoribus*, yet afterwards (as it appeareth by the said Book and the said Act) the Bishopricks came by the grants of Kings eligible by their Chapters: And therefore if by the surrender of the Dean and Capter their Corporation shall be dissolved, it will bring in three inconveniences; 1. To the Bishop concerning his assistance in his Episcopal function: 2. To Bishops and others, touching the confirmation of his Grants: 3. To all the Church in general; for how shall the Bishop be chosen in such Case? And therefore to shun such and many other inconveniences, it was concluded that the Corporation made by King *H.* 8. did remain, and so the grant made to them by such name was good and well made. *Vide F. N. B.* 195. that the Bishop and Chapter are but one body, although their possessions be several. But to make this Case clear, the Attorney moved, that admitting the Corporation newly made by King *E.* 6. was good, and that their old Corporation was surrendred, and that the said words which were omitted, *scil. ex fundatione Regis E.* 6. were material, and not words of ornament only; yet the Kings grant to them was good, notwithstanding this misnosmer by the Statute of 1 *E.* 6. *cap.* 8. of Confirmations; which Statute reciteth, That where King *E.* 6. had made divers grants as well to bodies Politick and Corporate as to divers and sundry of his loving and obedient Subjects, &c. in avoiding of which sundry and many ambiguities, &c. have and might be moved, &c for lack of true naming of the same bodies Politick or Corporate; It is enacted, that all such grants made, or during his life to be made shall be good, notwithstanding any of the Causes above mentioned: So that the lack of the true meaning of the said Corporations, &c. to which the King had granted, or after should make any grant is remedied by the expres words of the said Act. [76]

And after these Arguments upon conference between the Lord Keeper of the Great Seal, and the said Justices, and upon great consideration had of the said Points, it was unanimously agreed and resolved by them, That if any imperfection were in the said Translation, that the said Act of 35 *Eliz.* had made it without question. And so was it resolved as to this Point in this very Case of the Dean and Chapter of *Norwich*, *Mich.* 35 & 36 *Eliz.* at S. *Albans* by all the Judges of *England*.

2. If the Corporation of the Dean and Chapter made by King *H.* 8. were gone by the said surrender made to King *Ed.* 6. And if the misnosmer were material, and not an additional ornament; yet it was resolved and agreed, That the said Act of Confirmation of 1 *E.* 6. hath made the same good, notwithstanding the said misnosmer; and upon these two Points they resolved without any question.

3. It was holden by the Lord Keeper of the Great Seal and the said Justices, That the old Corporation of Dean and Chapter did remain, notwithstanding the said surrender of their Church and of all their possessions. [b]

Note, Reader, the great assurance and establishment which is made by the good and strong Act of Parliament of the said most illustrious, and most noble Queen *Elizabeth* in the 34th year of her reign, not only of all Foundations of Cathedral Churches and Colledges in any manner founded or translated, or mentioned to be founded or translated by the said King *H.* 8. but also of all subjects which have any estate or interest in any possessions of any Abbot, Prior, or any other such Religious persons, notwithstanding that they made not any surrender to King *H.* 8. or that their surrender was insufficient; or that the Record of the same be imbezilled or lost. And notwithstanding divers other defects, all which are remedied by the said most excellent Act of Parliament, the fatal Plea to all Concealments as to those possessions. And although that these Resolutions properly concern the Meridian of the Cathedral Church of *Norwich*; yet it will well serve as well for many other Cathedral Churches, as for divers Colledges in the University of *Cambridge* and *Oxford*.

Hill.

Hill. 44 Eliz. *in the Chancery.*

Fermor's Caſe.

[77] IN a Caſe depending in Chancery, between *Richard Fermor* Eſquire Plaintiff, and *Thomas Smith* Defendant upon the hearing of the Cauſe before Sir *Thomas Egerton* Knight Lord Keeper of the Great Seal, the Caſe was ſuch: *Richard Fermor* the Plaintiff being ſeiſed of the Mannor of *Somerton* in fee, by Indenture *6 Julii* 20 *Eliz.* demiſed a Meſſuage parcel of the ſame Mannor to *Thomas Smith* the Defendant for 21 years, rendring the yearly rent of 3 l. during the term, by force of which the Defendant entred and was poſſeſſed; He was alſo poſſeſſed of divers other parcels of the ſaid Mannor at the will of the Plaintiff, rendring 20 s. *per ann.* and held divers other parcels of the ſaid Mannor by copy of Court Roll according to the cuſtom of the ſaid Mannor, rendring 40 s. rent *per ann.* all which lay in *Somerton*; And the ſaid *Thomas Smith* was ſeiſed in his demean as of fee of divers lands in the ſame Town which were his proper inheritance. And afterwards by his deed 15 *Octob.* 25 *Eliz.* demiſed the ſaid houſe and all the ſaid land which he held for years, at will, and by copy to one *Chappel* for his life, *Paſch.* 35 *Eliz.* *Smith* levied a Fine with proclamations of as many of the meſſuages and lands as comprehended as well all the ſaid lands which he held for years, at will, and by copy, as his own inheritance, by covin and practice to bar the Plaintiff of his inheritance; the proclamations and five years paſſed, *Smith* at all times [b] before and after the Fine continued in poſſeſſion, and paid the ſaid ſeveral rents to the Plaintiff. *Chappel* died, the 21 years expired, and now *Smith* claimed the inheritance of the land which he held by leaſe, at will, and by copy, and would have barred the Plaintiff by force of the ſaid fine with the proclamations, and four years paſt. And the Lord Keeper of the Great Seal thinking and conſidering of the great miſchiefs which might enſue by ſuch practices, and on the other ſide conſidering that the fines with proclamations are general aſſurances of the Realm, referred the Caſe (being a thing of great importance and conſequence) to the conſideration of the two chief Juſtices *Popham* and *Anderſon*, and after conference amongſt them, they thought it neceſſary that all the Juſtices of *England*, and Barons of the Exchequer ſhould be aſſembled at Serjeants Inn in *Fleetſtreet* for the reſolution of this great Caſe. And accordingly the ſame Term all the Judges of *England* and the ſaid Barons of the Exchequer met at Serjeants Inn, where the Caſe was debated amongſt them. And at length it was reſolved by the two chief Juſtices, *Popham* and *Anderſon*, and by *Gawdy*, *Walmeſley*, and all the other Juſtices of *England* and Barons of the Exchequer (except two) that the Plaintiff was not barred by the ſaid fine with proclamations, and that for four cauſes.

1. The makers of the Act of 4 *H.* 7. *cap.* 24. did never intend that ſuch fine levied by fraud and practice of leſſee for years, tenant at will, or tenant by copy of Court roll, who pretend no title to the inheritance, but intend the diſ-enheriſon of their leſſors or Lords, ſhould bar them of their inheritance, and that appeareth by the preamble of the Act of 4 *H.* 7. where it is ſaid, That fines ought to be of greateſt ſtrength to avoid ſtrifes and debates, &c. But when leſſee for years, or at will, or tenant by copy of Court roll make a feoffment by aſſent and covin that fine ſhall be levied, the ſame is not to avoid ſtrife and debate; but by aſſent and covin to begin ſtrife and debate where none was; And therefore the Act doth not extend to eſtabliſh any eſtate made by ſuch fraud and practice.

2. It was never the intent of the makers of the Act, that thoſe who could not levy a fine, ſhall by making of an eſtate by wrong and fraud be enabled by force of the ſaid Act to bar thoſe who had right by levying of a fine: For if they themſelves without ſuch fraudulent eſtate cannot levy a fine to bar them which have the free hold and inheritance, certainly the makers of the Act did not intend that by making of an eſtate by fraud and practice they ſhould have power to bar them; and ſuch fraudulent eſtate is as no eſtate in the judgment of Law.

3. As it is ſaid in *Dalamer's* Caſe in *Plow. Comm.* 352. if any doubt be conceived upon the words or meaning of an Act of Parliament it is good to conſtrue the ſame according to the reaſon of the Common [78] Law; but the Common Law doth ſo abhor fraud and covin, that all Acts as well Judicial as others, and which of themſelves are juſt and lawful, yet being mixt with fraud and deceit, are in judgment of Law wrongful and unlawful: *Quod alias bonum & juſtum eſt, ſi per vim vel fraudem petatur, malum & injuſtum efficitur:* And therefore if a woman hath title to dower which is one of the things favoured in Law, and by covin between her and another cauſeth a ſtranger to diſſeiſe the tenant of the land, to the intent that ſhe may bring a Writ of Dower againſt him, which is done accordingly, and the woman recover againſt him upon a juſt and good title, yet all the ſame is void and of no force to bind the Terre-tenant; *a fortiori* in the principal Caſe when the leſſee for years maketh a feoffment by covin, which amounteth to a wrong and Diſſeiſin, a fine levied by him who is *particeps criminis*, and who had not, nor pretended any right to the land ſhall not be a bar to the leſſor. And that recoveries in Dower, or any other real Action ſhall be made a good title againſt the Tenant who cometh to the land by wrong and covin are void and of no force appeareth by 41 *Aſſ.* 28 44 *E.* 3. 25 *Aſſ.* 1. 22 *Aſſ.* 92. 11 *E.* 4. 15 *E.* 4. 4. 7 *H.* 7. 11. 18 *H.* 8. 5. 12 *Eliz. Dier* 295. For although that his right be lawful, and that he hath purſued his Recovery by judgment in the Kings Court, yet his covin maketh all that unlawful and wrongful, and yet Recoveries and chiefly upon good title are much favoured in Law: Alſo the right of inheritance of feme Coverts, and infants, are much favoured in Law; and yet if a feme covert, or an infant be of covin and conſent, that the diſcontinuee ſhall be diſſeiſed, and that the diſſeiſor ſhall enfeoff them,

them, and all the ſame is done accordingly, they are not remitted, as appeareth by *Littleton*, Chap. *Remitter* 151 & 19. *H.* 8. 12. And there it is holden by ſix Juſtices, that in ſuch caſe if the diſſeiſor enter by covin to the intent to enfeoff an infant, although that the infant be not of the covin, &c. yet he ſhall not be remitted, becauſe he who is in by him who maketh the covin ſhall be in the ſame plight as he who did the covenous act. And it is agreed in 19 *H.* 8. 12. that if a man make a diſſeiſin to the intent to make a feoffment with warranty, although he maketh the feoffment in 20 months after, yet it is a warranty which commenceth by diſſeiſin.

So if one make a gift in tail to another, and the unkle of the donor diſſeiſeth the donee, and maketh a feoffment with warranty, and the unkle dieth, and the warranty deſcendeth upon the donor, and afterwards the donee dieth without iſſue, the donor bringeth a *Formedon* in the Reverter, and the Tenant pleadeth the feoffment with warranty, the demandant ſhall avoid the ſame, becauſe it began by diſſeiſin, and yet the diſſeiſin was not immediately done to the donor, but to the donee, but by it his reverſion was deveſted, and yet warranties are much favoured in Law. And it appeareth in 8 *Eliz.* 249. *Dier*, that a *vacat* was made of a recovery in the Common Pleas had by covin. The Law hath ordained, that he who will be aſſured of his goods buy them in open market, and this ſale ſhall bind all ſtrangers as well as the ſeller; yet it is agreed in 33. *H.* 6. 5. that a ſale in Market overt ſhall not bind him who hath right to the goods, if the ſale be by fraud, or if the vendee hath notice that the property of the goods was belonging to another: So the Law hath ordained the Court of Common Pleas as an open Market for aſſurances of land by fine, ſo that he who will be aſſured of his land not only againſt the ſeller but all ſtrangers, it is good for him to paſs the ſame in this Market overt by fine; for as it is ſaid, *finis finem litibus imponit*; And yet covin and deceit in the Caſe at Bar ſhall avoid it. In 4 *E* 2. *Cui in vita* 22. it is holden, That a Reſignation made by an Abbot by covin ſhall not abate the Writ. 34 *E.* 1. *Warranty* 88. & 19 *E.* 2. *Aſſets* 3. & 31 *E.* 1. *voucher* 301. a covenous conveyance that Aſſets ſhall not deſcend is nothing worth. And it appeareth in 17 *E.* 3. 49. & 21 *E* 3. 3. 46. that an eſtate made to the King, and Letters Patent granted over, and all by covin by him who granted to the King and the Patentee to make evaſion out of the Statute of Mortmain, ſhall not bind, but ſhall be repealed. And 17 *Eliz. Dier* 339. a preſentation obtained by colluſion is void. And 17 *Eliz. Dier* 339. Letters of Adminiſtration obtained by colluſion are void and ſhall not repeal a former Adminiſtration: See 13 *Eliz. Dier* 295. many Caſes put concerning covin. [b]

And thereupon it was concluded, That if a recovery in Dower or other real Action, if a remitter to a feme covert or infant, if a warranty, if a ſale in open Market, if the Kings Letters Patents, if a preſentation, adminiſtration, &c. *ſcil.* temporal acts and Eccleſiaſtical, ſhall be avoided by covin; by the ſame reaſon a fine in the principal Caſe levied by fraud and covin as is aforeſaid ſhall not bind; for *fraus & dolus nemini patrocinari debent*.

Note Reader, in 33 & 34 *Eliz.* in the Kings Bench between *Robert Launе* Plaintiff, and *William Toker* Defendant in *Ejectione firmæ* of lands in *Ilfordcoome* in the County of *Devon*, it was adjudged, that where Tenant for life levieth a fine with proclamations, and 5 years paſs in his life, that the leſſor ſhall have 5 years to make his claim after the death of the leſſee. And although that this Statute of 4 *H.* 7. hath a ſaving for the leſſor in ſuch Caſe, yet the ſaving is of ſuch right (as firſt ſhall grow and remain, &c.) and the right firſt accrued to the leſſor after the fine and the forfeiture, but notwithſtanding that, in as much as by the Covin of the leſſee he in reverſion or remainder may be barred of his reverſion or remainder (for they do not expect to enter till after the death of the leſſee) and eſpecially when the leſſee hath lands of his own inheritance in the ſame Town, (as in the Caſe at Bar he had) there the leſſor ſhall have 5 years after the death of the leſſee. [79]

So it was agreed in the ſame Caſe, if Tenant for life maketh a feoffment in fee to one who hath lands in the ſame Town, and the feoffor levieth a fine with proclamations, it ſhall not bind the leſſor, but he ſhall have five years after the death of the leſſee, for the leſſor cannot know of what land the fine is levyed, for he is not party to the Indenture, or agreement between the conuſor and conuſee: So in the ſame Caſe, the Judges make conſtruction againſt the letter of the Statute in ſalvation of the ſtate and inheritance of him in the reverſions. And ſo it hath been adjudged before in *Some*'s Caſe in the Common Pleas, in Sir *James Dier*'s time, as *Plowden* told me. Alſo it was ſaid, that if leſſee for years make a feoffment in fee by practice and covin, that the feoffee ſhall levy a fine with proclamations to another (the feoffee having other lands in the ſame Town) and all is done accordingly; and yet the leſſee doth continually pay the rent to the leſſor, the ſame ſhall not bind for the reaſons aforeſaid. [c]

Laſtly, The Judges in this reſolution did greatly reſpect the general miſchief which would follow if ſuch fines levied by practice and covin of thoſe which have the particular intereſts ſhould bar thoſe who had the inheritance, and eſpecially in the Caſe at Bar, when after the fine levied the conuſor continually payeth the rent to the leſſor, which maketh the fraud and practice apparent, and therefore the leſſor, was ſecure, and had not any fear of doubt of ſuch fraud. But it was reſolved, if *A.* purchaſe lands of *B.* by feoffment, or bargain and ſale, and enrol the ſame; and afterwards perceiving that *B.* hath but a deſeiſible title, and that *C.* hath right to it, *B.* levieth a fine with proclamations to a ſtranger, or taketh a fine from another with proclamations, to the intent to bar the right of *C.* this fine ſo levied by conſent ſhall bind, for nothing was done in this Caſe which was not lawful; and the intent of the makers of the Act of 4 *H.* 7. was to avoid ſtrifes and debates, and by expreſs purview ſhould bind all ſtrangers which do not purſue their right by Action, or entry within 5 years. So if one pretending title to land entreth, and diſſeiſeth another, and afterwards with intent to bind the diſſeiſee levieth a fine with proclamations, this fine ſhall bind the diſſeiſee by the expreſs purview of the Act, if he do not enter nor purſue his Action within 5 years; and the ſame cannot be ſaid a fine levied by covin, becauſe the levying of the fine is lawful, and the diſſeiſee may reenter, or bring his Action within the five years. [b]

The fourth reaſon was, becauſe the leſſee hath contrived his fraud and deceit in ſo ſecret manner, that he hath deprived the leſſor of the remedy which the Statute gave him, that is to ſay, to make his entry or bring his Action within the five years: For how can he make his entry or bring his Action when he knew not of the feoffment which did the wrong. As to the fine, in as much as the leſſee had lands in the ſame Town every one ſhall preſume that the fine was levied of that whereof he might lawfully levy a fine. And although the ſame containeth more acres than his own lands, the ſame is uſual in all fines, and peradventure the leſſor did not know the juſt quantity of the leſſees land, for that doth not appertain to him; and therefore it ſhall be unreaſonable in this Caſe of Nonclaim of the leſſor to give the leſſee benefit, when the wrong and covin of the leſſee is the cauſe of his Nonclaim. And a man ſhall not take advantage of his own wrong or covin. The poſſeſſion of the leſſee is not any mean for the leſſor to take any notice of this wrong, for he cometh to the poſſeſſion of the land by lawful grant and demiſe; and after the feoffment he continueth in the poſſeſſion as leſſee, for he payeth his rent as a leſſee doth, yea, the poſſeſſion of the leſſee, and the payment of the rent, was the cauſe that the leſſor knew not, nor ſuſpected the fraud.

Alſo it was ſaid, that the fraud and covin in this Caſe made it the more odious, becauſe that between the leſſor and the leſſee, and the Lord and his Copyholder there is a truſt and confidence, and fraud and deceit by him who is truſted is moſt odious in Law. And if the makers of this Act had been asked, if their intent was that ſuch a fine levied by ſuch practice and covin ſhould bind the leſſors, they would have anſwered, God defend that they ſhould intend to patronize any ſuch iniquity practiſed and compaſſed by thoſe in whom was truſt and confidence repoſed. But when a diſſeiſor (although he gaineth the poſſeſſion by wrong) levieth a fine with proclamation, yet it ſhall bind as is aforeſaid, for a diſſeiſor *venit tanquam in arena*, and it is not poſſible but that the diſſeiſee to whom the wrong is done, and who hath loſt his poſſeſſion ſhould be knowing of it; and therefore it ſhall be his folly that he make not his claim, and not accompany with fraud and practice one who cometh to the poſſeſſion lawfully, by grant or demiſe, and who hath truſt repoſed in him by his leſſor or grantor, which fraud and practice is ſo ſecretly contrived that the leſſor by common preſumption cannot have knowledge to make his claim, be-
[80] cauſe that his leſſee doth continue in poſſeſſion, and payeth his rent, as a leſſee ought to do. And as to that which was objected, That it ſhall be miſchievous to avoid fines upon ſuch bare averments; It was anſwered, That it ſhall be a greater miſchief, and principally in theſe days in which the Poet ſaith,

——Fugere pudor, rectumque fideſque
In quorum ſubiere locum, fraudeſque dolique
Inſidiæque, & vis, & amor ſceleratus habendi.

if fines levied by ſuch covin and practice ſhould bind. And ſuch objection may be made, if a fine be levied to ſecret uſes to deceive a purchaſor, an averment of fraud may be taken againſt the ſame by the Statute of 27 *Eliz. cap.* 4. So if a fine be levied upon an uſurious contract, it may be avoided by averment by the Statute of 13 *Eliz. cap.* 8. And Sir *Tho. Egerton* Lord Keeper of the Great Seal commended the Reſolution of the Juſtices, and agreed in opinion with them.

Mich. 44 Eliz. *in the Star-Chamber.*

Twine's Caſe.

[b] IN an Information by *Coke* the Queens Attorney General againſt *Twyne* of *Hampſhire* in the Star-chamber, for making and publiſhing of a fraudulent gift of goods: The Caſe upon the Statute of 13 *Eliz. cap.* 5. was ſuch; *Pierce* was indebted to *Twyne* in 400 l. and was indebted alſo to *C.* in 200l. *C.* brought an Action of Debt againſt *Pierce*, and pendant the Writ, *Pierce* being poſſeſſed of goods and chattels of the value of 300 l. in ſecret made a general deed of gift of all his goods and chattels real and perſonal whatſoever to *Twyne* in ſatisfaction of his debt; and notwithſtanding *Pierce* continued in poſſeſſion of the ſaid goods, and ſome of them he ſold; and he ſhore the ſheep and marked them with his own mark: And afterwards *C.* had judgment againſt *Pierce*, and had a *Fieri facias* directed to the Sheriff of *Southampton*, who by force of the ſaid Writ, came to make Execution of the ſaid goods, divers perſons by the command of the ſaid *Twyne* with force did reſiſt the Sheriff, claiming them to be the goods of the ſaid *Twyne* by force of the ſaid gift; and openly declared by the commandment of *Twyne*, that it was a good gift, and made upon good and lawful conſideration: And if this gift upon the whole matter were fraudulent and of no effect by the ſaid Act of 13 *Eliz.* or not, was the Queſtion. And it was reſolved by Sir *Thomas Egerton* Lord Keeper of the Great Seal, and by the chief Juſtices *Popham* and *Anderſon*, and the whole Court of Star-chamber, That this gift was fraudulent within the Statute of 13 *Eliz.* And in this Caſe divers Points were reſolved:

1. That this gift hath the ſigns and marks of fraud.

2. Becauſe the gift is general, without exception of his apparel or other thing of neceſſity; for it is commonly ſaid, *quod doloſus verſatur in generalibus.*

3. The

3. The donor doth continue in poſſeſſion, and uſeth them as his own, and by reaſon thereof he tradeth and trafficketh with others, and defrauds and deceives them.

4. It was made in ſecret, *Et dona clandeſtina ſunt ſemper ſuſpicioſa.*

5. It was made pendant the Writ.

6. Here was truſt between the parties, for the giver doth poſſeſs all, and uſe them as his proper goods, and fraud is always apparelled and clad with truſt, and truſt is the cover of fraud.

7. The deed containeth, that the gift was made honeſtly, truly, and *bona fide*; *Et clauſulæ inconſuetæ ſemper inducunt ſuſpicionem.*

Secondly, It was reſolved, that notwithſtanding here was a true debt to *Twyne*, and good conſideration of the gift, yet it was not within the Proviſo of the ſaid Act of 13 *Eliz.* by which it is provided, That the ſaid Act ſhall not extend to any eſtate, or intereſt in lands, &c. goods or chattels made upon good conſideration, and *bona fide*, for although it is upon a true and good conſideration, yet it is not *bona fide*, for no gift ſhall be ſaid to be *bona fide* within the ſaid Proviſo which is accompanied with any truſt: As if a man be indebted to five ſeveral perſons in the ſeveral ſumms of 20 l. and hath goods of the value of 20 l. and maketh a gift of all his goods to one of them in ſatisfaction of his debt, but there is a truſt between them that the donee ſhall deal favourably with him in regard of his poor eſtate, either to permit the donor, or ſome other for him, or for his benefit to uſe, or have poſſeſſion of them, and is contented that he ſhall pay his debt unto him when he is able; The ſame ſhall not be ſaid *bona fide* within the ſaid Proviſo; for the Proviſo ſaith upon good conſideration, and *bona fide*; ſo good conſideration doth not ſuffice, if it be not alſo *bona fide*; And therefore Reader, when any gift ſhall be to you in ſatisfaction of a debt by one who is indebted to others alſo; 1. Let it be made in publick manner, and before the neighbours, and not in private, for ſecrecy is a mark of fraud. 2. Let the goods and chattels be appriſed by people to the very value, and take a gift in particular in ſatisfaction of your debt. 3. Preſently after the gift take the poſſeſſion of them, for continuance of the poſſeſſion in the donor is a ſign of truſt. And know Reader, that the ſaid words of the Proviſo, upon good conſideration and *bona fide*, do not extend to every gift made *bona fide*; and therefore there are two manner of gifts upon good conſideration, *ſcil.* Conſideration of nature or blood, and valuable conſideration: As to the firſt in the Caſe before put, if he who is indebted to five ſeveral perſons, to each party in 20 l. in conſideration of natural affection give all his goods to his ſon or couſin, in this Caſe for as much as others ſhall loſe their debts, &c. which are things of value, the intent of the Act was, that the conſideration in ſuch Caſe ſhould be valuable; [b] for equity requireth that ſuch gift which defeateth others, ſhould be upon ſo high and good conſideration as the things which are defeated thereby are; And it is to be preſumed, that the father if he had not been indebted to others would not have diſpoſſeſſed himſelf of all his goods; and to ſubject himſelf to his creditors; and therefore it ſhall be intended that it was made to defeat his creditors: And if conſideration of nature or blood, ſhould be a good conſideration within this Proviſo, this Statute ſhould be to little or no purpoſe, and no Creditor ſhall be ſure of his debt. And as to gifts made *bona fide*, it is to know, that every gift made *bona fide*, either is upon truſt between the parties, or without any truſt, every gift made upon truſt is out of this Proviſo; for that which is betwixt the donor and donee called truſt, *per nomen ſpecioſum*, is in truth as to all the creditors fraud, for thereby they are defeated and defrauded of their true and due debts. And every truſt is either expreſſed, or implied; An expreſs truſt is, when in the gift, or upon the gift the truſt by word or writing is expreſſed, Truſt implied is, when a man maketh a gift without any conſideration, or upon conſideration of nature, or blood only: And therefore if a man before the Statute of 27 *H.* 8. had bargained and ſold his land for valuable conſideration to one and his heirs, by which he was ſeiſed to the uſe of the bargainee, in this Caſe the Law implieth a truſt and confidence that he ſhall be ſeiſed to the uſe of the bargainee; So in the ſame Caſe, if the feoffees either in conſideration of nature, or of blood, had without valuable conſideration enfeoffed their ſons, or any who had not notice of the firſt bargain, the ſame ſhould not take away the uſe raiſed upon valuable conſideration; for a feoffment made only upon conſideration of nature or blood, ſhall not take away any uſe raiſed upon valuable conſideration, but ſhall take away an uſe raiſed upon conſideration of nature, for both conſiderations are in *æquali jure*, and of one nature.

And when a man being greatly indebted to ſundry perſons, maketh a gift to his ſon or any of his blood without conſideration, but only of nature, the Law intendeth a truſt betwixt them, *ſcil.* that the donee would in conſideration of ſuch gift being voluntarily made to him, and alſo in conſideration of nature, relieve his father, or couſin, and not ſee him want, who hath made ſuch a gift to him, *Vide* 33 *H.* [82] 6. 33. by *Priſot*, if the father enfeoff his ſon and heir apparent *bona fide*, yet the Lord ſhall have the Wardſhip of him: So note, valuable conſideration is a good conſideration within this Proviſo; and a gift made *bona fide* is a gift made without any truſt either expreſſed or implied: By which it appeareth, that as a gift made upon good conſideration, if it be not *bona fide*, is not within the Proviſo; ſo a gift made *bona fide*, if it be not upon good conſideration is not within the Proviſo, but it ought to be upon good conſideration, and *bona fide*.

To one who marvelled what ſhould be the reaſon that Acts and Statutes are continually made at every Parliament without intermiſſion, and without end, a wiſe man made a good and ſhort anſwer, both which are compriſed in verſe.

Quæritur, ut creſcunt tot magna volumina Legis?
In promptu cauſa eſt, creſcit in orbe dolus.

And becauſe that fraud and deceit increaſeth in theſe days more than in former times, it was reſolved in this Caſe by the whole Court, That all Statutes made againſt fraud, ſhall be liberally and beneficially expounded to ſuppreſs the fraud. Note Reader, according to their opinions divers Reſolutions have been made.

Between *Paunceſoot* and *Blunt* in the Exchequer Chamber, *Mich.* 35 & 36 *Eliz.* the Caſe was: *Paunceſoot* being indicted for Recuſancy and not coming to Divine Service, and having an intent to flee beyond Sea, and to defeat the Queen of all which might accrue to her for his Recuſancy or flight, made a gift of all his leaſes and goods of great value, coloured with feigned conſiderations: and afterwards he fled beyond the Sea, and afterwards was outlawed upon the ſame indictment: And if this gift ſhall be void to defeat the Queen of her forfeiture, either by the Common Law, or by any Statute was the Queſtion: And ſome conceived, that the Common Law which abhorreth all fraud, ſhould void this gift as to the Queen, *vide Mich.* 12 & 13 *Eliz. Dier* 295. 4 & 5 *Phil. & Mar.* 160. And the Statute of 50 *E.* 3. *cap.* 6. was conſidered; but that extended only in releif of creditors, and extends only to ſuch debtors as flee to Sanctuaries, or other privileged places: But ſome conceive, that the Statute of 3 *H.* 7. *cap.* 4. extendeth to this Caſe. For although that the preamble ſpeak only of Creditors; yet it is provided by the body of the Act generally, That all gifts of goods and chattels made or to be made upon truſt to the uſe of the donor ſhall be void and of no effect, but that is to be intended as to ſtrangers which are to have prejudice by ſuch gift, but between the parties themſelves it ſtandeth good: But it was reſolved by all the Barons of the Exchequer, That the Statute of 13 *Eliz. cap.* 5. extended to it, for by the ſame it is enacted and declared, that all feoffments, gifts, grants, &c. to delay, hinder, or defraud Creditors, or others of their juſt and lawful Actions, Suits, Debts, Accounts, Damages, Penalties, Forfeitures, Mortuaries, Heriots and Reliefs ſhall be void, &c. So that, this Act doth not extend only to creditors, but to all others who had cauſe of action, or ſuit, or any penalty, or forfeiture.

And it was reſolved that this word (forfeiture) ſhall not be intended only of a forfeiture of an Obligation, Recogniſance, or ſuch like (as it was objected by ſome that it ſhould in reſpect it came after damages and penalties) but alſo to every thing which ſhall by the Law be forfeited to the King or Subject. And therefore if a man to prevent a forfeiture for felony, or by outlawry, maketh a gift of all his goods, and afterwards is attainted or outlawed, theſe goods are forfeited notwithſtanding this gift: The ſame Law of Recuſancy, and ſo the Statute expounded beneficially to ſuppreſs fraud. Note well this word (declare) in the Act of 13 *Eliz.* by which the Parliament expoundeth that this was the Common Law before. And according to this Reſolution it was decreed *Hill.* 36 *Eliz.* in the Exchequer Chamber.

Mich. 42 & 43 *Eliz.* in the Common Pleas upon evidence to a Jury between *Standen* and *Bullock* theſe points were reſolved by the whole Court upon the Statute of 27 *Eliz. cap.* 4. *Walmſley* Juſtice ſaid, That Sir *Chriſtopher Wray* late chief Juſtice of *England* reported to him, that he and all his Companions of the Kings Bench were reſolved, and ſo directed a Jury upon evidence before them; That where a man had conveyed his land to the uſe of himſelf for life, and afterwards to the uſe of divers others of his blood, with future power of revocation, as after ſuch feaſt, or after the death of ſuch one, and afterwards, and before the power of revocation began, he for valuable conſideration bargained and ſold his land to another and his heirs, this bargain and ſale is within the remedy of the ſaid Statute. For although the Statute ſaith, The ſaid firſt conveyance not by him revoked, according to the power by him reſerved, which ſeemeth by the literal ſenſe to be intended of a preſent power of revocation, for no revocation can be made by force of a future power till it come in *eſſe*; Yet it was holden that the intent of the Act was, that ſuch voluntary conveyance which was originally ſubject to power of revocation, be *in præſenti*, or *in futuro*, ſhould not ſtand againſt a purchaſor *bona fide*, for valuable conſideration: and if other conſtruction ſhall be made, the ſaid Act ſhould ſerve for little or no purpoſe, and it ſhould be no hard thing to make evaſion out of the ſaid Act: So if *A.* hath reſerved to himſelf power of revocation with the aſſent of *B.* and afterwards *A.* bargaineth and ſelleth the land to another, this bargain and ſale is good, and within the remedy of the ſaid Act, for otherwiſe the good proviſion of the Act, by a ſmall addition, or evil invention ſhall be defeated.

[83] And upon the ſame reaſon it was adjudged 38 *Eliz.* in the Common Pleas, between *Lee* and his wife Executrix of *Smith* Plaintiff, and *Mary Colſhil* Executrix of *Thomas Colſhil* Defendant, in debt upon an Obligation of 1000 Marks. *Rot.* 1707. the Caſe was, *Colſhil* the Teſtator had the Office of one of the Cuſtoms of the Queen by Letters Patents to him and his Deputies, and by indenture between him and *Smith* the Teſtator of the Plaintiff, and for 600 l. paid, and 100 l. *per ann.* to be paid during the life of *Colſhil*, made a deputation of the ſaid office to *Smith*; and *Colſhil* covenanted with *Smith*, that if *Colſhil* ſhould die before him, that then his Executors ſhould pay back to him 300 l. And divers Covenants were in the ſaid Indenture concerning the ſaid Office, and the enjoying of it: And *Colſhil* was bound to the ſaid *Smith* in the ſaid Obligation to perform the Covenants; and the breach was alledged in the not payment of the ſaid 300 l. for as much as *Smith* overlived *Colſhil*: And although the ſaid Covenant to repay the ſaid 300 l. was lawful, yet for as much as the reſt of the Covenants were againſt the Statute of 5 *E.* 6. *cap.* 16. and if the addition of a lawful Covenant ſhould make the Obligation of force, the Statute ſhould ſerve for little or no purpoſe; for this cauſe it was adjudged, that the Obligation was utterly void.

2. It was reſolved, that if a man hath power of revocation, and afterwards to the intent to defraud a purchaſor he levieth a fine, or maketh a feoffment, or other conveyance to a ſtranger, by which he extincts his power, and afterwards bargaineth and ſelleth the land to another for valuable conſideration, the bargainee ſhall enjoy the land, for as to him the fine, feoffment, or other conveyance, by which the Condition was extinct, was void by the ſaid Act; and ſo the firſt clauſe, by which all fraudulent and covenous conveyances are made void as to purchaſors, extends to the laſt clauſe of the Act, *ſcil.* when he who maketh the bargain and ſale had power of revocation. And it was ſaid, that the Statute of 27 *Eliz.* hath made voluntary eſtates made with power of revocation as to purchaſors, in equal degree with conveyances made by fraud and covin to defraud purchaſors.

Between

Between *Upton* and *Baſſet* in Treſpaſs, *Trinit.* 37 *Eliz.* in the Common Pleas, it was adjudged, That if a man make a leaſe for years by fraud and covin, and afterwards make another leaſe *bona fide*, but without fine or rent reſerved, that the ſecond leſſee ſhall not avoid the firſt leaſe.

For firſt it was agreed, that by the Common Law an eſtate made by fraud ſhall be avoided only by him who hath former right, title, intereſt, debt, or demand, as 33 *H.* 6. a ſale in open Market ſhall not barr a right which is more ancient; nor a covenous gift ſhall not defeat execution in reſpect of a former debt as it is agreed in 22 *Aſſ.* 72. but he who hath right, title, intereſt, debt, or demand puiſne ſhall not avoid a gift or eſtate precedent by fraud by the Common Law.

2. It was reſolved, that no purchaſor ſhall avoid a precedent conveyance made by fraud and covin, but he who is a purchaſor for mony or other valuable conſideration; for although that in the preamble it is ſaid (for mony or other good conſideration) and likewiſe in the body of the Act (for money or other good conſideration) yet theſe words (good conſideration) are to be intended only of valuable conſideration; and that appeareth by the clauſe which concerneth thoſe who had power of revocation: For there it is ſaid, for money or other good conſideration paid, or given, and this word (payed) is to be referred to (money) and (given) is to be referred to (good conſideration) ſo that the ſenſe is for mony paid, or other good conſideration given; which words exclude all conſiderations of nature, or blood, or the like, and are to be intended only of valuable conſideration which may be given; and therefore he who maketh purchaſe of land for valuable conſideration is only a purchaſor within this Statute. And this clauſe doth well expound theſe words (other good conſideration) mentioned before in the preamble and body of the Act. [b]

And ſo it was reſolved, *Paſch.* 32 *Eliz.* in a Caſe referred out of the Chancery to the conſideration of *Windham* and *Periam* Juſtices, between *John Needham* Plaintiff, and *Beaumont* Serjeant at Law Defendant, where the Caſe was; *Henry Babington* ſeiſed in fee of the Mannor of *Lit-Church* in the County of *Derby*, by Indenture 10 *Feb.* 8 *Eliz.* covenanted with the Lord *Darcy* for the advancement of ſuch heirs males which he had begotten, or which after he ſhould beget upon the body of *Mary* then his wife (ſiſter to the ſaid Lord *Darcy*) before the feaſt of S. *John Baptiſt* then next following, to levy a fine of the ſaid Mannor to the uſe of the ſaid *Henry* for life, and afterwards to the uſe of the eldeſt iſſue male of the bodies of the ſaid *Henry* and *Mary* begotten in tail, &c. and ſo to the three iſſues of their bodies, &c. with remainder to his right heirs. And afterwards 8 *Maii ann.* 8 *Eliz.* *Henry Babington* by fraud and covin to defeat the ſaid covenant made a leaſe of the ſaid Mannor for a great number of years to *Robert Heyes*; and afterwards levied a fine accordingly; And upon Conference had with the other Juſtices, it was reſolved, That although the iſſue was a purchaſor, yet he was not a purchaſor in vulgar and common intendment: Alſo conſideration of natural affection is a good conſideration, but not ſuch a good conſideration which is intended by the Statute of 27 *Eliz.* for a valuable conſideration is only a conſideration within that Act: In this Caſe *Anderſon* chief Juſtice of the Common Pleas ſaid, That a man who was of ſmall underſtanding, and not able to govern the lands which deſcended unto him, and being given to riot and diſorder, by mediation of his friends openly conveyed his lands to them upon truſt and confidence that he ſhould take the profits for his maintenance, and that he ſhould not have power to waſt and conſume the ſame; and afterwards he being ſeduced by deceitful and covenous perſons, for a ſmall ſum of mony bargained and ſold his land being of a great value; This bargain although it was for mony, yet it was holden to be out of this Statute, for this Act is made againſt all fraud and deceit, and ſhall not help any purchaſor which cometh not to the land for good conſideration lawfully, and without fraud and deceit; and ſuch conveyance made upon truſt is void as to him who purchaſeth the land for valuable conſideration *bona fide*, without deceit or cunning.

And afterwards by the Judgment of the whole Court *Twyne* was convicted of Fraud, and he and the others of a Riot.

A Reſolution of the Juſtices after hearing of many Arguments of Council on both ſides, and divers Conferences amongſt them upon the Statute of Fines, *Paſch.* 44 Eliz.

The Caſe of *Fines.*

[84] A Tenant for life of certain land, the remainder to *B.* in tail, the reverſion to *B.* and his heirs expectant, *B.* levieth a fine to *C.* and *D.* and to the heirs of *C.* to the uſe of them and their heirs, and hath iſſue and dieth before all the Proclamations are paſt, the iſſue in tail then being beyond the Seas, the proclamations are made, and afterwards the iſſue returneth, and preſently upon the land maketh claim to the remainder in tail, and if in this Caſe the eſtate tail were barred or not was the Queſtion; and in this Caſe four Points were reſolved.

1. That the eſtate which paſſeth by the fine, as to the eſtate tail, was not determined by the death of *B.* for it was ſaid, If one be Tenant in tail of a Rent, Advowſon, Tythes, Common, or other ſuch things which lie in grant, and by deed granteth them in fee, and dieth, the Grant is not abſolutely determined by his death, but is at the election of the iſſue in tail to make it voidable or void at his pleaſure. For if he bring a *Formedon* for the rent, &c. he maketh the grant voidable; but if he diſtrain for the rent, or claim the ſame upon the land, by that he determineth his election to make it void, *& ſic de cæteris.* But until he hath made election the grant is not determined, for then it ſhall prevent his election; and true it is, that *Littleton* ſaith, That of ſuch things which paſs from Tenant in tail by way of grant, or by confirmation, or by releaſe, nothing can paſs to make an eſtate to him to whom ſuch grant, confirmation or releaſe is made, but that which the Tenant in tail may lawfully do, and that but for the term of his life. And if Tenant in tail be of an Advowſon, and he by Deed granteth the Advowſon to another fee, it is no diſcontinuance, for in ſuch Caſe the grantees have eſtate but for the life of Tenant in tail, and that (as was ſaid) is as much as to ſay, that the grant is no diſcontinuance, but is determinable by the iſſue after the death of the Tenant in tail at his election, either by claim, or by Action. And *Littleton* is not to be litterally intended, that the grantee in ſuch Caſe hath only eſtate for the life of Tenant in tail, and then the Tenant in tail in ſuch Caſe had the reverſion in tail, and ſhall have an Action of Waſt, or ſhall enter for forfeiture upon alienation made by ſuch Grantee; Or if Tenant in tail of a reverſion expectant upon an eſtate for years, or life, grant the ſame in fee, and the leſſee attorneth, and afterwards the particular eſtate determineth, and the grantee doth waſt, or maketh a feoffment, &c. that the Tenant in tail ſhall puniſh the waſt, or ſhall enter for the forfeiture; for *Littleton* himſelf 145. is againſt that, for he ſaith, That if tenant in tail granteth all his eſtate over to another, in this Caſe the grantee hath not eſtate but for the life of tenant in tail, and the reverſion of the tail is not in the tenant in tail, becauſe he hath granted all his eſtate and his right, &c. And if the grantee doth waſt, the tenant in tail ſhall never have an Action of waſt, becauſe that no reverſion is in him, but the reverſion and inheritance of the tail during the life of tenant in tail is in abeyance.

[*b*]

Note Reader, the office of an interpreter is to make ſuch conſtruction, not only that the Author be not againſt himſelf, but alſo that the Reſolutions and Judgments reported in one Book, be not by literal interpretation expounded againſt the Judgments and Reſolutions in another Book, but that all (*ſi fieri poſſit*) may ſtand together. So here the intent of *Littleton* was not that the grantee had not an eſtate but for life, and that his eſtate ſhould be determined by the death of tenant in tail, but that the iſſue after his death might at his pleaſure determine the ſame: And if the grantee ſhall not in ſuch Caſe have eſtate but for the life of tenant in tail, then the wife of ſuch grantee ſhall not be endowed, againſt which it is adjudged in 24 E. 3. 28. Alſo if the eſtate of the grantee ſhall be abſolutely in judgment of Law determined by the death of tenant in tail, then the iſſue in tail after the death of the father cannot have a *Formedon* againſt ſuch grantee; for although the demandant and the tenant will admit the eſtate which paſſeth by the grant to continue, yet the Court who ought to judge according to Law, and is not concluded by the admittance of the party from any thing which generally appeareth to them to the contrary, ought *ex officio* in ſuch Caſe to abate the Writ. But it is agreed in 13 *H.* 7. 10. *pl.* 8. by all the Juſtices, If tenant in tail of a rent granteth the ſame with warranty, that it is no diſcontinuance although Aſſets do deſcend, but he may diſtrain; but if he bring a *Formedon* in the Deſcender he ſhall be barred, 33 *E.* 3. *Formedon* 47. *acc.* By which it appeareth in ſuch Caſe, the grant of tenant in tail is determinable by his death upon claim upon the land, or by Action tried: So when tenant in tail granteth a rent, reverſion, or common, &c. in fee, he hath an indefeaſible eſtate during the life of tenant in tail (and that *Littleton* intendeth) and after the death of tenant in tail, it is defeaſible at his election; for if he cometh upon the land and diſtrain, or by claim upon the land determineth his election, then upon the matter it is void by the death of tenant in tail, for otherwiſe the warranty in ſuch Caſe ſhould make a diſcontinuance: As if tenant in tail be diſſeiſed, and releaſeth to the diſſeiſor with warranty, and dieth, now that is a diſcontinuance, becauſe that the eſtate upon which the warranty doth enure doth continue after the death of tenant in tail: But when tenant in tail of a rent, reverſion, &c. granteth the ſame in fee with warranty, and dieth, now if the iſſue in tail determineth his election to have it void, it is void by the death

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death of the tenant in tail, and by consequence the warranty also: But if the issue bringeth a *Formedon* and determineth his election to make the estate to have continuance, and not to be determined by the death of tenant in tail, then the estate doth continue, and by consequence the warranty doth remain, and if assets descend, the issue shall be barred, *vide* 19 *E.* 3. *Brief* 468. 24 *E.* 3. 28. 36 *Ass.* 8. 22 *R.* 2. *Discontinuance* 50. 8 *H.* 4. 9. 33 *E.* 3. *Formedon* 47. 48 *E.* 3. 23. 32 *E.* 3. *Discontinuance* 2. 23 *Ass.* 8. 16 *H.* 7. 4. 21 *H.* 7. 40. 38 *H.* 8. *Br. Discontinuance* 35. for this matter: And there is no difference between a grant of tenant in tail of a Rent, Advowson, Common, Tithes, &c. in possession, and a grant of tenant in tail in reversion or remainder expectant upon an estate for life: for although that in the first Case, the issue may have a *Formedon* presently by the death of the tenant in tail, and in the other Case not, till after the death of the tenant for life, yet all is one; for by the death of the tenant in tail the grant is not determined till election made by the issue in tail, for after the death of tenant for life he may bring a *Formedon* if he will.

Note Reader, if you be desirous to know the reason, why upon the words of the Act of *West.* 2. *cap.* 1. *de Donis condicionalibus*, that is to say, (*Non habeant illi quibus tenementum sic fuerit datum sub conditione, potestatem alienandi tenementum sic datum, quo minus ad exitum illorum quibus tenementum sic fuerit datum remaneat post illorum obitum, vel ad Donatorem, &c. revertatur.*) such sundry constructions have been made; As if tenant in tail maketh a feoffment in fee, it is a discontinuance and avoidable by Action only: If tenant in tail of a rent or other thing which lieth in grant, grant the same in fee, it is no discontinuance, but is voidable by claim or by Action: If tenant in tail of land grant a rent out of it, the rent is absolutely determined by his death: If tenant in tail be disseised, and releaseth to his disseisor, it is no discontinuance, but the estate is avoidable by entry or Action of the issue of the tenant in tail: But if a release be with warranty it is a discontinuance, if the issue in tail be heir to the warranty: But if tenant in tail maketh a lease for the term of his own life, or for years, and releaseth to the lessee and his heirs, the same is no discontinuance although it be with warranty: So if tenant in tail maketh a lease for life, and afterwards granteth the reversion in fee, it is no discontinuance of the fee, if it be not executed in the life of the grantor. And all these, and (many other) divers constructions have been made upon the words aforesaid, *scil. Non habeant illi quibus tenementum sic fuerit datum sub conditione, potestatem alienandi, &c.* this is the reason which is worthy of observation; for the Judges have construed the said words according to the rule and reason of the Common Law (which always is *optimus interpretandi modus*:) For at the Common Law, if a Bishop, Abbot, &c. or Husband seised in the right of his wife make a feoffment in fee, it is by the Common Law a discontinuance, and doth put the successor, or the wife to her Action, for the favour which the Law giveth unto an estate which passeth by livery and seisin, because it is publick and notorious, and in ancient times was the common and usual assurance of the land; But if a Bishop, &c. or Husband seised of a rent, or any thing which lay in grant, by deed granteth the same in fee, it is no discontinuance, and yet it is not absolutely determined by the death of the Bishop, &c. or Husband, for the successor or the wife hath election to determine it and make it void, or by the bringing of his Writ to make it voidable, or by claim upon the land to make it void: But if a Bishop, &c. or Husband granteth a rent in fee out of the wives land, or Bishoprick, it is absolutely void by the death of the Bishop, or of the Husband: Also if a Bishop or the husband and wife be disseised, and the Bishop or husband releaseth to the disseisor, it is no discontinuance; If the Bishop or husband maketh a lease for years, and releaseth to the lessee and his heirs, it is not absolutely determined by the death of the Bishop or husband, but it is void or voidable at the election of the successor, or of the wife. But if a Bishop or the husband make a lease for life, and afterwards grant the reversion fee, and the lessee for life dieth in the life of the Bishop, or of the husband, it is a discontinuance; otherwise if the lessee surviveth the Bishop, or the husband; *Vir bonus est quis? Qui consulta patrum, qui leges, juraque servat.*

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And it was holden by *Popham* chief Justice, and divers other of the Justices, that the Statute of 32 *H.* 8. *cap.* 36. hath enforced the Case; that the estate which passeth by the fine shall not be determined by the death of the tenant in tail, for in as much as the Statute hath provided, That fines levied of any lands, tenement, or hereditament entailed, &c. in possession, reversion, or remainder immediately after the fine engrossed, and proclamations past, shall be a barr, &c. if the fine with proclamation cannot bar the estate tail, if not that the estate given by the fine continue, the same Statute which provided, that the fine with proclamations shall be a bar, provideth also for all things which are necessary and incident to the perfection and consummation thereof: And therefore in 28 *Eliz.* in a *Quid juris clamat* brought by *Francis Windham* then one of the Justices of the Common Pleas, the Case was thus in effect; That the Lady *Gresham* was tenant for life of the Mannor of *West Bradenham* in *Norfolk*, the remainder to *Richard Read* in tail, the reversion to *William Read* in fee. *Richard Read* levied a fine of his remainder to Justice *Windham* and his heirs, and before the engrossing thereof (as *oportet*) Justice *Windham* brought a *Quid juris clamat* against the Lady *Gresham*, who pleaded that *Richard Read* the conusor, at the time of the fine levied had but an estate tail in the remainder, and shewed how; and demanded Judgment thereupon if she shall be compelled to attorn, upon which the Plaintiff demurred. And although that before the Statutes of Fines of 4 *H.* 7. & 32 *H.* 8. it was a good plea, as appeareth 37 *H.* 6. 33. *b.* 2 *E.* 2. *Age* 77. 2 *E.* 3. 23. & 22 *E.* 3. 18. yet it was adjudged that now after the said Statutes which make the fine (after the engrossing and proclamations past) a barr of the estate tail; although that the *Quid juris clamat* ought to be brought before the engrossing, and by consequence before the estate tail be barred; and that it doth not appear at the time of the *Quid juris clamat* brought, that it shall be a fine at the Common Law, or a fine levied with proclamations: yet it was adjudged that she should attorn.

See Reader 17 *E.* 3. 7. *pl.* 20. if alienation be made in Mortmain; and 31 *E.* 3. *Ancient demesn* 16. if a fine be levied of a reversion of land in Ancient demesn, 36 *H.* 6. 24. *pl.* 19. if an infant levy a fine,

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fine, 45 E. 3. 6. if a fine be levied of a reversion, of land holden in *Capite* without licence, or as in our Case; if tenant in tail of a reversion or remainder levy a fine thereof, in all these Cases, and other like, the tenant was not compellable to attorn, because the estate which passed by the fine was not lawful, but either prohibited by the Common Law, or by some Statute, and for the greater part was voidable: But now the Statutes have made a fine levied by tenant in tail to be lawful, and after the engrossing thereof, and proclamations past, hath made the estate which passeth by the fine unavoidable: And in the said Case two Points were resolved for good Law.

1. That every fine levied shall be intended to be levied with proclamations according to the said Statutes, for it is most beneficial for the conusee; and all fines being general assurances of the land are levied accordingly.

2. That the Statutes which make the fine after the engrossing thereof, and proclamations past, a bar to the estate tail giveth all things incident thereto; and in as much as the connusee cannot have a *Quid juris clamat* after the engrossing, from thence it followeth that he shall have it before; And now the said Statutes have altered the reason of the Common Law, and given greater force and strength to a fine than it had before. For the reason of the Common Law was, That the particular tenant shall never be compelled to attorn to an unlawful, torcious, or avoidable grant; which Judgment in the Case of Justice *Windham* was affirmed by all the Judges in this Case. So it was resolved by all the Judges of *England* and Barons of the Exchequer, for the one cause or for the other, that the estate which passed by the fine as to the estate tail was not absolutely determined by the death of the Tenant in tail.

2. It was resolved by all the Justices and Barons of the Exchequer *nullo contradicente*, that although by the death of Tenant in tail, a right of estate tail doth descend to the issue, in as much as he died before all the proclamations were past; yet when the proclamations pass without any claim made by the issue in tail upon the land, this right which descended to him is barred by the Statutes of 4 *H.* 7. & 32 *H.* 8. For although the fine without the proclamations, nor the proclamations without the fine cannot bar an estate tail; and although that after the fine levied, and before all the proclamations be past, a right is descended to the issue in tail *per formam doni*, which is paramount the fine, and there is no fine with proclamations levied after the death of tenant in tail to bar this right so descended to the issue in tail; yet
[87] for as much as it is provided by the Statute of 32 *H.* 8. that all fines levied with proclamations of any lands, tenements or hereditaments intailed to the person so levying the same, or to any of his ancestors in possession, or reversion, or remainder, or in use, shall be immediately after the fine levied, ingrossed, and proclamations made, adjudged a sufficient bar against the said persons and their heirs, claiming the same only by force of such entail: And the issue in tail in this Case claimeth as heir by force of the estate in tail; therefore by the express letter of the said Act he is barred: With this agreeth the Judgment in *Smith* and *Stapleton*'s Case, *Plow. Com.* 430.

3. It was resolved be *Popham* and *Anderson* chief Justices, and all the other Justices and Barons of the Exchequer but three, that in this Case the issue in tail being heir and privy, cannot by any claim that he can make save the right of the estate tail which is descended to him; but that after the proclamations are past, the estate tail shall be barred by the Satutes of 4 *H.* 7. & 32 *H.* 8. notwithstanding any claim that can be made by him; For it is enacted by the Statute of 4 *H.* 7. That every fine after the engrossing of it, and proclamations had and made, shall be a final end, and conclude as well privies as strangers: And if no saving or exception had been after in the Act, the right of all as well strangers as privies had been bound and barred by this Act. And therewith agreeth the opinion of five Justices, 19 *H.* 8. 2. *scil. Fitz-James*, *Brudnel*, *Fitzherbert*, *Brook*, and *Moore*. Then if all the exceptions and savings in the Act do extend to strangers to the fine, and not to parties, or privies, from thence followeth that the heir, or other privy cannot by any claim avoid the fine of his ancestor. The first Exception as to feme coverts doth not extend to this Case; The second Saving by express words extendeth to strangers; The third saving extends also to strangers who are not parties or privies to the fine, for the words are, And also saving to all other persons all such Action, Right, &c. as first shall grow, remain, descend, or come after the said fine ingrossed, &c. by force of any gift in tail, &c. so that it appeareth by these words (saving to all other persons, &c.) that he who shall take benefit of this saving ought to be another person, and not party or privy to the fine: And therewith agreeth the opinion of the said five Justices in 19 *H.* 8. But if Tenant in tail maketh a feoffment, and the feoffee levieth a fine with proclamations, the issue in tail after the death of his father, as it is there holden, shall have five years within this third saving, for he is the
[*b*] first to whom the right doth accrue, and descend after the fine levied. But if tenant in tail be disseised, and the disseisor levieth a fine with proclamations, and five years pass, and afterwards tenant in tail dieth, there the issue in tail is barred as it is there also holden: For there after the fine levied the tenant in tail himself had right, so that the issue in tail was not the first to whom the right did accrue and descend after the fine levied, but after the feoffment in fee he himself had not any right: And with this diversity agreeth the opinion in *Stowel*'s Case in *Plowden*'s Commentaries; but in none of those Cases the issue was privy, but a stranger to him who levied the fine. Also the Statute of 32 *H.* 8. which is but an explanation and interpretation of the Act of 4 *H.* 7. (as appeareth by the preamble thereof) expoundeth the said Act in such manner, that is to say, that all fines levied with proclamations according to the Statute of 4 *H.* 7. of any lands, &c. in any wise entailed to the person so levying the same fine, or to any of his ancestors, shall be immediately after the same fine levied, ingrossed, and proclamation made, adjudged a sufficient bar, &c. And in all this Act there is no saving for the issue in tail. *Ergo*, after the proclamations past, by the express provision of this Statute the issue in tail is barred, and no power is left to him to make claim, for the intent of the Act was (as appeareth by the preamble) to bar him by the fine, and therefore it was never intended

intended to save his right: But against this it was objected, That although the letter of the said Acts, and chiefly of the Act of 32 *H.* 8. were against the issue in tail in this Case, yet he may make his claim by the equity and intent and meaning of the said Acts; for otherwise to what purpose shall the proclamations be made, if not that those who had lawful Rights, Action, Entry or Claim might pursue it, for proclamations are made to this end and purpose, and the making of them with such solemnity as they are made should be utterly vain, if the issue in tail after the death of his father may not pursue his Action, Entry or Claim before all the proclamations do incurr: For the Act of 32 *H.* 8. doth not bar any stranger, but he who levieth the fine, and the issue of his body. And therefore if the issue after the death of his father cannot pursue his Action, Entry or Claim before the proclamations incurr, the proclamations in such Case shall be utterly idle and vain.

To which it was answered, That the Act of 32 *H.* 8. being an Act which explaineth and expoundeth the Act of 4 *H.* 7. as to the fine by the tenant in tail, shall not be taken by any strained construction against the letter, for then it will be requisite to have another new Act to make explanation and exposition what was done by the former Act, and so *in infinitum*. [88]

2. It appeareth by the Statute of 4 *H.* 7. the last clause, that every person hath liberty to pursue his fine according to the said Act, *scil.* with proclamations in four several Terms after the fine engrossed, or without proclamations, for so was the use before the said Act; and therefore the Act of 32 *H.* 8. which explaineth the Act of 4 *H.* 7. of necessity doth prescribe that proclamation shall be made according to the Act of 4 *H.* 7. to distinguish it from a fine at the Common Law, which was not a bar to the estate in tail, and not to enable the issue to make claim. For as hath been said, it shall be against the intention of the Act expressed in the preamble, and against the express purview of the body of the Act; so that it was material that the fine shall be levied with proclamations, otherwise it should not be levied according to the Statute of 4 *H.* 7. which was interpreted and expounded by the said Act of 32 *H.* 8.

3. It shall be greatly inconvenient, that when tenant in tail levieth a fine of a reversion or remainder, &c. expectant upon an estate for life, or upon a bargain and sale upon valuable consideration, or for the advancement of his children, or for the payment of his debts, &c. and dieth before proclamations passed, that all shall be avoided by claim of the heir in tail, when the conusee cannot have better assurance, either by common Recovery (in that he was not tenant to the *Præcipe*) or otherwise.

4. It is proved by divers Judgments and Resolutions given before this time, that the issue in tail in such Case shall not make claim to save the estate tail, but that after proclamations had he shall be barred, *Pasch.* 28 *Eliz. Rot.* 13. *Edward* Lord *Zouch* brought a *Formedon* in the *Descender* of the moiety of a Mannor, &c. against *Bampfield*, who pleaded in bar, that *John* great Grandfather of the demandant levied a fine *sur conusans de droit come ceo, &c.* with proclamations of the said moity, *Pasch.* 30 *H.* 8. which was by the same fine granted and rendred to the said *John* and his heirs, whose estate the tenant had; The demandant replied, and said, That at the time of the fine levied, and at all times after (and shewed how) the said *Richard Bampfield* now tenant, was seised of the land in demand in his demesn as of fee: And upon solemn Argument it was agreed by *Anderson*, *Periam*, *Windham* and *Rhodes* Justices, That the demandant being heir in tail against such fine levied by his ancestor, whose heir he is, was estopped to aver his seisin and continuance thereof in a stranger at the time of the said fine levied, nor to averr, *Quod partes finis nihil habuerunt*: And in the same Case the Justices did consider, if before the Statutes of 4 *H.* 7. & 32 *H.* 8. such averment were avowable in Law. And it seemed by the opinion of the Books, that before the Statute of 4 *H.* 7. & 32 *H.* 8. that the issue in tail was not admitted to such averments against a fine levied by his ancestor. And that appeareth by the Statute of 27 *E.* 1. *cap.* 1. *de Finibus levatis*, which reciteth, *Quod per aliquod tempus præteritum, &c. partes finium, & earum partium hæredes (contra leges & consuetudines Regni nostri antiquius usitat') super hujusmodi finibus adnullandis & evacuandis, admittebantur proponere quod ante finem levatum & tempore levationis ejusdem, & postea petentes seu querentes aut eorum antecessores de tenementis in finibus content', aut de aliqua parte earundem semper fuer' seisiti, & sic fines hujusmode rite levatos per Jurat' patriæ falsè, subordinate, & malicioſe procurat' multotiens evacuabant & adnihillabant, & hac minus juste: Statuimus quod dictæ exceptiones seu responsiones, vel inquisitiones patriæ super hujusmodi exceptionibus seu responsionibus, nullo modo contra hujusmodi recognitiones & fines de cætero admittantur.* But against that, three Exceptions were made. [b]

1. That it is provided by the Statute of *Donis Conditionalibus*, *quod* (as to the issue in tail) *finis ipso jure sit nullus.*

2. That the said Act of 27 *E.* 1. doth not extend to heirs in tail, but only to heirs in fee simple, as *arguendo dicitur* in 8 *H.* 4. 7. for the issues in tails are not bound by fines, or any other Record which enureth by way of estoppel or conclusion.

3. The said Act of 27 *E.* 1. speaketh *de finibus rite levatis*, and a fine is not said *rite levatus*, when there wanteth seisin in the one part or the other, so that *partes finis nihil habuerunt*; but so hath the said Act by the Judges in ancient times been interpreted, as appeareth by the Book in 46 *E.* 3. 41. *pl.* 20. where in a *Formedon* in the *Descender* the tenant pleaded a fine with warranty in bar, the demandant replied, *quod partes finis nihil habuerunt.* And 13 *Ass.* 8. it is said, that it hath been adjudged a good plea for the issue in tail against a fine and render of his father, to alledge the continuance in his father, and that he died seised, and that he entred as son and heir. And *Br. tit. Fines* 109. a fine levied with proclamation by tenant in tail may be avoided by the issue, *si partes finis nihil habuerunt*, for the Statute is intended *de finibus rite levatis*; and therefore the issue in tail may plead *quod partes finis nihil habuerunt*, for then it is but a fine by conclusion between

the parties: And in 13 E. 3. *Replication* 62. and 17 E. 3. 53. some held that a fine is not *rite levatus*, when *partes finis nihil habuerunt*, for seisin in one of the parties is of the essence of a fine rightfully levied.

[89] To the first Objection it was answered, that the Statute of *Donis Conditionalibus* was made 13 E. and the Statute *de Finibus* was made 27 E. 1. in which the issue in tail is not excepted. *Ergo*, he sh be bounden by the latter Act, and therewith agreeth good opinion in 8 H. 4. 8.

To the second Objection, although the issue in tail was not bound by any fine by his ancestor before the Statute of 4 H. 7. yet as hath been said, he was ousted to aver in such Case, *quod partes finis nihil habuerunt*, and being privy as heir to him who levied the fine, was by the Statute of 27 E. estopped and concluded to annihilate the fine of his ancestor by such plea; and although it is provided by the Statute of *Donis Conditionalibus*, *Quod finis ipso jure sit nullus*, that is to say, to bar the right the issue in tail, yet it is an estoppel for him to say, *Quod partes finis nihil habuerunt*. And therefore the Case is remarkable in 33 E. 3. *Estoppel* 280. where the Case in effect was: Grandfather, father and son; the son brought a *Formedon* of a gift in tail made to the Grandfather, the tenant voucheth one *T.* as cousin and heir of *E.* within age, and prayed that the parol might demurr, and the demandant said that the vouchee nor any of his ancestors, &c. were seised after the seisin of the Grandfather, of which seisin, &c. The tenant said, that the Grandfather of the demandant levied fine of the tenements in demand to *E.* and demanded Judgment, if against the fine levied by his Grandfather, whose heir he is, he shall be restrained to such averment. The demandant said that the Statute *Scil. De donis conditionalibus*, voided the fine by the ancestor in tail; and yet by Judgment of the Court he was ousted of the said averment; for there it was said that the Statute voided the fine as to bar the heir in tail of Action, nevertheless the fine remained in force to restrain the heir in tail to aver a thing contrary to the fine as well as the heir in fee simple; and therewith agreeth 22 E. 3. 17. & 33 H. 6. 18. *Yelverton* and others.

As to the third Objection, a fine may be said *rite levatus*, although that *partes finis nihil habuerunt*, for *rite levatus* is as much as to say within the said Act, as duly levied, that is to say, due form of Law: For the same Act doth oust the parties of such averment, and therefore *rite levatus* ought to be so expounded; and a fine may be said levied in due form of Law, although it be a fine merely by conclusion: And as to the said Case in 46 E. 3. it ought to be intended of a fine levied by a collateral ancestor, from whom the demandant doth not claim the land, and then the averment is good, for *hæres dicitur ad hæreditate, vide* 19 H. 8. 6. *b.* by *Inglefield* and others; and

[b] 38 E. 3. 10. 36 H. 6. *View* 30. And in the said Act it is said *earum partium hæredes*, it is to be intended of such an heir who claimeth the inheritance from the ancestor who levieth the fine: As in *Formedon* of a gift made to the father of the demandant, the tenant pleaded the fine of the Grandfather of the demandant with warranty, &c. the demandant may plead, *Quod partes finis nihil habuerunt*, but that himself was seised at the time; and therewith agreeth 33 H. 6. 18. 13 *Ass.* 8. 13 3. *Replication* 62. 22 E. 3. 17. 17 E. 3. And as to the said Book of 13 *Ass.* 8. it was affirmed for good Law; for there is a difference when tenant in tail levieth a fine *sur conusans de droit come ceo, &c.* and when he accepteth such a fine, and maketh a grant and render, for against a fine levied by tenant in tail *sur conusans de droit come ceo, &c.* his heir cannot averr continuance, &c. in his ancestor for that shall be contrary to the fine, which is restrained by the Statute *de Finibus*, as *Fairfax, Littleton*, and *Brian* held in 12 E. 4. 15. 8 H. 4. 8. & 9. And so *Shard* said in the same Book of 13 *Ass.* 8. But when tenant in tail accepteth a fine, and granteth and rendreth the land by the same fine (which is but executory) there if no execution be sued in the life of tenant in tail, his issue may averr continuance of possession, &c. in his father, for that well stands with the fine, for acceptance of a fine *sur conusans de droit come ceo, &c.* which presupposeth a gift precedent, shall not alter the estate and the grant and render until it be executed doth not devest any estate out of the tenant in tail, and by consequence, he continueth tenant in tail, and therewith agreeth 41 E. 3. 14. 42 E. 3. 9. 8 *Ass.* 33. 11 H. 4. 85. *a.* And according to this difference was it adjudged M. 3 & 4 *Eliz.* in the Common Pleas, *Rot.* 1483. *Conisbies* Case, where the Case was such; *Palmer* and *Mary* his wife seised for the life of the wife as of her right, the remainder unto *Elizabeth Conisbie* in tail, the remainde to the said *Elizabeth* in fee; *Palmer* and his wife levied a fine *sur conusans de droit come ceo, &c.* to the said *Elizabeth* with Proclamations, who granted and rendred a rent of 27l. 10s. to the conusor for the term of their lives with clause of distress; and afterwards *Elizabeth* died, and the land descended to *Henry Conisbie* her son and heir in tail, who leased the land to *Parker* for years; and afterwards *Mary* died; *Palmer* distrained for the rent, and he brought a Replevin: And in this Case two Points were resolved and adjudged.

1. That against such fine accepted by tenant in tail, the issue may averr continuance of seisin by force of the tail, and the issue in tail is not estopped by the admittance and acceptance of his ancestor.

[90] 2. That the grant and render of the rent was not within the Statute of 4 H. 7. or 32 H. 8. because the fine was not levied of the land it self which was entailed but of a rent newly created out of the land: But in the Case of the Lord *Zouch* it was resolved by all the Judges of the Common Pleas, that the Statutes of 4 H. 7. & 32 H. 8. extend to fines levied by conclusion, and shall bind the estate tail, although *partes finis nihil habuerunt*; As if tenant in tail maketh a feoffment in fee, or be disseised, and afterwards levieth a fine with proclamations to a stranger, it shall bind the estate tail, and the issues in tail are barred for ever. And it is to be observed, that the Statute of 32 H. 8. saith, All fines levied of any lands, tenements, or hereditaments, in any wise entailed to the person so levying the same, or to any of his ancestors, &c. and the land is entailed to the person who levieth the fine, although he were not seised thereof at the time. And in the Statute of 4 H. 7. (which

(which is expounded by the Act of 32 *H.* 8.) is a saving to every person or persons not party or privy to the said fine, their exception, *quod partes finis nihil habuerunt*; and the issue in tail is privy, for he claimeth as heir and by descent. And afterwards, *scil. M.* 29 & 30 *Eliz.* Judgment was given accordingly, *scil.* that the demandant should be barred; which Case I have Reported more at large, because it is remarkable, and the first Judgment which was given in the said Point upon the said Statutes. And it was said, that the said Judgment did rule the Point now in debate, for thereby it appeareth, If tenant in tail be disseised, and levieth a fine and dieth before all the proclamations are past, although the issue enter into the land, yet after the proclamations are made he shall be barred, for he cannot say, *quod partes finis nihil habuerunt*; And it was said, that if in case when tenant in tail hath nothing at the time of the fine levied that the issue shall be barred by the said Statutes, *a fortiori*, when tenant in tail at the time of the fine levied is seised of an estate tail (be it in possession, reversion or remainder) which may in truth (and not by conclusion only) pass by the said fine, the issue shall be barred by the said Statutes.

Also in *ann.* 20 *Eliz.* the Case of one *Archer* in the Common Pleas, it was resolved by Sir *James Dier*, *Manwood*, *Monnson* and *Mead*, that where lands were given to the Grandfather and his wife in special tail, the Grandfather died, the father disseised the Grandmother, and levied a fine with proclamations; the Grandmother died, the father dieth, that the son was barred; and yet the father at the time of the fine levied had but a possibility (the Grandmother living) to the estate tail. Yet the Judges did expound the Statute of 31 *H.* 8. (being an Act of explanation) according to the letter, *scil.* that for as much as the land was entailed to his ancestor, although his ancestor were alive; so that no estate in right was descended to him which he might pass or execute, yet because the said Statute saith, intailed to the person so levying or to any of his ancestors in the disjunctive, it was holden that the fine with proclamations did bar the right, which after the fine should descend to him, not only as to himself, but as to all the heirs in tail; *pari ratione*, it was said that in the Case in Question, for as much as it is provided, That after the proclamations past the estate shall be barred without any saving for the issue; the issue shall be barred notwithstanding any claim by him according to the letter and purview of the Act. And upon these two Cases of the Lord *Zouch* and *Archer* it followeth, That if the Grandfather be tenant in tail, and the father in his life having nothing in the land, levieth a fine with proclamations, and the Grandfather dieth, and afterwards the father dieth; That this fine shall bind the issue, which as was said was the stronger Case, than the Case now in Question. [b]

And in the Term of S. *Michael*, 23 & 24 *Eliz.* in the Common Pleas, the Case was such; Sir *George Blunt* was tenant in tail of divers Mannors in the Counties of *Shrewsbury* and *Stafford*, and had issue a daughter who was married to one *Purslowe*: And afterwards in *Easter* and *Trinity* Term, 23 *Eliz.* Sir *George* levied a fine of the said Mannors to one *Lacon* of *Worcestershire*, and died in *August* following. *Purslowe* and his wife brought a *Formedon*, and pendant the plea proclamations passed; it was agreed by the whole Court, that the Defendant should plead the fine and proclamations which passed pendant the Writ, and should bar the demandant; and yet in the said Case a right of intail descended to the wife of *Purslowe*, and presently they sued their *Formedon*, which was as much as they could do, for the fine is the conveyance which passeth the estate, and the proclamations are but a short repetition of the fine, and are by the Statute of 32 *H.* 8. only added (as hath been said) to declare that it is a fine according to the Statute of 4 *H.* 7. which barreth the estate tail, and not a fine at the Common Law: *Ex hoc* four things are to be observed.

1. That though that after the fine levied a right of intail descended to the wife of *Purslow*, yet after the Proclamations past, the right which descended is barred by force of the fine.

2. That although a *Formedon* be brought and pursued, yet when after the proclamations pass the fine is a bar; and what reason shall there be that the issue in tail shall be more barred of his right which descends to him, and of his rightful Action which he hath pursued for the recovery of his right, then the issue should be barred in the Case in question after the proclamations past, notwithstanding his entry or claim in *pais*. [91]

3. When tenant in tail levieth a fine and dieth before proclamations, that the issue in tail is not within any of the savings of 4 *H.* 7. for if he shall be, then the bringing of his *Formedon* before all the proclamations passed, and the pursuing of it should avoid the bar which the Statute made after the proclamations past.

4. That in such Case the proclamations serve to no purpose, but only to distinguish that it is a fine levied according to the Statute of 4 *H.* 7. For although that the issue having notice of the proclamations bringeth his *Formedon*, yet it shall not avail him.

Trin. 4 *Eliz.* in the Common Pleas, a Case was, as *Bendloe*'s Serjeant at Law reporteth to this effect: Tenant in tail doth discontinue in fee, and disseiseth the discontinuee, and levieth a fine *sur conusans de droit come ceo* with proclamations to a stranger, and taketh back an estate by render in the same fine; and the discontinuee before all the proclamations past entreth, and claimeth the land, and avoideth the estate which passeth by the fine, and afterwards proclamations pass, tenant in tail continueth his possession and dieth seised within the year after the entry and claim; The Question was, if the heir in tail be remitted, or if the entry of the discontinuee were lawful; And the opinion of the Justices was, That the heir in tail was not remitted, but that he was barred by the Statute of 32 *H.* 8. although the estate which passed by the fine was utterly avoided before the proclamations passed. By which it appeareth, that although that the estate which passeth by the fine be utterly defeated before the proclamations, yet when after the proclamations pass, the estate tail shall be passed. And so the doubt which was conceived in the Kings Bench, *M.* 38 & 39 *Eliz.* in an *Ejectione firmæ*, between *Harvy* Plaintiff, and *Facy* Defendant, upon a demise made by *Robert Bret* Esquire, of land in *Northpedderton*, where the same

Point was in question, and not adjudged; for the said *Robert Bret*, and *Arthur Acclam* Esquire, who was the Defendants lessor, did agree, and *Bret* who claimed by the fine had good part of the inheritance, was well resolved.

5. It was resolved, that although the issue in tail be beyond the Sea, yet for as much as he is privy and out of all the savings of the Statute of 4 *H.* 7. he is bound, although he be beyond the Sea, in the same manner as the issue in tail was within age, or under coverture, or *Non compos mentis*, or in Prison; [b] and that was agreed by all the Justices *nullo contra dicente*; *Ex hoc sequitur*, that the entry or claim of the issue in tail before all the proclamations are past is not material, for if the entry or claim of the issue in tail shall be of any force, then it shall be hard to bind them for want of claim, which have not power or intelligence to make entry or claim, and their Nonclaim was not prejudicial to them by the rule and reason of the Common Law. And if Infancy, Coverture, *Non sanæ memoriæ*, or imprisonment of the heir in tail, in such Case shall give him power to avoid the fine, in this Case no man shall be assured of lands conveyed to him by fine.

Note Reader, there was never any Judgment or Resolution of any Court against the third Point resolved in this Case; but the opinion of Councellors *arguendo* in *Smith* and *Stapleton*'s Case, *Plow. Comm.* 430. And the opinion of *Brook tit. Assurance* 6. and *Fines* 109. But those opinions are not only against and contrary to the said Judgments and Resolutions aforesaid, of the Courts aforesaid, but would bring in great inconvenience in weakening of the general Assurance of lands: And observe well all these points now resolved, and the said former Judgments and Resolutions cited in this Case, for as I conceive they are grounded upon deep and pregnant reason, tending to the repose and quieting of infinite inheritances,

THE

THE REPORTS OF Sir Edward Coke Kt. &c.

PART IV.

Mich. 14 & 15 Eliz.

Vernon's Case.

IN a Writ of Dower brought by *Mary Vernon* againſt *John Vernon* Eſquire, of the Mannor of *Sudbury* in the County of *Darby*; The Tenant pleaded, that her husband was alſo ſeiſed of certain lands in the ſame County in his demeſn as of fee; and by deed indented did thereof enfeoff Sir *Thomas Gifford* Knight, and others, and their heirs to the uſe of himſelf for the term of his life without impeachment of Waſt; And after his deceaſe to the uſe of the demandant then his wife for the term of her life; and after her deceaſe to the uſe of the right heirs of the husband; And averred that the ſaid eſtate limited for life to the demandant was for her Joynture, and in full ſatisfaction of her Dower; and that after the death of her husband the demandant entred into the ſaid land ſo limited to her for her Joynture and agreed to the ſame. To which the demandant replied, and confeſſed the ſaid feoffment, and the limitation of uſes, *ſcil.* to the uſe of the husband for life without impeachment of Waſt, and afterwards to the uſe of the demandant for her life; but further ſaid, That the ſaid limitation to the wife for life was upon condition that ſhe ſhould perform the laſt Will of her husband; and ſhewed all the Will in certain, in which divers things were to be performed by the demandant, and demanded Judgment if the tenant ſhall be admitted, and received to aver that this eſtate ſo limited to the wife upon condition, was for the Joynture of the wife, and in ſatisfaction of her Dower. Upon which matter the tenant did demur in Law: And in this Caſe five Points were reſolved. [1]

1. That by the Rule of the Common Law, a right or title that any one hath to any lands or tenements of any eſtate of inheritance or freehold, cannot be barred by acceptance of any manner of collateral ſatisfaction or recompence: As if *A.* diſſeiſe *B.* tenant for life or in fee of the Mannor of *Dale*, and afterwards giveth the Mannor of *Sale* to *B.* and his heirs in full ſatisfaction of all his Rights and Actions which he hath in or for the Mannor of *Dale*, which *B.* accepteth: yet *B.* may enter into the Mannor of *Dale*, or recover the ſame in a real Action. For a right or title of freehold or inheritance cannot be barred by any collateral ſatisfaction, but by Releaſe or Confirmation, or an act which doth *tant amount*; And therefore it is commonly ſaid in our Books, that Accord with ſatisfaction is a good plea in perſonal Actions where damages are only to be recovered, and not in real Actions: *Vide* 13 *H.* 7. 13, 20, *&c.* And that was the reaſon that no collateral ſatisfaction or recompence made to the wife in ſatisfaction of her Dower, was any bar of her Dower by the Common Law: But Dower *ad oſtium Eccleſiæ*, or *Ex aſſenſu patris* did conclude her of her Dower, if ſhe did enter into the land aſſigned her after the death of her husband, for the Law doth allow them, being made in ſuch form as the Law doth require Dower in Law to be. But if a man in conſideration of a marriage after to be had with *A.* make an eſtate of certain lands to her for her life, in full ſatisfaction of all the Dower which after marriage [b]

may

may accrue unto her in any of his lands, and after they do intermarry, it was not any bar of her dower at the Common Law for two cauſes; One, becauſe ſhe had not any title of Dower at the time of the acceptance of the ſatisfaction, but it accrued after: Secondly, becauſe that no collateral ſatisfaction can bar any right or title of any inheritance or freehold, as hath been ſaid; And by that the doubt in 29 *E.* 3. 3. is well reſolved. So if the husband purchace, or cauſe an eſtate to be made to him and his wife for life, or in tail in full ſatisfaction of her Dower and dieth, it was not any bar of her Dower at the Common Law, *cauſa quæ ſupra.* So if after the death of the husband the heir maketh an eſtate to the wife for life of any land whereof ſhe is not dowable) in full ſatisfaction of her Dower, it is not any bar of her Dower: See the Caſe now in the Reports of the Lord *Dier*, 1 *Mar.* 91. *acc.* and *vide* 31 *E.* 3. *Scire facias* 99. Before the making of the Statute of 27 *H.* 8. *cap* 10. The greateſt part of the land in *England* was conveyed to ſundry perſons to uſes, and for as much as a wife was not dowable of an uſe, her father or friends upon marriage did procure the husband to take eſtate from his feoffees, or others ſeiſed
[2] to his uſe, to him and to his wife before or after marriage for their lives, or in tail for a competent proviſion for the wife after the death of the husband: Then came the Statute of 27 *H.* 8. which transferreth the poſſeſſion and eſtate of the lands to the uſe, by which the husbands were ſeiſed accordingly, and by conſequence if further proviſion had not been made, the wives ſhould have as well their Dowers as their Joyntures for the reaſons aforeſaid. And for this cauſe the branches concerning Joyntures were added to the ſaid Statute of 27 *H.* 8. And therefore it was reſolved, that if this eſtate in the Caſe at Bar limited to the wife was not within the ſaid Act of 27 *H.* 8. that by the Common Law it was not any bar of the demandants Dower, but that ſhe ſhould have both.

Secondly, it was reſolved, That if a man make a feoffment to the uſe of himſelf for life, and afterwards to the uſe of his wife for her life, for the Joynture of his wife, that ſuch eſtate in remainder is within the intent of the ſaid Act of 27 *H.* 8. For although the Statute expreſſeth particularly theſe five forms, that is to ſay, 1. To husband and wife, and the heirs of the husband; 2. To the husband and wife, and the heirs of their two bodies; 3. To the husband and wife, and the heirs of the body of one of them; 4. To the husband and his wife for their lives; 5. To the husband and wife for the life of the wife; yet many eſtates not there expreſſed are within this Act, for the ſaid particular forms are ſet but for examples, and not to exclude any other eſtate, which is to ſuch effect, and agreeth with the intent of the makers of the Act; And although it was objected, that all the examples expreſſed in the Act are of a joynt eſtate made to the husband and wife, and none of them to the wife only, or by way of remainder; and although by a Proviſo in the ſame Act it is provided, that if any wife ſhall have any Mannors, Lands, &c. unto her aſſured after marriage for term of her life, or otherwiſe in Joynture, &c. ſo as the letter of the Act doth import a joynt eſtate, and that this word (*Junctura*) implieth a joynt eſtate; and that the Dowers of women are much favoured in Law; yet it was reſolved that all is to one effect as to the wife, to limit an eſtate to the husband and his wife for their lives, and to the husband for life the remainder to the wife for her life; for the one eſtate is as beneficial to the wife as the other. See after the Caſe of *Aſhton* as to this Point. But it was reſolved, that the eſtate which by force of this Act ſhall be in lieu and bar of her Dower ought by the limitation thereof to take effect immedi-
[b] ately after the death of the husband, for that appeareth by all the examples expreſſed by the Act, *ſcil.* that the eſtates of the wives ſhould take effect immediately after the death of their husbands: And therefore no other eſtate not expreſſed in the Act, ſhall be taken by the equity of the Act, if it hath not the ſame beginning for the benefit of the wives as the examples purport: and therefore if the husband maketh a feoffment in fee to the uſe of himſelf for life, and afterwards to the uſe of *B.* for life, and afterwards to the uſe of his wife for life for her Joynture, it is not within the Act, although *B.* dieth living the husband. So if the husband make a feoffment in fee to the uſe of *A.* for life, and afterwards to the uſe of his wife for life for her Joynture, it is not within the Act although *A.* dieth living the husband. For in theſe and other like Caſes, for as much as at the time of the limitation of the eſtates they were out of the Act, becauſe it was not certain that the eſtate of the wife ſhall take effect preſently by the death of the husband, as it ought by the Act, no ſubſequent event can make them within the Act. For *quod ab initio non valet, in tractu temporis non convaleſcet, & quæ malo ſunt inchoata principio, vix eſt ut bono peragantur exitu:* And therefore in all the ſaid like Caſes, although the wife attain to them, and entreth, and taketh the profits, yet ſhe ſhall have Dower of the reſidue. For if the ſaid Act doth not bar her, the Common Law, as hath been ſaid before ſhall not conclude her in ſuch Caſe of her Dower. And the Lord *Dier* ſaid, that it was adjudged in Queen *Mary's* time, that where the Duke of *Somerſet* purchaſed lands to him and to the Dutcheſs his wife, and to the heirs males of their two bodies, that although the ſame was not any of the eſtates put for example in the ſaid Act, yet it was adjudged that it was within the intent of the Act, and that you may ſee in the Lord *Dier's* Reports, 1 *Ma.* 26. Alſo the Lord *Dier* ſaid that it was reſolved in the time of Queen *Elizabeth*, that where one *Aſhton* in performance of covenants of a marriage to be between his ſon and one *A.* made a feoffment to the uſe of *A.* for her life for her Joynture, and afterwards they entermarried, and the husband died, it was a good Joynture within the intent of the Act; and yet all the five examples are of eſtates made to the husband and wife: But in the ſaid Caſe of *Aſhton*, the eſtate was made before morriage, ſo as there was not any husband or wife at the time of the making of the eſtate; alſo the eſtate was only to the woman, where all the examples are of a joynt eſtate, but all is of one effect, which Caſe you mey ſee *M.* 6 & 7 *Eliz. Dier* 228.

Thirdly, it was reſolved, that although the eſtate limited to the wife were upon condition, and although that Dower (in lieu of which the Joynture cometh) at the Common Law was an abſolute eſtate for life; yet for as much as an eſtate for life upon condition is an eſtate for life, it was within the words and the intent of the Act, if the wife after the death of her husband accept thereof: For it was agreed, that a Joynture is a competent livelihood of freehold for the wife to take effect preſently after

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the death of her husband, if ſhe be not the cauſe of the determination, or forfeiture thereof; And therefore if the husband maketh a feoffment in fee to the uſe of his wife, for anothers life for her Joynture, [3] it is not within the Act, for the eſtate is not for the wives life, and by that ſhe ſhall be deſtitute of livelihood: But if a man maketh a feoffment in fee to the uſe of himſelf for life, and after to the uſe of his wife *durante viduitate ſua* for her Joynture, the ſame is an eſtate to her for life, and it cannot determine without her own act, and therefore it is a Joynture within the ſaid Act. The ſame Law of an eſtate made to the wife for her life upon Condition, for if ſhe do not break the Condition, it is an eſtate to her for her life. And in the Caſe at the Bar if the Condition bind her to any unreaſonable thing, ſhe might have waved it, but when ſhe after the death of her husband entreth and accepteth of the conditional eſtate for her Joynture, ſhe is barred of her Dower.

Fourthly, it was reſolved, that if a Joynture be made to a woman before marriage, that after the death of her husband ſhe cannot wave it, and take her Dower, as ſhe may of a Joynture made to her during the marriage, and that by force of the ſaid Proviſo, the effect of which is, that if any woman hath any mannors, lands, tenements, or hereditaments aſſured to her after marriage for the term of her life, or otherwiſe in Joynture, &c. that ſhe after the death of her husband ſhall have liberty to refuſe it. By which they reſolved, that if the Joynture were made before marriage, that the intent of the makers of the Act was, that ſhe ſhould not refuſe, but ſhall take ſuch Joynture as was made to her. See *Aſhton's* Caſe before to this purpoſe. And it was ſaid, that if lands be conveyed to a woman before marriage for part of her Joynture, and after marriage more land is conveyed to her in full of her Joynture, and in ſatisfaction of all her Dower, and afterwards the husband dieth, in this Caſe if the wife wave the land conveyed to her after her marriage, ſhe ſhall have the land conveyed to her before the marriage, and her Dower alſo in the reſidue; for land conveyed to a woman in part of her Joynture, or in ſatisfaction of part of her Dower is no bar (for the uncertainty) of any part of her Dower. As if the debtor give to the creditor a horſe or any other thing in ſatisfaction of part of his debt, it ſhall be a bar for no part for the uncertainty. Alſo the words of the Act are, *For the Joynture of Women*, and not for part of their Joyntures.

Fifthly, it was reſolved, that although in the Caſe at Bar the eſtate of the wife was upon expreſs Condition to perform his Will, which importeth conſideration of the making of the eſtate, yet it may be averred for the Joynture of the wife, for one conſideration ſtands with another, and although it be not expreſſed in the deed yet it can be averred, as the Lord *Dier* ſaid it was adjudged in the like Caſe between *Villers* and *Beamont* in the time of Queen *Mary*, which you may ſee in his Reports 4. & 5. *Phil. & Mar.* [b] 146. And in the Caſe at Bar the Caſe is ſtronger, becauſe the ſaid averment is given by the ſaid Act of 27 *H.* 8. by the words of the Act, *For the Joynture of the wife*; and in this Caſe the Lord *Dier* ſaid that the Caſe of 6 *E.* 6. *Br. Dower* 69. was miſreported, for true it is that it was reſolved, that an eſtate in fee ſimple conveyed to the wife, was not any Joynture within this Statute, but that is to be intended within the Statute of 11 *H.* 7. 20. which reſtraineth the alienations of women, the which Act neither in the letter nor in the meaning can be intended when a woman hath an eſtate in fee ſimple; for to reſtrain ſuch eſtate that it ſhall not be aliened, is repugnant and againſt the rule of the Common Law, and utterly out of the letter and intention of the Act: But he ſaid, that an eſtate in fee ſimple conveyed to a woman for her Joynture, and in full ſatisfaction of her Dower, is a Joynture within the equity of the ſaid Act of 27 *H.* 8. for that is a competent livelihood to the wife of an eſtate of freehold, to take effect preſently after the death of the husband, for all the wives life and more. And it was ſo reſolved in Sir *Morrice Dennis* Caſe, which Caſe is now reported 8 *Eliz. Dier* 248. And he ſaid that the reaſon reported by *Br.* that a fee ſimple is no Joynture within the ſaid Statute of 27 *H.* 8. is becauſe that ſuch Joynture is not ſpoken of in the Statute, but that is not any reaſon in Law for three cauſes:

1. Becauſe the principal Caſe at Bar, and divers other Caſes put before were out of the words of the Act, and yet were within the equity and intent of the Act.

2. It agreeth with the deſcription of a Joynture agreed and reſolved before.

3. He ſaid, that this eſtate in fee ſimple was within the expreſs letter of the Act, for the words of the *Proviſo* are, For term of life, or otherwiſe in Joynture; which word (otherwiſe) extendeth to all other eſtates conveyed to the wife not mentioned before in the Act; for all other eſtates which are as beneficial or more to the woman as the eſtates mentioned in the Act, are within this word (otherwiſe.) And note this word (otherwiſe) is not indefinite, but otherwiſe in Joynture, that is, for a Joynture, which is as much to ſay (otherwiſe) having all the effect of the incidents to a Joynture implied in the ſaid five Examples, or more: And if an eſtate for life, in tail, or fee ſimple be conveyed to the wife for her Joynture, and after the death of the husband it be evicted, ſhe ſhall recover Dower to the value in the reſidue, and ſhall have but an eſtate for life, of what eſtate ſoever the Joynture be, by an expreſs *Proviſo* in the ſaid Act of 27 *H.* 8. So that upon the eviction, no greater prejudice ſhall grow to the Terre-tenant, if the Joynture be of any eſtate of inheritance, then if it were but only for term of her [4] life. And afterwards Judgment in the principal Caſe was given againſt the Defendant.

Note Reader, in the ſaid Caſe reported by the Lord *Brook*, it is further ſaid, That a demiſe of land to the wife by the husband by Will is no bar of Dower, for the ſame is a Benevolence and not a Joynture, *per Juſticiarios*, as it is there reported; and that is good Law, if it be well underſtood. And as to that ſome have ſaid, That no eſtate deviſed by Will can be a Joynture within 27 *H.* 8. for two reaſons.

1. By the ſaid Act of 27 *H.* 8. all the eſtate of the feoffees was transferred to *Ceſtuy que uſe*, and by conſequence no land after the making of that Act was deviſable until the Statute of 32 *H.* 8. and therefore a deviſe of land, which then by the Law could not be made, cannot be within the ſaid Act of 27 *H.* 8.

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may accrue unto her in any of his lands, and after they do intermarry, it was not any bar of her dower at the Common Law for two causes; One, because she had not any title of Dower at the time of the acceptance of the satisfaction, but it accrued after: Secondly, because that no collateral satisfaction can bar any right or title of any inheritance or freehold, as hath been said; And by that the doubt in 29 *E.* 3. 3. is well resolved. So if the husband purchace, or cause an estate to be made to him and his wife for life, or in tail in full satisfaction of her Dower and dieth, it was not any bar of her Dower at the Common Law, *causa quæ supra.* So if after the death of the husband the heir maketh an estate to the wife for life of any land whereof she is not dowable) in full satisfaction of her Dower, it is not any bar of her Dower: See the Case now in the Reports of the Lord *Dier*, 1 *Mar.* 91. *acc.* and *vide* 31 *E.* 3. *Scire facias* 99. Before the making of the Statute of 27 *H.* 8. *cap* 10. The greatest part of the land in *England* was conveyed to sundry persons to uses, and for as much as a wife was not dowable of an use, her father or friends upon marriage did procure the husband to take estate from his feoffees, or others seised
[2] to his use, to him and to his wife before or after marriage for their lives, or in tail for a competent provision for the wife after the death of the husband: Then came the Statute of 27 *H.* 8. which transferreth the possession and estate of the lands to the use, by which the husbands were seised accordingly, and by consequence if further provision had not been made, the wives should have as well their Dowers as their Joyntures for the reasons aforesaid. And for this cause the branches concerning Joyntures were added to the said Statute of 27 *H.* 8. And therefore it was resolved, that if this estate in the Case at Bar limited to the wife was not within the said Act of 27 *H.* 8. that by the Common Law it was not any bar of the demandants Dower, but that she should have both.

Secondly, it was resolved, That if a man make a feoffment to the use of himself for life, and afterwards to the use of his wife for her life, for the Joynture of his wife, that such estate in remainder is within the intent of the said Act of 27 *H.* 8. For although the Statute expresseth particularly these five forms, that is to say, 1. To husband and wife, and the heirs of the husband; 2. To the husband and wife, and the heirs of their two bodies; 3. To the husband and wife, and the heirs of the body of one of them; 4. To the husband and his wife for their lives; 5. To the husband and wife for the life of the wife; yet many estates not there expressed are within this Act, for the said particular forms are set but for examples, and not to exclude any other estate, which is to such effect, and agreeth with the intent of the makers of the Act; And although it was objected, that all the examples expressed in the Act are of a joynt estate made to the husband and wife, and none of them to the wife only, or by way of remainder; and although by a Proviso in the same Act it is provided, that if any wife shall have any Mannors, Lands, &c. unto her assured after marriage for term of her life, or otherwise in Joynture, &c. so as the letter of the Act doth import a joynt estate, and that this word (*Junctura*) implieth a joynt estate; and that the Dowers of women are much favoured in Law; yet it was resolved that all is to one effect as to the wife, to limit an estate to the husband and his wife for their lives, and to the husband for life the remainder to the wife for her life; for the one estate is as beneficial to the wife as the other. See after the Case of *Ashton* as to this Point. But it was resolved, that the estate which by force of this Act shall be in lieu and bar of her Dower ought by the limitation thereof to take effect immedi-
[b] ately after the death of the husband, for that appeareth by all the examples expressed by the Act, *scil.* that the estates of the wives should take effect immediately after the death of their husbands: And therefore no other estate not expressed in the Act, shall be taken by the equity of the Act, if it hath not the same beginning for the benefit of the wives as the examples purport: and therefore if the husband maketh a feoffment in fee to the use of himself for life, and afterwards to the use of *B.* for life, and afterwards to the use of his wife for life for her Joynture, it is not within the Act, although *B.* dieth living the husband. So if the husband make a feoffment in fee to the use of *A.* for life, and afterwards to the use of his wife for life for her Joynture, it is not within the Act although *A.* dieth living the husband. For in these and other like Cases, for as much as at the time of the limitation of the estates they were out of the Act, because it was not certain that the estate of the wife shall take effect presently by the death of the husband, as it ought by the Act, no subsequent event can make them within the Act. For *quod ab initio non valet, in tractu temporis non convalescet, & quæ malo sunt inchoata principio, vix est ut bono peragantur exitu:* And therefore in all the said like Cases, although the wife attain to them, and entreth, and taketh the profits, yet she shall have Dower of the residue. For if the said Act doth not bar her, the Common Law, as hath been said before shall not conclude her in such Case of her Dower. And the Lord *Dier* said, that it was adjudged in Queen *Mary's* time, that where the Duke of *Somerset* purchased lands to him and to the Dutchess his wife, and to the heirs males of their two bodies, that although the same was not any of the estates put for example in the said Act, yet it was adjudged that it was within the intent of the Act, and that you may see in the Lord *Dier's* Reports, 1 *Ma.* 26. Also the Lord *Dier* said that it was resolved in the time of Queen *Elizabeth*, that where one *Ashton* in performance of covenants of a marriage to be between his son and one *A.* made a feoffment to the use of *A.* for her life for her Joynture, and afterwards they entermarried, and the husband died, it was a good Joynture within the intent of the Act; and yet all the five examples are of estates made to the husband and wife: But in the said Case of *Ashton*, the estate was made before morriage, so as there was not any husband or wife at the time of the making of the estate; also the estate was only to the woman, where all the examples are of a joynt estate, but all is of one effect, which Case you mey see *M.* 6 & 7 *Eliz. Dier* 228.

Thirdly, it was resolved, that although the estate limited to the wife were upon condition, and although that Dower (in lieu of which the Joynture cometh) at the Common Law was an absolute estate for life; yet for as much as an estate for life upon condition is an estate for life, it was within the words and the intent of the Act, if the wife after the death of her husband accept thereof: For it was agreed, that a Joynture is a competent livelihood of freehold for the wife to take effect presently after the

the death of her husband, if ſhe be not the cauſe of the determination, or forfeiture thereof; And therefore if the husband maketh a feoffment in fee to the uſe of his wife, for anothers life for her Joynture, it is not within the Act, for the eſtate is not for the wives life, and by that ſhe ſhall be deſtitute of livelihood: But if a man maketh a feoffment in fee to the uſe of himſelf for life, and after to the uſe of his wife *durante viduitate ſua* for her Joynture, the ſame is an eſtate to her for life, and it cannot determine without her own act, and therefore it is a Joynture within the ſaid Act. The ſame Law of an eſtate made to the wife for her life upon Condition, for if ſhe do not break the Condition, it is an eſtate to her for her life. And in the Caſe at the Bar if the Condition bind her to any unreaſonable thing, ſhe might have waved it, but when ſhe after the death of her husband entreth and accepteth of the conditional eſtate for her Joynture, ſhe is barred of her Dower. [3]

Fourthly, it was reſolved, that if a Joynture be made to a woman before marriage, that after the death of her husband ſhe cannot wave it, and take her Dower, as ſhe may of a Joynture made to her during the marriage, and that by force of the ſaid Proviſo, the effect of which is, that if any woman hath any mannors, lands, tenements, or hereditaments aſſured to her after marriage for the term of her life, or otherwiſe in Joynture, &c. that ſhe after the death of her husband ſhall have liberty to refuſe it. By which they reſolved, that if the Joynture were made before marriage, that the intent of the makers of the Act was, that ſhe ſhould not refuſe, but ſhall take ſuch Joynture as was made to her. See *Aſhton's* Caſe before to this purpoſe. And it was ſaid, that if lands be conveyed to a woman before marriage for part of her Joynture, and after marriage more land is conveyed to her in full of her Joynture, and in ſatisfaction of all her Dower, and afterwards the husband dieth, in this Caſe if the wife wave the land conveyed to her after her marriage, ſhe ſhall have the land conveyed to her before the marriage, and her Dower alſo in the reſidue; for land conveyed to a woman in part of her Joynture, or in ſatisfaction of part of her Dower is no bar (for the uncertainty) of any part of her Dower. As if the debtor give to the creditor a horſe or any other thing in ſatisfaction of part of his debt, it ſhall be a bar for no part for the uncertainty. Alſo the words of the Act are, *For the Joynture of Women*, and not for part of their Joyntures.

Fifthly, it was reſolved, that although in the Caſe at Bar the eſtate of the wife was upon expreſs Condition to perform his Will, which importeth conſideration of the making of the eſtate, yet it may be averred for the Joynture of the wife, for one conſideration ſtands with another, and although it be not expreſſed in the deed yet it can be averred, as the Lord *Dier* ſaid it was adjudged in the like Caſe between *Villers* and *Beamont* in the time of Queen *Mary*, which you may ſee in his Reports 4. & 5 *Phil. & Mar.* 146. And in the Caſe at Bar the Caſe is ſtronger, becauſe the ſaid averment is given by the ſaid Act of 27 *H.* 8. by the words of the Act, *For the Joynture of the wife*; and in this Caſe the Lord *Dier* ſaid that the Caſe of 6 *E.* 6. *Br. Dower* 69. was miſreported, for true it is that it was reſolved, that an eſtate in fee ſimple conveyed to the wife, was not any Joynture within this Statute, but that is to be intended within the Statute of 11 *H.* 7. 20. which reſtraineth the alienations of women, the which Act neither in the letter nor in the meaning can be intended when a woman hath an eſtate in fee ſimple; for to reſtrain ſuch eſtate that it ſhall not be aliened, is repugnant and againſt the rule of the Common Law, and utterly out of the letter and intention of the Act: But he ſaid, that an eſtate in fee ſimple conveyed to a woman for her Joynture, and in full ſatisfaction of her Dower, is a Joynture within the equity of the ſaid Act of 27 *H.* 8. for that is a competent livelihood to the wife of an eſtate of freehold, to take effect preſently after the death of the husband, for all the wives life and more. And it was ſo reſolved in Sir *Morrice Dennis* Caſe, which Caſe is now reported 8 *Eliz. Dier* 248. And he ſaid that the reaſon reported by *Br.* that a fee ſimple is no Joynture within the ſaid Statute of 27 *H.* 8. is becauſe that ſuch Joynture is not ſpoken of in the Statute, but that is not any reaſon in Law for three cauſes: [b]

1. Becauſe the principal Caſe at Bar, and divers other Caſes put before were out of the words of the Act, and yet were within the equity and intent of the Act.

2. It agreeth with the deſcription of a Joynture agreed and reſolved before.

3. He ſaid, that this eſtate in fee ſimple was within the expreſs letter of the Act, for the words of the *Proviſo* are, For term of life, or otherwiſe in Joynture; which word (otherwiſe) extendeth to all other eſtates conveyed to the wife not mentioned before in the Act; for all other eſtates which are as beneficial or more to the woman as the eſtates mentioned in the Act, are within this word (otherwiſe.) And note this word (otherwiſe) is not indefinite, but otherwiſe in Joynture, that is, for a Joynture, which is as much to ſay (otherwiſe) having all the effect of the incidents to a Joynture implied in the ſaid five Examples, or more: And if an eſtate for life, in tail, or fee ſimple be conveyed to the wife for her Joynture, and after the death of the husband it be evicted, ſhe ſhall recover Dower to the value in the reſidue, and ſhall have but an eſtate for life, of what eſtate ſoever the Joynture be, by an expreſs *Proviſo* in the ſaid Act of 27 *H.* 8. So that upon the eviction, no greater prejudice ſhall grow to the Terre-tenant, if the Joynture be of any eſtate of inheritance, then if it were but only for term of her life. And afterwards Judgment in the principal Caſe was given againſt the Defendant. [4]

Note Reader, in the ſaid Caſe reported by the Lord *Brook*, it is further ſaid, That a demiſe of land to the wife by the husband by Will is no bar of Dower, for the ſame is a Benevolence and not a Joynture, *per Juſticiarios*, as it is there reported; and that is good Law, if it be well underſtood. And as to that ſome have ſaid, That no eſtate deviſed by Will can be a Joynture within 27 *H.* 8. for two reaſons.

1. By the ſaid Act of 27 *H.* 8. all the eſtate of the feoffees was transferred to *Ceſtuy que uſe*, and by conſequence no land after the making of that Act was deviſable until the Statute of 32 *H.* 8. and therefore a deviſe of land, which then by the Law could not be made, cannot be within the ſaid Act of 27 *H.* 8.

The

The other reaſon was, becauſe that every Joynture intended within the Act of 27 *H.* 8. is made and aſſured either before, or during the coverture, as appeareth by the ſaid Act; but a deviſe takes its effect after the husbands death: But that none of theſe is any reaſon in Law appeareth by the Reſolution following, *Mich.* 38 & 39 *Eliz.* between *Leak* and *Randal* in the Court of Wards, it was reſolved by the two chief Juſtices, and the whole Court, That if a man deviſeth land to his wife for term of life generally, it cannot be averred to be for the Joynture of the wife, and in ſatisfaction of her Dower for two cauſes.

1. Becauſe a deviſe implieth a conſideration in it ſelf, and therefore as a deviſe cannot be averred to be to the uſe of another, then to the deviſee, if it be not expreſſed in the Will, no more can a deviſe be averred to be for a Joynture if it be not expreſſed in the Will. But as it is ſaid in the ſaid Caſe of 6 *E.* 6. it ſhall be taken for a Benevolence, and ſo is the ſaid Caſe of 6 *E.* 6. to be intended.

2. The whole Will concerning lands by the Statutes of 32 & 34 *H.* 8. ought to be in writing and no averment ought to be taken out of the Will, which cannot be collected by the words in the Will. But if a man deviſeth lands to a woman for term of her life, or in tail, &c. for her Joynture, and in ſatisfaction of her Dower; it was reſolved that the ſame is a good Joynture within the ſaid Act of 27 *H.* 8. for as an eſtate for life made to a woman before marriage, when ſhe is not his wife, is within the equity of the ſaid Act; So an eſtate deviſed to a woman for her life, which taketh effect preſently after his death when the marriage is diſſolved, is alſo within the equity of the ſaid Act; for ſuch eſtate well agreeth with the intent of the makers of the ſaid Act of 27 *H.* 8 and with the ſaid deſcription of a Joynture made by the Juſtices in *Vernon's* Caſe. And although that the land was not deviſable till 32 *H.* 8. yet it is frequent in our Books, that an Act made of late times ſhall be taken within the equity of an
[b] Act made long time before. As the Statute of *Marlebridge* which was made 52 *H.* 3. gave the Wardſhip of the heir of the tenant who held by Knights ſervice, notwithſtanding feoffment made by colluſion, at which time and by 200 years and more, that is to ſay, till the Statute of 4 *H.* 7. *c.* 17. which gave the Wardſhip of the heir of *Ceſtuy que uſe*, the heir of *Ceſtuy que uſe* was not in Ward; And yet it is holden in 27 *H.* 8. 9. that if *Ceſtuy que uſe* after the Statute of 4 *H.* 7. make a feoffment in fee by colluſion, to defraud the Lord of his Ward, it is taken within the equity of the Statute of *Marlebridge*.

Alſo the Statute of *Donis Conditionalibus* made 13 *E.* 1. as to the warranty of tenant in tail with Aſſets is taken within the equity of the Statute of *Glouceſter cap.* 3. made *anno* 6 *E.* 1. as it is holden in 11 *E.* 2. *garr. Stath.* & 38 *E.* 3. 23. For *Formedon* in *Deſcender* was given in place of *Mortdanceſter*. So the Statute of *Weſt.* 2. *cap.* 25. made 13 *E.* 1. gave a Certificate, but gave no Adjornment, but Adjornment is taken by equity of the Statute of *Magna Charta cap.* 13. made 9 *H.* 3. as it is holden 12 *E.* 4. 9. So the Statute of 7 *R.* 2. gave Aſſiſe in *confinio Comitatus*, and *Redisſeiſin* taken by equity of the Statute of *Merton cap.* 3. made 20 *H.* 3. *Vide* 1 *E.* 3. 25. & 12 *Eliz. Dier* 289. The Biſhop of *London* being one of the high Commiſſioners by force of the Act of 1 *Eliz.* was tranſlated to the Biſhoprick of *York*, yet his authority did remain by force of the Act made 1 *E.* 6. *cap.* 7. And with this reſolution in *Leak's* Caſe aforeſaid, agreeth the Caſe Reported by the Lord *Dier*, 5 *Eliz.* 20. A man ſeiſed of certain land in fee holden in Socage, and of other lands in tail holden in *Capite* deviſed by his Will in writing the third part of all his lands to his wife in recompence of her Dower, and died; the wife entred the third part of the land in fee ſimple; And it was reſolved, that it ſhould be a good Bar of her Dower by the ſaid Act of 27 *H.* 8. in the Court of Wards: Note Reader, a good difference; and all the opinions which ſeem to diſagree, well accorded and reconciled.

Know Reader, that by ſubtil and ſiniſter counſel an evaſion out of the ſaid Act of 27 *H.* 8. (as was intended) was deviſed, How women might have Joyntures and Dowers alſo notwithſtanding the ſaid Act, and the meaning thereof. And the invention was ſuch; One *Chriſtian* who was the wife of one *Richard Melles* of *Suffolk*, had a Joynture made of a houſe and certain lands in *Stoke Navlond* in the County of *Suffolk*, to her husband and her, and the heirs of the body of the husband by one *John Melles* unckle of the ſaid *Richard*; which *Richard* was ſeiſed in fee of other lands in the ſame Town,
[5] and afterwards *Richard* died; the wife with certain of her friends in confederacy in ſecret manner entred into the ſaid tenements conveyed to her and claimed them for her Joynture, and yet waved the poſſeſſion, and brought a Writ of Dower to be endowed of the whole, as well of that which was aſſigned to her for her Joynture, as of the reſidue of her husbands lands and tenements, and had a full third part of all (accounting the land conveyed to her for her Joynture to be parcel) aſſigned to her by the Sheriff for her Dower (he not knowing the practice) only out of the reſidue: And when ſhe had her Dower, then ſhe openly entred into the houſe and land conveyed to her for her Joynture, who was holden out by *Thomas Purſlowe* the Terre-tenant; and afterwards ſhe married with one *John Sharp*, who brought an Action of Treſpaſs againſt the ſaid *Thomas Purſlowe*, for a Treſpaſs done 10 *Junii*, 18 *Eliz.* in the houſe and land conveyed in Joynture. And *Purſlowe* by the advice of one of the Inner Temple pleaded the feoffment of the ſaid *Richard* to him and juſtified, &c. To which the Plaintiffs replied, that before *Richard* had any thing, that the ſaid *John* was ſeiſed, and gave to her husband and her *ut ſupra*. To which the Defendant rejoyned, that the eſtate made to *Richard* and *Chriſtian* was for the Joynture of *Chriſtian*, and that after the death of her husband, and before the Treſpaſs, ſhe brought a Writ of Dower againſt the Defendant then Tenant of the land whereof her husband was ſeiſed, and demanded the third part of all recovered, and had execution out of the reſidue, and averred that the ſaid houſe and land was parcel of the land conveyed to her for her Joynture, and no part of the land aſſigned to her for her Dower. To which the Plaintiffs did ſurrejoyn, that the ſaid *Chriſtian* after the death of her husband, and before the Writ of Dower brought, did enter into the ſaid houſe claiming the ſame for her Joynture. To which the Defendants by way of Rebutter ſaid, That to ſay that the ſaid *Chriſtian* after the death of her husband, and before the Writ brought, hath entred, ſhall not be admitted againſt the ſaid Record of Recovery in the Writ of Dower: Upon which the Plaintiffs did demurr in Law,

And

And it was argued by the Plaintiffs Council, that firſt, this bringing of the Writ of Dower cannot be any waver of the eſtate of the wife, becauſe that by the entry of the wife ſhe hath agreed to the ſaid eſtate, and was actually ſeiſed; and therefore ſhe cannot afterwards wave and deveſt the ſame out of her by the bringing of the ſaid Writ of Dower. To which it was anſwered by the Defendants Council, That *poſito* that the wife cannot wave, yet ſhe may well bar and conclude her ſelf to claim the ſaid eſtate; and in this Caſe ſhe hath eſtopped her ſelf to claim any eſtate in the houſe and land in which, &c. for when ſhe bringeth her Writ of Dower, and hath judgment to have the third part of the whole, by that ſhe affirmeth, that ſhe had not title to Dower, and by conſequence no eſtate. *Ergo* ſhe is eſtopped to claim in any part thereof, whereof ſhe doth demand by her Writ to be endowed.

As if the husband doth diſcontinue the wives land and dieth, and the wife bringeth a Writ of Dower againſt the diſcontinuee, and recovereth the third part, ſhe is thereby eſtopped to bring a *Cui in vita*, for by the Writ of Dower ſhe claimeth title of Dower only, and therefore ſhe ſhall be eſtopped to claim any other eſtate or right by her *Cui in vita: Vide* 10 *E.* 3. *Double plea* 8. 20 *E.* 3. *Scire fac'* 13. *F. N. B.* 194. 17 *Aſſ.* 3. Acceptance of Dower by Deed indented, concluded the wife of her right, *vide* 11 *H.* 7. 20. So if ſhe had brought a Writ of Dower to be endowed of the reſidue only, and had recovered her Dower thereof, ſhe ſhall be eſtopped to claim any eſtate in the ſaid houſe and land conveyed unto her, although ſhe hath entred before. For by the bringing of her Writ of Dower to be endowed of the reſidue, ſhe hath *tacite* affirmed, that ſhe hath not agreed to any Joynture made to her; for then ſhe cannot bring any Writ of Dower by the ſaid Act of 27 *H.* 8. And if the Law ſhall be otherwiſe, great inconvenience will follow, which by no induſtry or policy can be prevented, as appeareth before. [b]

And for theſe cauſes it was concluded, That the Plaintiffs were in any Caſe concluded to claim the ſaid houſe and land in which the Treſpaſs was ſuppoſed, &c. *Quod fuit conceſſum per* Sir *Chriſtopher Wray* Chief Juſtice, Sir *Thomas Gawdy*, and the whole Court. *Nota*, Reader, *Simplicitas eſt legibus amica, & nimia ſubtilitas in jure reprobatur.*

In a Replevin *in the Common Pleas, Mich.* 17 & 18 Eliz. Rot. 1739.

Bevil's Caſe.

BEtween *Walter Parker* Plaintiff, and *Nicholas Frauncis* Defendant, for taking of his Cattel in *Tellen* in the County of *Cornwal*, in a place called *Newton*; The Defendant made Conuſans as Baily to *John Bevil* Eſquire, by reaſon that the place where, &c. did contain 20 acres, whereof one *Robert Smith* was ſeiſed in fee, and held them of the ſaid *John Bevil*, as of his Mannor of *Kalligath* in the ſaid County by Knights-ſervice, *viz.* By Homage, Fealty, and Eſcuage, *ſcil.* when Eſcuage runs to 40 *s.* 40 *s.* and when more, more, and when leſs, leſs, and by ſuit of Court twice in the year, of which ſervices he was ſeiſed by the hands of the ſaid *Robert Smith*, as by the hands of his very Tenant, and made Conuſans for Homage: And iſſue was taken that the ſaid *John Bevil*, *nunquam fuit ſeiſitus de præd. ſervitiis, prout* the ſaid *Nicholas* had alledged. And the Jury gave a ſpecial verdict that the ſaid *John Bevil* was ſeiſed of the fealty only, &c. And if the ſeiſin of fealty were a ſufficient ſeiſin of the Services was the doubt, which the Jurors referred to the conſideration of the Court. [8]

And this Point was one of the principal Points in the Serjeants Caſe, and was argued by *Popham*, *Rhodes*, *Fenner*, *Shute*, and *Gawdy* Serjeants, and *Windham* and *Anderſon* the Queens Serjeants, *Paſc.* 21 *Eliz.* the Record and Pleading of which Serjeants Caſe is entred, *Hill.* 20 *El. Rot.* 1745. And this Caſe at Bar was many times argued in the time of Sir *James Dier*, and after his death, after many arguments at the Bar and Bench, was adjudged by *Anderſon* Chief Juſtice, *Meade*, *Windham*, and *Periam*, That the ſeiſin of fealty was ſeiſin of all the ſaid Services; and therewith agreeth 44 *E.* 3. 11. 8 *H.* 6. 16. and the reaſon was, That when the tenant doth fealty, he taketh a corporal Oath that he ſhall be faithful and loyal to the Lord, and bear faith to him for the Tenements which he claimeth to hold of him: and that he ſhall lawfully do the Cuſtoms and Services which he ought to do, ſo that the doing of this Service (by which he ſweareth to do all Services) is ſufficient ſeiſin of all. And true it is that *Littleton* ſaith, That Homage is the moſt honourable ſervice, and the moſt humble ſervice of reverence that a Freeholder can do to his Lord: But alſo it is true, that Fealty is a more ſacred ſervice then Homage; for that is made upon Oath, and the other not: And it is to be obſerved, that theſe words, *ſcil.* (*To him will be faithful and loyal, and bear him faith for the Tenements which he claimeth to hold of him*) are alſo parcel of the words in doing of the ſervice of Homage, and ſeiſin of any part of any ſervice is ſeiſin of the whole, as after appeareth. And that is the reaſon that the Law maketh ſo great account of the ſeiſin of theſe ſervices of Homage and Fealty; for the ſeiſin of them (becauſe it is the ſeiſin of all other ſervices) is ſo ineſtimable in Law, that no diſtreſs for them of any goods or chattels (of what value ſoever) is exceſſive in Judgment of Law; and although that the Lord often diſtrein for them, ſo that the tenant cannot till his land, yet the tenant ſhall not have Aſſiſe of Sovent diſtreſs, as he ſhall have for rent or other profits. *Vide* 28 *Aſſ.* 50. 11 *H.* 4. 2. 42 *E.* 3. 26. *Br. Diſtreſs* 80. And in this Caſe theſe Points were alſo reſolved.

1. That ſeiſin of ſuperior ſervices, is a ſeiſin of all inferior ſervices which are incident to it; as ſeiſin of Eſcuage is ſeiſin of Homage and Fealty, and ſeiſin of Homage is ſeiſin of Fealty, and ſeiſin of Rent is ſeiſin of Fealty where the Seigniory is by fealty and rent, *vide* 3 E. 2. *Avowry* 188. 5 E. 2. *Avowry* 209. 9 E. 2. *Monſtrans de faits* 41. 19 E. 2. *Avowry* 224. 7 E. 4. 28. & 29. 13 E. 3. *Avowry* 103. 21 E. 3. *Avowry* 115. 27 H. 8. 21. *Paſch.* 1 & 2 *Phil. & Mar.* in the *Common Pleas* it was adjudged, That where the Seigniory is by fealty and rent, that the ſeiſin of the rent is a ſeiſin of the fealty, and ſo is the Book adjudged in 29 E. 3. 21. *a.* and with that agreeth 3 E. 2. *Avowry* 188.

2. It was reſolved, That the doing of Homage is ſeiſin for all ſervices as well inferior as ſuperior, becauſe in doing of Homage he taketh upon him to do all ſervices, and therefore this ſervice is ſufficient ſeiſin of all the ſervices. And therewith agreeth 13 E. 4. 5. Seiſin of Homage is ſeiſin of Eſcuage which is ſuperior, and of Relief which is inferior, 22 *Aſſ.* 66. Payment of 1 *d.* in name of attornment of the whole, may be ſufficient ſeiſin of the whole Rent.

3. That ſeiſin of rent, or ſuit, or of other ſervice which is annual, is ſufficient ſeiſin of Eſcuage, Homage, Fealty, Guard, Relief, Heriot-ſervice, ſervice to cover the Hall of the chief Houſe or Mannor, or
[9] for impailing the Lords Park, or ſuch like caſual ſervices which peradventure fall not in 40, 60, or 70 years: And therefore there is great reaſon that ſeiſin of annual ſervices ſhall be ſeiſin of all ſuch caſual ſervices; and therewith agreeth 20 *E.* 3. *Avowry* 131. that ſeiſin of rent, and other annual ſervices, is ſeiſin of releaſe and other ſervices caſual and accident. And 7 E. 6. *Br. Gard* 69. & *Avowry* 69. that it was agreed by the Juſtices of both Benches, that where the Seigniory is by Knights-ſervice and rent, that ſeiſin of the rent which is annual and inferior to all the other, is a good ſeiſin to have the Wardſhip of the heir of the tenant; and therefore the opinion of *Brook* there, that it ſhall not be a ſeiſin to make an Avowry is not Law: And the Caſe of the Ward is a more ſtrong Caſe. But it was ſaid, That ſeiſin of one annual ſervice is not ſeiſin of another annual ſervice; As if the Lord and tenant by fealty and 10 *s.* rent, and three day works by the year, ſeiſin of the rent is not ſeiſin of the day works; nor ſeiſin of rent is not ſeiſin of ſuit of Court which is annual, *vide* 16 *Eliz. Dier* 330. and the reaſon is, becauſe it ſhall be accounted the folly of the Lord, that he doth not get ſeiſin of that which is due yearly, and it ſhall be miſchievous to the tenant, for peradventure the day works were diſcharged in ancient times, which cannot now be ſhewed, upon which would follow ſuits and troubles.

But note Reader, that all this which hath been ſaid, is to be intended of ſeiſin in Law, and not of actual ſeiſin. For ſeiſin of fealty in the Caſe at Bar is no actual ſeiſin of Homage, nor of ſuit of Court, nor ſeiſin of fealty is no actual ſeiſin of rent. *Vide* 8 H. 7. 17. 20 E. 3. *Aſſiſe* 433. 40 E. 3. 22. 29 *Aſſ.* 6. 44 *E.* 3. 11. *Br. Seiſin* 40. But ſeiſin of any part of any ſervice, is an actual ſeiſin of the whole to have an Aſſiſe. *Vide* 5 E. 4. 2. *b.* 12 *E.* 4. 7. 8 E. 3. 13. *a.* 8 *Aſſ.* 4. 44 E. 3. 32. 3 E. 3. *Aſſiſe* 175. And as to avow, ſeiſin in Law is ſufficient, but as to have aſſiſe, actual ſeiſin is requiſite; ſo the ſeiſin which is requiſite in a Writ of Right of land, ought to be actual and not a ſeiſin in Law, as appeareth 35 *E.* 3. *Droit* 30. *Litt. lib.* 3. *cap. Releaſes* 112. agreeth thereto. If a man make a leaſe for life, or a gift in tail, yielding the firſt year a Quarter of wheat, and afterwards the yearly rent of 5 *l.* ſeiſin of the corn is ſeiſin of the rent as to have an Aſſiſe, for all is but one reſervation. *Vide* 5 E. 4. 2. 44 E. 3. 11. 15 E. 3. *Exec.* 63. it is ſaid, that in the ſame Caſe all is one Freehold, and ſeiſin of the one is the ſeiſin of the other to have Aſſiſe, which was affirmed to be good Law.

[*b*] It was alſo ſaid, That if a meſnalty become Rent-ſeck by ſurpluſage, the ancient ſeiſin is ſufficient. For the meſnalty is extinct by the act of the Lord and the tenant paravail, and the nature of the rent of the Meſne is not altered by his own act, but by the act of others. And therefore although the rent be become ſeck, yet he ſhall diſtrein for it, as is ſaid in 2 E. 2. *Extinguiſhment* 6. *vide* 31 *Aſſ.* 23. 26 H. 6, *Extinguiſhment* 7. 7 *Aſſ.* 2. 2 E. 3. 42. 20 E. 3. *Avowry* 126. *vide* E. 3. 26. a Preſentation to a Prebend which is after changed into a Treaſury, ſhall ſerve to maintain a *Quare impedit* upon diſturbance to the Treaſury. But if there be Lord and tenant by fealty and rent, and the Lord granteth over the fealty ſaving the rent; Or if a man make a gift in tail, or a leaſe for life, rendring rent, and granteth over the reverſion, excepting the rent, in theſe Caſes the nature of the rent is altered by his own act; and therefore the old ſeiſin when it was a rent-ſervice will not ſerve, when by his own act the nature of the rent is altered; and aſſiſe of any rent-ſeck he cannot have, for he was never ſeiſed of any ſuch rent; yet ſuch rent-ſeck which was once a rent-ſervice ſeemeth to be apportionable by the Book in 32 *Aſſ.* 10. 2 H. 4. 23. for otherwiſe the tenant may defeat the Lord of his Seigniory, and the Lord ſhall never attain the ſervices.

So in avowry for ſuit, if the Lord recovereth damages for the ſuit, it is a ſufficient ſeiſin, *cauſa qua ſupra.* If the Lord grant his Seigniory upon Condition, and the tenant pay the rent to the Grantee, afterwards the Condition is broken, and the Lord diſtraineth for the ſervices, upon Reſcous made he ſhall have an aſſiſe, for the ſeiſin before is ſufficient. Otherwiſe it is if a man giveth land upon Condition, and the Condition is broken, the ancient ſeiſin is not ſufficient, but he ought to enter and get a new ſeiſin: But note in the Caſe of rent, the diſtreſs is in lieu of an entry. *Vide* 15 E. 3. *Aſſiſe* 95. & 15 *Aſſ.* 12. *quod vide Brook Seiſin* 38. If the Diſſeiſee releaſeth to the Diſſeiſor upon Condition, and afterwards the Condition is broken, the Diſſeiſee ſhall have an aſſiſe for the firſt diſſeiſin, as appeareth by 17 *Aſſ.* 2. 17 E. 3. 2. where in an aſſiſe the tenant pleaded the releaſe of the Plaintiff, the Plaintiff pleaded a defeaſance of the releaſe upon Condition, and ſo maintained the aſſiſe, which proveth that by the performance of the Condition, and the bringing of the aſſiſe, the right which was releaſed upon the Condition was veſted in the Plaintiff, for without a right he cannot have an aſſiſe, and ſo the ancient ſeiſin is ſufficient.

If a man granteth over divers ſeveral rents, and the tenant attorneth, and giveth 1 *d.* in the name of ſeiſin of all the rents, it is a good ſeiſin to have an aſſiſe of all, and yet no rent was due or payable at
[10] this time; and therewith agreeth 22 *Aſſ.* 66. And yet if there be Lord and tenant by fealty, and 20 *d.* rent,

rent, and the Lord granteth over his Seigniory, and the tenant payeth 2 *d.* to the Grantee in name of ſeiſin of his rent, yet at the rent due the Lord ſhall have his whole rent of 20 *d.* for that the 2 *d.* cannot be ſaid parcel of the rent, for no rent is due or payable till the day, and yet it ſhall enure to this purpoſe, *ſcil.* to give ſeiſin of the rent. *Vide* 34 *H.* 6. 42. *a.* 37 *H.* 6. 38. *Br. Seiſin* 15. 5 *E.* 4. 2. 25 *E.* 3. 44. by *Hill.* 29 *E.* 3. 31. 22 *Aſſ.* 66. *Littleton Chap. Attornment* 127. *a. b.* Then it was moved, if ſeiſin of fealty in the Caſe at Bar, be ſeiſin of all the other ſervices within the Statute of 32 *H.* 8. *cap.* 2. by which Statute it is provided, That none ſhall have a Writ of right of the ſeiſin of his anceſtor or predeceſſor, if the ſeiſin were not within 60 years before the *teſte*; nor any Writ of Mortdanceſter, Aiel, Coſinage, or Writ of Entry ſur diſſeiſin, if the ſeiſin were not within 50 years before the *teſte*; nor any Action of his own ſeiſin or poſſeſſion, if not within 30 years; nor any Avowry, nor Conuſans for rent, ſuit, or ſervice, if ſeiſin were not within 50 years before the avowry had: In all which four branches this word (Seiſin) is ſpoken indefinitely, and therefore if the Act had not gone further, this word (Seiſin) ſhall be conſtrued according to the ſubject matter, ſometimes for actual ſeiſin, and ſometimes for ſeiſin in Law; and therefore as to the Writ of Right, Writ of Mortdanceſter, Aiel, or Aſſiſe, &c. it ſhall be intended of an actual ſeiſin, and not of ſeiſin in Law; ſo that the three firſt branches are to be intended only of an actual ſeiſin, and the fourth branch concerning Avowries extendeth to ſeiſins in Law, as well as ſeiſins in fait, or actual ſeiſins: But the words of the Act (upon which the doubt doth ariſe) go farther, *ſcil.* And be it farther enacted, That if any perſon or perſons ſue any of the ſaid Actions, Writs, &c. or maketh any Avowry, Conuſans, Preſcription, or claim any rent, ſuit, ſervice, or other hereditament, and cannot prove that any of his anceſtors or predeceſſors were in actual poſſeſſion, or ſeiſin of or in the ſame lands, tenements, rents, ſervices, &c. within the years limited by this Act in manner and form aforeſaid, if it be traverſed or denied by the Plaintiff, Demandant, Avowant, or by the party tenant, or defendant, that after ſuch trial had, the party and his heirs ſhall be barred of all ſuch Writs, Actions, Avowries, Conuſans, Preſcription, Title and claim for the ſame lands, tenements, and hereditaments, &c.

And it was objected, that theſe words (actual poſſeſſion or ſeiſin) exclude ſeiſin in Law, and therefore this Act hath altered the Common Law: For although that at the Common Law, ſeiſin in Law was ſufficient to make avowry, yet this Act doth allow only of actual poſſeſſion or ſeiſin; and the reaſon of [b] that as was ſaid, becauſe that actual ſeiſin is the ſure cogniſance and enſign of right: But if the ſeiſin of fealty ſhall be the ſeiſin of all the other ſervices, then will riſe contention what were the other Services (which peradventure were never done) and which cannot be known by any ſeiſin had of them. And therefore it was ſaid, that this Act by expreſs words extendeth only to actual poſſeſſion and ſeiſin, and not to relieve thoſe who for ſo long time have neglected to have actual ſeiſin of their ſervices, and eſpecially of ſuit, which ought to be twice done every year: And it was ſaid, that that was *Craſſa & ſupina negligentia*, which this Law did never intend to relieve: For as it is commonly ſaid, *Dormientibus & non vigilantibus jura ſubveniunt.*

To which it was anſwered and reſolved by the whole Court, That ſeiſin in Law was ſufficient ſeiſin to make Avowry within the meaning and letter of the Act alſo. For the intention of the Act was to limit time within which ſeiſin ought to be had, and not to exclude any ſeiſin which was a lawful ſeiſin by the Common Law; and that appeareth by the Preamble, for there it is ſaid, For as much as the time of limitation, &c. extend, and be ſo far, and ſo long time paſt, that it is above the remembrance of any living man, &c. Alſo the former Acts of limitation, *ſcil. Weſt.* 1. *cap.* 38. *Weſt.* 2. *cap.* 2. & 46. do not exclude any manner of ſeiſin which was ſufficient at the Common Law. Alſo it is not againſt the letter of the Act, for the three firſt branches extend to actual ſeiſin, and the fourth extendeth as well to actual ſeiſin as to ſeiſin in Law: Then the ſaid words of the Act, *ſcil.* actual poſſeſſion, or ſeiſin in the disjunctive, maketh diſtinction between actual poſſeſſion which referreth to the three firſt branches, and a ſeiſin, be it actual or in Law, which referreth to the fourth, ſo that actual is coupled with poſſeſſion, and ſeiſin is disjoyned by this word (or) and ſtands of it ſelf indefinitely, and ſo much the rather, becauſe the words ſubſequent are, and in manner and form as is aforeſaid, which words infer actual poſſeſſion or ſeiſin to the ſaid four branches precedent, ſo that *reddendo ſingula ſingulis*, all ſtands well together.

2. It was reſolved, That the ſaid Act doth not extend to ſuch rent or ſervice which by common poſſibility cannot happen or become due within 50 years: As if a Seigniory conſiſt upon homage and fealty only, for the tenant may live above 60 years after they are done; ſo if the ſervice be to cover the Lords Hall, or to go with him when there ſhall be Wars between the King and his Enemies, ſuch caſual ſervices which by common poſſibility cannot happen within 60 years are not within this Act. The ſame Law of a *Formedon* in *Deſcender*, for the tenant in tail may live 60 years after a diſcontinuance, and al- [11] though that *de facto* he die within the time, ſo that his iſſue cannot bring his *Formedon* within the time, yet the iſſue may bring it any time, for by common poſſibility the Writ of *Formedon* in the *Deſcender* was not within the Statute, as it is adjudged in *Fitz William's* Caſe, *M.* 10 & 11 *Eliz.* which Caſe is reported by the Lord *Dyer fol.* 278. Alſo there it is ſaid, That the ſeiſin of the Donee was not traverſable: The ſame Law of homage and fealty, and other ſuch accidental ſervices, although they come due within time limited by this Act, and by lacheſs of the Lord no ſeiſin is had of them, yet he may diſtrain for them when he will, for they are not within the purview of the Act: The ſame Law, if the Lord releaſe to the tenant as long as *J. S.* hath heir of his body, and 60 years paſs, and afterwards *J. S.* dieth without heir of his body; in this Caſe although the 60 years paſs, yet he may diſtrain, for it was impoſſible that he ſhould attain to any ſeiſin before that time, & *impotentia excuſat legem.* And a man may hold by homage and fealty, and they ſhall never be done by him. As if lands holden by homage and fealty be conveyed to Mayor and Communalty, or other Corporation aggregate of many, in this Caſe they hold by homage and fealty, but they cannot do them. And therefore although they have enjoyed the land above 60 years, yet if they alien the land, the

Lord may diſtrain for the homage and fealty, *vide* 33 *H.* 8. *Br. Fealty* 15. And it was agreed, that the Writ of Eſcheat, Ceſſavit, or Writ of Reſcous are not within this Act, for in theſe Writs the ſeiſin is not traverſable, but the tenure.

Alſo in Writs of Eſcheat and Ceſſavit they demand the land, and cannot alledge any ſeiſin in the ſame lands, &c. as the Statute ſpeaketh; and therefore theſe Writs are not within the Statute, for the Act extendeth only to ſuch Writ where the demandant or his anceſtors may have ſeiſin of the land in demand within the time of limitation preſcribed by the Act, and the Statute doth not compel them to any impoſſibility. And it is agreed in 21 *H.* 6. 22. *a.* that in a Writ of Eſcheat or Ceſſavit, the demandant ſhall not alledge Explees, and the reaſon is becauſe he claimeth the land by reaſon of his Seigniory, and not by any ſeiſin of the land in him, or any of his anceſtors. So note, that although the Lord was not ſeiſed of the ſervices within the time of limitation, yet if the tenant dieth without heir, the land ſhall Eſcheat, for at the time of the Eſcheat the Seigniory remained, although there wanted ſeiſin; and in the ſame Caſe, if the tenant ceaſeth for two years, and the land be not open and ſufficient
[*b*] to his diſtreſs, the Lord ſhall have a *Ceſſavit* although he wanteth ſeiſin of the ſervices, for in *Ceſſavit* ſeſin is not traverſable, 8 *E.* 3. 46. *F. N. B.* 209. 10 *&* 11 *Eliz. Dier* 274. And although the Lord was never ſeiſed, yet becauſe the Seigniory doth remain, if he diſtrain, the tenant ought not to do Reſcous, as ſome opinions are in 40 *Eliz.* 3. 33. 6 *R.* 2. *Reſcous* 10. 22 *H.* 6. 2. 6 *E.* 4. 11. 7 *E.* 4. 20.

But it was reſolved, That if nothing be behind, and the Lord diſtraineth, the tenant may do Reſcous; Or if he often diſtrain, ſo that he cannot manure his land, he may have an Aſſiſe of ſovent diſtreſs; and in ſuch Caſe the tenant may make Reſcous as divers Judgments have been given. *Vide* 2 *H.* 4. 21. 8 *H.* 4. 1. 4 *E.* 6. *Diſtreſs* 75. by the Juſtices. *Vide* 31 *E.* 3. *Reſcous* 17. 39 *E.* 3. 45. 39 *H.* 6. 7. *F. N. B.* 102. *e.* 27 *Aſſ.* 51. 28 *Aſſ.* 20.

Note Reader, a great doubt in our Books well reſolved; But for wrongful diſtreſs where nothing is arrere, the tenant ſhall not have an Action of Treſpaſs, *Quare vi & armis* againſt the Lord, for that is prohibited by the Statute of *Marlebridge cap.* 3. *non ideo puniatur Dominus per redemptionem.* And if Lord and tenant are by fealty and 2 *s.* rent, and the Lord by encroachment, *ſcil.* by voluntary payment of the tenant had ſeiſin of more then he ought to have, the Law ſo greatly favoureth ſeiſins and poſſeſſions, that he ſhall not avoid this ſeiſin had by encroachment in avowry, if it be not in the Caſe of the ſucceſſor, as 4 *E.* 2. *Avowry* 204. is agreed; and in Caſe of the iſſue in tail, as is holden in 20 *E.* 3. *Avowry* 131. But ſeiſin by encroachment ſhall be avoided in an Aſſiſe, and *Ceſſavit*. *Vide* 22 *Aſſ.* 68. 22 *E.* 3. 18. 28 *Aſſ.* 33. 12 *E.* 4. 7. 10 *H.* 7. 11. 10 *H.* 6. 3. the ſame Law in Treſpaſs. Alſo if he diſtrain, *ſcil.* for rent behind and encroachment alſo, for the whole rent behind, the tenant may tender that which is due of right, and may do Reſcous if the Lord will not accept it, *vide* 12 *E.* 4. 7. 5 *E.* 4. 62. *&* 87. and ſhall not be driven to a *Ne injuſte vexes*, or *Contra formam feoffamenti*, as his Caſe is, but it ſhall be avoided in an Action brought by the Lord for the Reſcous, or in Treſpaſs brought by himſelf for the diſtreſs for the ſumme which was encroached, and which of right was not due. But if the Lord encroach more by coherſion of diſtreſs then he ought to have (although the coherſion be to his goods) yet he ſhall avoid ſuch ſeiſin in avowry. *Vide* 10 *E.* 3. 26. 22 *E.* 4. 7. *Long.* 5 *E.* 4. 87. 20 *E.* 4. 17. 8 *H.* 6. 18. 30 *H.* 6. 5. *e.* 10 *H.* 7. 11. *Plow. Comm.* 94. in *Woodland's* Caſe.

Thirdly, It was reſolved, That although a man hath been out of poſſeſſion for 60 years, yet if his entry be not taken away he may well enter, and bring his Action of his own poſſeſſion, for the firſt clauſe
[12] doth not bar any right, but prohibiteth that no perſon ſue, have, or maintain any Writ of right, or make any preſcription, title, or claim, for any lands, tenements, rents, commons, &c. of the poſſeſſion of his anceſtor or predeceſſor, but only of the ſeiſin of ſome of his anceſtors within 60 years: But if his entry be lawful, and he enter, he may have an Action of his own poſſeſſion; and the firſt and ſecond clauſes extend only to ſeiſin *Anceſtrel*, and not to a Writ of right brought of his own ſeiſin. And the third branch extendeth only to actions of his own poſſeſſion, and not to entries; the fourth to *Avowries*, and the fifth to *Formedon* and other actions there mentioned.

Note Reader, ſo much as it appeareth by theſe Reſolutions, that the ſervices of Homage and Fealty are not within the Act of 32 *H.* 8. and that ſeiſin of rent, or other annual ſervices is ſeiſin of Homage and Fealty; and that ſeiſin of Homage or Fealty is ſeiſin of all ſervices annual, or not annual; and thence it followeth, that when the tenant hath done Homage or Fealty (which the Lord may enforce him to do) it ſhall be ſeiſin of all other ſervices as to make avowry, which of right ought to be done, although the Lord nor any by whom he claimeth ought to have ſeiſin within 60 years.

Trin. 20 Eliz. Rot. 20. *in the Kings Bench.* Actiones de Scandalis; *Or, Actions for Slander.*

The Lord *Cromwel's* Caſe.

HEnry Lord *Cromwel* brought an Action *de Scandalis magnatum* againſt *Edmund Denny* Vicar of *Northlingham* in the County of *Norfolk*, *tam pro Dom. Regina, quam pro ſeipſo*; and declared upon the Statute of 2 *R.* 2. *cap.* 5. That if any contrive, *aliqua falſa nova, horribilia & falſa nuncia de Prælatis, Ducibus, Comitibus, & aliis Proceribus & Magnatibus Angliæ, &c.* by which debate may ariſe betwixt the Lords and Commons (which God forbid) by which danger, miſchief, and deſtruction may happen to the whole Realm, &c. and *quicunque contra fecerit* ſhall incur the penalty of the Statute of *Weſt.* 1. *c.* 33. And the Defendant was charged that he ſaid to the Plaintiff, then a Baron of the Realm, *It is no marvel that you like not of me, for you like of thoſe that maintain Sedition againſt the Queens proceedings.* The Defendant juſtified the words, upon which the Plaintiff did demur; and the bar was holden inſufficient. And *Trinit.* 23 *Eliz.* in arreſt of Judgment it was moved by the Defendants Council, that the Declaration was inſufficient, becauſe the ſaid Act of 2 *R.* 2. was miſrecited; for the words of the Act are, *Si aſcun (controv' aſcun faux novelles, horribiles & faux meſſoinges)* which word *(meſſoinges)* he who tranſlateth the Statutes in *Engliſh*, hath tranſlated (meſſages) which was the cauſe that he who drew the Declaration, inſerted the ſaid word *(nuncia)* where it ſhould be *mendacia.* 2. The ſaid Act ſaith, *Et quicunque le fra incurgera, &c.* And the Plaintiff in his Declaration ſaith, *Quicunque contra fecerit*, which is as much as to ſay, *que ceſtuy que ne fra*; But againſt that it was objected, That the Act was a private Act concerning only the Prelates, Nobles, and certain great Officers, whereof the Court ſhall not take notice *ex officio*; and therefore the Court ſhall take the Act, as the party hath alledged it: But it was reſolved by *Wray* Chief Juſtice, Sir *Thomas Gawdy* and the whole Court, that it was ſuch an Act, whereof the Judges ought to take notice: and ſo much the rather becauſe that the ſame by a mean doth concern the King himſelf. [a] [13]

1. For as much as it toucheth the Prelates, Nobles, and great Officers, which are the King's Council, and of eminent qualities, and ſerve him in ſo high and honourable Offices which they have under the King, and by his Royal authority have the adminiſtration of Juſtice to his Subjects; by which appeareth that the ſlandring of them principally concerneth the King himſelf in his Government.

2. In as much as the Statute ſaith, That danger, miſchief, and deſtruction may happen to the whole Realm, &c. that alſo doth concern the King, for he is the Head of the Realm; and theſe are the cauſes that all ſuch Actions *de Scandalis magnatum* have been brought upon the ſaid Statute, *tam pro Domino Rege, quam pro ſeipſo*, and of all Statutes which concern the King, the Judges ought to take notice of them.

Alſo it ws reſolved, That if the Act were a private Act, and that the Court ought to accept of it to be ſuch as is alledged; Then the ſaid Act was againſt the Law, and reaſon, and therefore void: For as the ſame is alledged, thoſe who offend not ſhall be puniſhed; and that were *condemnare inſontem & dimittere reum:* for which cauſe Judgment was given againſt the Plaintiff, *quod nihil capiat per billam.* And afterwards the Plaintiff brought a new Action, and amended the faults of the Declaration: And then the Court was moved that the ſaid words were not Actionable, becauſe it might well be that the Plaintiff did conceive liking of ſome perſons which maintain Sedition againſt the Queens proceedings, and yet he did not know that they do maintain Sedition. And it was ſaid, That *ſenſus verborum eſt duplex*, ſcil. *mitis & aſper*; *& verba ſemper accipienda ſunt in mitiore ſenſu.* To which it was ſaid, that Sedition is a publick thing. *Et dicitur ſeditio quaſi*, the going together of a great people *quando itur ad manus*, which is notably deſcribed by the Poet:

Virgil. Æneidos 1.

Ac veluti magno in populo cum ſæpe coorta eſt
Seditio, ſævitque animis ignobile vulgus,
Jamque faces atque arma volant, furor arma miniſtrat.

By which Sedition (being ſo publick and violent) it was ſaid that by common intendment the Plaintiff had notice of it; and it is not like felony or murder which may be ſecret, and done covertly. But as to that the Judges did not deliver any opinion, for they ſaid, that upon argument and conſideration they might alter their opinion which they now conceived, which ſhould be dangerous to the party; and therefore they ſaid to the Defendants Council, Be well adviſed, and plead, or demur at your perils, for which cauſe they pleaded a ſpecial juſtification (well knowing that the other matter ſhould be ſaved to them) and the effect of the juſtification was, That the Defendant was Vicar of *Northlingham*, which was a Benefice with Cure, and that the Plaintiff procured one *J. T.* and *J. G.* to preach ſeverally in the Church of *Northlingham*, who in their Sermons did inveigh againſt the Book of *Common-Prayer*, which was eſtabliſhed by the Queen and Parliament in the firſt year of her Reign, and affirmed the ſame to be ſuperſtitious and impious, &c. upon which the Plaintiff and Defendant ſpeaking in the ſaid, Church of theſe Sermons, becauſe the Vicar knew they were not licenced nor had authority to preach; when they were ready to preach, before their Sermons forbad them, but they being encouraged by the Plaintiff did proceed; The Plaintiff ſaid to the Defendant, Thou art a falſe varlet, and I [b]

like

like not of thee; To which the Vicar ſaid, It is no marvel that you like not of me, for you like of theſe, *innuendo J. T.* and *J. G.* that maintain Sedition *(innuendo ſeditioſam illam doctrinam)* againſt the Queens proceedings: And it was moved by the Plaintiffs Council, that this barre was inſufficient for divers cauſes.

1. The matter of juſtification was inſufficient, becauſe (as hath been ſaid) Sedition cannot be committed by words, but by publick and violent action.

2. If the matter of juſtification were ſufficient, then upon the Dialogue between the Plaintiff and Defendant, the Defendant is not guilty: But it was ſaid, that ſuch juſtification Dialogue-wiſe had not been ſeen before; but if the truth of the Cauſe were ſuch, he ought to plead Not Guilty, and give the ſpecial matter in evidence. But if he will juſtifie, he ought to juſtifie the words in ſuch ſence as they import upon the matter alledged in the Declaration. As if a man bring an Action upon the Caſe for calling a man Murderer; The Defendant will ſay, that he ſpake with the Plaintiff concerning unlawful hunting, and the Plaintiff confeſſed that he killed Hares with unlawful Engines; to which the Defendant anſwereth and ſaith, Thou art a murtherer *(innuendo* the killing of the ſaid Hares) it is not any juſtification, for he doth not juſtifie the ſence of the words which the Declaration doth import, and therefore he ought to plead Not Guilty: But to that it was anſwered by the Defendants Council, and reſolved by the whole Court, that the juſtification was good. For in Caſe of ſlander by words, the ſence of the words ought to be taken, and the ſence of them appeareth by the cauſe and occaſion of ſpeaking of
[14] them. For *ſenſus verborum ex cauſa dicendi accipiendus eſt, & ſermones ſemper accipiendi ſunt ſecundum ſubjectam materiam.* Then in this Caſe the Defendants Council have well ſhewn the ſpecial matter by which the ſence of this word (Sedition) appeareth upon the coherence of all the words, what was the intent of the Defendant; The ſaid ſeditious doctrine againſt the Queens proceedings, *ſcil.* the ſaid Act of Parliament of *primo*, by which the Book of *Common Prayer* was eſtabliſhed, and that he did not intend any ſuch publick or violent Sedition as hath been deſcribed, and as *ex vi termini per ſe* the word it ſelf importeth; And it was ſaid, God forbid the words of one ſhall be by ſuch ſtrict and Grammatical conſtruction taken by parcels againſt the manifeſt intent of the party upon conſideration of all the words, which import the true cauſe and occaſion which manifeſt the true ſenſe of them; *Quia quæ ad unum finem loquuta ſunt, non debent ad alium detorqueri:* And therefore in the ſaid Caſe of Murder, the Court held the ſatisfaction good; and that the Defendant ſhall never be put to the general iſſue, when he confeſſeth the words and juſtifieth them, or confeſſeth the words, and by ſpecial matter ſheweth that they are not Actionable. And although he varieth from the Plaintiff in the ſence and quality of the words, yet it is not a cauſe to drive him to the general iſſue: As in maintenance the Plaintiff chargeth the Defendant with unlawful maintenance, the Defendant may juſtifie by reaſon of a lawful maintenance, and cannot plead the general iſſue. For which cauſe the Plaintiff replied and ſaid, *Quod præd' Edwardus Denny dixit & propalavit prædicta verba, &c. de injuria ſua propria abſque tali cauſa*, and thereupon iſſue was joyned; and afterwards the parties agreed: And that was the firſt cauſe that the Author of this Book (who was of Council with the Defendant) moved in the Kings Bench.

In this Caſe, Reader, you may obſerve an excellent Point of Learning in Actions of Slander, to obſerve the occaſion and cauſe of the ſpeech, and how the ſame may be plead in excuſe of the Defendant.

2. When the matter in fact will clearly ſerve for your Client, although your opinion be that the Plaintiff hath no cauſe of Action, yet take heed you do not hazard the matter upon a demurrer; in which upon the pleading otherwiſe more perhaps will ariſe then you thought of; but firſt take advantage to the matters of fact, and leave the matters in Law, which always ariſe upon the matters in fact, to the laſt, and never at firſt demur in Law, when after trial of the matters in fact, the matters in Law ſhall be ſaved to you.

[b] 2. *Mich. 27 & 28 Eliz.* in the Kings Bench it was adjudged, between *Cutler* and *Dixon*, That if one exhibit Articles to Juſtices of Peace againſt a perſon certain, containing divers great abuſes and miſdemeanors, not only concerning the Petitioners themſelves, but many others, and all to the intent that he might be bounden to the good behaviour: In this Caſe the party accuſed ſhall not have for any matter contained in the Articles any Action upon the Caſe, for they have purſued the ordinary courſe of Juſtice in ſuch Caſe: And if Actions ſhall be permitted in ſuch Caſe, thoſe who have juſt cauſe of complaint, will not dare to complain for fear of infinite vexation.

3. *Mich. 33 & 34 El.* in the Kings Bench, between Sir *Rich. Buckley* Plaintiff, and *Owen Wood* Defendant, the Caſe was, that *Ow. Wood* exhibited a Bill in the *Star-Chamber* againſt Sir *R. Buckley*, and charged him with divers matters examinable in the ſame Court; and further, that he was a maintainer of Pirats and Murderers, and a procurer of Murders and Piracies, which offences were not determinable in the *Star-Chamber:* Sir *Richard Buckley* brought an Action upon the Caſe againſt *Owen Wood*, and counted, that the ſaid *Owen* had exhibited the ſaid Bill, containing *(inter alia)* that the ſaid Sir *Richard* was a maintainer of Pirats and Murderers, and a procurer of Murders and Piracies, and that the ſaid *Owen* at *B.* in the County of *Shrewsbury*, ſpeaking of the matters contained in the ſaid Bill, ſaid in the hearing of many, That the ſaid Bill, and matters therein contained were true: The Defendant confeſſed the exhibiting of the Bill in the *Star-Chamber*, and that in the ſaid Court at *Weſtminſter* he ſaid the ſaid words; without that, that he ſpake the words in the County of *Shrewsbury*, before or after the day mentioned in the Declaration, by which he excluded the day it ſelf and anſwered not to it, for which cauſe the Bar was holden inſufficient by the whole Court. And it was reſolved by the whole Court, That for any matter in the Bill that was examinable in the ſame Court, no Action lieth, although the matter

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be meer falſe, becauſe it was in courſe of Juſtice. And therewith agreeth the opinion of *Dier*, 11 *Eliz. Dier* 285. and the Judgment in *Cutler* and *Dixon*'s Caſe before.

2. It was reſolved and adjudged, that for the ſaid words not examinable in the ſaid Court, an Action upon the Caſe did lie, for that cannot be in courſe of Juſtice; for the Court hath no power or juriſdiction to do that which appertaineth to Juſtice, nor to puniſh the ſaid offences, and if ſuch matters may be inſerted in Bills exhibited in ſo high and honourable a Court, in ſlander of the parties, and they cannot anſwer to the ſame to clear themſelves, nor have their Action as well to clear themſelves, as to recover [15] damages for the great injury and wrong done them, great inconvenience would follow; but the ſaid Libel without any remedy given them ſhould remain always on Record, to their great ſhame and infamy, which ſhould be full of inconvenience. Alſo by the Law no Murder, nor Piracy can be tried by any Bill exhibited in *Engliſh*, but the offender ought to be indicted thereof, and thereupon to have his trial; and therefore he who preferred this Bill hath not only miſtaken the proper Court, but the manner and nature of exhibiting of the ſaid Bill (as to the ſaid clauſes) hath not any appearance of an ordinary ſuit in courſe of Juſtice: But if a man bring an appeal of murder, returnable in the *Common Pleas*, no Action lieth; for although the Writ be not returnable before competent Judges who can do juſtice, yet it is in the nature of a lawful ſuit, namely, by Writ of Appeal. And afterwards Judgment was given for the Plaintiff.

And ſo in the like Caſe, *Trinit.* 21 *Eliz. Rot.* 561. between *Bowes* and *Standen*, it was reſolved by the whole Court of *Kings Bench* in the like Caſe upon a Bill preferred in the *Star-Chamber*; but the parties agreed and no Judgment was entred. And upon the ſaid Judgment *Owen Wood* brought a Writ of Error in the *Exchequer-Chamber*; and there it was reſolved that upon the ſaid matter Sir *Richard Buckley* might have had a good Action. But in this Caſe, he hath not alledged the matter in ſufficient manner, for the Action was not grounded upon the Bill exhibited at *Weſtminſter*, but becauſe he ſaid in the County of *Shrewsbury in auditu quamplurimorum*, that his Bill was true without expreſſing the ſaid matters in particular contained in the Bill upon which the Action was intended to be grounded, ſo that thoſe who heard only the ſaid words, That his Bill was true, cannot without ſaying more, know the ſaid clauſes that were ſlanderous to the Plaintiff; and for this cauſe the Judgment was reverſed.

4. *Paſch.* 27 *Eliz.* between *Edward Stanhop* Eſquire Plaintiff, and *Blith* Defendant in the *Kings Bench*. The Plaintiff reciting in his Declaration, That whereas he was a Juſtice of Peace, Surveyor of the Dutchy of *Lancaſter*, and had divers other Offices; The Defendant ſaid of him, *M.* Stanhop *hath but one Mannor, and that he gotten by ſwearing and forſwearing:* And it was adjudged that the ſaid words were not actionable. 1. Becauſe they were too general; and words which ſhall charge any one with [16] an action, in which damages ſhall be recovered, ought to have convenient certainty. 2. The Defendant doth not charge the Plaintiff with ſwearing, or forſwearing; for he may recover or get a Mannor by ſwearing and forſwearing, and yet he was not procuring or aſſenting thereto; and words which maintain an action upon the Caſe ought to be directly applied to the Plaintiff, for the damages ought to be given to the Plaintiff, in regard of the damage which he hath by the ſcandal. 3. If one charge another that he hath forſworn himſelf, the ſame is not actionable for two cauſes:

1. Becauſe he may be forſworn in uſual communication, *Quia benignior ſenſus in verbis generalibus ſeu dubiis eſt præferendus.*

2. It is an uſual word of paſſion and choler for one to ſay, That another hath forſworn himſelf; As if one ſay of another, that he is a Villain, or a Rogue, or a Varlet, or the like, theſe or the like will not maintain an action, for *boni Judicis eſt lites dirimere:* But if one ſaith of another, that he is perjured, or that he hath forſworn himſelf in a Court of Record, for ſuch words an action ſhall be maintained; for by theſe words it appeareth that he hath forſworn himſelf in a Judicial proceeding; *Sed hæc ita in promptu ſunt, ut res probatione non egeant.* For all theſe Caſes have been often adjudged. And *Wray* Chief Juſtice ſaid, That although ſlanders and falſe imputations are to be repreſſed, becauſe that many times *a verbis ad verbera perventum eſt:* yet he ſaid, that the Judges have reſolved, that actions for ſcandals ſhall not be maintained by any ſtrained conſtruction or argument, nor any favour given for ſupportation of them, for as much as in theſe days they more abound then in times paſt, and the intemperance and malice of men increaſeth; *Et malitiis hominum eſt obviandum:* And in our Books actions upon the Caſe for ſlanders are moſt rare or ſeldom, and ſuch which are brought, are for words of eminent ſlander, and of great import.

5. IN the ſame Term in the *Kings Bench*, between *Hext* and *Yeomans*. *Yeomans* charged *Hext* being a Juſtice of Peace; *For my ground in* Allerton, Hext *ſeeketh my life, and if I could find* John Silver, *I do not doubt but within two days to arreſt* Hext *for ſuſpition of felony:* And it was adjudged, that for the firſt part of the words, *That for my ground in* Allerton, Hext *ſeeks my life*, no action lay, for two cauſes: 1. Becauſe he may ſeek his life lawfully upon juſt cauſe, and his land may be holden of him, and ſo *in mitiore ſenſu.* 2. Seeking of his life is too general, and for ſeeking only no puniſhment is inflicted by the Law: But for the latter words it was adjudged, that the action lay, becauſe that for ſuſpition of felony he ſhall be impriſoned, and his life drawn in queſtion.

6. *Mich.* 27 & 28 *Eliz.* in the *Kings Bench*, *Birchley*'s Caſe. *Birchley* being one of the Attorneys [16] or Clerks of the *Kings Bench*, and ſworn to deal duly without corruption in his Office: the Defendant upon ſpeech of the manner of *Birchley*'s dealing in his profeſſion, ſaid to *Birchley*, *You are well known to be a corrupt man, and to deal corruptly.* 1. It was reſolved that the ſaid words *ex cauſa dicendi* implyeth that *Birchley* hath dealt corruptly in his profeſſion: Alſo it was ſaid, *Quod ſermo relatus ad perſonam intelligi debet de conditione perſonæ.* And the Plaintiff had Judgment for

two

two causes: 1. Because the said scandal touched the Plaintiff in his oath only. 2. The said words scandalize him in the duty of his Profession by which he getteth his living. *Skinner* a Merchant of *London* said of *Manwood* Chief Baron, That he was a corrupt Judge; and it was adjudged that the words were actionable, *Vide* 4 *E.* 6. *Br. Action sur le Case* 112. But it was resolved in the principal Case, That if the precedent speech had been, that *Birchley* was an Usurer, or that he was anothers Executor, and would not perform the Will, &c. and thereupon the Defendant had spoken the said words, then no action shall be maintenable for them, which agreeth with the Resolution in the Lord *Cromwel*'s Case.

7. *Mich.* 44 & 45 *Eliz.* in the *Common Pleas*, between *Stucley* and *Ballard*. *Stucley* Justice of Peace in the County of *Devon*, brought an action upon the Case against *Ballard* for these words; M. *Stucley* covereth and hideth felonies, and is not worthy to be a Justice of Peace; And adjudged, that the action did lie, for it is against his Oath and the Office of a Justice of Peace, and a good cause to put him out of the Commission, and thereof he may be indicted and fined.

8. *Hill.* 37 *Eliz.* between *Weaver* Plaintiff, and *Cariden* Defendant. The Defendant said, That the Plaintiff was detected for perjury in the *Star-Chamber*; and adjudged, that no action lay: For a perjured man may be detected, but not convicted; and every one who hath a Bill of Perjury exhibited against him is detected.

9. *Hill.* 39 *Eliz.* in the *Common Pleas*, between *Robert Snag* Esquire Plaintiff, and *Gee* Attorney of the same Court Defendant. The Plaintiff sheweth in his Declaration, That the Defendant hath a wife yet living. And that the Defendant said of the Plaintiff, *Thou hast killed my wife, thou art a Traytor.* And as to these words, Thou hast killed my wife, the Defendant did demur in Law; and it was adjudged, that no action lay; and the difference taken when the wife was living (as in this Case it appeareth she was) and when she was dead. For when she is alive no action lieth, although the Defendant saith, That the Plaintiff hath murdered her; for then it appearth that no murder could be of her, nor the Defendant in any jeopardy, and so the words vain, and no scandal or damage to the Plaintiff.

[b] 10. *Trin.* 40 *Eliz.* in the *Common Pleas*, between *Eaton* Plaintiff, and *Allen* Defendant. The Defendant said of the Plaintiff, *He is a brabler and a quarreller, for he gave his Champion counsel to make a deed of gift of his goods to kill me, and then to flie out of the Country, but God preserved me.* And it was strongly urged that the Action should be maintenable, and divers Cases cited; one of the Lady *Cockein*, *M.* 32 & 33 *Eliz.* in the *Kings Bench* for these words, *My Lady* Cockein *offered to give poyson to one to kill the child in her body.* Another between *Tibots* and *Heine* in *Gloucester* for these words, *Tibots and another did agree to hire one to kill* S. B. Also *Cardinals* Case for these words, *If I had consented to M.* Cardinal, T. H. *had not been alive:* And the Lord *Lumley*'s Case, *My Lord* Lumley *hath gone about to take away my life against all Christian dealing.* But upon great consideration and advisement it was adjudged that in the principal Case the words were not actionable; for the purpose or intent of a man without act is not punishable by Law. *Et ubi non est lex, ibi non est transgressio quoad mundum.* And although for such conspiracy he might be punished in the *Star-Chamber*, the same is by the absolute power of the Court, and not by the ordinary course of Law. Note well this Case, and the cause and reason of this Judgment.

11. *Trinit.* 35 *Eliz.* between *Anne Davies* Plaintiff, and *John Gardiner* Defendant: The Plaintiff declared, That she was a Virgin of good fame, &c. and free from all suspicion of incontinency, &c. And where *Anthony Elcock* Citizen and *Mercer* of *London*, of the wealth and value of 3000 *l.* desired her for his wife, and thereof had speech with *John Davies* father of the said *Anne*, and was ready to conclude it, the Defendant (*præmissarum non ignarus*) to defame the said *Anne*, and to distast the said *Anthony* to proceed, uttered and published of the said *Anne* these words; *I know* Davies *daughter well* (innuendo præd. Annam) *she dwelt in* Cheapside, *and there was a Grocer that did get her with child* (and the Defendant being there then admonished that he should be advised what he said *de præfat.* Anna) *alterius de eadem dixit*; *I know very well what I say, I know her father, and mother, and sister, and she is the youngest sister, and had the child by the* Grocer: By reason of which words the Plaintiff was greatly defamed, & *ratione inde dict. Anthonius ipsam* Annam *in uxor. ducere penitus recusabat*; and the Defendant pleaded, Not Guilty, and by *Nisi prius* in the County of *Buck.* the Jurors found for the Plaintiff, and assessed damages to 200 Marks. And it was moved in arrest of Judgment by the Defendants Council, That the said defamation of incontiency did concern the Spiritual, and not the Temporal Jurisdiction: And therefore as the offence shall be punished in the Spiritual Court, so her remedy for defa-
[17] mation shall be there also; for *Cognitio causæ non spectat ad forum Regium:* So if a man be called *Bastard*, or *Heretick*, or *Miscreant*, or *Adulterer*, for as much as these do belong to the Ecclesiastical Jurisdiction, no Action lieth at the Common Law; and in proof thereof 12 *H.* 7. 22. & 27 *H.* 8. 14. were cited. But it was answered by the Plaintiffs Council, and resolved by the whole Court, that the Action was maintenable for two Causes:

[21] 1. Because that if the woman hath a bastard, she shall be punished by the Statute of 18 *Eliz. cap.* 3. And although that Fornication and Adultery is not examinable by our Law, because they are done in secret, and peradventure are uncomely to be openly examined, yet the having of a bastard is a thing apparent and punishable by the said Act.

2. It was resolved, If the Defendant had charged the Plaintiff with bare incontinency, yet the Action should be maintenable: For in this Case the ground of the Action is Temporal, *scil.* that she was to be advanced in marriage, and that she was defeated thereof; and the mean by which

she

ſhe was defeated was the ſaid Slander, which mean tending to ſuch end ſhall be triable at the Common Law.

So if a Divine is to be preſented to a Benefice, and one to defeat him thereof, ſaith to the Patron, *That he is an Heretick, or a Baſtard, or that he is Excommunicated*, by which the Patron refuſeth for to preſent him (as he well might if the Imputations were true) and he loſe his preferment, he ſhall have his Action upon the Caſe for theſe ſlanders tending to ſuch end. And if a woman be bound that ſhe ſhall live continent and caſt; or if a leaſe be made to her *quamdiu caſta vixerit*, in theſe Caſes incontinency ſhall be tried by the Common Law.

And *Popham* Chief Juſtice ſaid, That if one ſaid of an Inholders wife, that ſhe hath a great infectious Diſeaſe, by which ſhe loſeth her Gueſts, ſhe ſhall have an Action upon the Caſe. *Trin.* 25 *Eliz.* between *Baniſter* and *Baniſter*, it was reſoved, That where the Defendant ſaid of the Plaintiff (being ſon and heir to his father) *that he was a Baſtard*, that an Action upon the Caſe did lie; for it tendeth to his diſenheriſon of the land which is to deſcend to him from his father: But there it was reſolved, That if the Defendant pretend that the Plaintiff was a Baſtard, and that he himſelf was the next heir, there no Action lieth. And that the Defendant may ſhew by way of bar, if the Plaintiff omit it in his Declaration; which agreeth with the Reſolution in *Anne Davie*'s Caſe, and with the Lord *Cromwel*'s Caſe.

12. *Mich.* 41 & 42 *Eliz.* in the *Kings Bench*, between *John Jeames* Plaintiff, and *Alexander Rutlech* Defendant; The Plaintiff declared, That the Defendant and one *John Bonner* having conference of the Plaintiff, the Defendant ſaid of the Plaintiff to the ſaid *John Bonner* theſe words, *Hang him* (prædictum *Johannem Jeames* innuendo) *he is full of the Pox* (innuendo) *the French Pox, I marvel that you* (præd. *Johannem Bonner* innuendo) *will eat or drink with him*, (prædictum *Johannem Jeames* innuendo) *I will prove that he is full of the Pox* (innuendo) *the French Pox.* The Defendant pleaded, Not Guilty, and it was found for the Plaintiff, and damages aſſeſſed. And it was moved in arreſt of Judgment, that the words were not Actionable: And it was reſolved, that in every Action upon the Caſe for ſlanderous words, two things were requiſite. [b]

1. That the perſon who is ſcandalized be certain.

2. That the ſcandal be apparent by the words themſelves; And therefore if one ſaith, without any precedent communication, that one of the ſervants of *J. S.* (he having many) is a notorious Felon, or Traytor, &c. here for the incertainty of the perſon no Action lieth; and an *innuendo* cannot make it certain. So if one ſay generally, I know one near *J. S.* that is a notorious Thief, or the like; But when the perſon is one certainly named: As if two ſpeaking together of *J. S.* one ſaith of him, He is a notorious Thief, there *J. S.* in his Declaration may ſhew that there was ſpeech of him between them two, and that one of them ſaid of him, He (*innuendo prædict.* J. S.) is a notorious Thief. For the office of an *innuendo* is to contain and deſign the ſame perſon who was named incertain before, and in effect ſtands in place of *prædict'*, but an *innuendo* cannot make a perſon certain who was incertain before. For it ſhall be inconvenient, that Actions ſhall be maintained by imagination of an intent which doth not appear by the words upon which the Action is grounded, but is altogether incertain and ſubject to deceivable conjecture: But if one ſaith of *J. S.* Thou art a Traytor, &c. there *conſtat de perſona*, and the Action lieth: So in the Caſe at Bar, when the Defendant and *Bonner* had ſpeech of the Plaintiff, Then, when the Defendant ſaith, *Hang him*, there *innuendo* will denote the ſame perſon named before.

As to the ſecond, as an *innuendo* cannot make the perſon certain which was incertain before, ſo an *innuendo* cannot alter the matter or words themſelves: And therefore when the Defendant in the Caſe at Bar ſaith of the Plaintiff, *That he was full of the Pox*, (innuendo) *the French Pox*, this *innuendo* doth not do his proper office, for it doth contend to extend the general words, the Pox, to the *French* Pox by imagination of an intent which is not apparent by any precedent words to which the *innuendo* referreth. And the words themſelves ſhall be taken *in mitiori ſenſu*.

13. *Trinit.* 41 *Eliz.* between *Oxford* and his wife Plaintiff, and *Croſs* Defendant; The Plaintiffs brought an Action in *London*, becauſe the Defendant called the Plaintiffs wife *Whore*; and the Defendant removed the ſame into the *Kings Bench* by *Habeas Corpus*, and it was moved to have a *Procedendo* to remand it, becauſe the Action was maintenable in *London* for the ſaid words, and not at the Common Law. And the *Procedendo* was denied by the whole Court. And ſuch Cuſtom to maintain Actions for ſuch brabling words is againſt Law. *Licet conſuetudo ſit magnæ authoritatis, nunquam tamen præjudicat manifeſtæ veritati.* [18]

14. *Mich.* 32 & 33 *Eliz.* between Sir *Gilbert Gerard* Knight, Maſter of the Rolls Plaintiff, and *Mary Dikenſon* Defendant: The Plaintiff declared that he was ſeiſed of the Mannor and Caſtle of *H.* in the County of *Strafford* in fee by purchace from *George* Lord *Audley*; and that he was in communication to demiſe the ſaid Caſtle and Mannor to *Ralph Egerton* for 22 years for 200 *l.* Fine, and 100 *l.* rent *per annum*; and that the Defendant (*præmiſſorum non ignara*) ſaid, *I have a leaſe of the Mannor and Caſtle of H. for 90 years*, and then and there ſhewed and publiſhed a Demiſe ſuppoſed to be made by *George* Lord *Audley*, Grandfather to the ſaid *George* Lord *Audley*, for 90 years to *Edward Dikenſon* her husband, and publiſhed the ſaid Demiſe as a true and good leaſe; and ſo affirmed it, and offered to ſell it; *ubi revera* the ſaid leaſe was counterfeited by her husband, and that the Defendant knew the ſame to be counterfeited; by reaſon of which words and publication, the ſaid *Ralph Egerton* did not proceed to accept the ſaid leaſe to the damage, &c. The Defendant pleaded in bar, *quod talis Indentura* (*qualis* in the Declaration is alledged) came to the Defendants hands by trover, and traverſed that ſhe knew of the forgery, upon which the Plaintiff did demur in Law. And in this Caſe three Points were reſolved.

1. That if the Defendant had affirmed and publiſhed, that the Plaintiff had not any right to the Caſtle and Mannor of *H.* but that ſhe her ſelf had right to them, in that Caſe, becauſe the Defendant her ſelf doth pretend right to them, although in truth ſhe had not any, yet no Action lieth. For if an Action ſhould lie when the Defendant her ſelf claimeth an intereſt, how can any make claim or title to any land, or begin any ſuit, or ſeek advice and counſel, but he ſhall be ſubject to an Action, which ſhall be inconvenient. Which Reſolution agreeth with the opinion in *Baniſter's* Caſe before, 2 *E.* 4. 5. *&* 15 *E.* 4. 32. no Action upon the Caſe lieth againſt one who publiſheth another to be his Villain, without ſaying that he lieth in wait to impriſon him, *Et tales & tantas minas in ipſum fecit, quod circa*
[*b*] *negotia ſua palam intendere non audebat. Vide* 23 *E.* 3. 2. *In Conſpiracy,* 38 *E.* 3. 33. 43 *E.* 3. 20. *F. N. B.* 116. *b.* And therefore it was reſolved, that for the ſaid words, *I have a leaſe of the Mannor of* H. *for* 90 *years*, although it be falſe, yet no Action lieth for ſlandering of his title or intereſt in the ſaid Caſtle or Mannor. And although it appeareth by the bar of the Defendant, that ſhe hath no title or intereſt in the ſaid leaſe, but is a ſtranger to it; yet for as much as the matter alledged in the Declaration doth not maintain the Action, the bar will not make it good.

2. It was reſolved, that there was other matter in the Declaration ſufficient to maintain the Action, and that was becauſe that it is alledged in the Declaration that the Defendant knew of the communication of the making of the ſaid leaſe to *Ralph Egerton*, and alſo that ſhe knew that the leaſe was forged and counterfeited, and yet (againſt her own knowledge) ſhe hath affirmed and publiſhed, that it was a good and true leaſe, by which the Plaintiff was defeated of his bargain. *Vide* 5 *E.* 4. 126. If a man forge an Obligation in my name, and put the ſame in ſuit againſt me, by which I am vexed and damnified, I ſhall have an Action upon the Caſe, 22 *Aſſ.* 8. *B.* offered 8 Oxen to ſell to *A.* as his proper goods, knowing them to be the proper goods of *P. A.* truſting in the fidelity of *B.* bought them for 8 *l.* and afterwards *P.* taketh back the Oxen; In this Caſe *A.* ſhall have his Action upon the Caſe againſt *B.*

3. It was reſolved, that the bar was inſufficient, for the knowing of the Defendant of the forgery is not traverſable. As in an Action upon the Caſe, becauſe that the Defendants Dog hath bitten the Plaintiffs cattel, *ipſe ſciens canem ſuum ad mordendas oves conſuetum*; the *(ſciens)* is not traverſable, but ought to be proved in evidence upon the general iſſue, for *ſciens, &c.* is not any direct allegation, nor ever alledged in any place, ſo that it is not traverſable nor triable. Alſo the manner of pleading, *Talis Indentura qualis* in the Declaration is alledged, is no direct anſwer to the Indenture alledged in the Declaration, for *talis Indentura non eſt eadem Indentura*; for *Nullum ſimile eſt idem. Vide* 30 *Aſſ.* 19. 2 *E.* 4. 5. 15 *E.* 4. 32. 27 *H.* 8. 14. 22. 30 *H.* 8. *Br. Action ſur le Caſe* 104. 4 *E.* 6. *ibid.* 112. 28 *H.* 8. *Dier* 19. 6 *E.* 6. *ibid.* 72. *&* 75. 3 *Ma. ibid.* 118. 7 *Eliz. ibid.* 236. 11 *Eliz. Dier* 285. 15 *Eliz. Dier* 317. And theſe in effect are all the Caſes in our Books.

15. *Mich.* 44 *&* 45 *Eliz.* in the *Kings Bench, Bittridges* Caſe. *Bittridge* brought an Action upon the Caſe for theſe words, *M.* Bittridge *is a perjured old Knave, and that is to be proved by a ſtake parting the land of* Henry Martin *and Maſter* Wright. The Defendant pleaded, Not Guilty, and was found
[19] guilty; and now in arreſt of Judgment it was moved, that theſe words are not Actionable.

1. Becauſe that this word, *A perjured old Knave*, the Noun is Knave, and perjured is ſpoken adjectively; As if a man ſaith, One is a ſeditious or thieviſh Knave, theſe words are not Actionable, becauſe the words do not import that he hath made ſedition or felony, but are adjective, which imply an inclination to it.

2. That the Court ought to judge upon all the words together, and collect the intent of the Defendant upon all the words, and not to take his words by parcels. And it was ſaid that the laſt words do extenuate the genuine and proper ſence of the firſt words, for perjury ſhall be intended in ſome Court upon Judicial proceeding; but when he adds, *And that is to be proved by a ſtake parting, &c.* that explaineth for any thing appeareth to the Court, that this perjury was not in any Court, but ſome unadviſed Oath extrajudicial between the placing of a ſtake for a partition.

As to the firſt, it was reſolved by *Popham* Chief Juſtice, *Gawdy, Fenner*, and *Yelverton* Juſtices, that for theſe words, *Thou art a perjured Knave*, without any more, an Action upon the Caſe doth lie. For ſometimes adjective words will maintain an Action, and ſometimes not. They are Actionable, 1. When the adjective doth preſume an act committed. 2. When they ſcandalize one in his office, or function, or trade by which he getteth his living; As if a man ſay, That one is a perjured Knave, there ought to be an act done, otherwiſe he cannot be perjured, as was reſolved before: So if one ſaith of an Officer, or a Judge, That he is a corrupt Officer or Judge, an Action lieth for both cauſes; 1. Becauſe it implieth an act done: 2. It is ſlanderous to him in reſpect of his Office. *Paſch.* 24 *Eliz.* in the *Kings Bench, Philips* Batchelor of Divinity and Parſon of *D.* brough an action upon the Caſe againſt *Robert Badby* Eſquire, becauſe the ſame Defendant ſpake theſe words in *London, Thou haſt made a ſeditious Sermon, and moved the people to Sedition this day.* The Defendant juſtified at S. *Edmonds Bury* in *Suffolk*, that he ſpake the ſaid words at *Bury*, upon which the Plaintiff demurred; and in this Caſe two Points were reſolved.

1. Notwithſtanding that the firſt part of the words were utterly adjectively, and the latter words were but moving to ſedition, and it did not appear that any did follow, yet becauſe they ſcandalized the Plaintiff in his function, it was reſolved that the words were Actionable.

2. The Defendant ought to have juſtified the words in *London*, and not at *Bury*, for the words in the Declaration were not anſwered: For which cauſe Judgment ws given for the Plaintiff. So if one
[*b*] ſay of a Merchant, That he is a Bankruptly Knave, or Bankrupt Knave, although that there Bankrupt be ſpoken adjectively, yet an Action lieth, as it was adjudged in *Mitton's* Caſe in the *Common Pleas, Mich.* 43. *&* 34 *Eliz.* where one ſaid of a Merchant, *That he would be Bankrupt in two days*, which implieth but inclination, yet an Action lieth, 6 *E.* 6. *Dier* 72. for that defameth him in his

Trade

Trade by which he getteth his living: But when the words do not imply an act done, but an inclination to an act which doth not ſcandalize the party in the duty of any office, or function, nor in his trade of living, there an action upon the Caſe doth not lie. But to ſay that he is a ſeditious or theeviſh Knave, theſe do not import an act to be done, but an intent or inclination to it, which is not puniſhable by the Common Law.

As to the ſecond it was reſolved in the Caſe of *Bittridge*, That upon all the words taken together no Action lay; for the latter words do extenuate the firſt, and explain his intent, that he did not intend any Judicial perjury. Alſo it was impoſſible that a ſtake can prove him perjured. And therefore upon conſideration of all the words for the impoſſibility and inſenſibility of them they are not actionable; as it hath been adjudged, that where one ſaith of another, *Thou art a Thief, for thou haſt ſtollen my apples out of my Orchard*; or, *For thou haſt robbed my Hop-ground*, theſe latter words prove it no felony, and ſo qualifie the proper words of this word (*Thief*) which of it ſelf, although it be generally ſpoken, will bear an action. And ſo it was adjudged between *Dobbins* and *Franklyn*, *Mich.* 43 & 44 *Eliz.* in the *Common Pleas*, *Thou art a Thief, for thou haſt ſtollen my apples out of my Orchard*; and to ſay, *Thou art a Thief, and that will be proved by ſtealing my apples in my Orchard*. So in the Caſe at Bar, *Thou art a perjured old Knave, and that will be proved by a ſtake parting, &c.* For the Office of Judges is upon conſideration of all the words to collect the true ſcope and intention of him who ſpeaketh them: And if in this Caſe the Plaintiff had declared only upon the firſt words, *Thou art a perjured Knave*, the Defendant might have ſhewed all the words, and the coherence of them, as appeareth before in the Lord *Cromwel*'s Caſe. But it was ſaid, that if the Plaintiffs Council had diſcloſed the truth of the Caſe in the Declaration, the ſaid words would have well maintained the action; for the truth of the Caſe was, That in an action between *Martin* and *Wright*, the ſtate of the controverſie was, Whether the ſaid ſtake ſtood upon the land of the one, or of the other, or indifferently, as a boundary betwixt them. And in that action the Plaintiff was depoſed as a witneſs, and by the pretence of the Defendant had in his depoſition perjured himſelf. But this ſpecial matter was not ſhewed, and therefore it was adjudged, That the Plaintiff ſhould take nothing by his Bill.

16. *Mich.* 44 & 45 *Eliz.* in the *Kings Bench*, *Barham*'s Caſe. *Barham* brought an Action upon the Caſe againſt *Netherſel*, and the words were, *Maſter* Barham *did burn my Barn* (innuendo) *a Barn with Corn, with his own hands, and none but he*; And after Verdict it was moved in arreſt of Judgment, That the words were not actionable, for it is not felony to burn a Barn, if it be not parcel of a Manſion-houſe, nor full of Corn: And in ſuch Caſe *agitur civiliter*, and not *criminaliter*, *& verba accipienda ſunt in mitiore ſenſu*: And the *innuendo* will not ſerve when the words themſelves are not actionable; which well agreeth with divers Reſolutions before. [20]

17. *Trinit.* 25 *Eliz.* in the *Kings Bench*, between *Palmer* and *Thorpe*. Touching defamation determinable in the *Eccleſiaſtical Court*, it was reſolved, That ſuch defamation ought to have three incidents: 1. That it concern matter meerly Spiritual and determinable in the *Eccleſiaſtical Court*, as for calling him *Heretick*, *Schiſmatick*, *Adulterer*, *Dilapidator*, *&c.* 2. It ought to concern matter meerly Spiritual only, for if ſuch defamation touch or concern any thing at the Common Law, the *Eccleſiaſtical Court* ſhall dot have conuſans thereof. 3. Although that ſuch defamation be meerly Spiritual and only Spiritual; yet he who is defamed cannot ſue there for amends or damages, but the ſuit ought to be only for the puniſhment of the ſin, *pro ſalute animæ*. And as to the firſt and ſecond the Caſe in 22 E. 4. 20. was cited to this effect; The Abbot of S. *Albans* ſent his ſervant to a feme covert to come to his Maſter and ſpeak with him, the ſervant performed his command, and thereupon the wife came with him to the Abbot; and when the Abbot and the woman were together, the ſervant (who knew his Maſters will) withdrew from them, and left them two in the Chamber alone; and then the Abbot ſaid to the woman, *That her apparl was groſs apparel*; to whom the wife ſaid, *That her apparel was according to her ability, and according to the ability of her husband*: The Abbot (knowing in what women repoſe delight) ſaid to her, *That if ſhe would be ruled by him, that ſhe ſhould have as good apparel as any woman in the Pariſh*, and did ſolicite her chaſtity; when the wife would not conſent to him, the Abbot did aſſault her, and would have made her an ill woman againſt her will, which the wife would not ſuffer, whereupon the Abbot kept her in his Chamber againſt her will, and to the intent, &c. The husband having notice of this abuſe to his wife, ſpake of this matter and ſaid, *That he would have his Action of falſe Impriſonment againſt the Abbot, for that he had impriſoned his wife*: Thereupon the Abbot (adding one ſin to another) ſued the innocent and poor husband for defamation in the *Spiritual Court*, becauſe the husband had publiſhed, that the Lord Abbot had ſolicited his wives chaſtity, and would have made her an ill woman: But upon all this matter diſcloſed to the Court, the husband had a Prohibition, becauſe the husband might have had an Action at the Common Law for this aſſault, and impriſonment of his wife; yet becauſe the ſcandal determinable in the *Eccleſiaſtical Court* was upon the matter diſcloſed mixed with matter determinable at the Common Law, for this cauſe upon a motion made by the Abbots Council to have a Conſultation in that Caſe, it was denied by the Court. *Vide* 18 E. 4. 6. 12 H. 7. 22. *Regiſt* 46, 47. *&* 54. [b]

As to the third, *vide* the Statute of *Articuli Cleri cap.* 1, 2, *&* 3. and the Statute of *Circumſpecte agatis*, *anno* 13 E. 1. and *F. N. B.* 51. *J. K.* 52. *D. M.* 53. *A. F.* So it appearth that if a Parſon ſue in the *Spiritual Court* for laying violent hands upon him, and to have him excommunicate, or have corporal puniſhment, and not for damages or amends; but the Plaintiff ſhall recover coſts there: And if the Defendant in caſe of defamation be put to corporal puniſhment, or for laying hands upon Clerks, &c. if the party will redeem his penance, and agree to pay to the party damnified a certain ſum of mony, it appeareth there that the party damnified ſhall have ſuit for this in the *Spiritual Court*, and no

Prohibition lieth; And upon theſe differences you ſhall better underſtand the better opinion in 12 *H.* 7. 22. and the ſence of the *Regiſt.* 54. where all the Juſtices refuſe to grant a Conſultation in Caſe of defamation, that is, either becauſe the matter of the defamation was not meer and ſole ſpiritual, or that the Plaintiff ſued for damages or amends for ſuch defamation; and therewith agreeth *F. N. B.* 53. *f.*

• Theſe Reſolutions concerning Scandals (which I amongſt many others for my inſtruction have obſerved) at the importunity, requeſt, and deſire of my good friends, ſome within the Realm of *Ireland*, and others dwelling within the remote parts of *England*, out of the meridian of *Weſtminſter*, I have Reported but in ſummary and ſhort manner, omitting many others which I do not think neceſſary to be publiſhed, my opinion always being, *Quod multo utilius eſt pauca idonea effundere, quam multis inutilibus homines gravari.* And at leaſt theſe briet Reſolutions, and the reaſons of them being well underſtood, and kept, will peradventure give great direction and inſtruction *pro multis aliis*, and will deter men for words which are but wind to ſubject themſelves to actions, in which damages and coſts are to be recovered, which ſometimes do trench to the great hindrance and impoveriſhment of the ſpeakers.

Copihold Caſes.

[21] *Mich.* 23 & 24 *Eliz.* in the *Common Pleas*, *Brown*'s Caſe. A Copiholder in fee by licence made a leaſe for years, the leſſee entred; the Copiholder having iſſue a ſon and a daughter by one woman, and a ſon by another woman, died; the eldeſt ſon died before admittance; It was adjudged, that the land ſhould deſcend to the daughter of the whole blood. And in this Caſe three Points were reſolved by the whole Court.

1. Although that a Copiholder hath not in Judgment of Law but an eſtate at will, yet Cuſtom hath ſo eſtabliſhed and fixed his eſtate, that the ſame by the cuſtom of the Mannor is deſcendable, and his heirs ſhall inherit the ſame; and therefore his eſtate is not meerly *ad voluntatem Domini*, but *ad voluntatem Domini ſecundum conſuetudinem Manerii:* So that the cuſtom of the Mannor is the ſoul and life of Copihold eſtates; for without cuſtom, or if they break their cuſtom they are ſubject to the Lords will. And by cuſtom a Copiholder is as well inheritable to have his land according to the cuſtom, as he who hath Freehold at the Common Law, for *Conſuetudo eſt altera lex:* Cuſtom and uſage time out of mind, &c. may create and conſolidate Inheritances. For *Conſuetudo vincit legem.* And Copihold eſtates are of great antiquity, for *Bracton* who wrote in the time of the Reign of King *H.* 3. wrote of them. *Lib.* 2. *cap.* 8. where he ſaith, *Si ipſe ad alium transferre voluerit, prius illud reſtituat Domino, vel ſervienti (id eſt, Seneſchallo Manerii) ſi Dominus præſens non fuerit, & de manibus illorum fiat tranſlatio ad alium, &c. quia ille non habet poteſtatem transferendi, cum liberum tenement. non habeat.* And in the ſame Book, *fol.* 76. *Et ſemper in hujuſmodi Socagiis conſuetudo loci eſt obſervanda.* And 4 *E.* 1. (who was the ſon of *H.* 3.) by the Statute called *Extenta Manerii*, there it is ſaid, *Inquirendum eſt de liberis tenent. quibuſcunque, &c. Inquirendum eſt etiam de cuſtumariis,* viz. *Quot ſunt cuſtomarii, & quantum terræ quilibet cuſtumarius teneat, quæ opera, quas conſuetudines faciat, & quantum opera & conſuetudines cujuſlibet cuſtumarii valeant per ann', & quantum reddit. de reddit. Aſſiſæ per ann', præter opera & conſuetudines quæ poſſunt talliari, & quæ non ad voluntatem Domini.* By which it appeareth, that all the Parliament eſteemed of them as cuſtomary tenants; 2. That the rent is accounted parcel of the rent of Aſſiſe: 3. That ſome of their cuſtoms within ſome Mannors are arbitrary at the Lords will, as Fines incertain, &c. and within ſome Mannors their cuſtomes are certain, and all that as cuſtom hath allowed.

[b]

42 *E.* 3. 25. The Lord brought an action of Treſpaſs againſt his Copiholder, who pleaded, Not Guilty; The Jury gave a ſpecial verdict, that the Copiholder had not done his ſervices, by which he brake the cuſtom of the Mannor, for which cauſe the entry of the Lord was adjudged lawful, and that he ſhall have the corn then growing; which proveth that he entreth for the forfeiture, and cannot put him out without cauſe. So 33 *E.* 3. *Treſpaſs* 254. If a Copiholder alien it is a diſſeiſin to the Lord, and a forfeiture of his eſtate.

13 *R.* 2. *Faux Impriſonment* 7. It is there adjudged, that where the heir of a Copiholder recovered in a plaint in the nature of an aſſiſe of *Mortdanceſter* in the Court of the Biſhop of his Mannor of *Stepney* in *Middleſex*, the tenant brought a Writ of falſe Judgment returnable in the Court of *Common Pleas*, which Writ of falſe Judgment doth not lie in this Caſe: But there it is ſaid, that he hath not other remedy, but to ſue to the Lord who hath the Freehold by Petition, and he may if there be cauſe reverſe the Judgment; by which it appeareth, that the heir of a Copiholder is inheritable according to the cuſtom, and ſhall recover by plaint in the nature of an aſſiſe of *Mortdanceſter*; but it is true that *Charleton* ſaith there, that he ſhall not have an aſſiſe againſt his Lord as tenant in antient demeſne ſhall have, becauſe he hath not the Freehold, as *Bracton* ſaith.

2 *H.* 4. 12. A Copiholder brought an action of Treſpaſs for breaking of his Cloſe, and cutting of his trees, and the Defendant pleaded, Not Guilty, the Jury found the Defendant guilty, and aſſeſſed damages, the Plaintiff recovered.

1 *H.* 5. 11, 12. A Copiholder may surrender to the use of another, reserving rent with condition of reentry for non-payment, and for want of payment enter, 4 *H.* 6. 11. 21 *H.* 6. 37. If a Bishop granteth customary lands by Copy, and dieth, the Copihold is not determined by his death, for he is *Dominus pro tempore*, and this grant shall bind the King, and the Grantee, the Temporalties being in the Kings hands, shall have aid of the King.

7 *E.* 4. *Danby* Chief Justice said, That a Copiholder is as well inheritable to have his land according to the custom, as he who hath a Freehold at the Common Law. [22]

21 *E.* 4. 80. *Brian* saith, that his opinion always hath been and ever shall be, That if such tenant by custom paying his services be ejected by his Lord, that he shall have an action of Trespass.

15 *H.* 7. 10. & 27 *H.* 8. 28. A Bishop grants lands by Copy and dieth, the Temporalties come to the King's hands, the Copihold estate stands, and he shall have aid of the King.

15 *H.* 8. *Br. Tenant by Copy* 24. The heir of a Copiholder Tenant in tail shall recover in a *Formedon* in the *Descender* by all the Justices. By which Cases it appeareth, that the Judges in all successions of ages have allowed Copihold estates to be established and sure by the custom of the Mannor, and descendible to their heirs, as other Inheritances are.

2. It was resolved, when custom hath created such Inheritances, and that the land shall be descendible, then the Law shall direct the descent according to the maxims and rules of the Common Law as incidents to every estate descendible; *Quia quod tacite intelligitur deesse non videtur.* As in 5 E. 4. 7. when uses had gained the reputation of Inheritances descendible, the Common Law directed the descent of them, and that there should be *possessio fratis* of an use, as well as of other Inheritances at the Common Law. But it was resolved, that such customary Inheritances shall not have by Law any other collateral qualities which do not concern the descent of the Inheritance, than other Inheritances at the Common Law had. And therefore such customary Inheritance shall not be assets to charge the heir in an Action of debt upon an Obligation made by his ancestor, although he bind himself and his heirs, nor the wife of such customary tenant shall not be endowed, nor the husband of a woman inheretrix shall not be of such estate tenant by the curtesie, nor descent in such Case shall not take away entry of him who hath a customary right to it, *& sic de cæteris*; for as without custom such estate at will cannot be descendible, so without custom it cannot have any collateral quality or incident as other Inheritances at the Common Law: For Copiholders have estates of Inheritances *secundum quid*, that is to say, to be descendible by custom to their heirs, and not to be determined by their deaths, nor subject to the Lords will, as other estates at will are, but they are not estates of Inheritance *simpliciter*, *scil.* to all collateral qualities, but such as custom have allowed, or are incident to them.

3. It was resolved, That where the customary part of Inheritance descendeth to the heir before admittance, that he may enter and take the profits, and that there shall be a *possessio fratris* before admittance upon an actual possession as in the Case at Bar. And such heir may surrender to the Lord before admittance, as any other Copiholder may, but it cannot prejudice the Lord of his Fine due to him upon the custom of the Mannor upon the descent; and he is a tenant by Copy of Court Roll, for the Copy made to his ancestor doth belong to him; as the admittance of one tenant for life, is the admittance of him in the remainder to vest the estate in him, but shall not bar the Lord of his Fine which he ought to have by the custom. And although it was objected that every admittance of the heir upon a descent did amount to a grant, and so may be pleaded, and therefore nothing doth vest in the heir before admittance. To that it was answered and resolved, That true it is, that after admittance the heir in pleading may alledge it as a grant, and the same hath been allowed for avoiding of inconvenience which might afterwards ensue; for if the Copiholder in pleading shall be driven to shew the first grant, either it was before time of memory, and so not pleadable, or within time of memory, and then the custom faileth; And for this Cause the Law hath allowed the Copiholder in pleading to alledge any admittance as well upon descent as surrender, as a grant; and yet he may if he will alledge the admittance of his ancestor as a grant, and shew the descent to him, and that he entred, and that well without any admittance of him; but the heir cannot plead, That his father was seised in fee at the will of the Lord by copy of Court Roll of such a Mannor according to the custom of the Mannor, and that he died seised, and that the same descended to him, for in truth such interest is but a particular interest at will in judgment of Law, although it is descendible as hath been said by custom: For he is tenant at the will of the Lord according to the custom of the Mannor. [6]

Note Reader, all these Resolutions and Opinions have been adjudged and confirmed, as appeareth by the Cases following.

2. AT *Lent Assises, ann.* 24 *El.* in *Suffolk*, in *Rivet*'s Case, it was adjudged by the Chief Justices, *Wray* and *Anderson*, Justices of the Assise upon an evidence to a Jury, that where a woman Copiholder in fee hath a husband who hath issue, and the wife dieth, that the husband shall not be tenant by the curtesie without special custom, according to the Resolution aforesaid; and according to their opinions the Jury passed against the husband.

3. *Trinit.* 36 *Eliz. Rot.* 547. in the *Kings Bench*, between *Deal* and *Rigden*; That whereas by the custom of the Mannor, plaints had been made in the Court of the Mannor in the nature of real actions, that if a Recovery be in a plaint in the nature of a real action against Tenant in tail (admitting that Copihold lands may be entailed) that it shall be a discontinuance, and take away the entry of the heir in tail; for in as much as plaints in the nature of real Actions are warranted by the custom, it is an incident which the Law annexeth to the custom, that a recovery shall be a discontinuance, which agreeth with the reason of the principal point in *Brown*'s Case. Like Judgment was given in the same Court, *M.* 35 & 37 *Eliz. Rot.* 1417. between *Clun* and *Pease*. [23]

4. *Pasch.*

4. *Paſch.* 35 *Eliz.* in the *Kings Bench*, *Rot.* 734. between *Bullock* and *Dibley* in Treſpaſs in *Berks*, it was adjudged, That if a man ſeiſed of Copihold land in the right of his wife, ſurrendreth the ſame to the uſe of another, and the husband dieth, it is no diſcontinuance to the wife, but that the wife may enter, and ſhall not be put to a *Cui in vita*, nor her heir to a *ſur Cui in vita*. And if a Copiholder for life ſurrendreth to the uſe of another in fee, it is no forfeiture, for it paſſeth by ſurrender to the Lord, and not by livery; and Copihold eſtates ſhall not have ſuch qualities as eſtates at Common Law have without ſpecial cuſtom, as hath been often ſaid. The like Judgment in the *Kings Bench* 30 *Eliz.* between *Wright* and *Portman*. And 35 *Eliz.* in the *Common Pleas*, between *Foxſton* and *Colſton*, like Judgment was given.

5. *Mich.* 35 & 36 *Eliz.* in the *Kings Bench*, between *Gravenor* and *Ted*. In this Caſe two Points were adjudged. 1. That the deſcent of a Copihold in fee ſhall not take away the entry of him who hath right to the Copihold, which agreeth with the Reſolution in *Brown*'s Caſe. 2. That where the cuſtom of the Mannor of *Alleſley* in the County of *Warwick* was, That Copihold lands may be granted to any perſon *in feodo ſimplici*, that a grant to one and the heirs of his body is within the cuſtom: For be it a Fee-ſimple conditional, or an eſtate tail, it is within the cuſtom. So he may grant for life or for years by the ſame cuſtom, for an eſtate in Fee-ſimple includeth all; and it is a maxim in Law, *Cui licet quod majus, non debet quod minus eſt non licere*.

6. *Paſch.* 36 *Eliz.* in the *Kings Bench*, *Rot.* 331. between *Fitch* and *Huckley*, the Caſe was ſuch; *Richard Fitch* the father, Copiholder in fee, makes a ſurrender to the uſe of himſelf for life, and after to the uſe of *Richard* his ſon for life, and after to the uſe of his laſt Will; The father is admitted and dieth, and afterwards the Lord pretending cauſe of forfeiture granteth the ſame to a ſtranger. In this Caſe two Points were reſolved:

1. That the admittance of the Tenant for life, was the admittance of him in the remainder, but not to prejudice the Lord of his Fine which was due by the cuſtom of the Mannor, according to the opinion in *Brown*'s Caſe.

2. It was adjudged, that the Fee-ſimple of the Copihold being limited to the uſe of his Will, did remain in the Copiholder, and not in the Lord.

[b] 7. *Trinit.* 26 *Eliz.* in the *Kings Bench*, between *Clark* Plaintiff, and *Pennifather* Defendant, three Points were adjudged.

1. That the heir of a Copiholder may enter and have an Action of Treſpaſs before admiſſion (and ſo if the heir die before admiſſion as the principal Caſe was) his heir may enter and take the profits, and have an Action of Treſpaſs, which agreeth with the Judgment in the principal Point in *Brown*'s Caſe.

2. It was adjudged, that where King *H.* 8. granted a Mannor to the Queen his wife for life, that there the Queen was a ſole perſon exempt by the Common Law, and may make a leaſe or grant without the King, and ſo may plead and be impleaded alone. *Vide* 10 *E.* 3. 18. & 50. 18 *E.* 3. 1, 2. & 38. 20 *E.* 3. *Nonability* 9. 32 *E.* 3. *Brief* 346. 49 *E.* 3. 4. 11 *H.* 6. 67. 26 *H.* 6. *Aide del Roy* 24. 3 *H.* 7. 14. 7 *H.* 7. 7. And that the Statute of 32 *H.* 8. is but explanatory of the Common Law.

3. It was adjudged, that where the Queen was Tenant for life, and a Copihold eſcheated to her, there the Queen may grant the ſame to whom ſhe pleaſeth, and it ſhall bind the King, his heirs and ſucceſſors for ever; for ſhe was *Domina pro tempore*, and the cuſtom of the Mannor ſhall bind the King: And it was reſolved that every one who hath a lawful eſtate in a Mannor, be it in fee, in tail, in dower, or by the curteſie, or for life, or years, or as Guardian, or tenant by Statute, *Elegit*, or at will, if a Copihold eſcheat or come to their hands during their time, every one of them at their will may grant the ſame rendring the ancient rent, cuſtoms, and ſervices, and the ſame ſhall bind the Lord who hath the Inheritance or Freehold of the Mannor, for every one is *Dominus pro tempore* and within the cuſtom. As in 20 *H.* 6. 8. the Chief Juſtice of the *Common Pleas* who hath his Office but at will may by cuſtom grant Offices for life. And it is to be obſerved, that a Copiholder doth not derive his eſtate out of the eſtate or intereſt of the Lord only, for then the Copihold eſtate ſhould ceaſe when the eſtate of the Lord determineth. But as it was ſaid in *Brown*'s Caſe, the ſoul and life of a Copihold is the cuſtom of the Mannor; and when the grant is made by any who hath a lawful eſtate, or intereſt, the Copiholder is in by the cuſtom without any regard to the eſtate, or perſon of the grantor, and therefore ſuch grant made by the husband and wife ſhall bind the wife notwithſtanding the coverture. So of a grant made by *Non compos mentis*, or an Infant, or by a Biſhop, Prebend, Parſon, &c. it ſhall bind for ever. For the cuſtom is, that the tenements are parcel of the Mannor, *Et dimiſſ. & diviſibil' per* [22] *Dominum Manerii, &c. pro tempore exiſtent', ſeu per ejus Seneſchal', &c.* And ſo a feme covert, *Non compos mentis*, an infant, the ſucceſſors of Biſhops, Prebends, Parſons, &c. are bound by the ſaid cuſtom: But by force of theſe words in the cuſtom (*per Dominum Manerii, &c. pro tempore exiſten'*) in ſome Caſe the Lord ought to have lawful eſtate, and in ſome Caſes not. And therefore this difference was agreed; If a diſſeiſor, or feoffee of a diſſeiſor, or any other who hath a torcious and deforcible eſtate or intereſt ſubject to the action, or entry of another, hold Court, and make any voluntary grant upon eſcheat, or forfeiture of a Copihold, ſuch voluntary grant ſhall not bind him who hath right, when he hath recontinued the Mannor by action, or entry; for to this intent the cuſtom ſhall be intended of a Lord who hath a lawful eſtate or intereſt. But if ſuch Lord who hath a wrongful and defeaſible eſtate, admit any upon ſurrender made to the uſe of another, or admit the heir upon a deſcent, ſuch admittances are good, and within the ſaid cuſtom. For ſuch acts are lawful, and *quodam modo* judicial to do, which he may

may be compelled and enforced in a Court of Equity to do; and therefore such admittances shall bind him who hath right.

8. *Pasch. 26 Eliz.* in the *Kings Bench* it was adjudged, that where the Lord of a Mannor wherein were many Copiholds for lives took a wife, and afterwards a Copiholder died, the Lord after marriage doth grant the land according to the custom of the Mannor for lives, and dieth, that the wife shall not avoid such grants in a Writ of Dower: For although the grant were after the title of Dower, yet the custom which is the life and force of the grant was long before. And an opinion in 8 *Eliz.* was cited to the contrary; which see *Dier* 251. and yet it was adjudged as above. If feoffee of a Mannor upon condition maketh voluntary grants of Copihold estates according to the custom, and afterwards the condition is broken, and the feoffor entreth, yet the grants by Copy shall stand; and therewith agreeth the Judgment 17 *Eliz. Dier* 342. the Countess of *Arundel*'s Case.

9. *Pasch. 29 Eliz.* in the *Kings Bench*, between *Rous* and *Arters*, it was adjudged, If tenant for another mans life be of a Mannor, and *Cestuy que vie* die, and the tenant for life continue in the Mannor, and holdeth Courts, and maketh voluntary grants by Copy, they shall not bind the lessor; for in such Case it was resolved, that he was tenant at sufferance, who hath not any lawful interest: And a Writ of *Terminum qui præteriit* lith against him, and so he is a disseisor of the Mannor.

10. *Mich. 33 & 34 Eliz.* in the *Kings Bench*, between *Murrell* and *Smith* in Trespas. Upon a special verdict the Case was such; Queen *Elizabeth* seised in fee of the Mannor of *Bawdesey Butley* in the County of *Suffolk*, granted part of the same being ancient Copihold land to *Smith* the father in fee; and afterwards the Queen granted the Inheritance of the said Copihold to a stranger in fee; and afterwards *Smith* made his Will in writing, and thereby devised the Copihold to *Murrell* the Plaintiff in fee; and at a Court holden at the said Mannor surrendred into the hands of the Queen to the use of his Will; and in pleading the Defendant *Smith* did alledge the said grant made to his father, by force whereof he was seised, and so seised, died seised, and that the same descended to the Defendant as his son and heir, and that the Plaintiff claiming by the said devise and surrender, traversed the descent to the Defendant. And the Jurors upon this special issue gave the said special verdict: And upon great deliberation Judgment was given against the Plaintiff. And in this Case three Points were resolved. [b]

1. That custom hath so established and fixed the estate of the Copiholder, that by the severance of the Inheritance of the Copihold from the Mannor, the Copihold is not destroyed; for as much as the Lord himself cannot oust the Copiholder, no more can any claiming under him do: For *Nemo potest plus juris ad alium transferre, quam ipse habet; Et quod per me non possum, nec per alium.* But it was objected, that every Copihold estate in land or tenements ought to stand upon two pillars, and without some of them cannot be supported; The one that the land or tenements be parcel of the Mannor, the other that such land or tenement hath been demised and demisable time out of mind, so that parcel of the Mannor, and Prescription are two incidents to every Copihold: but in the Case at Bar one of them faileth, for by the said severance the land was not parcel of the Mannor. To which it was answered and resolved, for as much as the land was parcel of the Mannor, and custom hath once established and fixed the estate, so that once it had both the incidents, for this cause the severance made by the Lord afterwards shall not destroy the estate of the Copihold.

2. That in this Case the said customary lands descended to the Defendant, notwithstanding the devise and surrender, for the surrender after the severance of the Inheritance of the Copihold from the Mannor was void, because the lands were not parcel of the Mannor at the time of the surrender, and the devise alone cannot transfer such customary estate. For as it appeareth by *Bracton* before, and by *Litt.* 15. it cannot be transferred but by surrender into the hands of the Lord according to the custom of the Mannor. [25]

3. That after the severance the Copiholder shall pay his rent to the feoffee, and also shall pay and do other services which are due without admittance or holding of any Court; As to plough the Lords demeans, heriot, and the like; but suit of Court, and fine upon alienation, or admittance are gone: For now the land or tenement cannot be aliened, for as the Copiholder hath some benefit by his severance, as appeareth before, so hath he great prejudice, for now he cannot surrender or alien his estate, because he cannot alien it by surrender *in manus Domini servitiorum*, as the custom hath warranted, and that he cannot now do, nor the feoffee cannot make admittance or grant of the Copihold, for he is not *Dominus pro tempore*: But it was resolved that such forfeitures as were forfeitures before the severance, as the making of a feoffment, lease, wast, denying of rent, or the like, are forfeitures also after the severance. So if land were of the nature of Borough *English* or Gavelkind before the same custom, and all other customs which run with the land remain after the severance: And it was said, that if such Copiholder will alien, there is not any means but to have a Decree against him and his heirs in *Chancery*, but thereby the interest of the land is not bound, but the person only.

11. *Pasch. 31 El.* in the *Kings Bench*, between *Kite* and *Queinton*, the Case was, a Copiholder in fee of the Mannor of the Dean and Chapter of *Westminster*, called *Lainton* in the County of *Oxford*, surrendred his Copihold lands out of Court, by the hands of certain Copihold tenants according to the custom of the Mannor, unto the use of another and his heirs upon certain conditions, and after at the next Court the surrender was presented, but in the presentment the conditions were omitted, and he to whose use the surrender was made being dead, the Lord by his Steward, according to the custom, did admit his daughters and heirs, who entred; he who made the surrender by his Deed, did release to the daughters being in possession, and afterwards entred upon them, and if his entry were lawful or

not

not was the Queſtion. And it was reſolved, that his entry was not lawful; and in this Caſe two Points were reſolved.

1. That the preſentment of the ſaid ſurrender was void, for the ſurrender out of Court ought by the cuſtom of the Mannor be preſented in Court, but for as much as the ſurrender was upon condition, and the preſentment was of an abſolute ſurrender, the ſurrender which the Copiholder made was not preſented: But if the truth of the Caſe were, that the ſurrender conditional was preſented, and the Steward in entring thereof omitted the condition, yet upon good proof thereof, the ſurrender was not avoided, [b] but the Roll ſhall be mended, for the Roll doth not conclude in ſuch Caſe the party either to plead, or give in evidence the truth of the matter.

The ſecond Queſtion and the greater doubt was, If by the ſaid releaſe by Deed the cuſtomary right of the Copiholder were extinct, and he who made the ſurrender barred of his right. And it was objected that *Littleton Sect.* 15. ſaith, That a Copiholder cannot alien his land by Deed; but if he will alien, he ought according to the cuſtom, &c. ſurrender, &c. And he ſaith, that ſuch tenants are called tenants by Copy, becauſe they have no other evidence concerning their tenements but the Copies of the Court Rolls. And it was ſaid, that that doth exclude all releaſes by Deed, for then they ſhould have other Evidences then the Court Rolls. Alſo it was ſaid, that he who purchaſeth the land, may upon ſearching the Rolls be adviſed if the title of the land be good. But if a releaſe by Deed ſhall extinguiſh Rights, then it ſhall be perilous to Purchaſors, for that it doth not appear in the Rolls.

To which it was anſwered and reſolved, That the releaſe in the Caſe at Bar extinguiſhed the right of the Copiholder; and their reaſon was, becauſe he to whom the releaſe was made was admitted to the tenements, and Copiholder in poſſeſſion; ſo that a releaſe of a cuſtomary right may enure to him, and therefore the Lord is not at any prejudice, for he hath had his Fine upon admittance, and he to whom the releaſe was made was in by title, *ſcil.* by the Lords admittance, and ſo the releaſe doth enure by way of Extinguiſhment: But if a Copiholder be ouſted by one by tort, there his releaſe by Deed to the diſſeiſor, or other wrong doer, doth not transfer his right, nor bar him for two cauſes: 1. Becauſe he hath not any cuſtomary eſtate upon which the releaſe of the cuſtomary right can enure. 2. It ſhall be to the Lords prejudice, for thereby he ſhall loſe his fine and ſervices; and for theſe cauſes the releaſe by Deed in ſuch Caſe is utterly void, and this is not againſt any thing *Littleton* ſaith, for *Littleton* ſpeaketh of alienation by ſurrender, and that of neceſſity ought to be into the Lords hands according to the cuſtom: But the releaſe in the Caſe at Bar cannot be made to the Lord but to the Copihold tenant in poſſeſſion: Alſo he who claimeth a Copihold eſtate by ſurrender, hath not other Evidences but Copies, and ſo are *Littletons* words to be intended. But he who claimeth extinguiſhment of a right, may have it by a releaſe by Deed: So the Reſolution in *Murrel*'s Caſe before well agreeth with the Judgment in this Caſe upon the difference aforeſaid in transferring of an eſtate, and extinguiſhing of a right: And as to the peril of Purchaſors, it was ſaid, That there was not any danger for if the Copiholder who is in poſſeſſion ſell the ſame, he will ſhew to the Purchaſor the releaſe made [26] to him, and he who is out of poſſeſſion, ought not to ſell the ſame till he hath regained the poſſeſſion; and if any one will purchaſe a title, he is not to be favoured, but in ſuch caſe *caveat emptor:* and yet he who hath made ſuch releaſe, may and ought to acquaint the Purchaſor with that which himſelf hath done, and ſo no miſchief. And *Wray* Chief Juſtice in this Caſe ſaid, That if one who hath pretended right or title to Copihold land, bargain and ſell the ſame to another, it is within the Statute of 32 *H.* 8. *cap.* 9. for the Statute ſaith, If any one bargain, buy, or ſell, &c. any right or title, in or to any lands or tenements: So that theſe words, any right or title, extend to all manner of rights or titles, and by conſequence to Copihold lands. And a great part of the land of the Kingdom is in grant by Copy, and therefore the intent of the Makers of the Act was to include it, for avoiding of ſuits, maintenance, and champerty, and not to leave all Copihold eſtates to the miſchiefs mentioned in the preamble of the ſaid Act, eſpecially when a leaſe for years hath been adjuged in *Partriges* and *Crocker*'s Caſe. *Plow. Com.* 76. to be within the ſaid Act.

12. TRin. 30 *Eliz.* in the *Kings Bench*, between *Melwich* and *Luter*, the Caſe was; *William Melwich* brought an *Ejectione firmæ* againſt *John Luter* and *Mary* his wife, upon a demiſe made by *John Melwich* of lands in *Eſtworth* in the County of *Shrewsbury* for one year, &c. The Defendant pleaded, Not Guilty; and the Jury gave a ſpecial Verdict to this effect; The Abbot of *Tewksbury* was ſeiſed of the Mannor of *Boveridge* whereof the tenements in which, &c. were parcel, and Copihold lands of the ſame Mannor; and that there were many ancient Copiholds of the ſame Mannor in *Eaſtworth* aforeſaid, which Mannor came to the King by diſſolution. And the King *anno* 37 *H.* 8. granted the Inheritance of all the Copiholds in *Eaſtworth* to *John Ogden* and his heirs, who called it his Mannor of *Eaſtworth*: And afterwards a Copiholder of the tenements aforeſaid in which, &c. did ſurrender them to the ſame *John Ogden*, who alſo being ſeiſed of the Mannor of *Harbridge* within the ſame County, at *Harbridge* granted the tenements in which to *John Melwich* the leſſor of the Plaintiff by Copy, according to the cuſtom of the Mannor of *Eaſtworth* for term of his life, and that the Plaintiff was poſſeſſed till he was ejected by the Defendant, claiming it under the title of *John Ogden*, pretending that the ſaid grant by Copy did not bind him. And afterwards upon adviſement, Judgment was given for the Plaintiff; and in this Caſe four Points were reſolved.

1. That the leſſee of the Copiholder for one year ſhall maintain an *Ejectione firmæ*; for in as much as his term is warranted by the Law by the general cuſtom of the Realm, it is reaſon that if he be ejected, [b] that he have an *Ejectione firmæ*, and it is a ſpeedy courſe for a Copiholder to have the poſſeſſion of the land againſt a ſtranger.

2. That by the ſeverance of the Inheritance of Copiholds from the Mannor, the Copiholds were not deſtroyed, but remained of force and effect, which agreeth with the Judgment in *Murrel*'s Caſe.

3. When

3. When the Lord of a Mannor having many ancient Copiholds in one Town granteth the Inheritance of all the Copiholds to another; the Grantee may hold Court for the Copihold tenements, and take surrenders to the use of others, and make admittances and grants: For although it is not a Mannor in Law, because it wanteth free tenants, yet as to the Copihold tenements, the feoffee or grantee of such a Mannor may hold a Court to make admittances and grants of the Copiholds: For every Mannor which consisterh of Freehold and Copihold tenements comprehendeth in it self in effect two Courts; one which is commonly called the Court Baron, *scil.* the Court of Freeholders, and in this Court the Suitors, *scil.* the free tenants are Judges; and therewith agreeth 7 *H.* 6. 39 *H.* 6. 5. 6 *E.* 3. 43. 12 *H.* 7. 16. Another Court is for the Copiholders, and as to that, the Lord or Steward of the Mannor is the Judge; and as the other is called the Freeholders Court, so this may be called the Copiholders Court: And therefore when the Lord granteth over the Inheritance of his Copiholds to others, the grantee may hold Court for the Copihold tenements only, as his grantor might. And as to this Court there need not any free tenements; so if all the Freeholds escheat, or if the Lord releaseth the tenure and services of all his free tenants, yet the Lord may hold a customary Court for his Copihold tenements, to make admittances and grants to them; *Benedicta est expositio, quando res redimitur a destructione.* Note Reader, although the Lord by his own act cannot make of one Mannor at the Common Law sundry Mannors consisting upon Demeans and Freeholds, yet he may by his own act, as by this Judgment appeareth, make a customary Mannor consisting upon Copihold to the purposes aforesaid. 4. It was resolved, that the Lord himself may make a grant or admittance of a Copiholder out of the Mannor at what place he pleaseth; but the Steward of the Court of a Mannor cannot at any Court holden off from the Mannor make such grants or admittances. *Quod nota.*

13. *Pasch.* 37 *Eliz.* in the *Common Pleas*, between *Neal* and *Jackson*, it was adjudged by *Anderson* Chief Justice of the *Common Pleas*, *Walmsley*, and the whole Court, That where the Lord of a Mannor doth demise all his lands granted by Copy to another for 2000 years, that such lessee may hold a Court for the Copihold according to the Resolution in the third Point in *Melwiche*'s Case. And in this Case it was said, that so it was resolved by all the Justices in the Case of Sir *Christopher Hatton*, late Lord Chancellor of *England* touching Copiholds in *Wellingborough* in *Northamptonshire*: Note Reader, a good difference between these Cases which consist upon numbers of Copiholds which may support a custom, and one single Case of a Copihold, as in *Murrel*'s Case before, in which the Lord doth not grant *tacite* any customary Court, nor the grantee having but one single Copihold cannot hold Court. [27]

14. *Mich.* 27 & 28 *Eliz.* in the *Kings Bench*, between *Clifton* and *Molineux*; two Points were resolved by *Wray* Chief Justice, Sir *Thomas Gawdy*, and the whole Court upon an evidence given to a Jury; That if a Court be holden by a Steward of a Mannor out of it, and divers grants and admittances there made; the Court and all the grants and admittances are void, for the Court of the Mannor ought to be holden within the Mannor, and not out of the Jurisdiction of it; which agreeth with the Resolution of the fourth Point in *Melwiche*'s Case. But it was resolved, that by custom the Court may be holden out of the Mannor, and grants and admittances there good enough: As divers Abbots and Priors used to hold Courts at one Mannor, for divers several Mannors, and good by custom.

2. It was resolved, that where a woman tenant for life taketh a husband, and the husband committeth Wast against the custom of the Mannor, and dieth, the estate of the wife is utterly forfeited by the act of the husband. But if a stranger doth Wast without the assent of the husband, it is no forfeiture; and according to this Resolution it was certified into the *Chancery* by *Mead* and *Periam*, two of the Justices of the *Common Pleas* between the same parties as to both the Points, upon conference had with divers other Justices.

ib. 121

15. *Trinit.* 26 *Eliz.* in the *Kings Bench*, between *James Tavernor* and *Cromwell*. It was resolved by *Wray* Chief Justice, Sir *Thomas Gawdy*, and the whole Court upon evidence to a Jury, That if a Copiholder be seised by force of several Copies, *scil.* of black acre by the rent of 4 *d.* of white acre by the rent of 4 *d.* and of green acre by the rent of 6 *d.* And afterwards the Copiholder committeth Wast in part of black acre, or maketh a feoffment of part of black acre, or denieth the rent of that acre, by that all black acre is forfeited, but it is no forfeiture of white acre, or green acre. For although they all are in one hand, yet every acre is holden severally, and to every acre there is a condition in Law *tacite* annexed, so as the forfeiture of the one cannot be the forfeiture of any of the other, for the several conditions in Law follow the several tenures; and therefore the forfeiture of the one cannot be the forfeiture of the other: So it was at the same time resolved, That if the said Copiholder of the said three acres severally holden as aforesaid, surrendreth them to *A.* and his heirs, and the Lord admitteth *A.* accordingly, *Tenendum per antiqua servitia inde prius debita & de jure consueta*, or to such effect; and after *A.* committeth a forfeiture in black acre, he shall forfeit the same only, and none of the other. And so it is not materal whether the Copihold be in one or several Copies. And so was it adjudged upon a demurrer, *Hill.* 35 *Eliz.* in the *Common Pleas*, between *James Tavernor* Plaintiff, and *Thomas Cromwel* Defendant. [b]

So if divers several Copiholds escheat to the Lord, and he regrant them to another, *Tenendum per aliqua servicia, &c.* they shall be severally holden as they were before the escheat: And in this Case it was resolved, That when a Copiholder surrendreth to the use of another, and the Lord admits him, now he who is so admitted is in by him who made the surrender; and in plaint in nature of a Writ of Entry in the *Per*, shall be supposed in the *Per* by him who made the surrender; for the Lord is but

an inſtrument to make admittance, and he who is admitted ſhall not be ſubject to the charges or incumbrances of the Lord: And ſo Reader, where it is ſaid in the Caſe of *Clifton* and *Molineux* before, that by the forfeiture of the husband all the eſtate of the wife ſhall be forfeited, it is to be intended all the Copihold eſtate under the ſame tenure.

16. *Mich.* 42 & 43 *Eliz.* in the *Kings Bench*, between *Hubbard* and *Hamond*. Upon an evidence to a Jury, theſe Points were reſolved by *Popham* Chief Juſtice, *Gawdy* and *Fenner* Juſtices of the *Kings Bench*.

1. That if the Fine of Copiholders of a Mannor upon admittance be incertain, yet the Lord cannot demand and exact exceſſive and unreaſonable Fines, and if he do, the Copiholder by the Law may deny to pay them without any forfeiture; And it ſhall be determined by the opinion of the Juſtices before whom the matter is depending, or upon demurrer, or upon evidence to a Jury upon the confeſſion or proof of the yearly value of the land, whether the Fine demanded were reaſonable or not: For if the Lords may aſſeſs exceſſive Fines at their pleaſures, all the eſtates of Copiholders, which are a great part of the Realm, and which have continued time out of mind, &c. ſhall be at the wills of the Lords to be defeated and deſtroyed, which ſhall be inconvenient. And it was ſaid, that according to this Reſolution in this Point, it hath been adjudged in the *Common Pleas* in *Hoddeſdon*'s Caſe.

2. It was reſolved, that if the Lord in caſe of incertainty of Fines aſſeſs a reaſonable Fine, and require
[28] the Copiholder to pay the ſame, the Copiholder is not tied to pay it preſently, becauſe he cannot tell what Fine the Lord will ſet; *Et nemo tenetur divinare*; and therefore he could not provide any ſuch ſum, and for this cauſe he ſhall have convenient time to pay it, if the Lord appoint no certain day for the payment of it. But otherwiſe it is of Fines certain.

3. It was reſolved, that where a Copiholder hath ſeveral lands ſeverally holden by ſeveral ſervices by Copy, there the Lord ought to aſſeſs and demand the Fines ſeverally for every parcel which is ſo ſeverally holden. For the tenant may refuſe to pay the fine for one parcel and forfeit it, and pay the fines for the other. And it was agreed in *Taverner*'s Caſe, every ſeveral tenure hath a ſeveral condition in Law *tacite* annexed to it; and therefore the Lord ought for every ſeveral tenure aſſeſs and demand a ſeveral fine: So if all the ſaid ſeveral Copiholds be ſurrendred to the uſe of another and his heirs, and the Lord admit him *Tenendum per antiqua ſervicia inde prius debita & de jure conſueta*, there, as it was reſolved in *Taverner*'s Caſe, the tenures are ſeveral, and therefore the fines ought to be ſeverally aſſeſſed and demanded.

4. *Popham* Chief Juſtice ſaid, it was adjudged in *Sand*'s Caſe, that no fine is due to the Lord either upon ſurrender or deſcent till admittance; for the admittance is the cauſe of the fine, and if after the tenant deny to pay the fine it is a forfeiture. And ſo it was reſolved by *Wray* and *Periam* Juſtices of Aſſiſe in evidence to a Jury in the County of *Suffolk*, between Sir *Nicholas Bacon* Knight Plaintiff, and *Flatman* Defendant, for a Copihold of the Mannor of *Walſham* in the *Willowes* in the County of *Suffolk*.

17. *Trinit.* 33 *Eliz.* in the *Kings Bench*, between *Ralph Weſtwick* Plaintiff and *Edward Wyer* and *Joan* his wife Defendant, the Caſe was ſuch; *Alice Weſtwick* was Copiholder of the tenements in which, &c. in fee, holden of the Mannor of *Peter Leyſton* in the County of *Buck.* and 12 *H.* 8. ſurrendred the tenements into the hands of the Lord, to the uſe of *Willam Weſtwick* her ſon in fee; and at the next Court holden 13 *H.* 8. for the ſame Mannor, the entry in the Roll was to this effect; *Ad hanc Curiam venerunt* Will. Weſtwick & Johanna *uxor ejus, & ceperunt de Domino tenementa prædicta cum pertinentiis in quibus, &c. præf.* W. Weſtwick & Joh. *uxori ejus: Tenend. eiſdem* W. & J. & *hæred. ſuis, &c.* And afterwards *William* died, and *Joan* ſurvived and ſurrendred the tenements to the uſe of the Defendants, who entred, upon whom the Plaintiff as couſin and heir of *William Weſtwick* entred, and the Defendants reentred; And the Plaintiff brought an Action of Treſpaſs, and all this was found in a ſpecial verdict: And it was argued by the Defendants Council, that the Defendant ought to have Judgment for divers cauſes:

[b] 1. When *Alice Weſtwick* did ſurrender her land to the Lord of the Mannor to the uſe of *W. Weſtwick*, by the ſurrender the eſtate of the Copihold is in the Lord, which he might grant to any ſtranger, as the feoffees of an uſe may do at the Common Law; and *Will. Weſtwick* hath no remedy but in a Court of Equity to compel the Lord to admit him; and by conſequence, when the Lord granteth the land to *W. Weſtwick* and to his wife in fee, this is a good grant to them both.

2. *W. Weſtwick* in the Caſe at Bar, having but remedy in equity to be admitted to the land, it ſhall be intended that *W. Weſtwick* requeſted the Lord to make a grant to him and his wife, for ſo much is implied in it, when it is ſaid, *Quod ad hanc Curiam venerunt* W. Weſtwick & Johanna *uxor ejus, & ceperunt, &c.* and every admittance of a Copihold amounteth in Law to a grant, for which they conceived that Judgment ought to be given for the Plaintiff.

To which it was anſwered and reſolved by the Court, That as to the firſt reaſon the Defendants Council had miſtaken the Law. For when *Alice Weſtwick* ſurrendred the land to the Lord to the uſe of *W. Weſtwick*, the Lord by the cuſtom (which makes the Law in ſuch caſe) hath but a cuſtomary power to make admittance *ſecundum formam & effectum ſurſum redditionis*, and therefore it is not to be likened to the Caſes of feoffees at the Common Law. And although the Lord granteth the land over by Copy to another, all is without Warrant, for notwithſtanding that, the Lord may make admittance according to ſurrender, as it was reſolved in *Taverner*'s Caſe next before. And it was agreed by the whole Court, that if the Lord after ſuch ſurrender grant the land to *Ceſty que uſe* and a ſtranger, all ſhall enure to the *Ceſtuy que uſe*; or if he admit *Ceſtuy que uſe* upon condition, the condition is void, for after admittance he is in by him who made the ſurrender. As if a man deviſe a term to *J. S.* and

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the executors agree and assent that *J. S.* and *J. D.* shall have the term, in this Case *J. S.* shall have the term alone and absolutely, for after the assent of the Executors he is in by the devise. And it was said, that it hath been lately adjudged in *Bunting*'s Case, That where a Copiholder surrendreth to the use of another for life to the Lord, and the Lord admit him to hold to him and his heirs, that yet he who is so admitted, hath but an estate for life, for he is in after the admittance by force of the surrender.

As to the second Objection it was answered and resolved, That without special custom, for *Consuetudo loci est semper observanda*, or other special matter which is the same Case, the admittance shall enure only to the husband for the causes aforesaid: For which cause Judgment was given for the Plaintiff.

18. *Mich* 27 & 28 *Eliz.* between *Charls Bunting* Plaintiff, and *Richard Lepingwel* Defendant in Trespass, the Case as it was found upon special Verdict was such; *John Bunting* father of the Plaintiff, and *Agnes Adingshal* did contract by marriage betwixt them *per verba de præsenti tempore*; and afterwards 10. *Decemb. anno Dom.* 1555. the said *Agnes* took to husband *Thomas Twede*; and afterwards 9. *Julii*, 1555. *John Bunting* libelled against the said *Agnes* upon the said Contract in the Court of Audience, upon the proceeding of which Libel, *Decretum fuit quod præd. Agnes subiret matrimonium cum præfato* Johanne Bunting: *Et insuper pronunciatum, decretum & declaratum fuit dictum matrimonium fore nullum, &c.* And further it was adjudged, that the said *John* and *Agnes* should entermarry, which they did, and had issue the Plaintiff, the said *Thomas Twede* then living, and afterwards *John Bunting* died; and it was further found, that one *Richard Bunting* father of the said *John* was a Copiholder in fee of the land in which, &c. holden of the Mannor of *Golding* in *Ganiscolne* in *Essex*; and out of Court according to the custom of the Mannor did surrender by the hands of the customary tenants unto the Lord to the use of *Margaret* his wife and *Robert* his younger son, and died, after whose death the said surrender was presented according to the custom; and thereupon the Lord of the Mannor gave admittance, and granted seisin of the land to *Margaret* and *Robert*, and to the heirs of *Robert*; *Margaret* died, *Robert* survived, and surrendred the land to the use of *Emme* his wife, and died, *Emme* was admitted, *Charles Bunting* as cousin and heir of the said *Richard Bunting*, *scil.* son and heir of *John*, son and heir of the said *Richard* entred upon *Emme*, and the Defendant as her servant, and by her commandment, did reenter, upon which reentry the Plaintiff brought the Action. And in this Case five Points were resolved. [29]

1. That although that *Twede* being *de facto* the husband of the said *Agnes* was not party to the said suit, nor to the Sentence in the *Spiritual Court* which dissolved the marriage betwixt him and the said *Agnes*, but the said *Agnes* only; yet the sentence against the woman only being but declaratory, was good, and shall bind the husband *de facto*; and for as much as the conusance of the right of marriage doth belong to the *Ecclesiastical Court*, and the same Court hath given sentence in this Case, the Judges of our Law ought (although it be against the reason of our Law) to give faith and credit to their proceedings and sentences, and to think that their proceedings are consonant to the Law of holy Church, for *cuilibet in sua arte perito est credendum*; and so always have the Judges of our Law done, as appeareth in 34 *H.* 6. 14. 11 *H.* 7. 9. 8 *Ass. pl.* So that it was resolved, that the Plaintiff was legitimate, and no bastard.

2. When *Richard Bunting* Copiholder doth surrender into the hands of the Lord to the use of the said *Margaret* and *Robert* without limitation of any estate, it was resolved, that they had estate but for their lives, for as well estates as descents shall be directed by the rules of the Law, as necessary consequents upon the custom, if there be not a special custom (which always is to be kept) within the Mannor; as these words, *sibi & suis*, or *sibi & assignatis*, or such like may by custom create an estate of Inheritance. And it was observed that the estates in these Cases limited upon surrenders, are always annexed to estates of him to whose use the surrender is made, and always the surrender to the Lord is general without limitation of any estate. [b]

3. It was resolved, That when the Lord doth make admittance and deliver seisin to *Margaret* and *Robert*, and the heirs of *Robert*, it was only an admittance to them for the term of their lives, the reversion over to *Richard Bunting* who made the surrender, because the Lord is but an instrument in this Case, and when he hath admitted according to the effect of the surrender, nothing remains in him but the reversion of the estate in him who made the surrender to dispose of as pleaseth him according to the custom of the Mannor; and those who were admitted for their lives were in by him who made the surrender, which cannot be if the reversion shall be in the Lord.

4. Although that he who is admitted is in by him who made the surrender, yet it was resolved a man may surrender (as *Robert Bunting* did in this Case) to the use of his wife, because the husband doth it not immediately to his wife but by two means, *scil.* by the surrender of the husband to the Lord to the use of the wife, and by the admittance of the Lord to the wife according to the surrender.

5. When *Richard Bunting* made a surrender out of Court, and died before that it was presented in Court, yet the surrender being presented after his death according to the custom is good, but if it had not been presented according to the custom, then the surrender became of no force or effect. So if the tenants by whose hands the surrender was made die, yet if the same upon good proof be presented, it is good enough. So in the Case of *Kite* and *Queinton* before, where he to whom the surrender was made died before admittance, yet his heirs shall be admitted. And this last Point was resolved without any difficulty or scruple, and that was the true Case of *Bunting* mentioned in *Westwick*'s Case next before, and well agreeth with the reason of the same Case.

19. *Paſch.* 36 *Eliz.* in the *Kings Bench*, between *Anaſtace Downe* Plaintiff, and *Elias Hopkins* Defendant in Treſpaſs, the Caſe was; Within the Mannor of *Chaldwarton* in the County of *Southampton* there were divers cuſtomary lands and tenements; and that by cuſtom of the Mannor time out mind, &c. had been granted by copy of Court Roll of the ſame Mannor, for one, two, or three lives;
[30] Of which Mannor Sir *George Pawlet* and *Elizabeth* his wife, as in the right of his wife were ſeiſed, &c. and at a Court of the ſaid Mannor 4 & 5 *Phil. & Mar.* granted the place where, &c. being parcel of the cuſtomary tenements, &c. to the ſaid *Anaſtace durante viduitate ſua*; and if this grant were according to the cuſtom of the ſaid Mannor or not was the Queſtion. And it was adjudged that this grant was within the cuſtom, for every grant *durante viduitate* is for life, as appeareth by *Litt.* 90. 37 *H.* 6. 27. 14 *H.* 8. 13. *&c.* but every grant for life is not *durante viduitate*, for a general eſtate for life is larger and more beneficial then *durante viduitate*. In *Mich.* 2 & 3 *Eliz. Dier* 192. iſſue was taken, whether the cuſtom of the Mannor was, that the wife of every Copiholder ſhall have the land after the death of her husband for the term of her life; and gave in evidence that the cuſtom was, that ſhe ſhould have it *durante viduitate*. And it was adjudged, that this evidence did not maintain the cuſtom alledged before, becauſe it is a leſſe eſtate then cuſtom *pro termino vitæ* was, and the effect and ſubſtance of the iſſues joyned betwixt the parties are to be proved preciſely. But in the principal Caſe it was reſolved, that the cuſtom is well purſued, becauſe the eſtate granted was leſs then the cuſtom did warrant; And that agreeth with the Reſolution before of the ſecond Point of *Gravenor*'s Caſe. And in this Caſe it was ſaid, that the Lord of a Mannor may by word retain one to be Steward of his Mannor, and to hold the Courts thereof, as well as a Baily may be, and that by word, and this retainer ſhall ſerve till he be diſcharged, and therewith agreeth 8 *Eliz. Dier* 248.

20. *Trinit.* 41 *Eliz.* in the *Kings Bench*, between *Harris* and *Jaye*, upon a ſpecial Verdict three Points were reſolved.

1. That the Lord of a Mannor may retain one to be his Steward, and to keep his Courts by word, and this retainer ſhall endure till he be diſcharged thereof, and therewith agreeth the opinion in Caſe next before.

2. Where a Copiholder of the Queens Mannor was attainted of Felony, by which the Copihold did eſcheat, that the Queens Steward may grant the ſame over *ex officio* without a ſpecial warrant; for the cuſtom of the Mannor doth warrant the Steward of the Mannor for the time being to grant it, and the cuſtom bindeth the Queen and her heirs: But although he may by the Law do it, yet his duty is before he make any grant to inform the Lord Treaſurer of *England*, Chancellor and Barons of the Exchequer, or any of them, for his better direction, and for the more avail of the Queen in ſuch Caſes.

3. It was reſolved, That the Auditor or Receivor of the King hath not power to retain a Steward
[*b*] to hold the Queens Courts: But he ought (if ſuch voluntary grants by him made upon eſcheats or forfeiture ſhall be good) to have Letters Patents of the Office of the Stewardſhip of the Mannor. And it was ſaid in this Caſe, That it was adjudged in the *Common Pleas* in the Lady *Julian Holcroft*'s Caſe, that whereas one was generally retained by the Lord of a Mannor by word to be Steward of a Mannor, and to keep his Courts, that ſuch Steward may take ſurrenders of cuſtomary tenants of the Court, for till ſuch Steward be diſcharged, he is Steward of the Mannor, as well by the retainer by word, as if he had a grant thereof.

21. *Trinit.* 37 *Eliz.* between *Shaw* and *Thompſon*, the Caſe was; That the Plaintiff late the wife of a Copiholder in fee, of a Mannor in which by ſpecial cuſtom women were to be endowed, recovered Dower by plaint in the Court of the Mannor; and becauſe her husband died ſeiſed, ſhe recovered 40 *l.* damages for the profits from the death of her husband. The woman brought an Action of debt for the 40 *l.* in the *Kings Bench*.

And in this Caſe, firſt, it was reſolved, That the wife ſhall not have Dower of a Copihold, if it be not by ſpecial cuſtom.

2. When a wife is to be endowed by cuſtom of a Copihold, then ſhe ſhall have incidents to Dower, and therefore in ſuch Caſe ſhe ſhall recover damages by the Statute of *Merton cap. de viduis, &c.* And therefore in the Caſe at Bar the recovery of the damages was lawful; and although they exceed 40 *l.* yet they were well warranted by Law: which two Points agree with the Reſolution before in *Brown* and *Rivet*'s Caſe.

3. It was reſolved, That no Action of debt lieth for the ſaid damages at the Common Law, for upon ſuch Judgment no Writ of Error or falſe Judgment lieth, but the remedy is in the Court of the Mannor, or in the *Chancery*, which is alſo agreeing to the Reſolution in *Brown*'s Caſe. And *Fenner* Juſtice ſaid, That he hath ſeen a Record of 36 *H.* 8. where the Lord upon a Petition to him, had for certain Errors in the proceedings, reverſed ſuch Judgment given in his own Court; And upon that the Defendant ſhall have an *Audita querela* to be reſtored to the damages recovered againſt him. *Vide* 13 *R.* 2. cited in *Brown*'s Caſe, 14 *H.* 4. *vide* 7 *E.* 4. 29.

22. *Paſch.* 37 *Eliz.* between *Hoe* and *Tailor*, in a Writ of Error in the *Kings Bench*. The Writ of Error was brought upon a Judgment given in the *Common Pleas*, where the Caſe was ſuch; *Henry Jerningham* Eſquire was Lord of the Mannor of *Mutford* in the County of *Suffolk*, and *Tailor* claimed the Underwood of a great Wood called *Mutford*-Wood, parcel of the ſame Mannor to be demiſed, and demiſable time out of mind, by Copy of Court Roll of the ſame Mannor, to be cut
[31] yearly by four or five acres at the moſt, and conveyed to himſelf a grant of the ſaid Underwood by Copy,

Copy, &c. according to the custom; and for trespass done in the Underwood, he brought the Action of Trespass against *Hoe*: And it was adjudged in the *Common Pleas*, that Underwood growing upon parcel of the Mannor may by custom be granted by Copy of Court Roll of the same Mannor; And that Judgment was affirmed in the *Kings Bench*, for it was there said, That the said Underwood may be granted by Copy, because it groweth upon parcel of the Mannor; also it is a thing of perpetuity to which custom doth extend, for after every felling the Underwood groweth again, *ex stirpitibus*. So it was resolved, that herbage, or any profit of any parcel of the Mannor, may by custom be granted by Copy: And it was said that a Fair appendant to the Mannor of *Crokehorn* in the County of *Somerset* is granted by Copy of the same Mannor. And that well explaineth the Resolution in *Murrel*'s Case before, concerning the first of the pillars upon which a Copihold standeth, *scil.* Custom.

23. *Mich.* 18 & 19 *Eliz.* in the *Kings Bench*, *Frenches* Case. If a Copihold estate be forfeited to the Lord, or Escheat, or otherwise come to the Lords hands, if the Lord make a lease for years, or for life, or other estate by Deed, or without Deed, that this land can never after be granted by Copy, for the custom is destroyed, because that during such estates, the land was not demised or demisable by Copy of Court Roll: So if the Lord make a feoffment in fee thereof upon condition, and afterwards enter for the condition broken, yet it can never be regranted by Copy; But if the Lord keep the land in his hands for a long time, or let the same at will, he, his heirs or assigns may regrant it at pleasure. So if the interruption be wrongful, as if the Lord be disseised, and the disseisor dieth seised; Or if the land be recovered against the Lord by false verdict, or erroneous Judgment; in these Cases, till the land be recovered, or the Judgment reversed by the Lord of the Mannor, the land was not demised, or demisable, and yet after the land is recontinued, the same is grantable by Copy; for, *Non valet impedimentum quod de jure non sortitur effectum, & quod contra legem fit pro infecto habetur*: But if the land so forfeited, or escheated before any new grant made be extended upon a Statute, or Recognisance acknowledged by the Lord; Or if the wife of the Lord hath this land assigned to her in Dower, although that these impediments are by act in Law, yet in as much as the interruptions are lawful, the lands can never again be granted by Copy. If a Copiholder accept a lease for years of the Lord of his Copihold, the Copihold is destroyed for ever, and can never be granted again: If the Copiholder take a lease for [b] years of the Mannor, by that his Copihold hath not continuance, as it was adjudged, *Pasch.* 17 *Eliz.* in *Hide*'s Case; but in the same Case it was resolved, That such lessee may regrant the Copihold to whom he will, for the land was always demised or demisable; And if a Copihold be surrendred to the lessor of the Mannor, or be forfeited to him, he or his Executors or Assignees may regrant it: And if a Copihold escheat to the Lord, and he alieneth the Mannor by fine, feoffment, or otherwise, his alienee may regrant the land by Copy, for it was always demised or demisable: And by these Resolutions you will better understand the learning in *Murrel*'s Case before, concerning the second pillars of Copihold, *scil.* demised or demisable time out of mind; &c.

THE Case was, that a Copiholder of certain lands called *Collins* parcel of the Mannor, &c. in pleading alledged, *Quod infra Manerium præd. talis habetur, necnon a toto tempore cujus contrarii memoria hominum non existit, habebatur consuetudo*, (viz.) *quod quilibet tenentes præd. tenementorum vocat. Collins*, had used to have Common in such a place parcel of the said Mannor; And if the custom may be alledged within the Mannor and applied but to a single Copihold was a demurrer in Law. And it was adjudged, that such custom as well for the form as for the matter was not good: For first, the Copiholder in his own name cannot prescribe for the weakness and baseness of his estate; but if he will prescribe he ought to prescribe in the name of the Lord of the Mannor, *scil.* to say, That the Lord of the Mannor and his Ancestors, and all those whose estate he had, have had Common in such a place for him and his Tenants at will, &c. as it appeareth in 22 *H.* 6. 51, *&c.* And that shall serve when the Copiholder claimeth Common or other profit in the soil of a stranger: But when the Copiholder claimeth Common or other profit in the Lords soil, then he cannot prescribe in the name of the Lord; For the Lord cannot prescribe to have Common or profit in his own soil; but then the Copiholder for as much as he cannot prescribe, neither in his own name, or in the Lords name, of necessity he ought to alledge, that within the Mannor is such a custom as in the Case at Bar: And as when the Copiholder claimeth Common or other profit in the soil of the Lord, he ought to claim it by custom of the Mannor; so when he claimeth in the land of another which is not parcel of the Mannor, he cannot claim it by the custom of the Mannor; for the custom is, *Quod infra Manerium talis, &c. consuetudo*, and therefore he [32] cannot apply it, or by force thereof claim any thing out of the Mannor, as it was done 21 *Eliz. Dier*, and therefore it was clearly mispleaded; but in such Case he ought to prescribe in the name of the Lord.

Note a good difference between prescription which is personal, and is always done in the name of a person certain and his Ancestors, or those whose estate he hath, and custom which is local and alledged in no person, but within the Mannor, &c. is such custom, and that serveth for them who cannot prescribe in their own name, nor in the name of any person certain, as Inhabitants of a Town, &c. as it appeareth in 15 E. 4. 29. 40 *Ass.* 41. 2 *Ma. Br. Prescription* 100. 6 E. 6. *Dier* 71. Also allegation of a custom shall serve when it is referred to insensible things, *scil.* that all such lands are devisable, &c. or the like. *Vide* 40 *Ass.* 41. And because in the Case at Bar the custom may have a reasonable beginning; That a Copiholder only should have Common, or Estovers, or other profit only in the land of the Lord, and that in many Mannors, some Copiholders have had Common in a wast of a Mannor, and others in another severally, so as the custom cannot be applied to all; And because that all the other Copiholders may be determined or extinct, for these causes that the custom was well alledged in the Case at Bar, as well for the manner as for the matter; And such custom for a Copiholder to have Common

mon of Eſtovers in the Lords Wood parcel of the Mannor whereof the Copihold was holden, was adjudged to be good. *Paſch.* 10 *Eliz.* as it was ſaid in this Caſe. *Vide* 21 E. 3. 34. 1 *Ma. Dier* 114. 5 E. 6. *Dier* 70, 71. And becauſe that it hath been often ſaid, That the cuſtom of the Mannor is the ſoul and life of the Copiholders, it was needful in my opinion to add this Caſe, to ſhew how he ſhall alledge the cuſtom, and when and how he ſhall preſcribe.

Paſch. 26 Eliz.

Mitton's Caſe.

[*b*] QUeen *Elizabeth* by her Letters Patents under the Great Seal, did conſtitute and grant the Office of Clerk of the County Court, or Shire-Clerk of the County of *Somerſet* to *Mitton*, with all fees, &c. for term of his life. And afterwards the Queen did make *Arthur Hopton* Eſquire Sheriff of the ſame County, who interrupted *Mitton*, claiming that which was granted to *Mitton* to be incident to his Office of Sheriff; and thereupon he did appoint a Clerk himſelf of the County Court. *Mitton* thereupon complained to the Lords of the Council, who referred the conſideration of the validity of the grant of the ſaid Office to the two Chief Juſtices *Wray* and *Anderſon*, before whom the matter was often debated; And *Mitton*'s Council did argue, that the grant was good in Law for three cauſes:

1. Becauſe the County Court is the Queens Court, and in it as to all Actions and proceedings by Juſtices, or other Writ, or by Plaint, the Suitors are the Judges, and the Sheriff but the Miniſter; And as to Utlagaries, the Coroners are Judges; and in proof thereof were cited 6 E. 4. 3. *b.* 7 E. 4. 23. 39 *H.* 6. 5. 26 *Aſſ.* 45. And therefore it was concluded, that the Queen in her own Court may appoint a County Clerk to enter the Judgments and proceedings in the ſame Court.

2. That *Arthur Hopton* (who was Sheriff after the Patent) cannot avoid it, and principally becauſe the Sheriff hath his Office but at the will of the Queen, which Office at her pleaſure ſhe may determine in part or in all; And the Queen hath granted the ſaid Office of Shire Clerk to *Mitton* for the term of his life, and therefore the ſaid Sheriff cannot avoid it.

[33] 3. *Mitton*'s Council ſhewed two or three Precedents, by which it appeareth that ſuch Offices had been granted in the time of King *H.* 8. and after; and that was the ſubſtance of all which was ſaid for the maintenance of the ſaid Letters Patents. And after many Arguments (becauſe the Caſe did concern the validity of the Queens grant) the two Chief Juſtices had conference with the other Juſtices, and upon conſideration had of the Letters Patents, and of all that was ſaid in maintenance of them, it was reſolved by all the Juſtices *nullo contradicente aut reluctante*, That the ſaid Letters Patents were void in Law; and the reaſons and cauſes of their Judgment were:

1. That the Office of Sheriff is an ancient Office which had continuance long before the Conqueſt, and is an Office of great truſt and authority; for the King doth commit to him *cuſtodiam Comitatus*, the cuſtody and guard of the County; And when the King doth appoint a Sheriff *durante beneplacito*, although he may determine his Office at his pleaſure, yet he cannot determine it in part, as in one Town, or Hundred, or any other part, nor abridge the Sheriff of any thing incident, or appurtenant to his Office, for the Office is intire, and ſo ought to continue in his intierty without any fraction or diminution, if it be not by Act of Parliament, or that the King make any Town a County in it ſelf, and appoint a Sheriff and all things incident to a Sheriff within the ſame Town; but cannot determine the Office of the Sheriff, or any part without making a new Sheriff, *ſcil.* for the execution and adminiſtration of Juſtice. And it was reſolved, that the County Court, and the entring of all proceedings there are incident to the Office of Sheriff, and therefore cannot by Letters Patents be divided from it. And although the ſaid grant had been made to *Mitton* when the Office of Sheriff was void, yet it had been void, and when the Queen hath appointed one, he ſhall avoid it. And ſo it was ſaid it was adjudged in *Scrogge*'s Caſe in the beginning of the Reign or Queen *Elizabeth* where the Caſe was; That in time of vacation of the Office of Chief Juſtice of the *Common Pleas*, Queen *Mary* granted the Office of the Exigenter of *London* to *Scrogges*, and it was holden void, becauſe it was incident to the Office of Chief Juſtice of the *Common Pleas*, which the Queen cannot have, and the next Chief Juſtice ſhall avoid it.

And as to the firſt Objection it was anſwered, That in all Writs directed to Sheriffs concerning the County Court, the King ſaith, *In Comitatu ſuo*; And in all returns of Exigents made by him he ſaith, *ad Comitatum meum tentum, &c.* And the ſtile of the Court proveth the ſame alſo: And by the Statute of 33 *H.* 8. *cap.* 13. it is provided by the King, the Lords Spiritual and Temporal, and the Commons [*b*] in Parliament aſſembled, That the Sheriff of the County of *Denbigh*, ſhall keep his Shire Court at the Shire Hall in the ſaid County, &c. by which (as by many other Parliaments) it appeareth, that the County or Shire Court is the Court of the Sheriff, and although the Suitors be there Judges in ſome caſes, yet *non ſequitur* that the Court doth not belong to the Sheriff, for in a Court Baron the Suitors are Judges, and yet the Court doth belong to the Lord of the Mannor.

As to the ſecond Objection it is anſwered before, becauſe that the County Court is incident to the Office of Sheriff, as the Sheriffs turn is.

To

To the third Objection, it was anſwered, *Quod judicandum eſt legibus, non exemplis.* But for a general anſwer to all Objections, and all others which may be made, it was ſaid, that great inconvenience would befal Sheriffs, who are great and ancient Officers and Miniſters of Juſtice, if ſuch grants ſhall be of validity, for by ſuch, as well the entring of all proceedings in the ſame Court, as the cuſtody of the entries and Rolls thereof do belong to the Office of Sheriff, and that is proved by the Writ of Faux Judgment, of an erroneous Judgment given in the County Court, the form of which Writs is ſuch; *Jacobus, &c. Vicec' S. ſalutem, ſi A. fecerit. &c. tunc in pleno Com. tuo recordari facias loquelam*, which is, *in eodem Comitatu per breve noſtrum de recto, inter A. petentem, &c. unde idem A. queritur falſum ſibi factum fuiſſe judicium in eodem Com. & record. illud habeas coram Juſticiariis noſtris apud* Weſtm. &c. *ſub ſigillo tuo, & per quatuor legales milites ejuſdem Com. ex illis quæ Recordo illo interfuer', &c.* And the ſame alſo appeareth by the precept of a Tolt which the Sheriff maketh to remove a Plea in any Court Baron before him in his County, the words of the Precept are, *Et loquelam, &c. tollas, & ſummoneas, &c. prædict.* J. *quod ſit ad Comitatum meum* S. ſcil. *die Lunæ, &c. tenend'.* And in all Writs to remove any plea out of the County into the *Common Pleas*, the King calleth the County Court the Sheriffs Court; And if the Sheriffs do not certifie by force of ſuch Writs the Record, then at the laſt iſſueth Proceſs of contempt: And if the Record be imbezilled, the Sheriff ſhall anſwer for it, and therefore it ſhall be full of danger and damage to Sheriffs, if others ſhall be appointed to keep their entries and Rolls of the County Court, and yet the Sheriff anſwers for them as immediate Officer to the Court; And therefore the Sheriff ſhall appoint Clerks under him in his County Court, for whom he ſhall anſwer at his peril; The ſame Law is of the Sheriffs Turn: And Law and reaſon requireth, that the Sheriff who is a publick Officer and Miniſter of Juſtice, and who hath any Office of ſuch eminency, confidence, peril and charge, ought to have all rights appertaining to his Office, and ought to be favoured in Law before any private perſon for his ſingular benefit and avail.

[34]

Mich. 39 & 40 *Eliz.* at *Serjeants-Inne* in *Fleetſtreet* it was reſolved by *Popham* and *Anderſon* Chief Juſtices, and all the Judges of *England*, That the keeping of Gaols of the Counties of right belong and are annexed and incident by the Law to the Office of Sheriffs: And that appeareth by the Judgment in Parliament, *anno* 14 *E.* 3. *cap.* 10. by which it is ordained and enacted, That all Gaols of Counties ſhall be joyned again to Sheriffs, and the Sheriffs ſhall have the keeping of the ſame Gaols, as before times the Sheriffs uſed to have; and that they put in ſuch Gaolers for whom they will anſwer. Upon which it was reſolved by all the Juſtices, that the grants of cuſtody of Gaols of Counties, (now lately, or by King *H.* 8. or after granted to ſundry perſons) were utterly void: And for as much as the keeping of them doth belong to the Office of Sheriff, who being immediate Officer to the Kings Courts ſhall anſwer for all eſcapes, and ſhall be ſubject to amercements if he have not the body in Court upon Proceſs directed to him, &c. it is reaſon that he put in ſuch Keepers of the ſaid Gaols for whom he will anſwer, according to the purview of the ſaid Act of 14 *E.* 3. And therefore it ſhall be againſt all reaſon, that he ſhall anſwer for Eſcapes out of the ſaid Gaols, and that he ſhall be ſubject to amercements for not having the bodies of Priſoners, &c. and yet another ſhall have the keeping and cuſtody of the Gaol: Which Reſolution agreeth in reaſon with the ſaid Reſolution in *Mitton's* Caſe, and therefore I have added the ſame in this place.

Mich. 26 & 27 Eliz. *in the Kings Bench.*

Bozoun's Caſe.

[b]

THE Caſe between *Flutter* Plaintiff, and *Bozoun* and others Defendant, as it was found by ſpecial Verdict was ſuch; A portion of Tithes in *Longham*, in the County of *Norfolk*, appertaining to the Rectory of *Greſenhall*, which was a Rectory preſentable, and all the other Tithes in *Longham* were parcel of the Rectory of *Longham*, which was appropriate to the late Monaſtery of *Sendling* within the ſame County; of which Rectory of *Longham* Queen *Elizabeth* was ſeiſed in her demeſne as of fee in the right of her Crown; And by her Letters Patents bearing date 26. *Januarii, anno* 12. of her Reign, *Ex gratia ſpeciali, certa ſcientia, & mero motu* granted to *Nicaſius Yertſworth* and *Bartholomew Brockesby* and their heirs, *Totam illam portionem decimarum & garbarum ſuarum in* Longham *in Com.* Norf. *cum omnibus aliis decimis ſuis quibuſcunque in* Longham *in dict. Com.* Norf. *tunc vel nuper in occupatione* Joh. Corbet. And further granted by the ſaid Letters Patents, that it ſhall be of force and effect againſt the Queen, her heirs and ſucceſſors, *Non obſtante male nominando, vel male recitando præd. portionem decimar. & aliorum præmiſſ. Et non obſtante aliquibus aliis defectis in non nominando, vel male recitando, vel non nominando alicujus tenentis ſive occupatoris.* And it was further found by the Jurors, That the ſaid *John Corbet* never had any Tithes in *Longham* in his occupation; And if all the Tithes in *Longham* parcel of the ſaid Rectory of *Longham* ſhall paſs by the ſaid Letters Patents or not was the Queſtion. And in this Caſe four Queſtions were moved.

1. If the latter words, *ſcil.* in the occupation of *John Corbet*, ſhall refer to the firſt words, *ſcil. totam illam portionem decimarum & garbarum ſuarum in* Longham *in dicto Com.* Norf. or only to the latter words, *ſcil. cum omnibus aliis decimis, &c.*

2. When

2. When the Queen granteth, *totam illam portionem decimarum & garbarum in* Longham, if the Tithes which were parcel of the Rectory of *Longham* ſhall paſs.

3. If the ſaid firſt words, *totam illam portionem decimarum*, were ſo certain, that the latter words being falſe, ſhall not make the grant, but the ſuperfluous words void.

4. If the *Non obſtante* ſhall help the defect of the miſtaking of the Farmer.

As to the firſt it was reſolved by Sir *Chriſtopher Wray* Chief Juſtice, Sir *Thomas Gawdy* and the whole Court, that the latter words do refer to all the ſentence: 1. Becauſe the words are, *totam illam portionem decimarum & garbarum ſuarum, &c.* ſo that this Pronoun *(illam)* ſheweth plainly which ought to be words ſubſequents to explain and reduce into certainty what portion by the Queens intent ſhall be granted, *ſcil.* that which was in the occupation of *John Corbet*, and therefore this Pronoun *(illam)* is not ſatisfied till it come to the full end of the ſentence. 2. This conjunction, *cum omnibus aliis decimis ſuis, &c.* coupleth the latter words to the firſt, and ſhall make the words ſubſequent to refer to the whole ſentence. 3. If the firſt words ſhall convey all the Tithes of the ſaid Rectory, then the addition of the occupation of *John Corbet* to the ſubſequent words ſhall be vain and idle; *Et maledicta expoſitio eſt quæ corrumpit textum.*

To the ſecond Queſtion, it was reſolved, that this word *(portio)* properly doth ſignifie a part or portion in groſs divided, and not parcel of the Rectory of *Longham*. And in the Caſe at Bar the Queen hath not any portion of Tithes in groſs, but all were parcel of the Rectory: And although the Queens grant be, *Ex gratia ſpeciali, certa ſcientia, & mero motu*, yet the ſame ſhall not extend the Queens grant againſt her intent and meaning expreſſed in her grant, nor by any ſtrained conſtruction to make any thing to paſs againſt the apt and proper ſignification, or at leaſt the common and uſual intendment of the words of her grant: And as well the apt and proper ſignification as the uſual intendment of a portion of Tithes, is of Tithes in groſs, and not parcel of the Rectory, and therefore no Tithes parcel of the Rectory in the Caſe at Bar ſhall paſs.

And as to the third Point, when the Queen granteth *totam illam portionem, &c. adtunc vel nuper in occupatione* Johannis Corbet, and *Corbet* hath not any Tithes there; It was reſolved, that nothing paſſeth thereby: For admit that this word *(portio)* ſhall be taken for a part, then the effect of the grant is, *totam illam partem decimarum noſtrarum in occupatione* Johannis Corbet, and in truth he never had any part, without queſtion nothing ſhall paſs for the incertainty, if it were in the Caſe of a common perſon, *a fortiori* in the Queens Caſe. [b]

To the laſt Point theſe differences were taken and reſolved by the Court, *ſcil.* when a clauſe of *Non obſtante* ſhall make the Kings grant good, when not. 1. When the King by the Common Law cannot in any manner make a grant, there a *Non obſtante* of the Common Law will not againſt the reaſon of the Common Law make the grant good; but when the King by the Common Law may lawfully make the grant, but the Common Law doth require that he be inſtructed, that he be not deceived, there a *Non obſtante* ſupplying it, ſtands with the reaſon of the Common Law, and ſhall make the grant good. And therefore if the King grant a Protection in a *Quare Impedit*, or Aſſiſe with *Non obſtante* of any Law to the contrary, this grant is void; for by the Common Law Protection doth not lie in any of theſe Caſes, for the loſs may accrue to the Plaintiff by ſuch great delay. And therefore the *Non obſtante* cannot help, when the King by the Common Law cannot grant it for the reaſon aforeſaid, as it is ruled in 39 *H.* 6. 39. But when the King maketh a leaſe for life, or for years, he hath the reverſion in him which he may lawfully grant; But the Law doth require that in this Caſe the King be not deceived in his eſtate, *ſcil.* to grant the poſſeſſion of the land, where he hath but the reverſion: And therefore when he granteth the land, notwithſtanding that it be in leaſe for life, or years, of Record or otherwiſe; Or if he grant the land, and further grant the reverſion dependant or expectant upon it upon any eſtate for life or years, in both theſe Caſes the grant is good; Firſt, becauſe it ſtands with the reaſon of the Common Law, *ſcil.* that the King be not deceived in his grant. 2. In ſome caſe it may be doubtful whether the leaſe in poſſeſſion be good or no; and if the King doth recite it, and granteth the reverſion, and after it ſhall be determined by the Judgment of the Law that the leaſe was void, the grant ſhall be void alſo, which often trencheth to the diſenheriſon of the Patentee, which hazard is avoided by this Reſolution. 3. Admitting that all the leaſes be good, if they all ought to be recited, or otherwiſe, the Letters Patents ſhall be void: 1. It ſhall be great peril to the Patentee if he omit or miſrecite any of them: 2. Greater peril if any leaſe be not enrolled: 3. Great charge in ſearch for them, and greater charge in recital of them, which in ſome caſes draw the Letters Patents to ſuch infinite length, that they deſerve to be called *Elephanti libri*; and all this charge, peril, and prolixity is helped by this Reſolution.

2. When the words of the grant be not ſufficient *ex vi termini* to paſs the thing granted, but the grant is utterly void, there any *Non obſtante* cannot make the grant good: As in the Caſe at Bar the King granteth *totam illam portionem decimarum in* Longham, *nuper in tenura J. G.* here the addition of *J. C.* as hath been ſaid, is of the ſubſtance of the grant, and becauſe that *J. C.* never had any portion there, the grant is void *ex vi termini*, and therefore *Non obſtante* cannot make it good: But in caſe of grant of land which is in leaſe for life, or years, there by the grant of the lands the words are ſufficient *ex vi termini* to make the reverſion to paſs; but the Law requireth that the King be not deceived in the thing which he granteth, and that is ſupplied by the *Non obſtante*: And ſo the caſe of reverſion which was ſtrongly urged of the Plaintiffs part, is upon evident reaſon anſwered and reſolved. *William Daniel* and *Robert Snagge* were of Council with the Plaintiff, and *Godfrey* and *Coke* with the Defendant. And the ſaid Letters Patents were not made good by the Statute of 18 *Eliz. cap.* 2. for they were Patents of concealments, and therefore by expreſs Proviſo excepted out of the ſaid Act. [36]

Mich.

Mich. 26 & 27 Eliz. *in the Kings Bench.*

Tirringham's Case.

IN Treſpaſs between *Pheſant* Plaintiff, and *Salmon* Defendant, the Caſe was ſuch; *Tho. Tirringham* was ſeiſed of a houſe, 44 acres of land, 7 acres of meadow, and two acres of paſture in *Titchmerſh* in the County of *Northampton*; to which houſe, meadow, and paſture, he and all thoſe whoſe eſtate he hath, had uſed to have common of paſture for oxen, cows, and calves, levant and couchant upon the houſe, land, meadow, and paſture, as well in 30 acres of land in the ſame Town, (whereof one *John Pickering* was then ſeiſed in fee) as in 40 acres of land and paſture in *Titchmerſh* aforeſaid (whereof one *Boniface Pickering* was then ſeiſed in fee) as to the ſaid houſe, land meadow, and paſture appertaining. And afterwards the ſaid *Boniface Pickering* being ſeiſed as aforeſaid of the ſaid 40 acres purchaſed to him and his heirs the ſaid houſe, 44 acres of land, 7 acres of meadow, and two acres of paſture to which, &c. And ſo ſeiſed as well of the ſaid 40 acres in which, as of the ſaid tenements, to which, &c. demiſed the houſe, land, meadow, and paſture to which, &c. to *Pheaſant*, who put in two cows into the ſaid 30 acres to uſe the ſaid common. And the ſaid *Salmon* who was Farmer of the ſaid *John Pickering*, with a little Dog, *leviter & moliter* drove out the ſaid cows; And the ſaid *Pheſant* brought his Action of Treſpaſs for chaſing of his cattel. And in this Caſe divers Points were reſolved by *Wray* Chief Juſtice, Sir *Thomas Gawdy*, and the whole Court. [b]

Firſt, that preſcription doth not make a thing appendant, if not that the thing which ſhall be appendant agree in quality and nature to the thing to the which it ſhall be appendant; as a thing corporate cannot be appendant to a thing corporate, nor a thing incorporate to a thing incorporate, as it is holden in *Hill* and *Granges* Caſe, *Plow. Com.* 168. But a thing incorporate, as an advowſon to a thing corporate as a Mannor, or a thing corporate as land, to a thing incorporate as an Office, as it is there alſo holden: But every thing incorporate cannot be ſaid appendant to a thing corporate; as common of Turbary cannot be appendant to land, but to a houſe, as it is holden in 5 *Aſſ.* 9. for the thing which is appendant ought to agree with the nature and quality of the thing to which it is appendant, as Turfs are to be ſpent in a houſe: So 10 *E.* 3. 4. a Leet cannot be appendant to a Church or Chappel, for they are of ſeveral natures. The beginning of common appendant by the old Law was in ſuch manner; When a Lord did enfeoff another of arrable land, to hold of him in Socage, that is *per ſervicium Socæ*, as every ſuch tenure at the beginning (as *Littleton* ſaith) was, The feoffee *ad manutenendum ſervitium Socæ*, was to have common in the Lords Waſts for his neceſſary cattel which ploughed and manured his land, and that for two cauſes: [37]

1. Becauſe it was (as it was then holden) *tacite* implied in the feoffment; for the feoffee cannot plough and manure his land without cattel, and they cannot be kept without paſture, and by conſequence the feoffee ſhall have (as a thing neceſſary and incident) common in the Lords waſts and land, and that appeareth by the old Books in *temps E.* 1. *Common* 24. *&* 17 *E.* 2. *Common* 23. *&* 20 *E.* 3. *Admeaſurement* 8. *&* 18 *E.* 3. and by the rehearſal of the Statute of *Merton*, *cap.* 4.

The ſecond reaſon was for the maintenance and advancement of Tillage, which is much reſpected and favoured in Law. So that ſuch common appendant is of common right, and commenceth by operation of Law, and in favour of Tillage, and therefore he needeth not preſcribe therein, as it is holden in 4 *H.* 6. *&* 22 *H.* 6. as he ought if it were againſt common right; But it is only appendant to ancient land arrable Hide and Gain and only for cattel, *ſcil.* horſes and oxen to plough the land, and cows and ſheep to manure his land, and all for the bettering and advancement of Tillage; And with this Reſolution agreeth 37 *H.* 6. 3. *per Curiam*, *&* 29 *H.* 8. 4. as to the latter Point. And therefore it is againſt the nature of a common appendant, to be appendant to meadow or paſture; and therefore becauſe in the Caſe at Bar the preſcription was to have common appendant time out of mind, &c. to a houſe, meadow, and paſture, as well as arrable land, by which appeareth to the Court that there had been a houſe, and meadow, and paſture time out of mind, &c. for this cauſe it was reſolved, that this common was appurtenant and not appendant. But if a man hath had common for cattel which ſerve his plough appendant to his land, and perhaps of late time a houſe is built upon part of it, and ſome part is imployed to paſture, and ſome part for meadow, and the ſame for the maintenance of Tillage which was the original cauſe of the common, in this Caſe the common doth remain appendant, and ſhall be intended in reſpect of the common uſage of common for cattel levant and couchant upon ſuch land at the beginning all was arrable, but in pleading he ought to preſcribe to have it appendant to land, and although that *terra dicitur a terendo, quia vomere teritur*, yet *terra* includeth all, and although now it is paſture or meadow, yet it is arrable, *id eſt*, it may be ploughed, although it be not now in Tillage and ploughed: But if he preſcribe to have it appendant to a houſe, or meadow, or paſture, then it appeareth upon his own ſhewing as it hath been ſaid, That there hath been always a houſe, meadow, and paſture, and then he cannot have common appendant to it, but ſuch is common appurtenant. A man may preſcribe to have common appendant to his Mannor, for all the demeſns ſhall be intended arrable, or at leaſt ſhall be in conſtruction of Law *reddendo ſingula ſingulis* appendant to ſuch demeſnes as are ancient arrable land, and not to any land newly gained or improved to be arrable out of the Waſts and Moors parcel of the Mannor, and therewith agreeth 5 *Aſſ.* 2. [b]

Alſo when a man claimeth common appendant to his Mannor, no incongruity, as in the Caſe at the Bar appeareth upon his own ſhewing. So common may be claimed to be appendant to a Carve

of land, and yet a Carve, or a Plough-land may contain paſture, meadow, and wood, as it is holden in 6 E. 3. 42. but no incongruity appeareth there, and it ſhall be applied to that which agreeth with the nature and quality of a common appendant.

2. It was reſolved, That common appendant may be apportioned for two reaſons: 1. Becauſe it is of common right, and therefore if the commoner purchace parcel of the land in which, &c. yet the common ſhall be apportioned; As if the Lord purchace parcel of the Tenancy the rent ſhall be apportioned: So if *A.* hath common appendant to 20 acres of land, and enfeoffeth *B.* of part of the ſaid 20 acres to which, &c. this common ſhall be apportioned, and *B.* ſhall have *pro rata.* And where it was objected, that the preſcription faileth in both the caſes; for in the firſt caſe he never had common in part of the land only, but intirely in all; and it ſhall be now a prejudice to the Tenant if he ſhall have common in the 30 acres only for all the cattel levant and couchant upon all the tenements to which, &c. And in the latter caſe, no common was ever appendant to part of the land, but intirely to the whole. Alſo in Aſſiſe of common all the Terre tenants ought to be named, and that cannot be when the commoner himſelf hath purchaſed part of the land.

As to theſe Objections, it was anſwered and reſolved, That as to the firſt, the preſcription ought to be
[38] ſpecial, *ſcil.* to preſcribe to have common in the whole till ſuch a day, and then to ſhew the purchace of part, and from that time that he hath put in his cattel into the reſidue *pro rata portione*; As in the caſes, when a Corporation hath liberties by preſcription, and within time of memory the Corporation is altered, there ought to be ſpecial preſcription: As to the ſecond Caſe, *ſcil.* when part of the land to which, &c. is aliened there every of them may preſcribe to have common for cattel levant and couchant upon his land, and in none of theſe Caſes no prejudice doth accrue to the Tenant of the land in which the common is to be had, for he ſhall not be charged with more upon the matter then he was before the ſeverance; And God forbid the Law ſhould not be ſo, when part of the land to which, &c. is aliened; for otherwiſe many commons in *England* (which God forbid) ſhall be avoided and loſt. And it was agreed, that ſuch common which is admeaſurable, ſhall remain after the ſeverance of part of the land to which, &c. But in the Caſe at Bar, for as much as the Court reſolved, That the common was appurtenant and not appendant, and ſo againſt common right, it was adjudged, That by the ſaid purchace all the common was extinct. For in ſuch Caſe common appurtenant cannot be extinct in part, and be *in eſſe* for part by the act of the parties.

And as to the laſt Objection, it was anſwered and reſolved, That if upon the matter the common appendant ſhall be apportioned, then the Terre-tenant ſhall be only out of the land charged with the reſidue of the common, as in the Caſe of a rent-charge apportioned in caſe of deſcent, the tenant of the land ſhall be only named out of which the reſidue of the rent which remaineth iſſueth. And it was ſaid, that in this Caſe the word (*pertinens*) is *Latin*, as well for appurtenant as appendant, and therefore (*ſubjecta materia*) and the circumſtance of the Caſe ought to direct the Court to judge the common to be appendant, or appurtenant.

3. It was reſolved, That unity of poſſeſſion of the whole land to which, &c. and of the whole land in which, &c. make extinguiſhment of a common appendant againſt the opinions 11 E. 3. *Common* 11. 14 *Aſſ.* 21. 15 *Aſſ.* 2. 20 E. 3. *Admeaſurement* 8. The reaſons of which opinions was, becauſe the land to which the common was claimed was ancient land Hide and Gain, and for maintenance and the advancement of Tillage, but in as much as it was againſt a Rule in Law, *ſcil.* That a man hath as high and perdurable eſtate as well in the land as in the rent, common, and other profit iſſuing out of the ſame land, there the rent, common, and profit is extinct, and therewith agreeth 24 E. 3. 25.

4. In this Caſe *Wray* Chief Juſtice ſaid, That common for cauſe of vicinage is not common appendant, but in as much as it ought to be by preſcription time out of mind, &c. as common appendant
[b] ought, the ſame is in this reſpect reſembled to common appendant, but common appurtenant and in groſs ought at this day begin either by grant, or preſcription. And *Wray* Chief Juſtice further ſaid, That in Caſe of common for cauſe of vicinage one may encloſe againſt another; for he who hath ſuch common cannot put his cattel in the land of the other, but they ought to put them in the land where they have common, and if they eſtray into the other land, they are excuſed of Treſpaſs, by reaſon of ancient uſage which the Law alloweth to avoid ſuits which would ariſe, if Actions ſhall be brought for every ſuch Treſpaſs, when no ſeverance or encloſure is between the commons, and therefore he ſaid, that one may encloſe againſt the other, for *ceſſante cauſa ceſſat effectus.*

5. It was reſolved without any difficulty, That when the Plaintiffs cattel cometh into the land of the Defendant, and doth him Treſpaſs, the Defendant with a little Dog may chaſe them out, and ſhall not be compelled to diſtrain them damage feaſant. Note Reader, according to the ſaid opinion of *Wray* Chief Juſtice, it was of late adjudged in the *Kings Bench*, between *Smith* Plaintiff, and *Howe* and *Roman* Defendants, where the Caſe was; That two Lords of two ſeveral Mannors have two ſeveral Waſts adjoyning (parcels of their Mannor joyning) without incloſure or ſeverance, and yet the bounds of each Mannor was well known by certain bounds and marks, in which Waſts the tenants of the one Mannor and the other, have reciprocally common for cauſe of vicinage; in this Caſe one may encloſe againſt the other, and thereby utterly take away the common by cauſe of vicinage. Againſt which two Objections were made.

1. Becauſe the ſame hath been uſed by preſcription time out of mind of man, the beginning of which cannot be known, it ſhall be now hard to break that which hath had ſuch continuance. For as it is ſaid, *Obtemperandum eſt conſuetudini rationabili tanquam legi.*

2. It may be that the Waſt was of greater or of leſſer value then the other, and it may be that thoſe who had the leſſer at the beginning gave recompence to have this common in the greater, and therefore it ſhall not now be reaſonable to defeat it. As to theſe it was anſwered and reſolved, That the preſcription importeth reciprocal cauſe in it ſelf, *ſcil.* for cauſe of vicinage, and no other cauſe can be

be imagined; and for as much as the ſame is rather an excuſe of the Treſpaſs when the cattel of the tenants of the one Mannor ſtray into the waſt of the other Mannor, then any certain Inheritance: For it was clearly reſolved, that the Tenants of the one Mannor cannot put their cattel into the Waſts of the other Mannor, but they come there only by eſcape, and that the encloſure is only to prevent the eſcape of the cattel (which is a lawful act.) For theſe cauſes it was adjudged, That one may encloſe againſt the other. [39]

Note Reader, Agriculture and Tillage is greatly reſpected and favoured by the Common Law, as by common aſſent of the King, Lords Spiritual and Temporal, and all the Commons in ſeveral Parliaments.

1. The Common Law doth prefer arrable land before all other, and therefore for its dignity ought to be named in every *Præcipe* before meadow, paſture, wood, or other ſoil. And it appeareth by the Statute 4 *H.* 7. *cap.* 9. that there are ſix inconveniences brought in by ſubverſion and converting of Tillage into paſture, tending to two lamentable conſequents. The firſt inconvenience is the increaſe of idleneſs, the root and cauſe of all miſchiefs. 2. Depopulation and decreaſe of populous Towns, and maintenance of two or three Heardſmen only who keep cattel, in the place of great number of ſtrong and able men. 3. Churches for default of Inhabitants are waſted and deſtroyed. 4. The ſervice of God. 5. Injury and wrong done to Patrons and Curats. 6. The defence of the land for want of ſtrong men, and patient of labours againſt Forreign Enemies, enfeebled and empaired.

The two conſequents are; firſt, theſe inconveniences tend to the great diſpleaſure of God; ſecondly, to the ſubverſion of the policy and good government of the land, and all this by decay of Tillage, which there is ſaid to be one of the greateſt commodities of this Realm, which one Act of Parliament as to this purpoſe may be as a figure in *Arithmetick* in the third place to ſtand for a hundred. But I have obſerved, that the moſt excellent policy and aſſured means for increaſe and the advancement of Agriculture, is to provide that corn ſhall be of reaſonable and competent value; For make what Statutes you will, if the Plough-man hath not competent gain for his exceſſive labour, and great charge, he will not imploy his labour and charge, without reaſonable gain for to ſuſtain him and his poor family.

Caſes of Appeals and Indictments.

1. HIll. 28 *Eliz.* in the *Common Pleas*, *Brook*'s Caſe. *Richard Vaux* brought a Appeal of Burglary againſt *Thomas Brook*, and counted that the Defendant *domum manſionalem præd.* Richardi Vaux *felonice & burgaliter fregit, &c.* The Defendant pleaded, Not Guilty; And by a Jury of the County of *Buckingham* which the ſame Term appeared at the Bar, he was convicted of the felony and burglary aforeſaid. And in arreſt of Judgment it was moved by the Defendants Council that the count was inſufficient, becauſe that this word (*burgaliter*) was not of any ſignification, but the count ought to be *burglariter* or *burgulariter*, and the offence is called *Burglary*, or *Burgulary*, and not *Burgale*, for there wants *l.* between *g.* and *a.* and in the latter ſyllable *l.* is interpoſed in the place of *r.* and *Burgulariter eſt vox artis*, as *felonice*, *murdravit*, *rapuit*, *excambium*, *warrantizare*, *frankalmoigne*, *frankmarriage*, and divers others which cannot be expreſſed by any periphraſis or circumlocution: And this word *Burglary* is derived of theſe two words *Burghe* and *laron*, and therefore *Burglary* or *Burgulary* is good enough: but not *Burgale*, for that wanteth ſence. And many preſidents warrant *burgulariter* to be good, but none was found to warrant *burgaliter*. And upon this Exception the Court would adviſe till the next Term, and in the interim the Plaintiff died; and the ſame was ſhewed to the Court by the Defendants Council as *amicus Curiæ*, and proved by ſufficient witneſs; And thereupon the Court was moved, that for as much that for this felony and burglary he was once convicted at the ſuit of the party, that he cannot ever be charged with the ſame offence at the ſuit of the King, and that he might be thereof diſcharged; and upon that the Court took time to adviſe: And it was reſolved, That if the Count had been ſufficient, yet being convict at the ſuit of the party he ſhall not be again impeached at the Kings ſuit. But it was reſolved, that the Count was inſufficient, and thereupon he was diſcharged. And in this Caſe upon the evidence *Wray* Chief Juſtice ſaid, That if a man hath a Manſion-houſe, and he and all his family upon ſome occaſion are part of the night out of the houſe, and in the mean time one cometh and breaketh the houſe to commit felony, the ſame is Burglary; for although that the Owner, or any of the family be in the houſe, yet it is *domus manſionalis*; and the words of Appeal, or Indictment of Burglary are *domum manſionalem præd.* R. V. *fregit, &c.* And according to this opinion it was reſolved *Hill.* 38 *Eliz.* by *Popham* Chief Juſtice, and all the Juſtices, That where one hath two houſes, and dwelleth ſometimes in the one, and ſometimes in the other, and hath a family or ſervants in both, and in the night when his ſervants are out of the houſe, the houſe is broken by Thieves, that is Burglary, for the reaſon that *Wray* Chief Juſtice gave. [b]

2. PAſch. 35 *Eliz.* *Wetherel* brought an Appeal againſt *Darly* of murder, the Defendant pleaded, Not Guilty, and was found guilty of Manſlaughter, and had his Clergy; and afterwards was indicted of murder, and thereupon arraigned at the Queens ſuit; and he pleaded the former conviction in the appeal at the ſuit of the party: And it was adjudged a good bar, and thereupon he was

discharged, for it was a bar at the Common Law, and restrained by no Statute; and the reason is, because the life of man shall not be twice put in jeopardy for the same offence.

3. *Trinit.* 28 *Eliz.* *Young's* Case. At the Assises holden in *Sussex* 25. *Feb.* 28 *Eliz.* before the Justices of Assise, *H. Young*, *W. Garland* and others were indicted *de eo quod ipsi* 6. Augusti, *anno* 27. *vi & armis, videlicet gladiis, &c. apud* Lewes *prædict'*, *ex malitiis suis præcogitatis in quendam* Thomam Butcher, *nuper de* Lewes, &c. *Yeoman, adtunc & ibidem in pace Dei & dictæ Dominæ Reginæ existen. insultum & affraiam fecerunt, & præd.* W. Garland, *cum uno gladio de ferro & chalybe ad valentiam* 5 s. *quem idem* Willielmus *in manu sua dextra adtunc & ibidem habuit & tenuit, violenter & felonice & ex malitia sua præcogitat. præfatum* Thomam Butcher *adtunc & ibidem percussit, dans eidem* Thomæ Butcher *adtunc & ibidem unam plagam mortalem super faciem ipsius* Thomæ Butcher, *& cum præd. gladio amputavit nasum suum a*
[b] *facie sua, partem labiorum suorum, ac partem menti sui vocat.* the Chin, *Et præd.* Henricus Young *cum quodam alio gladio, &c. (ut supra) præfatum* Thomam Butcher *adtunc & ibidem percussit & perforavit, dans eidem* Th. Butcher *adtunc & ibidem unam aliam plagam mortalem (circiter pectus) usque ad ossa humer. ipsius* Th. Butcher, *latitudinis unius pollicis & dimid', & profunditatis septem pollicium, de quibus quidem plagis & vulneribus sic per præf.* W. G. *&* H. Y. *in forma præd. prius dat', dictus* Tho. Butcher *eodem* 6. *die* Augusti *an.* 27. *suprad. apud* Lewes *prædict. in Com. prædict. instanter obiit; Et præd.* Th. Bruer *præd.* 6. *die* Augusti *ano* 27. *supradict. apud* Lewes *præd. in Com. præd. ex malitia sua præcogitat. fuit felonice præsens, abbettans, procurans, confortans, & auxilians præf.* H. Y. *&* W. G. *ad feloniam & murdrum præd. in forma præd. faciend', exequend', & perpetrand. contra pacem dictæ Dominæ Reginæ coronam & dignitatem suam, Et sic Jurat. præd. dicunt super Sacramentum suum quod prædicti* H. Y. W. G. *&* T. B. *præf.* Th. Butcher *prædicto* 6. *die* Augusti *anno* 27. *supradicto apud* Lewes *præd. in Comitatu prædicto felonice & ex malitiis suis præcogitatis modo & forma præd. interfecerunt, & murdraverunt, contra pacem, &c.*

And it was moved that this Indictment was insufficient, because that *unam plagam mortalem (circiter pectus)* was altogether incertain, for it may be in the Neck, or in the Arm, or in the Belly, and Indictments ought to express in certain, as well in what part the mortal wound is, as the depth and breadth thereof, that it may appear to the Court to be mortal. And because it is said, That he died *de vulneribus & plagis prædictis*, and one of them is incertainly alledged, that makes the Indictment insufficient as to all, which was granted by the whole Court. And it was said, that the Indictment ought to have been, That if the party had not died of the first stroke, that he died of the other stroke, and that is the common course; *Ad quod non fuit responsum.* And in this Case it was holden by the whole Court, That if upon affray made, the Constable and others in his assistance come to suppress the affray, and to preserve the peace, and in doing of their Office the Constable or other of his officers be killed, it is murder in Law, although the murderer knew not the party who was killed; and although the affray were sudden, because the Constable and his assistants come by the authority of Law for to keep the peace, and to prevent the danger which may ensue by the breach of it, and therefore the Law shall adjudge it murder, and that the murderer had forethought malice, because he doth oppose himself against the Justice of the Realm: So if the Sheriff or any of his Bailiffs or Officers be killed in the execution of the Process of
[41] Law, or in doing of their Office, it is murder: The same Law of a Watchman who is killed in doing of his Office.

4. *Trinit.* 41 *Eliz.* in the *Kings Bench*, *Walker's* Case; *Walker* was endicted and outlawed of murder, and the Indictment was, that he stroke the party dead *in sinistra parte ventris circa umbelicum*; and it was resolved by the whole Court, that the Indictment was certain enough, for *in sinistra parte ventris* was of it self certain and sufficient, and these words, *circa umbelicum*, which were uncertain, were abundant and superfluous. But *Young's* Case before was affirmed to be Law, for there was not any certainty before the *circiter*. But the outlawry was reversed for other Errors, and *Walker* was put to plead to Judgment.

5. *Trinit.* 28 *Eliz.* in the *Kings Bench*, *Heydon's* Case. *Inquisitio indentata capta apud* Basingstoke *in comitatu prædict.* 21. *die* Decemb. &c. *coram* Joh. Scullard *gener. uno Coronator. dictæ Dominæ Reginæ in comitatu præd', super visum corporis* Edwardi Savage *gener. tunc & ibidem mortui jacent', per Sacramentum* Jacobi Searle, &c. *Ad inquirend. qualiter & quomodo præd.* Edw. Savage *ad mortem suam devenit; Qui dicunt super Sacramentum suum, quod* Jacobus Heydon *de S. in comitatu præd. Yeoman,* T. M. W. M. and divers others, 4. *die* Augusti, *anno* 27. *apud* B. *præd. in com. præd. circa horam decimam ante meridiem ejusdem diei, ex malitiis suis præcogit. felonice ut felones dictæ Dom. Reg. in dictum* Edw. Savage *adtunc & ibidem insultum & affraiam fecerunt, & quod prædict.* Jacobus Heydon *cum quodam gladio Anglice* a sword, *valor. quinque solidorum, quem idem* Jacobus *in manu sua dextra tenebat, adtunc & ibidem præfatum* Edw. Savage *felonice percussit, & dedit eidem* Edwardo *adtunc & ibidem unam plagam mortalem super sinistrum genu ipsius* Edwardi, *totaliter abscindens quoddam os præd. genu ipsius* Edw. *Anglice voc.* the pan of the knee, *de qua quidem plaga mortali idem* Edw. Savage *languebat a præd. quarto die* Augusti *anno* 27. *usque ad decimum nonum diem mensis* Decembris *ann.* 28. *quo quidem decimo nono die* Decembris, *idem* Edw. Savage *ex mortali plaga præd. apud* B. *præd. in comitatu præd. obiit, & jurator. prædict. dicunt super Sacramentum suum quod præd.* Jacobus Heydon *modo & forma præd', prædict.* Edwardum Savage *felonice & ex malitia sua præcogitat. interfecit & murdravit, contra pacem dictæ Dominæ Reginæ coronam & dignitatem suam: Et ulterius*
[b] *præd. jurator. super Sacramentum suum prædict. dicunt, quod præd.* T. M. W. M. &c. *tempore feloniæ & murdred. prædict. in forma prædicta fact', scil. dicto quarto die* Augusti *apud* B. *prædicta in comitatu prædicto anno* 27. *supradict', circa horam decimam ante meridiem ejusdem diei, felonice fuerunt præsentes cum gladiis, &c. tunc & ibidem auxiliantes, assistentes, abbettantes, comfortantes, & manutenentes præd.* Jacobum Heydon *ad feloniam & murdrum prædict. in forma prædicta faciend', & perpetrand. contra pacem dictæ Dominæ Reginæ coronam & dignitatem suam.*

And

And many Exceptions were taken against this Indictment.

1. Because the Indictment was taken before *J. S. Coronatore in comitatu prædicto*, and doth not say, *Coronatore comitatus prædicti*, nor *de Comitatu prædict'*; and every Coroner of a County is a Coroner in every County of *England*, but not of every County; but it was not allowed. For the Court said, That the Coroner in the County, &c. shall be in all reasonable intendment taken to be Coroner of the County, and that is proved by the Writ *de Coronatore eligendo*, the beginning of which is, *Rex Vicecom', &c. quia L. nuper unus coronatorum nostrorum in comitatu tuo diem clausit extremum, &c.* And so it is taken in the Lord *Willoughbie*'s Case in *Plow. Com.* 75. & 76. and almost infinite presidents were shewed in the same manner as this is. And it was said, *Quod nimia subtilitas in jure reprobatur.*

The second Exception was taken, because it was not said, that the said *Edward Savage* who was killed was in *pace Dei & Dominæ Reginæ*, as the usual form and the presidents are, but it was not allowed; for those are words but of amplification of the hainousness of the fact, and not of substance, and perhaps he was not in peace, but fighting, and breaking the peace, and many presidents were also shewed in which these words were omitted.

3. Because it was said, *Et dedit eidem* Edwardo *adtunc & ibidem, &c.* and doth not say *felonice*, nor *ex malitia sua præcogitat. dedit, &c.* and this Exception was disallowed by the Court, for this conjunction (*&*) coupleth the sentences together, so that these words (*felonice & ex malitia sua præcogit.*) first spoken refer to all the verbs subsequent, otherwise too much repetition and tautology shall be of the said words; and many presidents were also shewed to this effect, and in the same form as this is, as to this Point. And these words (*adtunc & ibidem*) maketh all to be at one instant.

The fourth Exception was, because the depth and length of the wound was not shewed as in all Indictments is used, so that it may appear to the Court that the wound was mortal; But it was answered and resolved by the Court, that cannot be in this Case, because the whole pan of the knee was utterly cut off, as if an arm or a foot be cut off, or if one be beheaded, the depth and length of the wound shall not be shewed. [42]

The fifth Exception was, because it was said *tempore feloniæ & murdred. præd'*, where it should be *murdri*, and this Exception was also disallowed, for *tempore feloniæ prædict.* had been sufficient without saying *murdred'*, and therefore the adding of that shall not make the Indictment insufficient, for as much as *murdredum* is a word insensible and vain, so that no contrariety or repugnancy appeareth, for surplusage shall not hurt but when it is repugnant or contrary to the matter precedent, or subsequent.

The sixth Exception was, because the wound was given the fourth day of *August*, and the death was the 19. day of *December* next following; and the Indictment saith that *præd.* T. M. W. M. &c. *tempore feloniæ & murdri prædict. fact'*, scil. 4. *Augusti, &c. felonicè fuerunt præsentes, &c. ad felonias & murdrum prædict. in forma prædicta faciend' :* To which it was said by *Gawdy* the Queens Serjeant, and *Popham* the Queens Attorney, that the death hath relation to the stroke; for if a man *Non compos mentis* strike himself, and afterwards becometh of *sane* memory and dieth, the death hath relation to the stroke, and he shall forfeit nothing, as it is agreed in 22 E. 3. *Corone* 244. So *Stamford* saith, That the Appeal shall be brought within the year after the stroke, and not the death; for when the death followeth, now in Judgment of Law felony was committed the day when the blow was given, for the death is in a manner but the execution of the felony; But *tota Curia in Banco Regis* against that; And they said, that they have often adjudged Indictments insufficient when the stroke is one day and the death another day, and the Jury did conclude the murder or manslaughter to be the first day: But they said that in the Case at Bar, the Indictment is that the *præsentes & abbettantes, fuerunt præsentes, auxiliantes, &c. ad feloniam & murdrum prædictum in forma prædicta faciend'.*

Another reason to maintain the Indictment was urged, because the Indictment notwithstanding that was sufficient, for the Office of the Jury is to find *veritatem facti*, and the Office of the Judges is to declare *veritatem Legis*; and because they have found all the circumstance and truth of the fact, without question the Law maketh them principals, for this cause although they take upon them also the Office of Judges, *scil.* to decide when and at what time the felony was done, it shall not be faulty which they have found sufficiently and certainly; For in all Cases when a Jury findeth the matter at large committed to their charge, and further conclude against the Law, the verdict is good, and the conclusion is naught. [b]

Further it was moved in maintenance of the Indictment, that the Indictment against them was good, because it appeareth by the Indictment that they all of their malice fore-thought feloniously, and as felons made the assault; and then although that *Heydon* only gave the stroke, yet it appeareth by the connexion of all the parts of the Indictment by the conjunction, and by the adverbs, *adtunc & ibidem*, that they were present, &c. And upon that *Wray* Chief Justice, Sir *Thomas Gawdy*, *Shute* and *Clench* would be advised; and upon conference had with the other Justices the said Indictment as to the said 6. Exception was holden to be repugnant and insufficient as to the said *T. M. W. M. &c.* for no felony was committed till the death, and none shall be adjudged a felon by relation, which is but a fiction in Law. And *Wray* said, That the common experience of the *Kings Bench* was, and so was the Law without question, that the year for bringing the Appeal shall be accounted from the death, and not from the stroke, against the opinion of *Stamford*. But it was resolved that to conclude, that he did murder the last day was sufficient, but the better form is to conclude that he did the murder *modo & forma supradict'*.

2. That the said clause of *auxiliantes & præsentes, &c.* was necessary, and without that the Indictment were insufficient, for it shall not be maintained by argument or implication, nor supplied by intendment; and as to this second and last Point it was resolved in *Milborn*'s Case, *Pasch.* 1 *Jacobi* in the *Kings Bench*; and because the Indictment wanted that clause, he and divers others were discharged.

6. *Mich.*

6. *Mich. 32 Eliz. Katherine Hume* brought Appeal of murder againſt *Luke Ogle* of the death of *A. H.* her husband, and declared that the Defendant 27. *Septemb.* gave the mortal ſtroke at *Whetwood* in *Com. Northumbriæ*, and that the Defendant the ſame day of the ſtroke aforeſaid *apud* Weſtlibborn *in eodem Com. obiit, & ſic præd.* Lucas Ogle *apud* Whetwood *præd. modo & forma prædict.* the ſaid *A. H. felonice &c. murdravit:* and it was reſolved, that the Declaration was repugnant and inſufficient; for as it cannot be ſaid, That he murdered him the firſt day as it was adjudged before in *Heydon's* Caſe, ſo it cannot be ſaid that he murdered him at the place where he was ſtrucken, but where he died.

[43] 7. *Hill. 31 Eliz.* in the *Kings Bench*, between *Robert Hudſon* Plaintiff, and *Robert Lee* Defendant: *Hudſon* brought an Appeal of Maihem againſt *Lee*, and declared that the Defendant the 8. day of *January anno* 28 *Eliz.* feloniouſly did maihem him in his left hand, &c. The Defendant pleaded that at another time before the Appeal began, the Plaintiff brought an Action of Treſpaſs in the *Common Pleas* of Aſſault, Battery, and Wounding, againſt the Defendant the ſaid 8. day of *Jan.* the 28 year aforeſaid: To which the Defendant pleaded, Not Guilty, and was found guilty, and damages aſſeſſed to 200 marks for the aſſault, battery, and wounding, and 10 *s.* coſts, and Judgment thereupon given and ſatisfaction acknowledged before the Appeal brought, and averred that the battery and wounding in the ſaid Action of Treſpaſs, and the ſaid Maihem whereof the Appeal is now brought, is one and the ſame, and not divers. And it was moved that the ſame was no bar for two cauſes:

1. Becauſe the Appeal of Maihem is of more high nature then the Action of Treſpaſs, for in the Appeal the Plaintiff declared, that the Defendant *felonice*, maihemed him. *Vide* 40 *Aſſ.* 9. where the Plaintiff declared that the Defendant *felonice, ut felo Domini Regis* maihemed him, and the Rule of the Law is, that recovery or bar in any Action is a good bar in another Action of equal or more baſe nature, but not in an Action of a higher nature; as a recovery or bar in an Aſſiſe is a good bar in another Aſſiſe, 44 *E.* 3. 45. 9 *H.* 7. 23. *&c.* but not in a Mortdanceſter, 5 *Aſſ.* 1. nor recovery or bar in a Mortdanceſter is a bar in a Wright of right, *F. N. B.* 5. 50 *Aſſ.* 4. 11 *E.* 3. *Entry* 56, *&c.* And bar in an Action of Treſpaſs of goods taken, is no bar in an Appeal of Robbery, for the Appeal of Robbery is higher, as it is holden in 2 *R.* 3. 14. And that was moved, admitting that the Appeal was brought for the ſame thing for which the Action of Treſpaſs was brought: But it was further moved, that the Appeal is brought for the Maihem only, and therefore it is ſaid felony, which cannot be applied to Treſpaſs, and the Action of Treſpaſs for battery and wounding which doth not touch the Maihem. But it was reſolved by the whole Court, That the bar was good; For in all Caſes when the Plaintiff for a wrong or injury is only to recover damages, he ſhall not be for one thing twice ſatisfied, according to that, *Nemo debet bis puniri pro uno delicto*, and *Deus non agit bis in ipſum*; But in both theſe Actions, *ſcil.* of Appeal and Treſpaſs, the Plaintiff ſhall recover only damages: And it appeareth to the Court by the
[b] bar of the Defendant, which the Plaintiff by his demurrer hath confeſſed, that he himſelf in the Action of Treſpaſs which he hath brought for the battery and wounding hath recovered damages for the Maihem, for wounding includeth the Maihem and more, and the Defendant hath averred that the wounding in the Action of Treſpaſs, and the Maihem in the Appeal were all one: ſo that although the Appeal of Maihem is an Action of higher nature, yet for as much as he ſhall recover but damages, and damages he hath recovered in the Action of Treſpaſs, for this cauſe it was reſolved that the bar in the Caſe at Bar was good. And *Wray* Chief Juſtice ſaid, that ſo it was adjudged of late in this very Court, which Record he hath ſeen; and therewith agreeth the Book in 41 *Aſſ. p.* 16. and the Book in 2 *R.* 3. 14. is good Law, for in the Appeal of Robbery, the Plaintiff ſhall have Judgment againſt the Defendant for his life, and not for any damages.

8. *Trin. 32 Eliz.* in *Syre's* Caſe it was reſolved by the whole Court; That if there be Principal and Acceſſory, and the Principal is pardoned, or hath his Clergy, that the Acceſſory cannot be arraigned, for the Maxim of Law is, *Ubi factum nullum ibi fortia nulla, & ubi non eſt principalis, non potest eſſe acceſſorius:* Then before it appeareth who is a principal, one cannot be charged as acceſſory, but none can be ſaid principal before he be ſo proved and adjudged in Law, and that ought to be by Judgment upon Verdict, or Confeſſion, or by Outlawry, for it doth not ſuffice that in truth there be a principal, if it doth not appear ſo by the Judgment of Law; and that is the reaſon that when the principal is pardoned, or hath his Clergy before Judgment, that the acceſſory ſhall never be arraigned; for it doth not appear by the Judgment of Law that he was principal, and the acceptance of a pardon, or prayer of his Clergy is an argument but no Judgment in Law, that he is guilty: But if the principal after attainder be pardoned, or hath his Clergy allowed him, there the acceſſory ſhall be arraigned, becauſe it judicially appeareth that there was a principal.

9. *Paſch. 39 Eliz. Blithe's* Caſe. *John Goffe* brother and heir of *R. Goffe*, brought Appeal of murder of the ſaid *R. Goffe* againſt *Blithe* as principal, and againſt *Hoell David* as acceſſory before, and againſt *David ap Thomas* as acceſſory after: The principal pleaded, Not Guilty, and by *Niſi prius* in the County of *Monmouth* he was found guilty of Manſlaughter, and not guilty of murder, and had his Clergy. And upon this matter, firſt, it was reſolved by *Popham* Chief Juſtice, and the whole Court
[44] of *Kings Bench*, That *Hoell David* was diſcharged, becauſe he cannot be acceſſory before the fact in caſe of Manſlaughter, for Manſlaughter ought to follow upon ſudden debate or affray, for if it be premeditated it is murder.

2. It was reſolved, That although the principal were convicted by verdict, yet for as much as he had his Clergy before Judgment, ſo that it doth not appear judicially, *ſcil.* by Judgment of Law

that

that he was principal, for this cause, and for the causes alledged in *Syre*'s Case, it was awarded that both the accessories, as well before as after shall be discharged. The same Law, if the principal upon his arraignment confess the felony, and before Judgment obtaineth a pardon, or hath his Clergy allowed, the accessory thereby is discharged. *Vide* 2 E. 3. 27. 22 E. 3. *Corone* 260. 7 H. 4. 16. 10 H. 4. 5. 3 H. 7. 1. 3 H. 7. *Corone* 53: And upon divers disagreeing opinions you shall understand the Law, as here it was adjudged upon consideration of all the Books.

10. *Pasch.* 33 *Eliz.* *Vaux* Case in the *Kings Bench.* *William Vaux* at the Sessions of Peace for the County of *Northumberland* holden 27. *Julii*, *anno* 32 *Eliz.* before the Justices of Peace of the same County was indicted of voluntary poysoning of *Nicholas Ridley*, which Indictment was removed into the *Kings Bench*: And in discharge thereof the said *Vaux* pleaded, That at another time, *scil.* 12. *August.* 30 *Eliz.* at *Newcastle* upon *Tine* in the County of *Northumberland* before the Justices of Assise of the same County the said *Vaux* was indicted; *Quod cum* Nich. Ridley *nuper de* W. *in comitatu præd. Armig. jam defunctus, per multos annos ante obitum suum nuptus fuisset cuidam* Margaretæ *uxori ejus & nullum exitum habuit, præd.* Will. Vaux *nuper de* K. *in comitatu* C. *generos. subdole, caute, & diabolice intendens mortem, venenationem, & destructionem ipsius* Nicholai, *& Deum præ oculis non habens*, 20. Decembris *anno* 28 Eliz. *apud* W. *præd. felonice, voluntarie, & ex malitia sua præcogitata, persuadebat eundem* Nichol. *recipere & bibere quendam potum mixtum cum quodam veneno vocat' Cantharides affirmans & verificans eidem* Nich. *quod præd. potus sic mixtus cum præd. veneno vocat. Canth. non fuit intoxicatus* (*Anglice* poisoned) *sed quod per receptionem inde præd.* Nich. *exit. de corpore dictæ* Margaretæ *tunc uxoris suæ procuraret; & haberet, ratione cujus quidem persuasionis & instigationis præd.* Nich. *postea*, scil. 16. Januarii *anno supradict. apud* T. *in comitatu* N. *præd. nesciens præd. potum cum veneno in forma præd. fore mixt', sed fidem adhibens præd. persuasioni dicti* Will. *recepit & bibit, per quod præd.* Nich. *immediat. post reception' veneni præd. per tres horas immediate sequent. languebat, & postea præd.* 16. Jan. *ann. suprad' ex venenatione & intoxicat. præd. apud* T. *præd. obiit: Et sic præd.* Will. Vaux *felonice & ex malitia sua præcogitata præfat.* Nich. *voluntarie & felonice modo & forma præd. intoxicavit, interfecit, & murdravit, contra pacem, &c.* [b]

Upon which Indictment the said *Vaux* was arraigned before the same Justices, and pleaded, Not Guilty: And the Jurors gave a special Verdict, and found, *Quod prædict.* Nich. Ridley *venenatus fuit, Anglice*, poisoned, *per receptionem præd. Cantharides, & quod præd.* Will. Vaux *non fuit præsens tempore quo præd.* Nich. Ridley *recepit prædict. Canth. sed utrum, &c.* And thereupon Judgment was given by the said Justices of Assise in this manner; *Super quo visis, & per Cur. hic intellectis omnibus & singulis præmissis, pro eo quod videtur cur' hic super tota materia per veredictum præd. in forma prædicta compert', quod præd. venenatio per reception' præd. Canth. & præd. procuratio præd.* Will. *ad procurand. præd.* Nich. *ad accipiend. præd. Canth. modo & forma prout per veredict. præd. compert' fuit, non fuit felonia & murdrum voluntar': Ideo consideratum est quod præd.* Will. Vaux *de felonia & murdro præd. indictamento præd. superius specificat', necnon de dicta felonica venenatione præd.* Nich. Ridley *in eodem indictament. nominat. eidem* Will. *imposit', eat sine die:* And as to the felony and murder he pleaded, Not Guilty.

And first, it was resolved by the whole Court, That the said Indictment upon which *Vaux* was arraigned was insufficient, principally because it is not expresly alledged, that the said *Ridley* received and drunk the said poison, for the Indictment is, *præd.* Nich. *nesciens præd. potum cum veneno fore intoxicatum, sed fidem adhibens dicto persuasioni dicti* W. *recepit & bibit, per quod, &c.* So that it doth not appear what thing he drunk, for these words (*venenum præd.*) are wanting, and the subsequent, *scil. per quod præd.* N. *immediate post receptionem veneni prædict. &c.* which words imply receipt of poison, are not sufficient to maintain the Indictment, for the matter of the Indictment ought to be fully expressed and certain, and shall not be maintained by argument, or implication, because the Indictment is found by the oath of Lay-men.

2. It was agreed by the Court, That *Vaux* was a principal murderer, although he was not present at the time of the receipt of the poison, for otherwise he shall be guilty of such horrible offence, and yet shall be unpunished, which shall be inconvenient and mischievous; for every felon is either principal or accessory, and if there be not a principal there cannot be an accessory, *quia accessorium sequitur principale*, and if any had procured *Vaux* to do it, he had been accessory before; *quod nota* a special Case, where the principal and accessory both shall be absent at the time of the felony committed. [45]

3. It was resolved by the Lord *Wray*, Sir *Thomas Gawdy*, *Clench* and *Fenner* Justices, that the reason of *Autrefoits acquit* was, because that where the Maxim of the Common Law is, That the life of a man shall not be twice put in jeopardy for one and the same offence, and that is the reason and cause that *Autrefoits* acquitted or convicted of the same offence is a good plea, yet it is intendable of a lawful acquittal or conviction, for if the conviction or acquittal is not lawful, his life was never in jeopardy; and because the Indictment in this Case was insufficient, for this cause he was not *legitimo modo acquietatus*, and that is well proved, because that upon such acquittal he shall not have an Action of Conspiracy, as it is agreed in 9 E. 4. 12. *vide* 20 E. 4. 6. And in such Case in Appeal, notwithstanding such insufficient Indictment, the abbetters shall be enquired of as it is there holden; and although the Judgment be given that he shall be acquit of the felony, yet this acquittal shall not help him, because he was not *legitimo modo acquietatus*; And when the Law saith, that *Autrefoits acquitte* is a good plea, it shall be intended when he is lawfully acquitted. And therewith agreeth the old Book in 19 E. 3. *Corone* 444. where it is agreed, That if process upon Indictment or Appeal be not sufficient, yet if the party appeareth (by which all imperfections of the process are saved) and be acquitted, he shall be discharged; but if the Appeal or Judgment be insufficient (as our Case is) there it is otherwise:

But

But if one upon an insufficient Indictment of felony hath Judgment *quod suspendatur per collum*, and so attainted, which is the Judgment and the end which the Law hath appointed for the felony, there he cannot be again indicted and arraigned until this Judgment be reversed by Error: But when the offender is discharged upon an insufficient indictment, there the Law hath not had his end, nor the life of the party in the Judgment of the Law was never in jeopardy, and the wisdom of the Law abhorreth that great offences shall go unpunished, which was grounded without question upon the ancient Maxims of Law and State: *Maleficia non debent remanere impunita, & impunitas continuum affectum tribuit delinquendi, & minatur innocentes qui pareit nocentibus:* So if a man be convicted either by verdict, or by confession upon an insufficient Indictment, and no Judgment thereupon given, he may be again indicted and arraigned, because that his life was never in jeopardy, and the Law hath not his end: And afterwards upon this new Indictment *Vaux* was tried and found guilty, and had Judgment, and was hanged.

[b] 11. *Mich.* 33 & 34 *Eliz.* between *Katherine Wrote* Plaintiff, and *Thomas Wigges* Defendant: *Katherine* the wife of *Robert Wrote* brought an Appeal of the murder of her husband against *Thomas Wigges*, and declared, that the said *Thomas Wigges* at *Sheperton* within the County of *Middlesex* the 23. of *September*, 31 *Eliz.* of his fore-thought malice feloniously stroke, &c. whereof the said *Robert Wrote* died 24. of *September* then next following, so the Defendant did murder him the 24. of *September* aforesaid. The Defendant pleaded that he himself, *Auterfoits*, 8. *October*, 32 *Eliz.* at *Sheperton* aforesaid by an Inquisition there taken before *William Danby* then Coroner of the Queens Houshold, and *Iron Chaukhill* then one of the Coroners of the said County of *Midd.* upon the view of the body of the said *Robert Wrote* by the oath of twelve men (and shewed their names) of the said County of *Midd.* was presented, That the said 23. *Sept.* 31 *Eliz.* at *Sheperton* aforesaid, the said *Robert Wrote* feloniously did strike, &c. whereof he died the 24. of *Sept.* following, and so indicted him of Manslaughter; The which Inquisition afterwards 23. *Septemb.* 32 *Eliz.* at *London* in the Parish of S. *Sepulchres*, the said *Iron Chaukhill* then one of the Coroners of the said County of *Midd.* at the Gaol-delivery at *Newgate*, made for the said County of *Midd.* there, *viz.* at *Justice-Hall* in the *Old Baily* before *John Hart* then Mayor of the City of *London*, and other Justices of Gaol-delivery of Prisoners within the said Gaol of *Newgate* being delivered and certified; upon which the said *Thomas Wigges* then under the custody of the Sheriffs of *London* was brought to the Bar; and there then the said *Thomas Wigges* being arraigned upon the said Indictment, confessed the felony, and prayed his Clergy; and the Book being delivered to him he read as a Clark as by the same Record appeareth, and said that Judgment was given thereupon; and averred, that *Sheperton* at the time of the said Inquisition, and stroke and death was within the verge of the Queens Houshold; and pleaded over to the felony, &c. And it appeareth that the said Arraignment and Confession and allowance of Clergy was after purchace of the Writ of Appeal and the return thereof; Upon which plea in bar the Plaintiff did demur in Law. And after many arguments, and great deliberation, it was adjudged against the Defendant: And in this Case six Points were resolved.

1. That *Auterfoits* convict of Manslaughter, and Clergy thereupon allowed was a good bar in an Appeal of murder. And so was it adjudged in an Appeal in the *Kings Bench*, between *Thomas Burgh* Esquire, brother and heir of *Henry Burghe*, and *Thomas Holcroft* Esquire, *Pasch.* 20 *Eliz.* of the murther of the said *Henry*, where the Defendant pleaded, that at *Hampton* Court in the Parish of *Hampton* within the County of *Midd.* within the Verge by an Inquisition before *Richard Vale* the Coroner of
[46] the Queens Houshould, and one of the Coroners of the County of *Midd. super visum corporis*, the Defendant was indicted of the Manslaughter of *Henry* within the Verge; upon which Indictment the Defendant was arraigned before Commissioners of *Oyer* and *Terminer* in the County of *Midd.* and confessed the Indictment, and prayed his Clergy, and thereupon *Curia advisari vult*, and demanded Judgment of the Appeal; And in this Case two Points were resolved.

1. That this Indictment was well taken, and within the Statute of *Articuli super Chartas cap.* 3. by which it is enacted, That in Case of the death of a man within the Verge, that it be sent to the Coroner of the County, who together with the Coroner of the Kings Houshold, doth the office which appertaineth, &c. And although it was objected, that the Statute requireth two persons, *scil.* two Coroners to do the Office which appertaineth in this Case; and in the Case at Bar there was but one person, although that he had two several offices, *sc.* Coroner of the Houshold, and one of the Coroners of the County, and when the Law giveth authority to two persons, one only cannot execute it; for *Securius expediuntur negotia commissa pluribus, & plus vident oculi quam oculus, & una persona non potest supplere vicem duarum:* Yet in this Case of several Authorities, it was resolved that the Indictment was well taken, for the intent and meaning of the Act was performed, and the mischif recited in the Act avoided as well when one person is Coroner of the Hostel, and of the County also, as if there should be two several persons, for although the Court remove, yet he as Coroner of the County may proceed, &c.

2. Where it is enacted by the Statute of 3 *H.* 7. *cap.* 1. That if it fortune that the felons, murderers, and accessories, or any of them be acquitted upon Indictment, or principal attainted, &c. the wife or next heir to him so slain, may have their appeal against the persons so acquitted, or against the principals so attainted, if they be alive, and that his benefit of his Clergy thereof before be not had; (for at that time Clergy was allowed for murder.) 1. It was resolved the bar was good at the Common Law not restrained by the said Act, because if the Defendant hath had his Clergy, then without question the appeal shall not lie; for if the offender be attainted, and hath his Clergy, the same is accepted out of the Act and left to the Common Law; *a fortiori* when he is but convict thereof and prayeth his Clergy. And the Act of the Court (to be advised as to the allowance of Clergy) shall not prejudice the party in case of his life: But it was resolved, that these words (*attaint of murder*) in this Act shall not be intended only of a person who hath Judgment of life, but also extendeth to a person convict by

by confeſſion, or verdict; for a perſon attaint is a perſon convict and more, *& omne majus continet in ſe minus*; and if the Statute ſhall not extend to perſons convict, all the purview of the Act ſhall be overthrown. And in the Statute of 25 *E.* 3. *cap.* 2. it is ſaid attaint by verdict, which is as much as to ſay, convict by verdict, and many times in common ſpeech a perſon convict is called a perſon attainted; *& loquendum eſt ut vulgus:* Alſo it ſhall be hard that the Law ſhall enable the party to appeal againſt a perſon acquitted, who by the Judgment of Law is innocent, and ſhall not enable him againſt one who is convicted who is found guilty: And in this caſe it was ſaid that it was adjudged in the Caſe of one *Agnes Gainsford*, that where the Act of 3 *H.* 7. *cap.* 1. is, That the wife, or heir of him ſo ſlain ſhall have the Appeal; That the heir of a woman who was murdered ſhall have appeal againſt one who was acquitted of the ſame murder, for *apices juris non ſunt jura:* And it was reſolved without any difficulty in *Holcroft*'s Caſe, that if a man commit murder, and be endicted, or convicted, or acquitted of Manſlaughter, that he ſhall never anſwer to any Indictment of the ſame death, for all is one and the ſame felony for one and the ſame death, although that murder be in reſpect of circumſtance of the forethought malice more odious; and therefore in an Indictment, or Appeal of murder, he may be found guilty of Manſlaughter. [b]

2. It was reſolved in the Caſe at Bar, That at the Common Law the Coroner of the Kings Houſe had an exempt juriſdiction within the Verge; and that the Coroner of the County cannot intermeddle therein; and that well appeareth by the preamble of the Statute of *Articuli ſuper chartas*; Becauſe that before this time many felonies done within the Verge have been unpuniſhed (and the reaſon and cauſe thereof was) becauſe the Coroners of the County are not ſuffered to interpoſe to enquire of felonies within the Verge, but the Coroner of the Kings Hoſtel which is paſſant, of which iſſue hath not been made in due manner, nor the felons put in Exigent, nor Outlawed, nor nothing thereof preſented in Eire, which hath been to the great damage of the King, and to the leſs good keeping of the peace: By which it appeareth, that at the Common Law the Coroner of the County could not intermeddle with the death of a man within the Verge, but the Coroner of the Hoſtel only. And ſo was it adjudged *Paſch.* 24 *Eliz.* in the *Kings Bench*, where *Swift* was indicted before the Coroner of the County of *Middleſex* of a murder done at *Tuthil* in the ſaid County of *Midd.* which Indictment was removed into the *Kings Bench*; and there *Swift* pleaded, That *Tuthil* was at the time of the murder, and yet is within the Verge, &c. upon which the Attorney did demur in Law, and it depended in adviſement three Terms, and at length the Plea was adjudged good, and thereupon he was diſcharged of the Indictment; for as the Coroner of the Houſhold cannot intermeddle within the County out of the Verge, becauſe his Office extendeth not to it, ſo the Coroner of the County cannot intermeddle within the Verge; And it ſhall be againſt reaſon that their Offices and Juriſdictions being ſeveral that the one ſhould intermeddle within the Juriſdiction of the other. But it was reſolved, that the Juſtices of the *Kings Bench*, Juſtices of Oyer and Terminer, Gaol-delivery, and Juſtices of Peace, may enquire of, hear and determine all murders and felonies within the Verge, becauſe their Authority and Juriſdiction are general through the whole County, and ſo always it hath been uſed, and ſo it was adjudged without any ſcruple in *Holcroft*'s Caſe. [47]

3. It was reſolved, That the Indictment was inſufficient, for by the ſaid Indictment taken before the Coroner of the Houſhold, and the Coroner of the County, it appeareth that the ſtroke and the death were at *Shepperton* within the County of *Midd.* and it doth not appear in the Indictment that *Shepperton* was within the Verge, *ſcil.* 12 miles off the lodging of the King in his Court; and although that in truth it were within the Verge, yet the Indictment being *veredictum, id eſt, dictum veritatis*, and matter of Record ought to import all the truth which is requiſite by Law, for *de non apparentibus & non exiſtentibus eadem ratio*, and every part of the Indictment material ought to be found by the Oath of the Indictors, and cannot be ſupplied by bare ſaying or averrment of the party; and becauſe it doth not appear within the Indictment that *Shepperton* was within the Verge, for this cauſe the Indictment taken before the Coroner of the Houſhold, and the Coroner of the County is inſufficient; for it doth not appear that the Coroner of the Houſhold had any authority to take it, and it ſhall not be void and *coram non Judice* as to the Coroner of the Houſhold, and good before the Coroner of the County, for the Record is intire, and the Indictment taken before both intire; And perhaps the Jury was directed principally by the Coroner of the Houſhold, and the witneſſes examined and ſworn by him, although that all is recorded and enrolled in both their names: Alſo the Defendant hath averred in his plea that *Shepperton* was within the Verge, ſo that the Coroner of the County as appeareth by the confeſſion of the Defendant himſelf cannot take it himſelf alſo.

4. It was reſolved, That for as much as the Indictment upon which he was indicted was inſufficient, notwithſtanding ſuch conviction, that he may be anew indicted and arraigned, or appealed of the ſame offence, becauſe his life in judgment of Law was never in jeopardy as it was reſolved in *Vaux* Caſe, *Paſch.* 33 *Eliz.*

5. It was reſoved by the whole Court, That where the ſtroke was given the 23. of *September*, and the death followed the 24. day; and concludes that the ſaid *Thomas Wigges* murdered the ſaid *Robert Wrote* the 24. day, that the ſame was good enough, for it was not murder before; but to conclude that he murdered him the 23. day was repugnant, as it was reſolved before in *Heydon*'s Caſe, *Trin.* 28 *Eliz.* But it was reſolved that the finding of the ſtroke, and the death was not ſufficient for him without making concluſion, that is to ſay, And ſo that the ſaid *Thomas Wigges* did murder the ſaid *Robert Wrote.*

6. It was reſolved, That though the conviction were pendant the appeal, yet if it had been lawful, and before the Defendant purchaſed his pardon, it had been a good bar. And afterwards *Wigges* was tried in the *Kings Bench*, and upon his trial, the Queens Attorney was of Council with him, (becauſe it was a Subjects ſuit) and *Wigges* was found Not guilty of the murder. [b]

12. *Hill.* 45 *Eliz.* in the *Kings Bench*, *Wait*'s Case. The wife of *William Waits* Gent. brought an Appeal of murder of her husband against divers; and afterwards she brought another Appeal against others; and in all she had brought seven Appeals of the said murder against several persons as principals; And it was resolved by *Popham* Chief Justice, and the whole Court, That all the said Appeals but the first ought to abate; for without any difficulty all the principals and accessories before the murder, and also all accessories after, and before the Writ purchased against whom the Plaintiff would bring Appeal ought to be named in one Writ, and not divers, *9 H.* 4. 1. The wife of *Thomas Goter* brought an Appeal against one *Thomas Walton*, and two others, *Walton* only appeared, and the others made default. The Plaintiff declared against all three, that is to say, two as principals, and against the other as accessory: *Walton* pleaded, That at another time, the same woman made an Appeal of the same death before certain Justices of Gaol-delivery of the same County of *N.* against one man as principal of the same death, who at her suit before the said Justices was attainted and hanged, and demanded Judgment of the Writ, and pleaded over to the felony: And it was said by the Plaintiffs Council that her Writ ought not abate, because her Appeal before the said Justices of Gaol-delivery, cannot charge any, nor the Justices of Gaol-delivery cannot make deliverance to any who then was not in prison in the Gaol before them, and that *Walton* and the others now Defendants then were at liberty, and therefore it was impossible to joyn them in the said Appeal before the Justices of Gaol-delivery; and so no default in the Plaintiff: But it was adjuged, that the Writ should abate, and in the same Case three Points were resolved.

1. That the Plaintiff ought to have made her Appeal against all, and afterwards have removed the same by Writ before us.

2. That a woman shall not have two Appeals of death in this place, but ought to joyn all (who she will charge) in one Writ. For if one bring an Appeal of death against divers, and all but one make default, yet the Plaintiff ought to declare against all; and by the same reason that he shall be driven to declare against all, he ought to bring his Appeal against all.

3. That in this Case the Defendant shall not have damages by the Statute of *West.* 2. *cap.* 12. *quia extra casum Statuti*, because the Writ abateth. *Vide* 28 *E.* 3. 90. A woman brought an Appeal of the
[48] death of her husband against the principal doer, and the principal assistants and doers; and sued another Appeal against the receivers, and the Book saith, That the two appeals were maintenable, notwithstanding the Statute giveth that all shall be in one Writ, which are the words of the Book, in which the Statute intended is the Statute of *Magna Charta*, *cap.* 34. by which it is enacted, That *Nullus capiatur propter appellum feminæ de morte alterius quam viri sui:* And because the Statute saith (*Appellum*) in the singular number, it was collected that all ought to be named in one Writ; which Book, if it might be maintained for Law, ought to be intended of accessories after the first Appeal brought, which cannot be named in the first Appeal. *Vide* 26 *Ass.* 52. to the same effect.

13. *Hill.* 30 *Eliz. Inquisitio capt. ad Sessions. pacis, &c. in Com.* Surr', *tent. die Martis & die Mercurii, &c.* And reciteth the Statute of 8 *H.* 6. of Forcible Entry, and misrecieth it in some Points; and this Indictment was quashed for two causes:

1. Although that Sessions may endure two or three days, yet the Record ought to mention, that the Sessions were holden at one certain day: Also because the Statute of 8 *H.* 6. was misrecited in a material Point: Know Reader, it is not policy in such Indictments to recite the said Act of 8 *H.* 6. for the recital thereof is not necessary, and misrecial thereof is fatal to the Indictment. And therefore the sure way is to draw the Indictment with conclusion, *contra formam Statuti, &c.* and with no recital of the Act.

Hill. 29 Eliz. *in the Common Pleas.*

Andrew Ognel's Case.

[*b*] IN a *Replevin* between *Andrew Ognel* Plaintiff, and *Thomas Underhill*, and *Henry Appelby* Defendants: The Case was, *William Rainsford anno* 4 *E.* 6. possessed for 30 years of a Farm called *Cresswelfield Grange*, which consisted of divers parcels known by several names, *scil. Hobbes field*, *Park field*, and divers others, made his Will, and thereof appointed *Hercules* his son his Executor, who 3 *&* 4 *Ph. & Ma.* demised all the *Grange*, (except *Hobbes field*) to one *Henry Bere* for 23 years; and demised *Hobbes field* to *Walter Freckleton* for 23 years; and afterwards granted all the residue of his term in the whole *Grange* unto the said *Henry Bere* and *Freckleton*; He in the reversion in fee 13 *El.* by deed granted a rent-charged in fee issuing out of all his lands and tenements commonly called *Cresswelfield Grange, quondam in tenura* W. Rainsford, *& adtunc in tenura & occupatione* H. Bere *vel assignator' suorum.* The rent is behind, the said term for 30 years expires, he in the reversion made a feoffment in fee of the said Farm to another, the grantee made his Executors and died, the feoffee made a lease at will, the Executors of the grantee distrained for the rent behind in the life of the grantee before the expiration of the term; And Judgment was given for the Executors against the Plaintiff. And in this Case three Points were resolved, *scil.* two at the Common Law, and one upon the Statute of 32 *H.* 8. *cap.* 37.

The

The first Point was, That at the Common Law there was difference between annuity in fee, and rent service, charge, or seck; for in the Case of annuity although it continue, yet in some Case an Action of debt may be maintenable for the arrerages; As if a Parson or Prebend have an annuity, and the annuity is behind, and the Parson or Prebend, &c. resign, he shall have an Action of Debt for the arrerages; So if a Parson or Prebend dieth, his Executors shall have an Action of debt for the arrerages incurred in the life of his Testator, because the person of him who ought to pay the annuity is chargeable in a Writ of annuity: But otherwise it is in Case of a rent, be it rent Service, rent Charge, or rent Seck, for when the rent doth continue of any estate of Freehold, no Action of debt lieth for the arrerages: Also at the Common Law great difference appeareth when the rent in fee is extinct by act in Law, and by act of the party, and wen particular estates in rents expire or determine; And therefore at the Common Law, if the son be Lord, and the father tenant by certain rent, the rent is behind, the tenant dieth, and the tenancy descendeth to the son, in this Case the rent is determined and extinct by act in Law; and yet the Executors of the Lord shall not have an Action of debt for the arrerages incurred in the life of the Testator, because the Lord himself by no possibility could have an Action of debt for the arrerages, for the tenure was all in the realty, and the tenant cannot be charged in any personal Action for them. But if a woman be endowed of a rent, or if a rent be granted for life, and the tenant attorn, the rent is behind, and afterwards the particular estate in the rent determineth by death, the Executors of the tenant in Dower, or of the Grantee for life shall have an Action of debt by the Common Law for *two* reasons: [49]

1. Because by possibility the Testator himself might have an Action of debt, for if he had surrendred his estate to him in the reversion, he shall have an Action of debt for the arrerages incurred before.

2. These particular estates with attornment of the tenant, or when the Law doth supply attornment, amount unto a real contract in Law, which realty, when the estate of Freehold is determined, dissolveth it self into personalty. And these are the true differences as to the first Point proved and approved in our Books. And therefore in 45 *E.* 3. *Executors* 71. where the Case was, That the father granted a rent charge out of certain lands to his son in fee, the rent is behind, the father dieth, the land descendeth to the son, by which the rent is extinct by act in Law; The son bringeth an Action of debt against the Executors of the father, for the arrerages incurred in the fathers life; and adjudged, that for them (as arrerages of a rent) no Action lieth, but for the arrerages of annuity it was maintenable. And although that by the descent of the land to the grantee being heir to the grantor, as well the annuity as the rent was determined, and that the original election was annexed to an Inheritance, yet in as much as the Inheritance of both was determined by act in Law, which will do no wrong, for this cause it was adjudged, That the election which he hath made by bringing of the Action of debt against the Executors of his father shall remain; for the Book saith that the son may choose whether he will have a Writ of annuity or distrain, &c. 4 *E.* 3. *Exec.* 98. A man maketh a lease for life rendring rent, the rent is behind, the lessor dieth, the executors during the life of tenant for life shall not have an Action of debt, but after the estate for life determined the Action shall be maintenable. 9 *H.* 6. 43. 14 *H.* 6. 26. 19 *H.* 6. 43. 32 *E.* 3. *Dette* 9. *F.N.B.* 121. *C. acc'.* So if a rent be granted for life, the wife shall be endowed of the rent, the Executors of the grantee, or of the tenant in Dower shall have an Action of debt by the Common Law as appeareth by 32 *E.* 3. *Dette* 9. 34 *H.* 6. 20. 9 *H.* 7. 17. But in the Case of 11 *H.* 4. *ultimo* when a rent is granted for life, and afterwards cometh behind, and afterwards the tenant alieneth, and afterwards the grantee of the rent dieth, the Action shall be maintenable against him who was tenant, and took the profits when it was behind, 26 *E.* 3. 64. Sir *William Loring*'s Case. Sir *William Loring* was grantee for life of a rent out of the moity of a Mannor, of which moity a man was seised in the right of his wife, the rent is behind, Sir *William Loring* died, his Executors brought an Action of debt against his Executors only for the arrerages of the rent, and there two Points were adjudged: One, that by the death of Sir *William Loring* the grant for life was turned into nature of debt. 2. That for as much as the husband took the profits of the land charged with the rent when it was behind, that he only without his wife shall be charged in an Action of debt. And there it is holden, that after the death of the husband the Action of debt in such Case shall lie against his Executors. If lessee for life be of a Mannor, and the rents be behind, the tenant for life doth surrender his estate, he shall have an action of debt for the arrerages. So if a Parson or a Prebend, &c. who hath an annuity resign, he shall have an Action of debt for the arrerages incurred before the resignation, 19 *H.* 6. 41. 43. *F.N.B.* 121, *D. E.* So if a Prebend or Parson, &c. dieth, his Executors shall have an Action of debt for the arrerages incurred during his life. *Vide* 4 *H.* 6. 31. 7 *H.* 6. 19. 8 *H.* 6. 7. 13 *E.* 3. *Jurisdiction* 22. *F.N.B.* 120. The Executors of the Lord shall have an Action of debt for relief, for it is but an improvement of service, and so it was adjudged in 32 *H.* 8. *Rot.* 429. in *Leet*'s Case. *Vide* 11 *H.* 6. 11. 11 *H.* 6. 18. 34 *E.* 1. *Avowry* 223. But the Lord himself shall distrein, and shall not have an Action of debt, as it is said in 7 *H.* 6. 13. 22 *Ass.* 52. A woman made a lease for life rendring the three first years 100 *l.* and afterwards 40 *l.* during the three first years she was disseised of the rent, and brought an Assise, and it was adjudged maintenable, for in judgment of Law all is but one rent, although it be divided in payment. *Vide* 15 *E.* 3. *Exec.* 63. But it was resolved, That in the Case at Bar, that the arrerages due in the life of the grantee were lost at the Common Law. [b]

The second Point resolved was, That *Hobbersfield* was not charged with the said rent by reason of these joynt words; for although it be parcel of *Crofwelfield Grange*, and that *Henry Bere* and *Freckelton* had the reversion of the term, and so the land may be said in their tenure; yet for as much as *Henry Bere* had not then *Hobbersfield* in his occupation, *Hobbersfield* is out of the said words, by reason of the said last clause, *scil. & idtunc in tenura & occupatione Henrici Bere.* So that by reason of the conjunctive, which joyneth the tenure and occupation together, nothing is charged but so much of the said *Grange* [50]

only as was in tenure and occupation of *Henry Bere*, and was not *Hobbesfield*; So for the Expolition of this conjunctive *(Et)* 19 *H.* 6. 4. *a. b.* 9 *E.* 4. 42. in the Case of a Release.

The third Point resolved was upon the Statute of 32 *H.* 8. *cap.* 37. And the doubt arose upon these words; And it shall be lawful to every such Executor, &c. of any such person or persons to whom such rent or fee farm is or shall be due and not paid at the time of his decease, to distrain for the arrerages of all such rents upon the lands, &c. so long as the said lands, tenements, or hereditaments, continue, remain, or be in the seisin or possession of the said tenant in demesne, who ought immediately to have paid the said rent, &c. be in the seisin or possession of any other person or persons claiming the said lands, tenements, and hereditaments, only by and from the said tenant by purchase, gift, or descent, in like manner and form as their said Testator might or ought to have done in his life. And it was objected, that this Case was out of the said Act, for the said Act doth extend only to tenants in demesne who immediately ought to have paid it; and that was in the Case at Bar the grantor, and to those who claim only by and from him; And in this Case lessee at will of the feoffee doth not claim only by and from the grantor, but he claimeth by and from the feoffee, and so out of the Statute. And therefore it was said, That the feoffee of the feoffee, and so in *infinitum*, is out of the said Act; and so it was said have like Statutes been construed which are *stricti Juris*, because they restrain the Common Law, as the Statute of *West.* 2. *cap.* 40. In *Cui in vita* if the vouchee vouch over one within age the parol shall demur, as it is adjudged in 18 *E.* 4. 16. So there it is said, that upon these words *(expectet emptor)* that the feoffee of the feoffee is out of the said Act, 16 *E.* 3. *Age* 47. *acc.* to the Case of two feoffees. 16 *E.* 3. *age* 2.

But it was adjudged, that although the lessee at will doth not claim immediately from the grantor, yet he is within the said Act; for where things are done in right and truth, and become remediless by the act of God, *scil.* by the death of him to whom they were due, in such Cases Acts of Parliaments
[b] which give remedy in such Case, God forbid that they have not benign and favourable interpretation to extend and advance the remedy proportionable to the mischief, and defect of the Law, and according to the intent and meaning of the makers of the Act. And therefore the second feoffee, and so over *in infinitum*, shall be charged by force of this Act, for what reason shall it be to bind the first feoffee, and not the second feoffee, and so all others? And what reason shall it be to bind only the immediate heir who shall have it by descent, and not any other mediate heir? For otherwise as to this Point the Statute shall serve to little purpose, and especially when the first feoffee may alien the land at his pleasure; and all the sons of *Adam* are subject to death: Also it seemeth to some that the second feoffee is within the express words of the Act, for although he be not in by the grantor, yet he is in from him, for from him doth amount to as much as under him; And the word (and) in this Case shall be taken for (or) and this word (only) was added only to this purpose that he ought to claim (only) under the tenant in demesne, and not paramount. As if tenant in tail maketh a feoffment in fee and dieth, and the discontinuee chargeth the land with a rent, and afterwards enfeoffeth the issue of the tenant in tail within age, so that he is remitted, in this Case (only) hath his operation, for now the issue in tail claimeth by title paramount; But if the tenant maketh a feoffment in fee to the use of another, in this Case *Cestuy que use* doth not claim only by the feoffor, but also by the Statute, and he is not in the *Per*, and yet he claimeth under the feoffor, and that with the intent of the Act: So if the tenant make a gift in tail, and the donee dieth, the issue in tail is within this Statute, for he claimeth (only) under the title and estate of the tenant in demesne, although he do not claim only by descent, but also *per formam doni*: So if tenant in tail be, the remainder to another in fee, the issue in tail is within this Statute against the opinion in *Plow. Comm.* in *Manxel's* Case 46. But it was agreed by the whole Court, if *A.* hath a rent service, or a rent charge in fee, or for life, and the rent is behind, and afterwards *A.* granteth over the rent to another, and the tenant attorneth, and afterwards *A.* dieth, his Executors are not within this branch, for by the said grant over the arrerages were lost, and were not due to the Testator at the time of his death as the Statute speaketh. Also the conclusion of the said branch is, In as large and ample manner as the said Testator might and ought to have; and after the said grant the Testator himself nor any other can distrain, or have any remedy for the said arrerages: Also in the clause next preceding touching the Action of debt the words are, Unto whom any such rent or fee farm is or shall be due, and not paid at the time of his death: So that the Act giveth no remedy when the Testator himself by
[51] his own act hath dispensed with the arrerages, but when they were due to him at the time of his death, and by the act of God become remediless: And in this Case a Judgment upon another branch of this Statute Reported by Serjeant *Bendloes*, between *Sharp* Plaintiff, and *Pool* Defendant in the *Common Pleas*, *Hill.* 17 *Eliz.* in *Dette*, *London*, 457. was cited, and the Case was; A rent charge was granted by deed to a feme sole for life, the rent was behind, the woman took *Sharp* to husband, the rent was again behind; the wife dieth, *Sharp* brought an Action of debt against the Defendant heir of the grantor (tenant of the land charged) for all the said arrerages, as well before as after marriage: And in this Case it was resolved, That for the arrerages incurred before the marriage, the husband had not any remedy by the Common Law, but for the arrerages which incurred during the marriage, the husband in this Case may have an Action of debt at the Common Law, 26 *E.* 3. 64. 10 *H.* 6. 11. *F. N. B.* 121. 23 *H.* 6. 25.

But it was adjudged, that by force of these words in the said Act, That if any man hath, or hereafter shall have in the right of his wife any estate in fee simple, fee tail, or for term of life, of or in any rents or fee farms, which be or shall be due behind or unpaid in the said wives life, that then the husband after the decease of his said wife, his Executors and Administrators shall have an Action of debt for the said arrerages against the tenant of the demesne that ought to have paid the same, his Executors or Administrators: And also may distrain for the said arrerages in like manner and form as he might have done if his said wife had then been living, &c. That the husband shall have all the arrerages as well before the marriage as after: But two Objections were made that the husband shall not have the arrerages before the coverture:

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1. Because that by the Common Law the Executors or Administrators of the wife might have an Action of debt for the said arrerages before the coverture; And the Statute as appeareth by the preamble, provideth remedy when the Executors or Administrators of him to whom the rent was due, cannot have or come by the said arrerages, &c. And therefore it was said, That the makers of the Act did not intend to give remedy where there was remedy at the Common Law, nor to take away the remedy which one had at the Common Law, and give the same to another.

2. The second Objection was, That the said branch touching the husband, gave remedy to him for the arrerages due in the said wives life; So that the arrerages ought to incur when she was a wife, and not before. But notwithstanding these Objections, it was resolved, That the husband by force of the said branch shall have the said arrerages; for the said branch doth enact, That the husband shall have the arrerages incurred in the life of his wife, and that cannot extend to arrerages during the marriage; for the Common Law in case when the wife hath not the rent but for life, gave to him such arrerages as it appeareth before. And therefore when the Statute giveth an Action of debt to the husband for arrerages, it ought not to be construed to extend to those which he may have by the Common Law before, but to the intent that the words of the Act shall have effect, for (*verba accipienda sunt cum effectu*) the said words of the said Act shall be construed of arrerages which were due before. [b]

And as to the said Exceptions it was resolved, That a feme covert cannot make an Executor without the assent of her husband; and the administration of her goods of right doth belong to the husband; and the Statute in naming the woman (wife) intendeth only to design and describe the condition of the woman, and not to imply that the arrerages shall incur after the marriage.

Mich. 29 & 30 Eliz. *in the Kings Bench.*

Rawlyn's Case.

BEtween *Rawlyns* and *Somerford* the Case in effect as it was found upon a special Verdict upon Not guilty pleaded in an *Ejectione firmæ* for a house called the *Ship* without *Temple-Bar* was such; *Peter Cartwright* being possessed of the said house for 30 years, of all in possession saving one Stable whereof one *Warlowe* was possessed for two years, assigned all his interest to *Rawlyns*; And afterwards *Cartwright* by deed indented demised the said Stable to *Warlowe* for six years after the said two years ended: And afterwards *Rawlyns* by deed indented in consideration of 25 *l.* fine to be paid redemised all the house to *Cartwright* for 21 years, rendring to him 24 *l. per ann.* quarterly, and 5 *l.* quarterly at the same feasts until the said 25 *l.* were paid; Upon condition, that if the said sum of 25 *l.* or the said rent was behind at any Feast, &c. that then it should be lawful for *Rawlyns* to reenter. And upon the back of the Indenture of redemise was endorsed in this manner, *Memorand'*, It was agreed between the parties before the sealing and delivery thereof, That *Warlowe* shall have the said Stable according to the said demise to him made. And afterwards and before any day of payment *Cartwright* redemised the said Stable which then was in possession of *Warlowe* by force and colour of the lease for six years made to *Warlowe* to the said *Rawlyns* for 10 years; and afterwards the rent was behind and lawfully demanded, and also 5 *l.* parcel of the sum in gross was also not paid; and *Rawlyns* never entred in the Stable, but *Warlowe* always continued the possession thereof, and *Warlowe* never attorned to any of the lessees; and if the entry of *Rawlyns* for the Condition broken were lawful or not was the Question: And after many arguments at the Bar and Bench, now in this Term it was adjudged, That the entry of *Rawlyns* for the Condition broken was lawful. And in this Case seven Points were resolved by Sir *Christopher Wray* Chief Justice, Sir *Thomas Gawdy* and the whole Court. [52] [b]

1. Where the Verdict was entred three Terms past, and in the entry thereof in the Roll the said demise made by *Cartwright* to *Warlowe* was not entred to be made by deed indented, and now in this Term it was prayed to be amended; and because that the note of the special Verdict which the Jury exhibited to the Court, and which remained with Master *George Kempe* Secondary to Master *Roper*, doth purport that the Jury found the said demise *prout, &c.* by which it appeareth to the Court, that the demise was given in evidence, and reference made by note to it; For this cause it was holden by the whole Court, that the Record in this Point shall be amended.

2. Although the Condition stand upon two parts in the disjunctive, *scil.* either for not payment of the rent, or the sum in gross which as to that was collateral; yet if it had been found that *Cartwright* redemised any part of the house to *Rawlyns*, and that *Rawlyns* had entred, by which the rent was suspended, that for that the whole Condition, as well as to the collateral sum, as to the rent was suspended. For it was resolved, although the Condition doth comprehend two several things in the disjunctive of two several natures; The one, the rent issuing out of the land which is incident to the reversion, and may be suspended with the intermedling with the land; The other matter collateral to the land, which cannot be suspended by the said redemise, yet here are not several Conditions, but one intire Condition which referreth to two several branches, and therefore suspended in part is suspended in the whole; and that the Condition was intire appeareth by the conclusion thereof, *scil.* for the non payment of the one or the other, it should be lawful for the lessor to reenter into the whole land, so that there is but

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one intire Condition, and one intire entry, which is not by the act of the parties to be divided or apportioned. And because that this Point was of late, *scil. Pasch.* 27 *Eliz. Rot.* 185. between *Brightman* and *Somerford* in this very Case (although between other parties) upon grave advice adjudged by Sir *Ed. Anderson*, and his Companions Justices of the *Common Pleas*, Sir *Christopher Wray*, and the Court of *Kings Bench* would not suffer this Point to be argued again, but agreed with the Court of *Common Pleas* in the Point adjudged.

3. That if *Cartwright* had redemised any part of the house to *Rawlyns*, and *Rawlyns* never entred into it, yet the rent by the acceptance of the redemise before any entry is suspended; so that the not
[53] entry of *Rawlyns* maketh not any difference in this Case, and the Case which was in the *Common Pleas*; for when the lessor accepeth a redemise, and suffereth a stranger to occupy the land redemised, it suspendeth the rent, as well as if himself had entred.

4. That the said lease made by *Cartwright* to *Warlowe* by Indenture when he had nothing in the house was notwithstanding good against him by conclusion; and when *Rawlyns* redemiseth all to him, then was his interest bound with this conclusion, and then when *Cartwright* redemised the said Stable to *Rawlyns*, now was *Rawlyns* concluded also. For all parties or privies in estate or interest are bound by estoppels, and then the Case is no other but *Cartwright* demiseth to *Warlowe* for six years the said Stable, and afterwards demiseth to *Rawlyns* for 20 years, so that this is a good lease in reversion for 14 years, the same doth not make any suspension of the rent, or condition, for it is not any grant of the reversion, but a future interest in reversion, no term but an interest of a term as the pleading is; And notwithstanding such grant the reversion (without attornment) doth remain in the grantor, and he shall have the rent reserved upon the first lease: But if there be attornment, then the reversion doth pass, and then will follow suspension: And therefore it was agreed, That if a man maketh a lease for 21 years rendring rent, with clause of reentry, and afterwards the lessee maketh a lease to the lessor for six years to begin two years after, and afterwards the rent being lawfully demanded is behind, the lessor may lawfully enter and take advantage of the Condition, notwithstanding the acceptance of the future interest and by the entry defeat the future interest which was vested in him: If a man make a feoffment in fee upon a collateral Condition, and afterwards the feoffee redemiseth the land to the feoffor, and afterwards the Condition is performed, now the redemise of the land being no suspension of the Condition, is no impediment but that the feoffee shall take advantage thereof, and thereby destroy the term which he himself hath accepted, as it is holden in 20 *E.* 4. 19. 8 *H.* 7. 8. 20 *H.* 7. 4. So in the Case at Bar, the redemise *in futuro* maketh no suspension of the rent, and by consequence no suspension of the Condition.

5. Although it was objected, 1. That Estoppels conclude the parties to say the truth, but cannot conclude the Jurors because they are sworn *ad veritatem de & super præmissis dicendam*: And 2. That Estoppels ought to be pleaded, and in pleading the party ought in the conclusion of his plea to rely upon the Estoppel, and not demand Judgment if Action, or make other conclusion, as it is holden in 22 *H.* 53. And for these causes the Court shall not give regard to this Estoppel by deed indented found by the Jurors: Yet it was resolved in this Case, That this Estoppel being found by Verdict, the Court ought to judge upon the whole special matter according to Law: And true it is, that the Jurors are
[6] sworn *ad veritatem dicendam*, and therefore they have well done in the Case at Bar to find all the truth of the Case, and to leave the Judgment to the Court, which upon the matter ought to judge according to Law. And the Chief Justice *Wray* said, That it was adjudged in *Pleadel*'s Case in 8 *Eliz.* that because that a Jury did not find such a lease by deed indented which took its operation only by conclusion intending that they being sworn *ad veritatem dicendam*, and that Estoppels conclude the parties, not the Jurors to say the truth, were therefore attaint and had Judgment accordingly; for the Justices in the same Case held, That the interest of the land as to parties and privies was in a manner by such conclusion bound, and no conclusion shall be by such deed indented after the term ended, as *Wray* Chief Justice held. And in such Case the Jury ought, if they will not find the special matter, and leave to the judgment of the Law, find it at their peril according to Law. See for this Point, 17 *E.* 3.
[ ] 18 *Ass.* 2. 22 *Ass.* 37. 34 *E.* 3. *Droit* 29. 15 *E.* 3. *Assise* 322. 13 *E.* 3. *Garr.* 26. 35 *Ass.* 8. 1 *H.* 27 *H.* 8. 22. *Plow. Com.* 315. and many other Books. And upon good consideration of this Judgment and the said Books, you shall understand and observe good differences, and which opinions in your Books agree to Law, and which not.

6. It was resolved, That if a man hath a lease for 20 years, and he leaseth for two years rendring rent, and afterwards granteth all his Tenure and interest to another, if the lessee attorn the reversion shall pass; and if no attornment be, yet the interest in reversion shall pass, so that the grantee shall have the land after the two years determined; For the grant of one shall not be adjudged void, if to any intent it may take effect.

7. It was resolved, That if lessee of a house for 20 years, leaseth part for two years, and afterwards leaseth the whole to another for 10 years rendring rent, so that this doth enure as a lease in reversion for the part in lease, and a lease in possession for the residue, that the rent shall issue out of the whole, and the interest of the term, although it be not any estate which can be surrendred, and although it be joyned with land in possession, yet the rent shall go out of the whole: Upon which Judgment *Somerford* brought a Writ of Error upon the new Statute upon the Judgment, and two Errors were assigned.

1. Because that *Rawlyns* the Plaintiff was an Infant, and was admitted by Guardian, and no Record thereof was made as is used in the *Common Pleas*, but only recited in the Court; *Jo. Rawlyns per A. R. guardianum suum ad hoc per Cur' prius admissus, querit', &c.*

The second Error was assigned in the Judgment it self given in the *Kings Bench*: As to the first Error the Judges *Anderson* Chief Justice of the *Common Pleas*, *Manwood* Chief Baron, *Penham*, *Windham*,

Windham, and *Rhodes* Justices, *Clark* and *Gent* Barons of the *Exchequer*, and of the Coif, commanded, That the Presidents of the *Kings Bench* should be searched, for without presidents, *prima facie* it seemed to them, That there ought to be a Record made of the said admittance by Guardian; and upon search of the Records in the *Kings Bench*, many were shewed to the Justices where Infants had sued by Guardians [54] in the same Court, and no Record made of their admittance by Guardian, but such recital in the Court as aforesaid.

The Justices and Barons *una voce* in regard of the presidents which in this Case make a Law in the same Court disallowed the Error, although that presidents in a small number were shewed, where Record was made of the like admittance of an Infant in the *Kings Bench*, as is done in the *Common Pleas*. As to the Error in the Judgment, all the said Points often argued in the *Kings Bench*, and upon great deliberation adjudged, were again new argued before the said Justices and Barons of the *Exchequer*; and after many Arguments at the Bar and Bench, all the matters aforesaid were resolved from Point to Point, and for the causes before alledged, affirmed by all the Justices, and Judgment given accordingly.

And *Coke* and others were of Council with the Plaintiff, and *Glanvil* Serjeant and others with the Defendant. And that was the last Case that Sir *Thomas Gawdy* argued, who was a most reverend Judge and Sage of the Law, of ready and profound Judgment, and of great gravity, prudence, and integrity.

Note Reader, according to the opinion of *Wray* Chief Justice, it was afterwards adjudged in the *Common Pleas*, *Pasch.* 33 *Eliz.* in the Case of one *London*, That if a man take a lease for years by deed indented of his own land, it is not any Estoppel but during the term, and after the term the lessor may enter or occupy the land, for by the determination of the term, the Estoppel is also determined; And then both the parts of the Indenture belong to the lessor, as it is holden 38 *H.* 6. 24. And so the Law is resolved in a Case which was much controverted in our Books, 14 *H.* 6. 23. *e.* 8 *H.* 4. 58. 3 *E.* 4. 14. 8 *H.* 6. 17. *f.* 44 *E.* 3. *Estoppel* 10. 43 *E.* 3. 17. 21 *H.* 6. 2. 43 *E.* 3. *Estoppel* 7. 3 *H.* 4. 6. 12 *H.* 4. 19. *Litt.* 156. 47 *Ass.* 3. 35 *Ass.* 8. 10 *E.* 3. *Double plea* 8. and the opinion of *Hales* and *Montague* in *Plowden*'s Commentaries.

Trin. 30 Eliz. *in the Chancery:* Monstrans de droit *by the Wardens and Comminalty of* Sadlers.

BY virtute of a Writ of *Mandamus* after the death of *Thomas Cox*, it was found by enquest before [b] *Wolstan Dixie* Mayor of *London*, Escheator of the same City, 17. *Jan.* 28 *Eliz.* and returned in the *Chancery*, That the said *Tho. Cox* the day of his death was seised in his demesne as of fee of 11 Messuages and 8 Gardens in the Parish of *All-Saints* in *London*, and died without heir, and that they were holden of the Queen in Socage. And the Wardens and Comminalty of *Sadlers* in the *Chancery* shewed their right, That long time before the said *Tho. Cox* had any thing in the said Messuages and Gardens, one *Richard Millard* was seised of them in his demesne as of fee. And so seised 6. *Aug.* 15 *H.* 8. by his Will in writing devised the said Messuages and Gardens to the Wardens and Comminalty of *Sadlers* in fee, and died; and that they were seised until the said *Tho. Cox* did disseise them, and so seised died without heir: And shewed the custom of *London*, That a Citizen and Freeman of *London* may devise in Mortmain; and indeed that the said *Richard Millard* was a Citizen and Freeman of *London* at the time of his death: Upon this plea the Attorney-General did demur in Law; and if a *Monstrans de droit* in this Case lieth or if they shall be put to their Petition was the great Question of the Case: And this Case, on the Queens part, and on the parts of the Wardens and Comminalty was often argued as well in the *Chancery*, as before all the Judges of *England*, and Barons of the *Exchequer* at *Serjeants Inn* in *Fleetstreet*: And in this Case divers Points were resolved.

1. In every Case where the King is entituled to any Freehold or Inheritance, it is 1. Either by matter of Record, which is, 1. Either by Record Judicial, as attainder, &c. 2. Ministerial upon Oath, as Office. 3. Or by conveyance of Record, by assent, as fine, deed inrolled, &c. 2. Or by matter in Fact, and found by Office of Record upon Oath, as alienation in Mortmain, purchase by Alien born, Villein, Escheat by death without heir, &c. and that found by Record Ministerial, as before the Escheator or other Officer. 3. Or by matter in fact only, when land cometh to the King by Escheat or other matter of fact, and the Kings Officers put it in charge in the *Exchequer* without Office.

And it was resolved in all these Cases at the Common Law, when the King was seised of any estate [55] of Inheritance or Freehold by any matter of Record, be his title by matter of Record Judicial or Ministerial, or by conveyance of Record, or by matter in fact, and found by office of Record, he who hath right cannot by the Common Law have any traverse upon which he was to have *Amoveas manum*, but was put to his Petition of Right (in the nature of his real Action which he cannot have against the King, because the King by his Writ cannot command himself) to be restored to his Freehold, or Inheritance, 4 *H.* 6. 12. 24 *E.* 3. 23. 1 *H.* 7. 3. 4 *E.* 4. 21. 9 *E.* 4. 52. But at the Common Law the party grieved may in some Case have his *Monstrans de droit* where the King was so entituled, and in some Case not, when the title of the King was by matter in fact, as by reason of purchase by an alien born, or the Kings Villein, or for alienation in Mortmain, or by death of the Kings Tenant without heir, &c. in all these and the like Cases, if office be found for the King, and in the same office the title or interest of the

party

party be found, there the party grieved, at the Common Law may have a *Monſtrans de droit*. And ſo are the Books to be intended in *9 E.* 4. 51. & *13 E.* 4. 8. 4 *E.* 4. 21. 33 *E.* 3. *Traverſe* 36. It was found by office that *T.* by licence of the King, did marry the King's Neif, and that certain lands deſcended to the ſame Neif, which her husband aliened without the Kings licence (his wife being the Kings Neif) to another, and for this cauſe the land was ſeiſed; whereupon the alienee came into the *Chancery* and ſhewed all his Caſe, *ſcil.* That the Neif was married with the Kings licence; 2. The deſcent to the Neif after the marriage appeared in the office; And it was awarded, That for this cauſe the husband might hold by the Curteſie; and by ſuch alienation put the wife to her Action, and thereupon the alienee had reſtitution: By which Caſe it appeareth;

1. That the wife being married with the Kings licence, is enfranched, at leaſt during the coverture, for if ſhe ſhould remain Neif, then the husband ſhould not be Tenant by the Curteſie; and when the Kings title, and the title of a Subject doth concur in the beginning, the Kings title ſhall be preferred, as *Weſton* holdeth in *Plow. Com.* 263. *b.*

2. When all the truth of the Caſe appeareth in the office, that there was a *Monſtrance de droit* at the Common Law: So if land be conveyed to the King upon Condition, if the performance of the Condition be of Record, as if the Condition be to levy a fine of other land to the King, or to make a Recogniſance to the King in any Court of Record, or other like Conditions which are to be performed of Record; he who hath performed the Condition may have a *Monſtrans de droit* at the Common Law, for his title appeareth on Record, and there is no Record which doth abſolutely entitle the King: But if the performance of the Condition be not on Record, then if the performance of the Condition be found by office, he ſhall have a *Monſtrans de droit* by the Common Law, *vide Plow. Com.* 229. But in the ſame Caſe if the office find only title for the King, and omitteth the right or title of the party, although that all the words of the office be true, yet by the Common Law he cannot have a *Monſtrans de droit*, but for the cauſe aforeſaid he was put to his Petition, and therewith agreed *Piers Patifield*'s Caſe in *29 Aſſ. p.* 31. it was found by force of a Writ of *Diem clauſit extremum*, that one held certain lands of the King in *London*, and died ſeiſed without heir, for which the King gave the lands by his Letters Patents to *Piers Partifield* for his life, who ſued a Writ to the Mayor of *London* to put him in ſeiſin, and thereupon nothing was done, for which cauſe he ſued a *Sicut alias*, *vel Cauſam nobis ſignifices*, upon which Writ the Mayor returned, That the Kings tenant by his Will in writing and enrolled before the Mayor deviſed his land to his wife for life, and that ſhe or her Executors ſhould ſell the reverſion for his ſoul; And that the wife and *John Digle* her now husband were in by the ſaid deviſe for which he could not make livery; And afterwards *Piers Partifield* by force of the Kings Patent entred, whereupon *John Digle* and his wife ſued a *Scire facias* againſt *Piers Partifield*, if they could ſay any thing wherefore they ſhould not be reſtored: *Piers Partifield* demanded Judgment of the Writ for two cauſes.

[b]

1. Becauſe he held but for life, the reverſion to the King, in which Caſe ſuit ſhould be againſt the King.

2. Becauſe an office was found for the King, he ſhall not have this ſuit before that upon his Petition an office be found as it ought to be intended for him, and ſo before he be admitted to ſhew his right, he ought to have his right as well found by office, as the Kings title was found by office, and that is *æquum jus*: To which it was anſwered:

1. That for as much as they were ſeiſed of the Freehold, that they were not to be ouſted without ſuit.

2. That againſt the King Petition could not be ſued, becauſe that *Piers* was tenant of the Freehold.

3. That this matter returned by the Mayor did ſerve for an office, for by the office, the reverſe of the matter was not found; which is as much as to ſay, That all the matter found by the office was true, *ſcil.* that the tenant held the land of the King, and died without heir, and by the deviſe it was confeſſed and avoided. And for the deciding of theſe Queſtions, all the Juſtices of *England* were aſſembled in the *Chancery*; And by the award of all the Juſtices of *England* the Writ was abated, becauſe that no office was found for *John Digle* and his wife, and it was ſaid to them, To ſue to the King, *ſcil.* by Petition for an office which might ſerve them. Out of which award of the Juſtices I obſerve theſe things:

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1. That at the Common Law when by office the King was ſeiſed of an eſtate of Freehold, although that all the Points of the office were true, yet the party grieved was put to his Petition in nature of his real Action, if his title be not found by office.

2. That Petition lieth againſt the King although he hath departed with the Freehold.

3. That for as much as the Kings title is found by enqueſt of office upon oath, the title of the Subject ought to appear by Record of as high nature, *ſcil.* by the like enqueſt of the office upon oath, and not by the return of the Mayor, which although it be of Record, yet it is not of ſo high and great regard as the office found by oath: So note Judicial Records as Attainders and Judgments are preferred before Miniſterial Records, as Inquiſitions, and offices before Eſcheators; and they alſo being found in courſe of lawful proceeding upon oath before Returns, or conveyances of Record, as it moſt plainly appeareth in this Caſe. And in *30 Aſſ. pl.* 28. by *Diem clauſit extremum* it was found, that *J.* held of the King, and that *M.* was her daughter and heir who was of full age and had livery; And by another office it was found, that the ſame *J.* had another daughter *K.* who was yet within age, by which a *Scire facias* iſſued againſt the ſaid *M.* and her husband, &c. who ſaid, That the land was given to *J.* and to his firſt wife mother of *M.* in tail, and that *K.* was the iſſue of another woman, and ſo *M.* ſole heir. But by award of the whole Council, *ſcil.* the Juſtices (who are as to adminiſtration of Juſtice called in Law the Council) all the land was ſeiſed into the Kings hands, becauſe that the tail was not found by any office, but only that *M.* was general heir.

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So at the Common Law, if the King by falſe office was poſſeſſed of the Wardſhip or intereſt in any land by reaſon of the Ward, or Ideocy, or alienation without licence, or the like; In ſuch Caſes although that the King was not entituled to a freehold, but to a chattel real, and by a falſe office only, yet the party grieved cannot have a Travers, and thereupon to have *Amoveas manum*, but was put to his Petition by the Common Law; and therewith agreeth the Book in 17 *E.* 3. 11. But yet as well a Travers as a *Monſtrans de droit* was at the Common Law, as well concerning freehold and inheritance as Chattels real; for in all Caſes when by the office land is not in the Kings hands, nor the King by it is in poſſeſſion, but the King by the office is only entituled to an Action, and cannot make a ſeiſure without ſuit, there in a *Scire facias* brought by the King in the nature of ſuch Action to which he is entituled, the party may upon the ſaid *Scire facias* appear, and traverſe the office at the Common Law, for the party is in poſſeſſion, and upon the matter found for him ſhall not have *Amoveas manum*, becauſe that by the office nothing was in the Kings hands, but the King ſhall be barred of his Action. And therefore if it be found by office that the Kings tenant hath ceaſed for two years; or that the Kings tenant for life, or years hath committed Waſt; or that his tenant by Knights ſervice hath made a feoffment by colluſion, in theſe Caſes the King is put to his *Scire facias* againſt the tenant; And in all theſe Caſes the tenant in the *Scire facias* may traverſe the ceſſer, waſt, and colluſion at the Common Law; and therewith agree the Books in 14 *H.* 7. 23. & 25. 15 *H.* 7. 6. & 12 *H.* 7. 21. It appeareth alſo by a Book before any Statute made which gave Travers, or *Monſtrans de droit*, 30 *Aſſ.* 28. 32 *E.* 3. *Scire facias* 106, 32 *E.* 3. *Travers* 38. 50 *Aſſ.* 2. It was found by office that *W.* the Kings Tenant in *Capite* died, and that the tenancy deſcendeth to *R.* his ſon and heir who is a fool and ideot from his nativity, and that *N.* was Terre-tenant, againſt whom a *Scire facias* iſſued, if he could ſay any thing that the land ſhould not be ſeiſed in the Kings hands, who came and pleaded that *R.* after the death of *W.* did releaſe to one *F.* then Tenant, all the right, &c. who enfeoffed him; at which time *R.* was of good memory; and traverſed the point of the office, *ſcil.* without that, that *R.* was a natural fool; for in vain ſhall it be to award a *Scire facias* to know if he can ſay any thing, &c. and when they ſee he can plead nothing: But if the office find no other in poſſeſſion but the ideot, thereby the King is in poſſeſſion, then he who in truth was Terre-tenant and ouſted by the office, cannot traverſe the office to have *Amoveas manum*, becauſe it doth not appear by the office, that he was tenant at the time of the office, but is put to his Petition: But for as much as in Caſe when the King was in poſſeſſion by the office, or may ſeiſe without ſuit, there the party is put to his Petition, which was tedious, and of great delay and charges to the party grieved; for his relief was the Statute of 34 *E.* 3. *cap.* 14, made, by which it is enacted, That there where lands and tenements are ſeiſed in the Kings hands by office of the Eſcheator, containing that the Kings tenant did thereof make alienation without licence, &c. Out of which words divers things are to be obſerved. [b]

1. Where it is ſaid, where lands and tenements are ſeiſed into the Kings hands, &c. By that it appeareth, that the miſchief was, where lands or tenements were ſeiſed in the Kings hand by the office, for it was not any miſchief as hath been ſaid, where the King was not entituled but to the Action, for there was traverſe at the Common Law.

2. That this Act extended only where the King was entituled by office only, for the words are ſeiſed in the Kings hands by office of the Eſcheator.

3. That this Act extended only to alienation without licence, and to the Caſe of Ward. But three things were grievous to the people which were not remedied by this Act. [57]

1. That no office was within the purview of this Act, but only office found *virtute brevis*, or *commiſſionis*; for the words are (taken by the mandment of the King) ſo that an office found *virtute officii* was out of the Act.

2. That the ſaid Act, as appeareth before, did not extend but only to the ſaid two Caſes of alienation without licence and Ward.

3. That the ſaid Act did extend to a traverſe only, and not a *Monſtrans de droit*; by which although by the traverſe the iſſue was found for the Plaintiff, yet the Judges cannot proceed to Judgment without a Writ of *Procedendo ad judicium*, which were great and grievous miſchiefs; For remedy of which another Statute was made *ann.* 36 *E.* 3. *cap.* 13. for the grievous complaints which the King had heard from his people of his Eſcheators, &c. He willeth and ordaineth, with the aſſent aforeſaid, That the lands ſeiſed in the Kings hands for cauſe of Ward, be ſafely kept without Waſt, &c. So of other lands ſeiſed in the Kings hands by Enqueſt of office taken before Eſcheators; which words are general. 1. As to the matter, that they are not reſtrained to the two things, *ſcil.* alienation without licence, and Ward mentioned in the former Act. 2. As to the office, for they extend as well to offices found *virtute brevis, ſive commiſſionis*, to which only the former Act extended, as to offices found *virtute officii*. And as to the great Objection which was made, that for as much as the words of the Act are, that the Eſcheator ſhall ſend the Enqueſt into the Chancery within the month, &c. that it ought to be intended of an office found *virtute brevis, ſive commiſſionis*, becauſe that no office found before the Eſcheator *virtute officii* can by the Law be returned into the Chancery, but only into the Exchequer, as it is ſaid in 4 *E.* 3. 23. & *Stamf. Prærog.* 70. To that it was anſwered and reſolved upon ſhewing of infinite of precedents in all ages, that ſuch offices have been returned by the Eſcheator as well into the Chancery as into the Exchequer, and that the Eſcheator hath election to return it in which of the Courts he will, for he is attendant to both Courts, and both are the Kings Courts; Then the Statute goeth further, And be heard without delay to traverſe the office (ſo that by theſe branches, the two firſt of theſe defects were remedied) or otherwiſe ſhew his right: By which the *Monſtrans de droit* was given to make a final diſcuſſion without attendance; by which words they ſhall proceed to Judgment without any *Procedendo*; And ſo all the ſaid miſchiefs were remedied. But it was reſolved, that this Act doth not extend to any Judiciai Record, as Attainder, or Recovery, but only when nothing appeareth of Record for [b]

the King but only the office; and therein the Makers of the Act had great reason, for in Cases of Attainder and Office, the King is entituled by double matter of Record, wherefore the party grieved ought to avoid it by double matter of Record, and not by single traverse, or *Monstrans de droit*; for it was said, *Nihil tam inconveniens est naturali æquitati, unumquodque dissolvi eo ligamine quo ligatum est*; And therefore he shall be put to his Petition, upon which he shall have an office found containing his title of Record, which is required by the Justice of the Law, because the Kings title doth commence by Record, and thereupon the party grieved shall traverse the Kings title found by the office, or shall shew his right, and confess and avoid; And if upon the traverse, or *Monstrans de droit* it be found for him, then he shall have an *Amoveas manum*, for he hath answered and satisfied double matter of Record with double matter of Record, *Vide* 11 *H.* 4. 52.

Another reason was, When the King is in by force of a title, by Judicial matter of Record, as by Attainder or Recovery, there for the estimation and credit that the Law giveth to the Judicial Records, the party is put to his Petition: These Resolutions of the Justices in this Case do agree with our Books. 1. That the Statute of 36 *E.* 3. extendeth to other Cases, then to the Case of alienation without licence, and ward, which are mentioned in the Act of 34 *E.* 3. there are divers Cases agreed in our Books. And therefore 43 *Ass.* 28. it was found by office returned into the Chancery that one *W.* of *Herlington* who was seised of certain lands in the County of *York*, was aiding to *Guilbert de M.* who was the Kings Enemy, and that the lands were seised into the Kings hands; and thereupon came *W.* into the Chancery, and traversed the office, and it was found for him and he had restitution by Judgment of the Court, which special Case is not mentioned in the Act of 34 *E.* 9. but is included within the general words of 36 *E.* 3.

Take heed Reader, for at this day although a man be aiding the Kings enemies, or be killed in open Rebellion against the King, he shall not forfeit his lands or his goods: But if the chief Justice of the Kings Bench (who is head Coroner of all *England*) in person upon the view of the body of him killed in open Rebellion, make a Record thereof, and returneth the same into the Kings Bench, he shall forfeit his lands and goods, as it was done and resolved in the time of *H.* 7. by *Fineux* chief Justice *Vide* 8 *E.* 3. 38. 7 *H.* 4. 47. and in 2 *H.* 4. 10. Sir *John Talbots* Case; The possessions of a Prior alien were seised into
[58] the Kings hands for certain cause, and afterwards the King made livery of them; and after livery the King by a Writ out of the Chancery had taken them again into his hands by this word *resumpsimus*, and committed them to one *Tutbury*; and now came the Executors of the said Sir *Thomas*, who had a term for years in the said possessions, and in the Chancery exhibited their traverse, and had a *Scire facias* against the said *Tutbury*, and there *Skreen* for the Defendant demanded Judgment of the Writ; for where the King seiseth for cause, a man may have a traverse to the cause, and answer to it by the Statute, meaning the said Statute of 36 *E.* 3. But where the King seiseth into his hands, and doth not determine wherefore in certain, he ought to sue to the King by Petition, *quod fuit concessum* by the Justices assembled together for this purpose in the Chancery.

Note Reader, thereby it appeareth, that a Termor may have a traverse in that Case by the Statute of 36 *E.* 3. But it was objected, that neither the Statute of 34 *E.* 3. nor the Statute of 36 *E.* 3. did extend to the Case at Bar, because that in this Case the King was entituled to the freehold and inheritance, and the Acts give remedy only when the King is entituled to a chattel, as a ward, or for alienation without licence, &c. To which it was answered and resolved, That the Act of 36 *E.* 3. doth extend generally to lands seised, &c. by office, which is a beneficial Law made in advancement and in execution of Justice and Right without grievous and tedious delay; and therefore shall be taken so generally according to the letter and intent of the Act; and with this Resolution in this point agreeth the Books 13 *E.* 4. 8. 4 *E.* 22. Lord *Hungerford*'s Case, 3 *H.* 7. 20. Lord *Grieſtock*'s Case, 49 *E.* 3. 16. *Isabel Goodcheaps* Case; and 19 *R.* 2. *Travers* 37. and so the *Quære* in *Stamfords Prærog.* 61. resolved; and the book in 8 *H.* 5. *Travers* 47. is to be intended at the Common Law before the said Act. It was also resolved, that when the Kings tenant seised of lands in fee simple dieth without heir, that the fee and freehold is presently after his death and before office found thereof cast upon the King; for in such Case it ought to be in some person, and if any person entreth into the land and taketh the profits, an information of intrusion for the King may be preferred against him before office or seisure; for the King presently by the death is in actual possession, and hath not only a freehold in Law, as a common person in such Case hath, and as to that, this difference was taken and agreed; When the Kings tenant dieth in possession without heir, so that in such Case *possessio est vacua* and in no body, the Law will adjudge the King (in whom shall be no lacheſs reckoned) in actual possession presently; But when another is in possession and seisin at the time of the Escheat, so that *possessio plena est & non vacua*, the King shall not be adjudged in possession until this seisin and possession be removed; as if the Kings Tenant be disseised and dieth
[b] without heir; or if an alien born, or the Kings Villain, or the alienee in Mortmain be disseised, and all the same is found by office, in these Cases the King shall not be in possession until the possession and seisin of the Terre-tenant be removed: But if the land descend to the King after the death of his father, or any other collateral ancestor, the King shall be presently in possession before entry or seisure. So if the King make a lease for life, or a gift in tail, and the lessee dieth, or the donee dieth without issue, in this Case the possession shall be actually in the King without any entry or seisure. And therewith agreeth 9 *H.* 7. 2. *b.* and there it is expressly said, That when no man is in possession it shall be adjudged in the King according to his title; and so the doubt which *Stamford* maketh *Prærog.* 53. well resolved.

But upon that it was strongly urged by one of the Justices, That in the principal Case the Company of Sadlers shall be put to their Petition; for in as much as presently after that that *Cox* was dead without heir, the possession was actually in the Queen; Then before office found they were put to their Petition, for the Act of 36 *E.* 3. doth not extend but only in Case where an office is found,

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for that is the Record traverſable by the Statute; And therefore he ſaid, If a diſſeiſor conveyeth land to the King, in this Caſe the diſſeiſee was put to his Petition by the Common Law, and therewith agreeth 22 *E.* 3. 5. 24 *E.* 3. 23. 4 *E.* 4. 22. And the ſame is not remedied by the ſaid Act; for although the King be entituled by a Record, yet it is not a Record traverſable by the ſaid Act: So he ſaid, When *Richard* Duke of *York* father of King *E.* 4. diſſeiſed one and died ſeiſed, and the ſame deſcended to King *E.* 4. the diſſeiſee was put to his Petition; and therefore although the deſcent was afterwards found by office, and although the King was entituled by Office, and ſingle matter of Record only, yet he was put to his Petition, and was not remedied by the ſaid Act as it appeareth in 9 *E.* 4. 51.

2. It was objected, That the Statute of 36 *E.* 3. *cap.* 13. extendeth only in Caſe where one is put out of poſſeſſion by office, as *Stamford* conceiveth *Prærog.* 61. *a.* But in this Caſe the Company of Sadlers was not put out of poſſeſſion by office, but by the diſſeiſin made by *Cox* to them, and therefore this Caſe was not remedied by the ſaid Act. But to that it was anſwered and reſolved, That it is a Maxim in Law, that when a common perſon againſt another common perſon is put to his real Action, in ſuch Caſe he ſhall be put to his Petition, which is in lieu of a real Action againſt the King. *Vide* 7 *H.* 4. 33. 9 *H.* 4. 5. And therefore there is a great difference between the Caſes which have been put, and the Caſe at Bar; For 1. as to that Caſe, when land deſcendeth to the King from his anceſtor, by this deſcent the entry of the diſſeiſee is taken away, if it were in the Caſe of a common perſon, and therefore in the Caſe of the King he ſhall be put to his Petition. But in Caſe of Eſcheat, when a diſſeiſor dieth without heir, if it were in the Caſe of a common perſon the entry of the diſſeiſee was not taken away, but he may enter upon the Lord by Eſcheat; and although it ſhould be admitted, that in the Caſe at Bar, the Company of Sadlers cannot have their *Monſtrans de droit* before office found, and that it ſhould remain at the Common Law not remedied by the ſaid Act of 36 *E.* 3. yet when office is found it hath relation to the [56] time of the death of the tenant without heir, and then the Statute of 36 *E.* 3. extendeth to it; and if it ſhall be alſo admitted, That the Caſe when a diſſeiſor conveyeth lands to the King, that that remain not remedied by the ſaid Act of 36 *E.* 3. becauſe there is no Record traverſable by the Act in ſuch Caſe: yet for as much as in the Caſe at Bar office is found, that the Record is traverſable, the party grieved by the purview of the Act ſhall have a *Monſtrans de droit*.

And as to the ſecond Objection, it was reſolved, That the Statute of 36 *E.* 3. extendeth to this Caſe, although the party grieved be not ouſted by the office, for the words are, *And if there be no man who makes challenge or claim to the land, &c.* and without queſtion the party grieved doth, for he maketh challenge and claim to the lands found by the office; and the Statute doth not ſay, If the party grieved be ouſted by the office: And ſo the doubt which *Stamford* conceived in this Caſe alſo explained. And it was well urged, That the Statute of 36 *E.* 3. hath provided remedy when the King by office is entituled to land, either by purchaſe of his Villain, or Alien born, or for alienation in Mortmain, or for any ſuch title which is matter of fact, or in *pais*; and the office is the ſole Record which entituleth the King, becauſe that the makers of the Act of 2 *E.* 6. have provided remedy only when the King is entituled by double matter of Record, as Attainder of Treaſon, Felony, and Premunire, and Office: And it was ſaid, That if Travers and *Monſtrans de droit* had not been provided in the ſaid Caſes of the Kings Villain, Alien born, Mortmain, &c. by the former Act, without doubt, they for theſe Caſes would have alſo provided remedy, becauſe that theſe ſhall be in as great miſchief if the party grieved ſhall be put to his Petition, as where the King was entituled by double matter of Record: But it was ſaid, That if the King be Lord, Tenant in tail, the remainder in tail Meſn, and Tenant, and the Meſn alieneth the meſnalty in Mortmain, or to the Kings Villain, or to an Alien born, and upon office found thereof the King ſeiſeth, Tenant in tail dieth, the tenancy eſcheateth, the iſſue ſhall not have Travers nor *Monſtrans de droit*, for the eſcheat is a thing newly accrued and dependant upon the Seigniory; and for as much as the King hath the Seigniory at the time of the eſcheat, of neceſſity the land ſhall eſcheat to him *quoſque*, &c. and he ſhall be put to his Petition in this Caſe. *Vide* 8 *H.* 4. 9. *vide Plow. Comm. Wimbiſhe's* Caſe. If a tenancy eſcheat to a woman who hath a Joynture, it is out of the Statute of 11 *H.* 7.

And laſtly, a Judgment in the Point now of late given in the Exchequer was vouched, where the Caſe was, That by office returned in the Exchequer it was found, That *Jane* wife of *Theophilaci Aden* was ſeiſed of lands in fee, and held them of the Queen and died without heir, and one *Collins* and *Howſtead* [b] came into the Exchequer, and by way of *Monſtrans de droit* did alledge that one *N. Reynolds* was ſeiſed of the ſaid lands in fee, and by his Will in writing deviſed them to *Emme* his wife in fee and died; The wife did thereof enfeoff *Collins* and *Howſtead*, by which they were ſeiſed till diſſeiſed by the ſaid *Jane*, who died without heir, and ſo confeſſed and avoided the office. And by the rule of the Court, the Attorney General anſwered thereunto, and maintained the office, and traverſed the deviſe, which was found againſt the Queen. Out of which Judgment I obſerve, That the Barons did adjudge the ſaid Act of 36 *E.* 3. to be taken by equity; for the ſaid office ſpeaketh only of office returned in the Chancery, and the ſaid office was returned in the Exchequer, which without queſtion was within the intent and meaning of the ſaid Act. *Vide Stamf. Prærog.* 70.

And in this Caſe, this difference as to Petition, Travers, and *Monſtrans de droit* was reſolved. In all Caſes at the Common Law, when the Kings title accrueth by a Judicial Record, or as *Gaſcoigne* ſaith 9 *H.* 4. by Judgment of Record, that although the King granteth all his eſtate over, yet the party grieved was put to his Petition, and had a *Scire facias* againſt the Patentee; as in Caſe of Attainder, Recovery, &c. 44 *E.* 3. 22. 10 *H.* 6. 15. 21 *H.* 7. 2. 3 *Ma.* 139. 7 *H.* 4. 21. But where the King was entituled by conveyance of Record, as if a diſſeiſor convey the land to the King by fine, deed enrolled, or other matter of Record, there although the party were put to his Petition againſt the King; yet if he granteth the land over, the diſſeiſee, or he who hath right may enter, or have his Action againſt the Patentee; for a Judicial Record is preferred always before a conveyance of Record by aſſent, as hath been ſaid.

Vide 9 H.4.4. by *Gaſcoigne* the ſame difference, 25 E.3.28. *a. Plow. Comm* 553. 22 E.3.7. 11 H.4.67.7 *R.* 2. *Aide del Roy* 61. By which Books if they be well conſidered this difference doth appear. Alſo in all Caſes when the party grieved may have a *Monſtrans de droit*, or traverſe againſt the King, there if the King granteth over the land, the party grieved may enter or have his Action againſt the Patentee, *Stamf. Prerog.* 75. *vide* 4 E. 4. 22. 3 *Ma. Dier* 139.

Note Reader, in the Common Pleas, between *Pemberton* and *Barham*, *Paſch.* 32 *Eliz. Rot.* 235. and in the Kings Bench, *Hill.* 42 *Eliz.* in a Writ of Error, between *Bereblocke* and *Read*, it was reſolved, That if *A.* be bounden in a Recogniſance, or Statute Merchant, or Staple; and after a Recovery is had againſt
[60] *A.* in an Action of debt, and *A.* maketh his Executors and dieth, his Executors are bound by the Law to pay the debt due upon the Recovery, although it be puiſne, before the debt due by Recogniſance, or Statute, becauſe that although both are Records, yet the Judgment in the Kings Court upon Judicial and ordinary proceeding is more notorious and conſpicuous, and of more high and eminent degree then a Statute or Recogniſance taken in private, and by conſent of the parties, and therefore preferred in Judgment of Law before Recogniſance, or Statute, which agreeth with the Reſolution in this Caſe: And I thought this Caſe neceſſary to be Reported, and by this the Reader ſhall underſtand what was the common Law before any Statute made concerning this matter, and what Caſes are remedied by the ſaid Acts of 34 and 36 *E.* 3. And therefore you will better apprehend the true intention and purview of the Statute of 2 *E.* 6. concerning theſe matters.

Mich. 30 & 31 Eliz. *in the Common Pleas.*

Forſe and *Hembling*'s Caſe.

[*b*] *Forſe* brought an *Ejectione firmæ* againſt *Hembling* upon a demiſe made by *Thomas Calie* to the Plaintiff for three years, of certain houſes in *Norwich*, from the feaſt of S. *Michael* 29 *Eliz.* &c. To which the Defendant pleaded, Not guilty; and the Jury gave a ſpecial Verdict, *ſcil.* That one *Alice Allen* was ſeiſed of the ſaid houſes in fee, and made her Will in writing; and thereby deviſed, that if *James Amynde* did overlive her, that then ſhe deviſed and bequeathed to him and his heirs the tenements in queſtion; and afterwards ſhe intermarried with *John Amynde*; and further found that ſhe oftentimes after the marriage revoked the ſaid Will, ſaying, that the ſaid *James Amynde* ſhall not have the ſaid tenements by the ſaid Will; and afterward the wife died without iſſue, and the husband ſurvived, and thereof did enfeoff the Defendant, upon which the ſaid *Thomas Calie* as heir to the ſaid *Alice* did enter, and made the leaſe as in the Declaration, and prayed the advice of the Court. And upon this Verdict two Queſtions were moved.

1. If the womans Will by the intermarriage with the deviſee were countermanded, or not.

2. If it were not countermanded by the intermarriage, if by her words of revocation after the marriage it was countermanded. And it was objected by the husbands Councel;

1. That if a feme ſole make her Will and deviſeth her land to *A.* and after marrieth *B.* and *B.* dieth, and the wife ſurvive him, in this Caſe it was ſaid that the Will doth remain good, and was not countermanded by the marriage, as *Manwood* ſaid in *Plow. Com.* 343. and was not denied; But if it were admitted that the Will in ſuch Caſe was countermanded by the marriage with a ſtranger; yet in the Caſe at Bar for the benefit of the husband being the deviſee, the Will ſhall not be countermanded, and therefore it is adjudged in 2 *R.* 2. *Attornment* 8. That if a feme ſole make a leaſe for life rendring rent,
[61] and afterwards by deed granteth the reverſion to another, and afterwards and before attornment marrieth with the grantee, that this marriage was not countermand of the attornment, as if ſhe had married with a ſtranger, for it is for the benefit of the husband that it ſhall not be a countermand; And therefore there by the payment of the rent by the tenant to the husband in the name of attornment, the reverſion doth paſs out of the wife; for the ſame reaſon which proveth that the intermarriage with a ſtranger ſhall be a countermand of the attornment for the benefit of the husband, proveth that when the grantor marrieth with the grantee, that it ſhall not be a countermand, for that ſhall be for the benefit of the husband: And ſo in the principal Caſe it is for the benefit of the husband that the Will by the intermarriage ſhall not be countermanded, but ſhall take effect according to the purport thereof: And it was ſaid, That the Caſe of a Will when the wife marrieth with a ſtranger is not like to the Caſe of attornment when the grantor marrieth with a ſtranger; for the Will of the woman cannot take effect during his life, but only after his death, and by no poſſibility could it be any prejudice to the husband: For if he hath iſſue he ſhall be Tenant by the Curteſie, and he may take the profits thereof during the coverture, or diſpoſe of them at his pleaſure to all intents and purpoſes, as if no Will had been made.

2. To ſay as it is ſaid in 3 *E.* 3. *Deviſe* 12. that the Will of a feme covert is void, becauſe that the Law preſumeth that it was made by coherſion of the husband, that cannot be ſo intended in this Caſe, for as much as in the Caſe of 3 *E.* 3. the Will was made by a man when ſhe was covert, which cannot be made good by any cuſtom: But here in our Caſe the woman was ſole, and free from all conſtraint at the time of the making of her Will.

3. It

3. It was objected, that if the Will was not countermanded by the intermarriage, without queſtion it was not or can be countermanded by the womans words after the marriage, for after marriage the whole will of the wife is in Judgment of Law ſubject to the will of the husband, and as is commonly ſaid, a feme covert hath not any Will; and therefore if the Will ſtands notwithſtanding the intermarriage, her countermand afterwards is of no force nor effect, *quod fuit conceſſum* by the whole Court as to this Point; Further it was objected, That notwithſtanding that after the Marriage the wife cannot revoke her Will, ſo that now after the marriage it is irrevocable, yet it is no reaſon that the intermarriage ſhall be a countermand: For if a man *Non compos mentis* make his Will, and afterwards become of ſane memory; In this Caſe until the time of his death after that he become of unſound memory, he cannot countermand his Will, and yet the diſability or imperfection of Nonſane memory was not any countermand of it.

4. It was ſaid, That countermands of Wills are not favoured in Law; and therefore for as much as there is no Book in Law in this Point, but the ſaid Caſe of attornment adjudged is all one in reaſon with this Caſe; for theſe cauſes it was concluded, that Judgment ſhould be given againſt the Plaintiff: But it was upon great deliberation adjudged for the Plaintiff. And in this Caſe it was agreed upon the whole matter, *ſcil.* The taking of husband, and coverture at the time of her death, the Will was countermanded, and that for two cauſes.

1. The making of a Will is but the inception of it, and it doth not take effect till the death of the deviſor, for *omne Teſtamentum morte conſummatum eſt*; *& voluntas eſt ambulatoria uſque extremum vitæ exitum*: Then it ſhall be againſt the nature of a Will to be ſo abſolute, that he who maketh the ſame being of good and perfect memory cannot countermand it; and therefore this taking of husband being in the Caſe at Bar her proper act ſhall amount to a countermand in Law: But when a man *Compos mentis* maketh his Will, and afterwards by the viſitation of God becometh of unſound memory (as every man for the moſt part before his death is) God defend, that this act of God ſhall be in Law a revocation of his Will, which he made when he was of good and perfect memory. [b]

2. It ſhall be miſchievous to women that after their intermarriages they cannot for no cauſe countermand their Wills.

3. As the Law will not allow any cuſtom, That a feme covert may make any deviſe, for the preſumption that the Law hath, that it ſhall be made by conſtraint of the husband, as it is adjudged in 3 *E.* 3. So if it were in the power of the wife after her intermarriage to revoke her Will, the Law would not ſuffer the continuance thereof after marriage, for as much as the husband by conſtraint may cauſe her againſt her will to revoke or continue it. And as to the ſaid Caſe of attornment, it was ſaid in 2 *R.* 2. that when the wife in the ſame Caſe by her deed ſealed and delivered by her, granted the reverſion to another, the ſame taketh effect againſt her ſelf, that ſhe her ſelf cannot by any words countermand it before or after the taking husband, and therefore it is not like the Caſe of a Will, and that it might well be, that in as much as her grant by deed ſtood in force after the taking of the grantee to husband, that it ſhall not be any countermand.

Paſch. 31 Eliz. *in the Kings Bench.*

Herlakenden's Caſe.

Robert Ive brought an Action of Treſpaſs againſt *Roger Herlakenden* Eſquire, for breaking of his Cloſe, *ſcil.* 380 acres, parcel of *Colme Park* in *Colme* in the County of *Eſſex*, and 300 Okes, 300 Aſhes, 330 Maples, and 100 Beeches there growing cutting, and 1000 load of wood and underwood carrying away; and the Defendant as to the whole Treſpaſs, *præter fractionem clauſorum, nec non præter ſucciſionem* 200. *quercuum*, 10. *fraxinorum*, *&* 10 *acr' parcel'*, *&c.* pleaded Not guilty; *Et quoad fractionem clauſorum præd'*, *ac herbæ præd' pedibus ambuland' conculcat'*, *& conſumptionem*; The Defendant pleaded the matter in Law which followeth, by which he intituled himſelf to the ſame land, and juſtified the cutting of the trees, but in the *quod*, *&c.* (as appeareth before) the Treſpaſs as to the trees was utterly omitted, and ſo in Law nothing pleaded thereto; and then the demurrer being joyned is all in the diſjunctive, as it is agreed in 7 *H.* 6. 27. *a.* See 27 *H.* 8. 1. & *Dier* 9 *Eliz.* 264. 7 *E.* 4. 24. *b.* & 10. 7 *H.* 6. 5. *a.* And therefore to the intent the matter in Law might appear, by aſſent the Defendants plea was amended. For it was agreed by the whole Court, that all was diſcontinued, and thereupon the Roll was amended: *Et quoad ſucciſionem arborum*, *&c.* was inſerted. And the matter in Law in effect was ſuch, *Edward* Earl of *Oxford* was ſeiſed of *Colme* Park in fee, and 17 *Eliz.* leaſed to *Tho. Barefoot*, *Tho. Luter* and *John Collins* the ſaid Park (except the trees in the declaration mentioned) for 21 years: *John Collins* aſſigned his intereſt to *Anthony Luter*, and afterwards the ſaid Earl ſold to the ſaid *Barefoot* and *Luter* the trees aforeſaid, who 15 *Julii*, 26 *Eliz.* leaſed the ſaid 380 acres of land paſture parcel of the ſaid Park aforeſaid (upon which the ſaid trees aforeſaid grew) to one *John Bragge* for 21 years; and afterwards in *Auguſt*, 26 *Eliz. Barefoot*, *Luter* and *Luter* ſold the ſaid Trees to the Defendant; and afterwards, 27 *Eliz. Bragge* aſſigned his intereſt to the Plaintiff, and afterwards the Defendant cut down the trees, and if this cutting down were lawful or not was the Queſtion. [62]

The

The Point was, When a man leaſeth his land for years (excepting the wood) and afterwards the leſſor granteth the wood to the leſſee, if now the wood be ſo united again to the land, that by leaſe of the land the wood ſhall paſs as a thing annexed to it, or if the wood remain as an intereſt diſtinct and ſevered from the land, ſo that by leaſe of the land they ſhall not paſs to the leſſee. And in this Caſe divers Points were reſolved:

1. When a man maketh a leaſe for life or years, the leſſee hath but a ſpecial intereſt or property in the trees being timber as things annexed to the land, ſo long as they are annexed to it: But if the leſſee or any other ſever them from the land, the property and intereſt of the leſſee is determined, and the leſſor may take them as things which were parcel of his inheritance in which the intereſt of the leſſee is determined. In an Action of Waſt for cutting down of trees againſt leſſee for life or years, the Writ ſaith *ad exhæredationem*, and it ſhall be abſurd that the leſſee who hath but a particular intereſt in the land, ſhall have an abſolute property in any thing which was parcel of the inheritance: At the Common Law if Tenant in Dower, or Tenant by the Curteſie cut down trees, he in the reverſion may take them, yet their eſtate is as high as leſſee for life: But the leſſor ſhall not have an Action at the Common Law againſt the leſſee, becauſe it was his own act, and it was his folly to make a leaſe to him who ought to do him fealty, and yet will do Waſt: It was alſo his folly that in his leaſe he would not provide by condition or covenant that he ſhould not do Waſt, or to prevent it by exception. If I leaſe my land for life, and afterwards give the trees, and afterwards the leſſee dieth, yet the donee cannot take them, as it is holden by the whole Court in 21 *H.* 6. 46. *d.* becauſe at the time of the gift the leſſee had the property in them as annexed to the land. And Sir *Chriſtopher Wray* chief Juſtice ſaid a Caſe now of late between *Moyle Finch* Eſquire, and the Lady *Finch* his mother was referred to him and Sir *Roger Manwood* chief Baron, which in effect was, That the Lady *Finch* had an eſtate for life in certain land without impeachment of Waſt, and the ſaid *Moyle* had the inheritance expectant. The Lady *Finch* cut down divers trees
[63] growing upon the land; The Queſtion was, if the ſaid *Moyle* might lawfully take the ſaid trees, or if they of right did belong to his mother; And upon conference with divers other Juſtices they reſolved:

1. That if the ſaid eſtate had been made for life without any ſuch clauſe of without impeachment of Waſt, that without queſtion the ſaid *Moyle* ſhould have the trees, becauſe they were parcel of his inheritance, and what intereſt the tenant for life had in the trees, was by the ſeverance of them from the land determined, becauſe ſhe had them as things annexed to the land.

2. In the ſame Caſe it was reſolved, That the ſaid clauſe of without impeachment of Waſt gave not to the Tenant any greater intereſt in the trees then ſhe had by the demiſe of the land, but it ſhall ſerve only that ſhe ſhall not be impeached in any Action of Waſt, either to recover damages, or the place waſted; As if I grant to one that he ſhall not be impeached for cutting of all my trees in ſuch woods, it ſhall excuſe him in any Action of Waſt brought againſt him for the cutting, but notwithſtanding that the property and intereſt doth remain in me, for no property or intereſt thereof is given from me: So if a man diſſeiſeth me of my land or diſpoſſeſſeth me of my goods, and I releaſe to him all Actions, yet I may enter into my land, or take my goods, for the diſcharge of my Action is no bar of my right; and therewith agreeth *Litt. cap. Releaſes* 115. and all this was ſaid and Reported by the ſaid Sir *Chriſtoper Wray*. *Vide* 27 *H.* 6. *Waſt* 8. where it is ſaid, Where a man leaſeth land *abſque impetitione vaſti*, and a ſtranger cutteth the trees, and the leſſee bringeth an Action of Treſpaſs, he ſhall not recover damages for the value of the trees, becauſe the property is to him in the reverſion, for which the leſſee ſhall not recover but for the cropping and breaking of the Cloſe: And it was ſaid, That if tenant in tail after poſſibility of iſſue extinct cut the trees, the leſſor ſhall have them: for in as much that he hath but a particular eſtate for life in the land, he cannot have an abſolute intereſt in the trees, but he ſhall not be puniſhed in Waſt becauſe his original eſtate is not within the Statute of *Glouceſter cap.* 5.

2. It was reſolved, If the houſe falleth by Tempeſt, or other act of God, the leſſee for life, or leſſee for years hath a ſpecial intereſt to take the Timber to build the houſe again if he will for his habitation: But if the leſſee pulleth down the houſe, the leſſor may take the timber as a thing which was parcel of his inheritance, and in which the intereſt of the leſſee is determined, as in the Caſe of Trees and for the ſame reaſon; and notwithſtanding he may have an Action of Waſt and recover treble damages. *Vide* 44 *E.* 3. 5. & 6. & 44. 29 *E.* 3. 42. 2 *H.* 1. 14. by *Brian.* 10 *H.* 7. 2. 13 *H.* 7. 9. 21 *E.* 4. 52. 1 *Ma. Dier* 90. 2 *Eliz. Dier* 194.

[b] 3. It was reſolved, That if trees being timber be thrown down by wind, the leſſor ſhall have them (for they were parcel of his inheritance) and not the tenant for life or tenant for years: But if they be dotards without any Timber in them, the tenant for life or years ſhall have them. *Vide* 40 *Aſſ.* 22. that Guardian in Knights ſervice ſhall have windfals; and ſo the *Quære* in 7 *H.* 6. 38. well ſatisfied.

The fourth Point was, When the Earl leaſeth the land for years excepting the trees, by which they were ſevered from the poſſeſſion of the land during the term, then after the leſſor granteth the trees to the leſſee, if now they be reunited to the poſſeſſion of the land ſo that when the term endeth the leſſor ſhall have them again as things annexed to the land. And it was reſolved, That the leſſee had in Judgment of Law abſolute and divided property in the trees, ſo that by the leaſe of the land they do not paſs and therefore this difference was taken: If I enfeoff you of all my land (except the trees) to have and to hold to you and your heirs, now the trees in property are divided from the land, although *in facto* they remain annexed to the land, for if he cut them down and carry them away it is not felony: And therefore in ſuch Caſe if the feoffor grant the trees to the feoffee, they are reunited as well in property as they are *in facto*, and the heir of the feoffee ſhall have them, and not the Executors, for the feoffee had abſolute ownerſhip in both, ſo that it is not any prejudice but rather a benefit to him that they are reunited to the land. But in

in the Caſe at Bar he hath but a term for years in the land, ſo that he hath not owelty in ownerſhip in both, and it ſhall be a prejudice to him, that during the term he cannot cut them, but ſhall be puniſhed in Waſt, and after the term he ſhall take them, and it ſhall be againſt reaſon that the leſſor ſhall againſt his grant have them again. It was alſo ſaid, That *Barefoot* and *Luter* were tenants in common of the lands, and they were Joynt-tenants of the trees, and ſo their intereſt divers and of ſeveral qualities, becauſe there cannot be an union of them. *Nicholas Fuller* and *Tanfield* were of Council with the Plaintiff, and *Egerton* the Queen's Solliciter and *Coke* with the Defendant.

Note Reader, *Mich.* 18 & 19. *Devon.* It was adjudged in the Common Pleas, that Waſt may be committed in glaſs annexed to windows, for it is parcel of the houſe, and ſhall deſcend as parcel of the inheritance to the heir, and that the Executors ſhould not have them. And although that the leſſee himſelf at his own coſts put the glaſs in the windows, yet the ſame being parcel of the houſe he cannot take it away, or waſt it, but ſhall be puniſhed in Waſt. And upon the ſaid Judgment a Writ of Error was brought in the King's Bench, and there the Judgment was affirmed.

Note alſo between *Warner* and *Fleetwood*, *Mich.* 41 & 42 *Eliz.* in the Common Pleas, it was reſolved by the whole Court, That glaſs annexed to windows by nails, or in other manner by the leſſor or leſſee cannot be removed by the leſſee, for without glaſs it is no perfect houſe; and by leaſe or grant of the houſe it ſhall paſs as parcel thereof, and that the heir ſhall have them, and not the Executors; and peradventure great parts of the coſts of the houſe doth conſiſt of glaſs, which if they be open to tempeſts and rain, waſt and putrefaction of the timber of the houſe would follow; and therewith agreeth the Judgment given before. [64]

Alſo it was then reſolved, That Wainſcot, be it annexed to the houſe by the leſſor or leſſee, is parcel of the houſe: and there is no difference in Law if it be faſtned by great nails, or little nails, or by ſcrues, or irons put through poſts or walls (as have been invented of late time;) But if the Wainſcot be by any of the ſaid ways, or by any other faſtned to the poſts or walls of the houſe, the leſſee cannot remove it, but he ſhall be puniſhable in an Action of Waſt, for it is parcel of the houſe, and by the leaſe or grant of the houſe, and in the manner as the ſeeling and plaiſtering of the houſe ſhall paſs as parcel of it.

Mich. 33 Eliz.

Fulwood's Caſe.

BEtween *Cartwright* Plaintiff, and *Roberts* Defendant, in an *Ejectione firmæ* of houſes in *London* upon a demiſe made by *Sara Sharrington*, &c. Upon Not guilty pleaded, the Jury gave a ſpecial Verdict to this effect; *Tho Caſtle* was ſeiſed of the houſes aforeſaid, *anno* 1 *Eliz.* took a wife, and afterwards 1 *Eliz.* before the Mayor and Aldermen of *London* acknowledged a Recogniſance of 250 l. to the Chamberlain of the City of *London* and his Succeſſors, according to the cuſtom of Orphanage money: And afterwards, *ſcil.* 8 *Eliz.* the ſaid *Caſtle* came before the Recorder of *London* and Mayor of the Staple, and acknowledged himſelf to owe 200 l. to Sir *Thomas Rivet*, And afterwards *anno* 10 *Eliz.* Sir *Thomas Rivet* ſued Execution upon the ſaid Statute and *Liberate*; upon which the Sheriff delivered the ſaid houſes amongſt others to the ſaid Sir *Thomas* (but it did not appear that the *Liberate* was returned.) And afterwards the Succeſſors of the ſaid Chamberlain ſued Execution in *London* by a Precept in nature of an *Elegit* directed to one *Flick* Serjeant of the Mace, and Officer of the ſaid Court, who by force thereof delivered the ſaid houſes among others for one moity to the Chamberlain aforeſaid. And afterwards *Tho. Caſtle* died, and after his death his wife recovered Dower, and had the ſaid houſes aſſigned her for her third part to hold in Dower, and ſhe died in *anno* 18 *Eliz.* and afterwards the ſaid Chamberlain aſſigned over his intereſt to one *Fulwood*; and afterwards 21 *Eliz.* Sir *Thomas* aſſigned over his intereſt to the ſaid *Fulwood* alſo. *Anno* 29 *Eliz.* the heir of the ſaid *Caſtle* demiſed to *Guilbert Sharington* the ſaid houſes for years, who demiſed them to the leſſor of the Plaintiff, upon whom the Defendant by title derived from the ſaid *Fulwood* did enter, &c. And if the entry of the ſaid Defendant were lawful or not was the Queſtion. And in this Caſe 8 Points were reſolved by Sir *Chriſtopher Wray* chief Juſtice and the whole Court. [b]

1. That whereas it was objected in the Caſe of a ſole Corporation or Body Politick, be ſuch created by Charter or preſcription, as Biſhop, Parſon, Vicar, Maſter of an Hoſpital, &c. no Chattel either in action or in poſſeſſion ſhall go in ſucceſſion, but the Executors or Adminiſtrators of the Biſhop, Parſon, &c. ſhall have them, no more than the heir of a private man can have them; for ſucceſſion in a Body Politick, is as inheritance in caſe of a private body. But otherwiſe it is in Caſe of a Corporation aggregate of many, as Dean and Chapter, Mayor and Cominalty, and the like, for there they in Judgment of Law, never die. And all that was affirmed by the whole Court, 8 E. 4. 1. *e.* & 20. E. 4. 2. by which it was concluded, That the Chamberlain of *London* being a ſole Corporation, that his Succeſſor cannot have the ſaid Recogniſance acknowledged to his predeceſſor; yet it was reſolved, that the Succeſſor ſhould have it, for in this Caſe the Corporation of the Chamberlain was by cuſtom which hath created and made him a Corporation in ſucceſſion as to this ſpecial purpoſe concerning Orphanage: And the ſame cuſtom hath enabled his ſucceſſor to take ſuch Recogniſances, Obligations, &c. which are made to his predeceſſor, and ſuch cuſtom is grounded upon great reaſon, for the Executors or Adminiſtrators of the

Chamberlain

Chamberlain ought not to intermeddle with such Recognisances, Obligations, &c. which by the said custom are taken in the corporate capacity of the Chamberlain, and not in in his private capacity: But a Bishop, Parson, &c. or any sole Corporation which are Bodies Politick by prescription cannot take a Recognisance or Obligation but only to their private, and not in their politick capacity, for there wanteth such custom (as in the Case at Bar) to take a Chattel in their politick or corporate capacity.

2. It was objected, That where the Statute of *West.* 2. *Cap.* 18. which gave the *Elegit* provideth, *Quod de cætero sit in electione illius, &c. quod vicecomes liberet ei omnia catalla, &c. & meditatem terræ suæ, quousque debitum fuerit levatum per rationabile precium & extentum, &c.* That because the Statute gave power expresly to the Sheriff to execute the *Elegit* by reasonable extent, which is to be intended by inquisition of honest men, and for as much as the Sheriff is a great Officer and sworn, that the said Act by any strained construction shall not be extended to a Serjeant at Mace (who is not sworn) to take a Jury, &c. And thereupon the Books in 7 *H.* 6. 35. 14 *E.* 2. *Redisseisin* 9. & 32 *H.* 6. 25. were cited, That
[b] an Action of Wast nor Redisseisin doth not lie in ancient demesn, because the enquiry of the Wast, and the proceeding in the Redisseisin is appointed by the Statutes to be made by the Sheriff, and in ancient demesn there is not any Sheriff, and the Bailiff who is Officer in ancient demesn shall not supply the place of the Sheriff. But it was resolved by the whole Court, that the Execution was well enough. For the Statute which provideth, That process shall be made by the Sheriff, by the equity of the Statute extendeth to every immediate Officer to every other Court of Record of the King, and *eo potius*, because that the Statute of *West.* 2. *cap.* 18. coupleth the *Elegit* with the *Fieri facias*, and limits both to be executed by the Sheriff; and yet without question the Serjeant at Mace in the Case at Bar may execute *Fieri facias*: And it is not like to the Case of Wast, that the Statute of *West. cap.* 14. provideth that *propria persona accedat ad locum vastatum*; So that the personal appearance of the Sheriff is requisite, as in the Case of Redisseisin, The Sheriff is Judge, and therefore not like.

3. Where it was further objected, That the Execution upon *Elegit* was not lawful, for as much Sir *Thomas Rivet* was in by matter of Record whereof he ought to take notice, and to have a *Scire facias* against him, in proof of which the Books in 9 *E.* 4. 24. *c.* & 2 *R.* 3. 8. *Simpson*'s Case was recited. But it was resolved by the whole Court, That the Execution upon *Elegit* was good enough: But it was said That if the Sheriff had returned the former Execution by extent, and the matter had appeared to the Court, the Plaintiff ought to have had a *Scire facias*; But the whole Court said, That if the Sheriff's Execution it is good enough; see for that 22 *E.* 3. 7. *f.*

4. It was objected, That there was no Statute or Recognisance in the nature of a Statute sufficiently found, for the Jurors have found, That the said *Tho. Castle, Veniebat coram R. O. Recordatore civitatis London, & Tho. O. majore stapulæ, & recognovit se debere Tho. Rivet militi* 200*l.* and doth not say, *cundum formam Statuti, &c. nec per scriptum obligatorium, &c.* where the Statute of 23 *H.* 8. provides that it shall be by Bill Obligatory sealed with three seals. But it doth not appear by the Verdict, that there was any Bond or any Seal, neither doth it appear by any word of the Verdict, that it was according to the Statute, &c. And it was said, that although that Verdicts being the words of Lay men shall be taken according to their meaning, and there need not be so precise form in them as in pleadings, yet the substance of the matter ought to appear either by expres words, or words equipollent, or which amount to so much, so that there ought to be convenient certainty, the which if it be false the party by such falsity may have his attaint: But it was resolved, That the Verdict is good enough, for in as much as they have found a Recognisance befor the Mayor and Recorder, &c. it shall be in a Verdict of Law intended according to the Statute, for otherwise they cannot take any Recognisance; and also all the form of the Verdict doth imply, That this was a Recognisance in the nature of a Statute, or otherwise no Execution could be sued thereupon in the Chancery.

[66] 5. It was objected, When the Wife of the Conusor doth recover Dower, and because the possession of the conusee was evicted, and also when a greater term in the moiety is evicted by force of the Dower then the conusee had; for (for example) the extent upon the Statute if no eviction had been incurred is 13 years; and the moity which was evicted by the *Elegit* shall be subject unto Execution by force of the *Elegit* for 15 years; so that a greater term was evicted by the *Elegit*, and a greater estate was recovered by the Writ of Dower than the Conusee had, and therefore he shall be put to his *Scire facias* upon the Statute of 32 *H.* 8. *cap.* 5. for otherwise will follow great mischief, for if the conusee should hold over after the death of the tenant in Dower, and after the extent upon the *Elegit* incurred, then during the life of the tenant in Dower, and during the Execution upon the *Elegit* the conusee might sue a new Execution of the said Statute, and so have double remedy, which never was the intention of the Statute. But it was resolved by the whole Court that in this Case the conusee cannot have any help of the said Statute, for tho as much as but part was evicted, *scil.* the moiety upon the *Elegit*, the conusee shall not only hold over the other moity, but also after the death of the tenant in Dower, and the extent upon the *Elegit* ended, he shall reenter into the land so evicted, because he is not helped by the said Act, for the said Act doth not help any, but when the Conusee is put clearly without remedy to obtain any part of his debt: As where all the Execution is avoided by title paramount for ever. And that appeareth by the expres words of the preamble, for the words of the preamble are; By reason whereof the obligees recognisees and recoverors have been thereby set clearly without remedy by any any manner of suit of Law. And the body of the Act doth refer to the preamble, *scil.* such lands, &c. In the body of the said Act it is said, Any such lands, tenements or hereditaments, as be or shall be had or delivered in extent, and doth not say, Or any part thereof. And it is provided that new execution shall be done for the levying of the residue of all such debt and damages as then shall appear to be unlevied, &c. And that cannot be when but parcel of the land extended is evicted; for by the Common Law the conusee in such Case is not without remedy, but the conusee shall hold the residue of the land over, till the residue

of the debt ſhall be ſatisfied; and therefore if he ſhall have his remedy alſo upon the Statute, he ſhall have double remedy or ſatisfaction, which ſhall be inconvenient: And if the conuſee hath remedy either *in præſenti* for part, or *in futuro* for all, or part, the ſaid Act of 32 *H.* 8. doth not extend unto it.

6. It was objected, That when Sir *Tho.* had Execution (for example) of 4 houſes, and the extent of that by courſe of time would endure for 13 years, and afterwards two of the ſaid houſes are evicted by *Elegit* for 15 years, and afterwards Sir *Tho. Rivet* aſſigneth over all his intereſt in the Execution upon the Statute to *Fulwood*, that this aſſignment as to the two houſes ſo evicted was void, for in that a greater term was evicted than the conuſee had for the moity, and then at moſt the conuſee had not but a poſſibility which cannot be aſſigned over. And a Caſe of late adjudged in the Common Pleas was cited, which was ſuch in effect; A man poſſeſſed of a term for divers years, deviſed the profits thereof to one for life, and after his deceaſe to another for the reſidue of the years, and died, the firſt deviſee entred by the aſſent of the Executor, and afterwards he in the remainder during the life of the firſt deviſee aſſigned it to another, and afterwards the firſt deviſee died; it was adjudged that the aſſignment was void, for he in the remainder hath but a poſſibility during the life of the firſt deviſee; for it is as much in Law, as if the land had been deviſed to him for ſo many years as he ſhould live, or for all the term if he ſhould live ſo long, ſo that the intereſt of the term *ſub modo* is in him, and the other in remainder hath but a poſſibility which he cannot grant over: But it was reſolved, That in the Caſe at Bar, the conuſee had an intereſt in the two houſes which were evicted, for it was agreed by them, that if a man be bounden in two Statutes, and the latter Statute is firſt extended and delivered in Execution, and afterwards the firſt Statute is put in Execution for greater time, and for a greater ſumm than the firſt Statute, yet when the firſt Statute is ſatisfied, and his intereſt lawfully determined, the ſecond conuſee ſhall have the land again by force of the firſt extent: And ſo in the Caſe at Bar, when a moity was evicted for 15 years by force of the *Elegit* now by computation the conuſee of the Statute ſhall hold the other moity for 15 years, and after the 15 years expired the whole land until the whole debt upon the Statute be ſatisfied: So that it is not a poſſibility, nor ſo uncertain but that by computation it may be by reaſonable intendment made certain: *Et id certum eſt, quod certum reddi poteſt:* And although that caſualties and ſudden adventures may happen, yet *Caſus fortuitus non eſt ſperandus, & nemo tenetur divinare.* It was alſo reſolved, that if the conuſee be ouſted by wrong by the conuſor, or any other who hath immediate eſtate, that the conuſee ſhall hold over. So when the wife of the conuſor recovereth Dower, the conuſee ſhall hold over, for ſhe claimeth by her husband. The ſame Law if a man make a leaſe for life or years, and afterwards diſſeiſeth his leſſee for life, or putteth out his leſſee for years, and acknowledgeth a Statute or Recogniſance upon which execution is ſued, and afterwards the leſſee for life entreth and dieth, or the years expire, the conuſee ſhall reenter and hold over. And ſuch eviction for a time is not within the Statute of 32 *H.* 8. becauſe that the conuſee hath remedy *in futuro.* [b] [67]

7. It was objected, That for as much as the *Liberate* was not returned, execution was not lawfully done, for for as much as Tenant by the Statute Merchant is Tenant by matter of Record, it behoveth that the *Liberate* be returned, or otherwiſe he ſhall be Tenant by matter in *fait* in *pais*, and not by matter of Record. Alſo the *Liberate* ought to be returned, or otherwiſe the time of the *Liberate* made doth not appear, and the term of the conuſee ſhall begin from the time of the *Liberate* executed, which ſee 33 *H.* 8. *tit. Statut.* 41. 2. It appeareth by the *Liberate* that the conuſee ſhall be ſatisfied for all his coſts and damages *quæ tunc, ſcil. tempore* of the delivery of the land of the conuſee *ſuſtinuit*, ſo that the time of the delivery is material and ought to appear of Record. 3. If the Terre-tenant ſhall be driven to ſue a *Scire facias* after the extent incurred by courſe of time, the *Liberate* ought to appear of Record, ſo that all appear to the Court that the time is paſt. 4. It was ſaid, that it ſhall be dangerous to purchaſors, for they cannot know of the execution by any ſearch, if the execution doth not appear of Record: But it was reſolved by the whole Court, that the execution of the *Liberate* was well enough, although the Writ were not returned, for the Writ is not conditional, but hath theſe words, *Et qualiter hoc præceptum, &c.* And it is ſtronger than the *capias ad ſatisfaciendum*, for there are words conditional, and yet the execution good although that the Writ be not returned: So of *Habere facias ſeiſinam* and generally of all Writs of Execution which are more final proceſs, and after which no judgment is to be given, nor no farther proceſs had. *Vide Paſch.* 13 *Eliz.* between *Borley* and *Borley*, 17 *Aſſ.* 24. 32 *E.* 3. 10. *tit. Scire facias*, 19 *E.* 3. *Scire fac.* 120. 20 *H.* 6. 24. 21 *H.* 6. 5. *b.* 11 *H.* 4. 57. *b.* But it was ſaid, that this Caſe was not like to the Caſe of *Elegit*, or where an inquiſition was to be taken, for there the Writ ought to be returned, to the intent the Court may judge upon the ſufficiency or inſufficiency of that inquiſition; But it was agreed clearly, That where no Inqueſt was to be taken, but only land to be delivered, or ſeiſin had, or goods ſold, &c. which were but matters in fait, theſe are good although the Writ be not returned: But every Inqueſt taken by the Kings Writ ought to be of Record, and not averrable by the Country.

8. It was objected, that after the extent upon the Statute Staple incurred by courſe of time, the conuſor may enter, and ſhall not be put to his *Scire facias*; for although that the damages and coſts are incertain, yet the Judges ought to adjudge and take knowledge of them, for firſt the time of the conuſans of the Statute appeareth, and for what time the debt was withholden till the *Liberate*, ſo that they may well judge of the damages and coſts; and therefore when by courſe of time as well the debt as the coſts and damages, and greater ſumm is levied, the conuſor may enter. And difference was taken when the extent doth incurr by effluxion of time, and when by caſual profit; for when it is ſatisfied by caſual profit, he ought to have a *Scire facias*, but in the other Caſe he may enter. And to this intent Books in 32 *E.* 3. *Scire facias* 101. 11 *H.* 6. 7. 9 *E.* 4. 50. 2 *R.* 2. *Execution* 17. 15 *H.* 7. 15. were cited. And ſee 30 *H.* 6. 1. *b.* 38 *E.* 3. 10. 14 *H.* 4. 9. That in debt the Court may aſſeſs coſts and damages without any enquiry for the cauſe aforeſaid. But it was reſolved by the whole Court, That in the Caſe at Bar the [b]

conuſor cannot enter, for the conuſee ſhall hold the land not only till he be ſatisfied for damages and the detainer of the debt, and for coſts of ſuit, but alſo for his reaſonable labours and expences. For the entry thereof is, *Tenendum ut liberum tenementum, &c. quouſque debitum præd' una cum damnis & coſtagiis ſuis neceſſariis & rationabilibus, ut in laboribus, ſectis, dilationibus, & expenſis, &c.* the which are incertain. And for as much as they are incertain, and the conuſee in by matter of Record, reaſon will that the conuſor bring a *Scire facias* againſt the conuſee before that his eſtate ſhall be defeated: Alſo the Court of Chancery which awardeth the Extent and *Liberate*, ſhall adjudge of the reaſonableneſs of the coſts, damages, labours, expences, &c. as any other Court.

And it was agreed by all, That in Caſe of *Elegit* the conuſor after ſatisfaction had may enter, for he ſhall not have coſts nor other thing, but only the land until the debt be ſatisfied; and becauſe that all is certain, the conuſor after the Extent expired may enter: *Vide* the Statute *de Mercatoribus*, 13 *E.* 1. the Statute of *Acton Burnel*, and the Statute of 27 *E.* 3. for coſts and damages upon the Statute Staple. And Judgment was given againſt the Plaintiff.

William Daniel, *James Dalton* and others were of Council with the Plaintiff, and *Edward Coke* and others with the Defendant.

Trin. 33 Eliz. *in the Common Pleas.*

Hynde's Caſe.

[*b*] *Richard Libbe* Eſquire brought an Action of Waſt againſt *Elizabeth Hynde*, and counted that *William Hawe* was ſeiſed of an houſe called *Place*, and certain lands in *Goring* and *Whithurch* in the County of *Oxford*: And 4 *Julii*, 29 *Eliz.* by his deed indented demiſed the Tenements aforeſaid to *Robert Garrard* from the Feaſt of *Chriſtmas* then paſt for 16 years, who 20th *Auguſt* the ſaid 29th year aſſigned his intereſt to the Defendant. And that the ſaid *William Hawe* 7 *Maii*, 30 *Eliz.* by deed indented and inrolled in the Court of Common Pleas, the ſaid 30th year (within ſix months according to the form of the Statute) for the conſideration of 120 l. bargained and ſold the ſaid reverſion to the ſaid *Libbe* now Plaintiff in fee, and aſſigned the Waſt in digging of clay, &c. The Defendant confeſſed that *William Hawe* was ſeiſed of the ſaid land, and that he by the ſaid Indenture demiſed unto *Robert Garrard*, and that he aſſigned to the ſaid *Elizabeth prout*, *&c.* But he further ſaid, that after the ſaid 7 *Maii*, in the ſaid 30th year, and before the ſaid Indenture of Bargain and Sale was enrolled, the ſaid *William Hawe*, 15 *Paſch.* in the ſaid 30th year did levy a fine of the tenements aforeſaid to the ſaid *Richard Libbe* now Plaintiff, after which fine levied, *ſcil.* 29 *Aprilis* in the ſaid 30th year, the ſaid deed was enrolled in the ſaid Court of Common Pleas, And further the Defendant ſaid, that ſhe never attorned; And upon this Plea the Plaintiff did demurr in Law: And in this Caſe two Points were moved.

1. If the conuſee of the fine after the ſaid Deed indented and enrolled ſhall be ſaid in by the fine, or by the bargain and ſale, for if he ſhall be adjudged in by the fine, no Action of Waſt lieth before attornment. [71] And if he ſhall be in by the Indenture enrolled, then there needeth no attornment. And it was reſolved by Sir *Edmund Anderſon* and his Companions Juſtices of the Common Pleas, That when *Hawe* by deed indented bargained and ſold the reverſion to *Libbe* and his heirs, and before the inrolment levied a fine to *Libbe* and his heirs, and afterwards the deed is inrolled within the ſix months, that the conuſee ſhall be in by the fine, and not by the Indenture inrolled; for when the fee ſimple paſſeth by the fine to the conuſee and his heirs, the enrolment of the deed indented afterwards cannot deveſt and turn the eſtate out of himſelf, which was abſolutely ſetled in him by the fine; for then where he was in before the *Per*, he ſhall be now in the *Poſt*. Alſo when the Common Law and Statute Law concurr, the Common Law ſhall be preferred: And it is true that the inrolment ſhall have relation to the delivery of the deed, but that is for the avoiding of mean eſtates or charges made to a ſtranger by the bargainor after the delivery of the deed, and before the inrolment, but not to deveſt any eſtate lawfully ſetled in the *interim* in the bargainee himſelf. And the Statute of 27 *H.* 8. of *Inrolments*, ſpeaketh by bargain and ſale only, and here it is not by bargain and ſale only, but the eſtate is paſſed originally by the fine.

The other Point was, Whether the Defendant ſhall be in this Caſe admitted to aver when the deed was inrolled, *ſcil.* ſuch a day after the fine levied, and before the inrolment; And it was objected:

1. In the Caſe at Bar it ſhall be intended in Law, That the deed was inrolled the firſt day of the ſaid *Eaſter* Term, for the Term as to divers purpoſes is but one day in Law, and ſo much the rather becauſe it doth not appear by the Record what day of the Term the deed was enrolled, and therefore it ſhall be intended to be inrolled the firſt day of the Term.

2. It was objected, That Records (for the avoiding of infiniteneſs which the Law abhorreth) are ſo high and ſacred that they carry in themſelves unviolable truth, which if any dare to deny, the Law attributeth ſo great honour and credit to them that they ſhall be tried only by themſelves, and not by the Country: But if this averment ſhall be ſuffered, then the effect and validity of the Record ſhall be tried by the Country, which ſhall be againſt the rule of Law.

3. It was objected, That it ſhall be miſchievous to allow of ſuch nice averment, and it ſhould trench to the diſenheriſon of many to draw in queſtion the times of all inrolments of bargains and ſales; for if the

the beginning of the Term was within the 6 months, and the end thereof after the 6 months, by such averment after long poſſeſſion when witneſſes are dead the eſtate of the land may be drawn into queſtion, which ſhall be a perilous and dangerous preſident, and principally in theſe days in which ſubordination of Perjury doth abound. But it was reſolved by the whole Court, that the averment was good and lawful.

And to the firſt Objection it was anſwered and reſolved by the whole Court, That it is true that it ſhall be intended by preſumption of Law, that the deed was enrolled the firſt day of the Term: But *Stabit præſumptio donec probetur in contrarium.* And becauſe the Plaintiff by his demurrer hath confeſſed the [b] inrolment to be after the Term, for this cauſe the preſumption doth vaniſh and become of no force, and the mutual conſent and confeſſion of both parties ſhall ſtand.

To the ſecond Objection it was anſwered and reſolved by the whole Court, That it is true that Records import much truth in themſelves, and conclude all men to ſay any thing appearing within the Record, as antidate, &c. *Vide* 37 *H.* 6. 21. *Plow. Com.* 7 & 8 *Eliz. Dier* 242. But to take averment which ſtands with the Record, and which doth not impugn any thing apparent within the Record the Law doth well admit and allow: As againſt a fine upon releaſe, to ſay that the conuſee had nothing in the land at the time of the fine levied, as it is holden in 16 *H.* 7. So againſt the King's Letters Patents under the great Seal ſhewed in Court there is no denial of them, but *Non conceſſit per prædictas literas Patentes*, is a good plea, for although there be Letters Patents, yet perhaps nothing doth paſs by them, and ſo *per conſequens non conceſſit.* And although that inrolment, or other matter of Record ſhall not be tried by *pais*, yet the time when the inrolment was made, ſhall be tried by Jury, for the inrolment it ſelf ſhall never be drawn into queſtion (for that is agreed on both parties) but only the time of it, as in the other Caſe where one pleads a grant of the King by his Letters Patents under the great Seal, and the other pleadeth *non conceſſit per præd' literas Patentes*, in this Caſe the Letters Patents are confeſſed, but the effect and operation of them denied, and therefore the trial ſhall not be where the Letters Patents bear date, but where the lands lie, as it was adjudged. So if Profeſſion be denied, it ſhall be tried by the Spiritual Court, but if the time of the Profeſſion be in iſſue, it ſhall be tried by Jury, as it is holden in 9 *H.* 7. 2.

To the third objection it was anſwered and reſolved by the whole Court, That if ſuch averment ſhall not be admitted, great injuſtice ſhall be protected, and great inconvenience will follow on the other ſide; For put Caſe (as hath been ſaid) that the beginning of the Term be only within the ſix months, and in truth the inrolment were towards the end after the ſix months, if ſuch averment ſhall not be received, the bargainor ſhould be diſ-inherited without truth and juſtice, and no inconvenience can riſe on the other ſide, for, for the preſumption of Law (as it hath been ſaid) he who ſtriveth to avoid the bargain, ought to make manifeſt truth thereof, for *actori incumbit onus probandi*: And as to fear of perjury, *Nullum* [72] *iniquum eſt præſumendum in jure*; and theſe days are not to be tainted with ſuch infamy of abundance of perjury as hath been ſurmiſed; and commonly thoſe who have moſt corrupt conſciences, are oftentimes moſt ſuſpicious, and moſt complain of the times.

Thirdly, It was ſaid by ſome of the Juſtices, That if it be admitted that the inrolment ſhall be preſumed to be made in 15 *Paſchæ*, and that at the ſame time the fine alſo was levied, that then the bargainee ſhould have election to have the reverſion by the one or the other: But in reſpect of the former Reſolutions, this Point was not reſolved by the Court.

Paſch. 38 Eliz. *in the King's Bench.*

Borough's Caſe.

BEtween *Boroughes* and *Taylor* the Caſe was; The Queen made a leaſe for years rendring rent payable [b] at her receipt of her Exchequer at *Weſtminſter*, *ſeu ad manus Ballivorum ſeu Receptorum*, &c. with the uſual condition to be void for the non payment of the rent; And afterwards the Queen granted over the reverſion to another and his heirs; And whether ſhe ſhall demand the rent to take advantage of the Condition was the Queſtion upon the ſpecial Verdict. And it was moved that the demand ought to be made at the receipt of the Exchequer, for that is the certain place appointed in the leaſe, and principally becauſe that *Weſtminſter* is added, and therefore of neceſſity it ought to be demanded there and not upon the land; and although that the reverſion be granted over, yet it doth not alledge the place where the rent ſhall be paid. As if a common perſon make a Leaſe of his Mannor of *D.* rendring rent to be paid at his Mannor of *S.* with Condition for non payment, and afterwards he granteth over the reverſion of the Mannor of *D.* yet the grantee ought to demand his rent at the Mannor of *S.* And although it be further ſaid, *ſeu ad manus Ballivorum ſive receptorum*, yet for as much as the ſame is for the benefit of the leſſee, and he hath election either to pay it at a certain place, or to the Bayliff or Receiver of the leſſor, and for as much as the ſaid words are words of abundance, for the Law doth imply them, although they were omitted, and becauſe the Condition is here penal to the leſſee that he ſhall loſe his intereſt, for theſe cauſes the Law doth require that the Patentee ought to make demand upon the land, and not elſewhere. And therefore if a common perſon maketh a leaſe for years of the Mannor of *D.* rendring rent at his Mannor of *S.* without condition of reentry, if the rent be not paid at the place aforeſaid, or to

the Law doth imply them, although they were omitted, and becauſe the Condition is here penal to the leſſee that he ſhall loſe his intereſt, for theſe cauſes the Law doth require that the Patentee ought to make demand upon the land, and not elſewhere. And therefore if a common perſon maketh a leaſe for years
[73] of the Mannor of *D.* rendring rent at his Mannor of *S.* with condition of reentry, if the rent be not paid at the place aforeſaid, or to the hands of the leſſor himſelf, in this Caſe for the Cauſes aforeſaid, the demand ought to be made at the Mannor of *S.* and chiefly becauſe the ſaid words are abundant, and no more than the Law without them would have implied, for which cauſe it was ſtrongly urged and concluded, that in the Caſe at Bar the demand ought to be made at *Weſtminſter*, at the place where the receipt of the Queen's Exchequer is kept: But it was adjudged by *Popham* chief Juſtice, *Clench*, *Gawdy* and *Fenner* Juſtices, That in the ſaid Caſe the demand ought to be made upon the land: And in this Caſe divers Points were reſolved by the Court.

1. If in Caſe of a common perſon the rent reſerved upon the demiſe be paiable at a place of the land, that he who will take advantage of a Condition for not payment of ſuch rent, ought to demand the rent at the place where it is appointed to be paid; for the limitation of the payment of the rent of the land, doth not alter the nature or quality of the rent, nor of any thing incident to it, but it is to all intents a rent going out of the land, and not any ſumm in groſs, for it ſhall paſs with the reverſion as incident to it, and ſhall be ſuſpended by entry of the leſſor into any part of the land leaſed, and ſhall be apportioned by recovery of part in Waſt, or entry in part for forfeiture, &c. and have other qualities of a rent in the ſame manner as if it had been payable upon the land. And therefore the opinion in *Kidwelly's* Caſe in *Plow. Comm.* 70. that he in the reverſion may enter for non payment of the rent without any demand made, was utterly denied by all the Court in this Caſe. And the Juſtices ſaid, that it had oftentimes been adjudged to the contrary.

2. When the Queen maketh a leaſe rendring rent with Condition *ut ſupra*, the Queen ſhall take advantage of the condition without any demand; But when ſhe granteth the reverſion over, her grantee ſhall not take advantage of the Condition without a demand; for the reaſon that the Queen ſhall take advantage of the Condition without demand was not in reſpect of the nature or quality of the rent, or that the Law doth adjudge that ſuch rent reſerved to the Queen was not at all demandable, but that the leſſee in ſuch Caſe ought to do the firſt act, *ſcil.* either to pay or tender the rent; for it was reſolved by the Court, that as long as the reverſion and rent continue in the Queen the Law doth diſpence with the demand as a thing undecent and againſt the dignity of the Queen, to attend upon her Subject to make a demand of him; But the Law (which willeth that always decorum and conveniency be kept) appointeth the Subject to attend upon his Soveraign, and in ſuch Caſe to do the firſt act, although it be in Caſe of a Condition, which trencheth to the deſtruction of his eſtate, but the ſame is but a perſonal prerogative annexed to the perſon of the King, and not in reſpect of the nature or quality of the rent; and therefore if he granteth the reverſion over, the grantee ſhall not take advantage of the Condition without demand of the rent.

[b] The third Point (the great doubt of the Caſe) was, That it was reſolved in this Caſe, that the Patentee ought to make the demand upon the land; and their principal reaſon was grounded upon a Rule in Law, *ſcil.* That the expreſſion of a clauſe which the Law implies, works nothing. *Expreſſio eorum quæ tacite inſunt nihil operatur, & expreſſa non proſunt, quæ non expreſſa proderunt*: And yet as *Littleton* ſaith, it is well done to put in ſuch clauſes to declare and expreſs to Lay men which have no knowledge of the Law, what the Law is in ſuch Caſes: As in 30 *Aſſ.* 8. a Leaſe is made to two for term of their lives, (this clauſe being added and expreſſed, *& diutius eorum viventi*) and afterwards they made partition, and one died, and he in the reverſion entred, and his entry adjudged lawful notwithſtanding the ſaid words, *& diutius eorum viventi*, for without them ſo much was *tacite* implied by the Law. *Vide* 17. E. 3. 7. *John Hull's* Caſe. 27 H. 8. *tit. Office Br.* 17. in Caſe of an Act of Parliament, 2 H. 7. 9. in Caſe of a *Liberate*, *Plow. Comm.* 445. & 486.

And it was reſolved, That if the King make a leaſe for years rendring rent, without appointing any place, or to whoſe hands it ſhall be paid, that the leſſee ought to pay the ſame at the receipt of the Exchequer, or at leaſt to the Kings Bailiffs or Receivers which the King hath authoriſed to ſuch purpoſe. And therefore the ſpecial and uſual limitation of payment of rent in ſuch Caſes at the receipt of the Exchequer, or to the hands of the Bailiffs or Kings Receivors, &c. importeth no more than the Law without them would have implied, and therefore *nihil operatur* by ſuch words; and although the ſaid clauſe is *ad receptum Scaccarii, &c. apud Weſtm'*, yet they being affirmative and declaratory, it is not neceſſary that the receipt be always holden at *Weſtminſter*, for if the receipt be at another place, the rent is to be paid there; for as to this Point the Law would have implied that which is expreſſed. *ſcil.* as to *Weſtminſter*, and more, *ſcil.* at what place ſoever the receipt be kept.

Then the principal Caſe, If the rent had been reſerved generally, the Patentee ought to have demanded it upon the land, and by conſequence ſo ought it to be done in the Caſe at Bar. And it was ſaid, as the Law hath appointed the receipt of the Exchequer to be the place where the King's Revenues ſhall be received; ſo in the caſe of a common perſon, the Law hath appointed the land where his rent (if no place by mutual agreement of the parties be appointed) ſhall be paid, and that is, upon the land demiſed, and there he ought to make the demand.

Hill. 39 Eliz. *in the Kings Bench.*

Palmer's Caſe.

[74]

BEtween *Palmer* Plaintiff, and *Umphrey* Defendant in the Kings Bench, it was reſolved by the whole Court, That if a *Fieri facias* cometh to the Sheriff to levy the money of the goods and chattels of the Defendant, and the Sheriff by writing reciting that the Defendant hath a leaſe for term of years (and ſheweth which) and ſuppoſing that the ſame began 2 & 3 *Phil. & Mar.* (as it was in the Caſe at Bar) where in truth the term began 3 & 4 *Phil. & Mar.* ſell the ſame term, the ſale is void, for there is not any ſuch term; But notwithſtanding this falſe recital, if the Sheriff ſell alſo all the intereſt which the Defendant hath in the ſame land (as alſo in the Caſe at Bar he did) the ſale is good. And *Popham* chief Juſtice ſaid, That in this very Court, *anno 26 Eliz.* between Sir *George Sidnam* and *Rolles* the Caſe was ſuch; The Sheriff in the like Caſe reciting that *Rolles* had a term in a Parſonage *pro termino diverſorum annorum extunc ventur'*, ſold the ſame by force of a *Fieri facias* to another, and the ſame was adjudged good. For by common intendment the Sheriff cannot have preciſe knowledge of the certainty of the beginning, and the certainty of the end of the term; But if he take upon him to recite the term and miſrecite the ſame, and ſelleth the ſame term, it is void; but if he ſelleth all the intereſt that the Defendant hath in the land, the ſame is good notwithſtanding the miſrecital as aforeſaid, for accordingly it was adjudged *M. 32 & 33 Eliz.* in the Exchequer, that where it was found by inquiſition that the Queens debtor was poſſeſſed of certain lands *pro termino quorundam annorum adtunc ventur'*, that this inquiſition was inſufficient, for a term cannot be extended, without ſhewing the beginning and certainty of the term, and the cauſe is this, becauſe that after the debt is ſatisfied the party is to have his term again, if any part thereof remaineth, which ought to appear, and thereupon the party may have remedy to remove the Queens hands or other parties. But in the Caſe of a ſale upon the *Fieri facias*, the [b] Sheriff may ſell all the intereſt or term which the Defendant hath in ſuch land, and never mention it in his return, but generally, *quod fieri fecit de bonis & catallis, &c.* But if the Execution in the principal Caſe ſhould be levied, the ſame ſhould tender to the ſubverſion of a poor man who made his complaint to the Court: The Attorney General coming into the Court at the requeſt of the poor man peruſed the Record, and found that the Execution was by force of an *Elegit*, which ought to be made by inquiſition; for the Statute of *Weſtm. 2. cap.* 18. which giveth the *Elegit*, provideth, *Quod Vicecom' liberet ei omnia catalla, &c. & medietatem terræ ſuæ, quouſque debitum fuerit levatum per rationabile precium* (which referreth to Chattels) *& extentum*, which referreth to land, and *rationabile precium*, and extent ought to be found by inquiſition and verdict, for the ſame is implied in Law, and the Court as the Law appointeth, although it be not ſo expreſſed, *vide* 10 *E.* 4. 11. 7 *R.* 2. *Barr* 241.

Proof is intended trial by verdict, and therewith agreeth 2 *Ma. Dier* 100. that the extent and appriſement ought to be *per ſacramentum duodecim*, and not by the Sheriff, and many precedents: And becauſe that the term was miſrecited in the inquiſition, and the term ſo miſtaken was appriſed by it, and the Sheriff cannot ſell any term but that only which was appriſed by the Jurors of Enqueſt; for this cauſe he moved the Court, that the ſale was utterly void, and ſo was the opinion of the whole Court; and Judgment was given accordingly.

Trin. 39 Eliz. *in the Kings Bench.*

Holland's Caſe.

[75]

WIlliam *Armiger* was Plaintiff in a Prohibition againſt *William Holland* Parſon of *Northcreak* in the County of *Norfolk*, and declared, That *Matthew* Biſhop of *Wincheſter* collated by Laps *John Meye* to the ſaid Church of *Northcreak*, who was therein inducted, and further had the moity of the Church of *Daresfield* in the County of *York*: And afterwards 17 *Auguſt*, 19 *Eliz.* he was nominated and elected to be Biſhop of *Carliſle*; after which election, and before conſecration and inſtallation into the ſaid Biſhoprick, *ſcil.* 18 *Auguſt* 19 *Eliz.* the Queen by her Letters Patents, *De gratia ſua ſpeciali, ac ex certa ſcientia, & mero motu ſuis conceſſit, & licentiam & poteſtatem dedit præfat' J. Meye, quod ipſe in ipſam Eccleſiæ Cathedralis Carl' conſecrat' procuret & obtineret; Necnon realem, actualem & corporalem poſſeſſionem, &c. recipere & obtinere, & nihilominus præd' medietat' dictæ Rector' de Daresfield, ac Rectoriam de Northcreak, una cum dicto Epiſcopat', quamdiu eidem Epiſcopatui præeſſet, retinere, & poſſidere, ac fructus & emolumenta inde quamdiu eidem Epiſcopatui præeſſet in ſuos proprios uſus convertere, &c.*

And

And afterwards *29 Septemb. 19 Eliz.* was conſecrated and inſtalled into the ſaid Biſhoprick, and was and yet is Biſhop of the ſame See; And the Plaintiff claimed a leaſe for years of the ſaid Rectory of *Northereak* by force of a leaſe made by Indenture by the ſaid Biſhop 1 *Maii*, 20 *Eliz.* for a term of years yet enduring; and that the Defendant of late being preſented by Laps by the Queen, pretending the [b] ſaid Queens Letters Patents made by the ſaid *Jo. Meye* were void, did ſue for Tithes in the Spiritual Court. And the Defendant to have a Conſultation ſaid, That the ſaid Church of *Northereak* at the time of the induction of the ſaid *John Meye* was and yet is *Benefic' cum cura animarum, & ultra annuum valorem* 8 l. *viz.* 8 l. 10 s. And afterwards the ſaid *John Meye* accepted the moity of the ſaid Church of *Daresfield*, and was inſtituted and inducted thereto: And the pleading was, *ad medietatem Rectoriæ*, where it ſhould be *ad Rectoriam medietatis, &c.* (but was taken by the Court to be all one) and that the ſaid Church of *Daresfield* was *Beneficium cum cura animarum*, and confeſſed the ſaid Letters Patents *prout*; and concluded that *prætextu præmiſſorum*, the Church of *Northereak* became void, and title to preſent by Laps came to the Queen, who preſented the Defendant to the ſame 15 *Feb.* 1492. and made no mention of the Act of 21 *H.* 8. *cap.* 13. in his plea; and upon this plea the Plaintiff did demurr in Law. And in this Caſe two Points were reſolved.

1. That before the Statute of 21 *H.* 8. if one had a Benefice with Cure, and accept another Benefice with Cure, that the firſt Benefice was void, but it was not an avoidance by the Common Law, but by the conſtitution of the Pope, of which avoidance the Patron might take notice if he would, and might preſent if he would without any deprivation or reſignation; but becauſe the avoidance did accrue by the Eccleſiaſtical Law no Laps did incur without notice, as upon deprivation or reſignation, and yet the Patron might preſent, and take upon him notice if he would; ſo that for the benefit of the Patron the Church is void in the principal Caſe, but not for his diſadvantage. And according to this difference it is adjudged in *Hill.* 24 *E.* 3. 33. that in a *Quare Impedit* brought by the King againſt the Biſhop of *Worceſter*, it was a good title for the King that the predeceſſor of the Biſhop preſented to the ſame Church one *A.* who afterwards accepted another Benefice, by which acceptance the Church in queſtion was void, and remained void till the temporalities of the Biſhop came to the Kings hands, and ſo it belonged to him: And the King upon this title by award of the Court had a Writ to the Biſhop, which proveth that Church was void in *facto* without any deprivation, and that the King might by Law preſent his Clark; and therewith agreeth the Books in 9 *E.* 3. 22. 10 *E.* 3. 1. 14 *H.* 7. 28. *b.* 14 *H.* 8. 17. *F. N. B.* 34. And it is ſaid in 10 *E.* 3. 1. that in ſuch Caſes both Churches ſhall be void; and by *Pening* the Conſtitution of Plurality is a general Judgment, that all ſhall be deprived who hold many Benefices with Cure above one month after the inſtitution; and ſtronger binds them upon deprivation then particular Judgment of any perſon, for a particular deprivation may be avoided by appeal, and the other not. But ſome opinions are in 5 *E.* 3. 9. & 11 *H.* 4. 37. that the Church is not void without deprivation; but that may be underſtood for the diſadvantage of the Patron, for, for his advantage it is void as is aforeſaid, and ſo all the Books are well reconciled, ſo that the Statute of 21 *H.* 8. is but an affir- [76] mation and confirmation of the Common Law in this Point: But now for as much as it is affirmed by Act of Parliament, if the firſt Benefice be of the value of 8 l. by the year, the Patron at his peril ought to preſent to it, for in as much as it is an avoidance by Parliament every one ought to take notice of it at his peril, but otherwiſe it is if the firſt Church be not of the yearly value of 8 l. for then it is void meerly by the Eccleſiaſtical Law, whereof the Patron is not to take notice at his peril as before is ſaid.

2. It was reſolved by the whole Court that the ſaid Act of 21 *H.* 8. was ſo general an Act that the Judges (although it be not ſet forth in pleading by the party) ought to take notice of it *ex officio*.

Note Reader, the Rule of the Law is, That of general Statutes the Judges ought to take notice, although they be not pleaded, otherwiſe of ſpecial or particular Statute. And for the better underſtanding of our Books in this Point, and which ſhall be ſaid in Judgment of Law *Statutum generale*, and which *Statutum ſpeciale*, it is to know, that *generale dicitur a genere, & ſpeciale a ſpecie*; And there are *Genus*, *Species*, *& Individua*; Know that Spiritualty is *Genus*, Biſhoprick, Deanery, &c. are *Species*, and Biſhoprick or Deanery of *Norwich*, *Individuum*, *Et ſic dicti' quia in partes dividi nequit*. And therefore it was reſolved in the Caſe at Bar, that for as much as the Act of 21 *H.* 8. concerneth all the Spiritualty that it was a general Act whereof the Judges ought to take notice. And *Paſch.* 31 *Eliz. Rot* 514. it was adjudged between *Claypoole* and *Carter* in the Common Pleas, and affirmed by Writ of Error in the Kings Bench, *Hill.* 32 *Eliz. Rot.* 791. that the Act of 18 *Eliz.* concerning Colledges in the two Univerſities, and the Colledges of *Eaton* and *Winchester* was a particular Act whereof the Judges ſhall not take notice. But the Statute of 13 *Eliz. cap.* 10. and and 18 *Eliz. cap.* 11. concerning Colledges, Deans and Chapters, Hoſpitals, Parſon, Vicar, or any other having any Spiritual or Eccleſiaſtical living, are general Acts, whereof the Judges ſhall take notice, which Caſe is like to the Caſe at the Bar. But it was adjudged *Trin.* 30 *Eliz.* in the Kings Bench, between *Elmer* Biſhop of *London* and *Gate*, for the ſcite and demeſns of the Mannor of *Dr iton* in the County of *Midd.* that the Statute of 1 *Eliz.* concerning leaſes, &c. made by Biſhops was a ſpecial Act becauſe it concerned the Biſhops only, who are but *ſpecies* of the Spiritualty, and therefore of ſuch ſpecial Law the Judges ſhall not take knowledge if it be not pleaded, and therewith agreeth 13 *E.* 4. 8. *b.* and ſo of the like. So this word (Officer) is a general word or *Genus* (Sheriff) is a ſpecial word or *Species*; and Sheriff of *Norfolk* is [b] *Individuum*. And therefore the Statute of *Weſt.* 1. *cap.* 26. by which it is enacted, That no Sheriff or other miniſter of the King take reward to do his Office, but be paid of that which they take of the King, is a general Act, becauſe it extendeth to all Officers in general: But the Statute of 23 *H.* 6. *cap.* 10. which extendeth only to Sheriffs is but a particular Act, as it is holden in 3 *Ma. Dier* 119. So Myſtery or Trade is a general word; Trade of Grocery is ſpecial, and this Grocer by name is *Individuum*: And therefore Acts of Parliament concerning Myſteries or Trades are general Acts; But an Act of Parliament

liament concerning the Trade of Grocery is a special Act, as it is said in 28 *H.* 8. *Dier* 27. because the Trade of Grocers containeth under it but *Individuum*, or singular persons, as this or that Grocer by name, *vide* 10 E. 47. *a.* The Statute of *Marlebridge cap.* 3. *Non ideo puniatur dominus per redemptionem*, is a general Law for the causes aforesaid, for this word (*Seignior*) is a general word. But an Act concerning all the Nobility, or Lords of the Parliament, or all the Bishops of *England*, or all Corporations made by King *H.* 6. are special and particular Acts for the causes aforesaid, as it is holden in the Case of the Lord *Say* in 13 E. 4. 86.

Know Reader, That if an Act be special which extendeth *ad species*, *a multo fortiori*, it is special and particular which extended *ad individua*: *Vide* 14 E. 4. 1. & 43 *Ass.* 29. So you may know what Act as to persons in general, and what not: Now know, that although the matter be special, so that under it there are *individua*, yet if it be general as to the persons, thereof the Judges ought to take knowledge: but if the Act concern *aliquod singulare seu individuum*, although it be general as to the persons, yet the Judges shall not take knowledge thereof: As (Appeal) is a special Act, and contained under the general word (Writ;) And yet the Statute of *Magna Charta cap.* 34. which concerneth Appeals is general, and the Judges ought to take notice thereof, as it is holden in 10 E. 4. 7. But if an Act were made that no Appeal shall be brought of the death of *J. S.* this Act is particular, *Causa qua supra*: So the Act of *Magna Charta cap.* 25. of Wast, *West.* 2. *cap.* 25. concerning Assises, and *cap.* 18. concerning Assise by Tenant by *Elegit*, *cap.* 41. concerning *contra formam collationis*; 32 *H.* 8. of Attaint and the like, are general Laws although they concern special Actions; the same Law of 4 *H.* 7. *cap.* 17. and *Merton cap.* 6. of Wards, *& sic de cæteris*: But although the Act as to the person be general, but the matter thereof concerneth *Individua*, or such things, as any particular Mannor, or house, &c. or all the Mannors, houses, &c. which are in one or sundry Towns, or in one or divers particular Counties, these are such special Acts whereof the Judges shall not take knowledge, if they be not pleaded or alledged by the party; But of every Act (although the matter thereof concern *Individua*, or single things, yet if they touch the King, the Judges *ex officio* ought to take knowledge of them, for every Subject hath interest in the King as in the Head of the Commonwealth; and as the inferiour members cannot estrange themselves from the actions and passions of the head, no more can any Subject estrange him in any thing which toucheth or concerneth the King their supreme Head. *Vide Plow. Com.* in the Lord *Barkley*'s Case for these matters, 21 E. 4. 59. 37 *H.* 6. 15. and *Plow. Comm.* in *Wimbishe*'s Case 53. And *Tanfield*, *Godfrey*, and others were of Councel with the Plaintiff, *Coke* and *Houghton* with the Defendant. [77]

Mich. 40 & 41 Eliz.

The Case of Corporations.

IN this Term at Serjeants Inn in *Fleetstreet* it was demanded of the chief Justices *Popham* and *Anderson*, and *Periam* chief Baron, and the other Justices, That where divers Cities, Boroughs, and Towns are incorporate by Charters, some by the name of Mayor and Comminalty, or Maior and Burgesses, &c. or Provost, or Reve and Burgesses, or Bailiffs and Burgesses, &c. or Aldermen and Burgesses, &c. or the like. And in the said Charters it is prescribed, That the Mayors, Aldermen, Bailiffs, Provosts, &c. shall be chosen by the Comminalty or Burgesses, &c. If that the ancient and usual elections of Mayors, Bailiffs, Provosts, &c. by certain selected number of the principal of the Comminalty, or Burgesses, commonly called the Common Councel, or by such like name, and not by the generalty by the whole Comminalty or Burgesses, nor by so many of them as would come to the election was good in Law, for as much that by the words of Charters the election shall be indefinitely by the Comminalty, or by the Burgesses, which is as much to say as by all the Commons and all the Burgesses, &c. Which Question being of great importance and consequence was referred by the Lords of the Councel to the Justices to know the Law in this Case, because divers attempts were of late in divers Corporations contrary to the ancient usages to make popular elections: And it was resolved by all the Judges upon great consideration and deliberation and conference amongst themselves, That such ancient and usual elections were good and well warranted by their Charters, and by the Law also. For in every of their Charters they have power given them to make Laws, Ordinances, and Constitutions for the better government and order of their Cities and Boroughs, &c. by force of which, and for avoiding popular confusion, they by their common assent do constitute and ordain, That the Mayor or Bayliffs or other principal of the Comminalty or of the Burgesses as is aforesaid; and prescribe also how such selected number be chosen: And such Ordinance and Constitution was resolved to be good and allowable, and agreeable with the Law and their Charters for avoiding popular discord and confusion: And although that now such Constition or Ordinance cannot be shewed, yet it shall be presumed and intended in respect of such special manner of ancient and continual election (which special election cannot begin without common consent) that at first such Ordinance or Constitution was made, Such reverent respect the Law attributeth to ancient and continual allowance and usage, although it began before the time of memory: *Mos retinendus est fidelissimæ vetustatis; Quæ præter consuetudinem & morem majorem fiunt, neque placent, neque recta videntur; & frequentia actus multum operatur.* [b] [78]

And

And according to this Reſolution the ancient and continual uſages have been in *London*, *Norwich*, and other ancient Cities and Corporations: And God forbid that they ſhould be now innovated or altered, for many and great inconveniences will thereupon ariſe, all which the Law hath well prevented, as appeareth by this Reſolution.

Hill. 41 Eliz. *in the King's Bench.*

Digbie's Caſe.

[b] BEtween *Richard Robins* Plaintiff, in an *Ejectione firmæ* for parcel of the Glebe of the Rectory of *Horton* in the County of *Lincoln*, upon a demiſe made unto him by *Edward Wickham* Parſon there, and *William Gerard* and *John Prince* Defendants: upon Not guilty pleaded, the Jurors gave a ſpecial Verdict to this effect; (which Action began in the Kings Bench *Hill.* 38 *Eliz. Rot.* 781.) The ſaid Rectory of *Horton* is a Benefice with Cure of the annual value of 8 l. *& amplius*, to which the Church being void) *George Digby* Eſquire Patron thereof did preſent *Robert Merick* his Clark, to which preſentment he was admitted, inſtituted, and inducted: And afterwards Queen *Eliz. anno* 29 of her reign did preſent the ſaid *Merick* to the Church of *Stanes* in the County of *Midd.* which is a Benefice with Cure; to which Church of *Stanes* the ſaid *Merick* was admitted and inſtituted; before induction *Katherine* the late wife of the Lord *Borough* did admit and receive by writing under her Seal the ſaid *Merick* to be her houſhold Chaplain according to the form of the Statute of 21 *H.* 8. And afterward the Archbiſhop of *Canterbury* by his Letters of Diſpenſation; *Cum eodem Roberto Merick, & una cum Rectoria de Horton dioceſ. Lincoln' quam adtunc obtinuit, Eccleſiam de Stanes dioceſ. London recipere, & quoad vixerit retinere liberè & licite valeat, & poſſit, authoritate Parliamenti gratioſe diſpenſavit:* And afterwards the Queen by her Letters Patents under the great Seal did ratifie and confirm the ſaid Letters of Diſpenſation: And afterwards
[79] the ſaid *Robert Merick* was inducted in the ſaid Church of *Stanes*, *viz.* 30 *Aug*, 29 *Eliz.* And afterwards the Queen by Laps *anno* 33. preſented the ſaid *Edward Wickman* to the Church of *Horton*, who was admitted, inſtituted, and inducted, and demiſed to the Plaintiff, upon whom the Defendants as ſervants of the ſaid *Robert Merick* did enter and eject him; and if they were guilty or not was the Queſtion: And it was adjudged for the Plaintiff, that the ſaid Diſpenſation came too late, becauſe it came after the inſtitution, for by the inſtitution *Eccleſia plena & conſulta exiſtit*, againſt all perſons but againſt the King: And it is to know, that every Rectory doth conſiſt upon Spiritualty and Temporalty; and as to the Spiritualty, *ſcil. Cura animarum*, he is compleat Parſon by the inſtitution; for when the Biſhop upon examination found, admits him able, then he doth inſtitute him, and ſaith, *Inſtituo te ad tale beneficium & habere curam animarum* of ſuch a Pariſh, *& accipe curam tuam, & meam, &c. vide* 33 *H.* 6. 13. But as to the Temporalties as the Glebe land, &c. he hath not the freehold in him till induction. See *Hare* and *Buckley's* Caſe, *Plow. Comm.* 528. And for the better underſtanding of our Books, know Reader, *Quod per generale Concilium Lateranenſe tentum ſub Innocentio Papa tertio; Statutum eſt quod quicunque reciperet aliquod Beneficium habens curam animarum annexam, ſi prius tale Beneficium obtinebat, eo ſit jure ipſo privatus, & ſi forte illud retinere contenderit, alio etiam ſpolietur, Is quoque ad quem prioris ſpectat donatio, illud poſt receptationem alterius conferat cui merito viderit conferendum.* And this Counceil was holden *anno Dom.* 1215. *vide Tomo* 4. 221. *cap.* 29. *de multa.* By which it appeareth that by the acceptance of the ſecond Benefice, that the firſt is void *ipſo jure*, and the Patron may preſent if he will: And upon this general Councel are the Books in 9 *E.* 3. 22. 10 *E.* 3. 1. (where the ſaid general Councel is mentioned) 24 *E.* 3. 30. *a.* 11 *H.* 4. 37. 14 *H.* 7. 28. 14 *H.* 8. 17. *F. N. B.* 34 *l.* grounded.

But then what ſhall be ſaid a taking of a ſecond Benefice with Cure within the ſaid Act of 21 *H.* 8. is the Queſtion; and the doubt ariſeth upon this, That although that *Merick* by his inſtitution was Parſon as to the Spiritualty, *ſcil.* to celebrate Divine Service and Sacrament, to Preach and inſtruct the Pariſhioners in the true faith, yet he is not compleat Parſon, for he wanteth the Temporalties whereof he may live until induction; and the Statute is to be intended of a compleat Parſon.

2. It was objected, that although he ſhall be ſaid compleat Parſon before induction, yet he hath not a
[b] Benefice with Cure till he be inducted; for this word (Benefice) as it was ſaid importeth and implieth profit and benefit, which he cannot have till his induction; and who hath *Beneficium* ought to execute and *facere officium*, but none can do his Office without ſome benefit.

3. It was objected, that the ſaid Act of 21 *H.* 8. doth not make the firſt Benefice void till induction, for the words are, And be inſtituted and inducted in the poſſeſſion of the ſame, &c. But it was reſolved, that great inconvenience will follow, if the firſt Benefice ſhall not be void by the inſtitution to the ſecond by force of the ſaid Conſtitution, for then one may be inſtituted to divers Benefices with Cure, the great Cure and charge of which he cannot diſcharge, and yet no other can be preſented to any of them which ſhall be inconvenient. And therefore *vide Tomo* 5. of the General Councels, *pag.* 368. *cap.* 64. *Res ipſa loquitur plura Beneficia, potiſſimum quibus animarum cura ſubmiſſa eſt, non ſine gravi Eccleſiarum damno ab uno obtineri, cum unus in pluribus Eccleſiis rite officia perſolvere, aut rebus earum neceſſariam curam impendere nequeat*; By which it appeareth that the great miſchief before the ſaid Counceil was, That thoſe who had plurality of Benefices could not diſcharge their Paſtoral duties which appertained to

to their functions, which functions they had to all intents by the inſtitution before induction: And in Judgment of our Law he who is inſtituted to a Benefice hath accepted thereof, for the Church is full by the inſtitution before induction.

2. It hath been lately adjudged in the Common Pleas, That where a Clark was preſented, admitted and inſtituted to a Benefice with Cure above the value of 8 l. and afterwards and before induction to the firſt he accepted of another Benefice with Cure, and is inducted in the ſame, that the firſt Benefice is void by the Statute of 21 *H.* 8. for the words of the Act are, If any perſon having one Benefice with Cure, &c. accept and take another, &c. and he who is inſtituted to a Benefice, is ſaid in Law to have accepted a Benefice, and to have the Benefice.

And *Popham* chief Juſtice ſaid, That although by the inſtitution to the ſecond Benefice the firſt is void by the Eccleſiaſtical Law without any deprivation, or ſentence Declaratory, yet no Laps ſhall incurr againſt the Patron if notice be not given him, no more then if the Church became void by reſignation or privation, and yet the Patron may take notice if he will, and may preſent according to the ſaid conſtitution, but he is not forced to take notice at his peril, if he be not inducted: *Quod fuit conceſſum* by the whole Court. And then for as much as the avoidance after the induction is declared by the Act of 21 *H.* 8. (to which every one is party) there he ought in ſuch Caſe to take notice at his peril: But admit the firſt Benefice was not void *de facto* by the inſtitution before induction, yet for another cauſe the diſpenſation cometh too late, for the words of the Act of 21 *H.* 8. are, May purchace licence to receive and keep two Benefices with Cure of ſouls, &c. and the words of Diſpenſation in the Caſe at Bar are *recipere & retinere*; and for as much as by his inſtitutution the Church was full of him, he cannot purchace licence to receive that which he had before, and the words are in the conjunctive *recipere & retinere*, ſo that he cannot retain that which he cannot receive. And it appeareth by the Judgment in the Common Pleas that within the ſaid Act of 21 *H.* 8. he who is only inſtituted is ſaid to have a Benefice with Cure; And the queſtion as to this Point was asked of the other Juſtices and Barons of the Exchequer, and they all agreed, That the Diſpenſation in the Caſe at Bar came too late for the cauſes aforeſaid. [80]

The Attorney General, *Tanfield*, and *Francis Moore* were of Councel with the Plaintiff, and *George Crook*, *Lawton* and others with the Defendant.

Trin. 41 Eliz.

Noke's Caſe.

BEtween *Noke* Plaintiff, and *James* Defendant, in debt upon an Obligation the Caſe was ſuch: The Defendant leaſed to the Plaintiff a houſe in *London* by theſe words, Demiſe, grant, &c. And the leſſor covenanted that the leſſee ſhould enjoy the houſe during the term without eviction by the leſſor, or any claiming under him; And the leſſor was bound to perform all covenants, grants, articles, and agreements, &c. in the Indenture; The Plaintiff granted his term over to a ſtranger, in debt upon this Obligation the Defendant pleaded performance of the Covenants, &c. The Plaintiff aſſigned the breach, that one *Savery* entred upon the aſſignee and made a leaſe for 7 years to one *Duck* if he ſhould ſo long live, who brought an *Ejectione firmæ* againſt the aſſignee, and recovered by verdict, and had execution; upon which the Defendant did demur in Law. And the opinion of the Court was againſt the Plaintiff; And in this Caſe theſe Points were reſolved: [b]

1. That for this Covenant in Law upon theſe words, Demiſe, grant, &c. the aſſignee ſhall have a Writ of Covenant, *9 Eliz. Dier* 257. *acc.*

2. That for this breaking of the Covenant in Law the Obligation was forfeited, for he was bound to perform all covenants, grants, &c. which extendeth as well to covenants in Law, as to covenants in Deed.

3. Although that the Recovery was by verdict, yet the Plaintiff ought to have ſhewed that *Savery* had ancient title, for otherwiſe the covenant in Law was not broken, and becauſe he did not ſhew the ſame, for this cauſe they reſolved againſt the Plaintiff.

4. It was holden by *Popham* chief Juſtice and the whole Court, That the ſaid expreſs covenant did qualifie the generality of the covenant in Law, and reſtrained the ſame by the mutual conſent of both the parties, that it ſhall not extend further then the expreſs covenant, *Quia clauſula generalis non refert ad expreſſa* in this Caſe. And ſo it was of late adjudged in *Hamonds* Caſe in this Court. [81]

See Reader 20 E. 3. *Counterplea de garranty* 7. it is adjudged. That if a man leaſeth for life rendring rent, and further bind him and his heirs to warranty, here the expreſs warranty doth not take away the warranty in Law, for if he in the reverſion granteth over his reverſion, and the leſſee attorneth, and afterwards is impleaded, he may vouch the grantee by the warranty in Law, or he may vouch the leſſor by the expreſs warranty; and therewith agreeth 31 *E.* 3. *voucher* 286. where the Caſe was, *L.* ſeiſed of three Oxegangs of land leaſed the ſame to *C.* for life rendring rent and ſervices, and bound him and his heirs to warranty, &c. And afterwards granted the reverſion to *R.* &c. *L.* died, his wife brought a Writ of Dower againſt *C.* who vouched the heir of *L.* by force of the expreſs warranty. And there *Howard*

chief Justice said, that she had two warranties, and she may choose which she will; But note that in both the said Cases the warranty in Law and the express warranty were general. And I heard the Lord *Dier*, and all the Court of Common Pleas, *Hill.* 24 *Eliz.* resolve, That if a man make a feoffment in fee by the word *Dedi*, with express warranty in the deed, he may use the one or the other at his election. And that the Statute of *Bigamis cap.* 6. is to be intended, That *Dedi* importeth a warranty, although the clause of warranty be not contained in the Deed. The words of which Statute is, *In chartis ubi continetur dedi & concessi, &c. sine clausula warrantiæ, ipse feoffator in vita sua, &c. sine warrantia, id est, quamvis nullam continet clausulam warrantiæ, tenetur warrantizare:* But note that by force of the said Act, now *Dedi* is made an express warranty during the life of the feoffor: And there is great reason in the principal Case, that the particular Covenant subsequent, should qualifie the force of this word (*demisi*) for otherwise the particular covenant should be in vain, if the force of this word *demisi* should stand; and also these words *demisi & concessi* are frequent in every ordinary lease that is made; and the best construction of deeds is to make one part to expound the other, and so to make all the parts agree, *& quoad fieri possit* according to the true intent and meaning of the parties, *vide* 48 *E.* 3. 2. If a man make a lease by *dedi*, and further grant over the reversion, the lessor shall be vouched by force of *dedi*.

Mich. 41 & 42 Eliz. *in the Court of Wards.*

Sir *Andrew Corbet's* Case.

[81 *b*] SIR *Andrew Corbet* Knight, 19 *Eliz.* seised of divers Mannors, lands, and tenements in fee, part of which were holden of the Queen by Knights service in *Capite*, by his Will in writing devised some of them to *Richard Corbet* and others to have and hold to them and the survivors of them until such time and term that the summ of 800 l. by them or the survivor of them, or the Executors of the survivor of them of the issues, rents, revenues, and profits of the said lands should be fully levied and received above all charges and expences; and the said summ so levied to be imployed for the preferment of his two daughters *Margaret* and *Mary*, as in his Will is limited, and left the third part to descend. The said Sir *Andrew Corbet* 20 *Eliz.* died, *Robert Corbet* his son and heir took the said Will into his hands, and entred into the said lands now in charge, and received the profit thereof during his life, and afterwards died in the 25 year of *Elizabeth*; after whose death upon the search of Evidences the said Will was found at *Moreton Corbet*, which Will was found in the Office after the death of the said *Robert*, and then transcribed into this Court; by virtue of which Will the said *Richard Corbet* the devisee did enter, and hath received the profits of the said land from the feast of S. *Michael anno* 26 *Eliz.* until the feast of the Annuntiation 36 *Eliz.* and by such time hath levied 640 l. and hath imployed it according to the Will; and if the profits taken by *Robert Corbet*, and which the devisees might have taken, shall be accounted parcel of the said summ of 800 l. was the Question. And in this Case two Points were resolved.

[82] 1. Although that the words be until the summ of 800 l. shall be levied by them of the profits of the land; yet it is as much in Law as if the words had been, shall or may be levied: and so was it holden in Case of a lease, where the limitation of an use until such summ shall be levied, is as much as to say until such summ can be levied, for otherwise great mischief will follow; for in as much as he in the reversion or remainder cannot enter till the summ be levied, it shall be in the power of them who are appointed to levy the summ, if they will deferr the levying thereof, to exclude him in the reversion or remainder, which shall be inconvenient: So it was agreed upon the words of the Statute of *West.* 2. *cap.* 18. *Quod* (by force of the *Elegit* which is given by the same Statute) *vicecomes liberet, &c. medietatem terræ suæ quousque debitum fuerit levatum per rationabile extentum*; And upon the words of the Writ of execution of a Statute Merchant and Staple, *omnia terras & tenementa, &c. habend', &c. juxta formam ordinationis inde factæ*, scil. *de Mercatoribus* 31 *E.* 1. or 27 *E.* 3. *quousque sibi de debito præd' fuit satisfactum*; That if the conusee neglect to take the profits, yet when the conusee might have been satisfied his debt according to the extent, the conusor shall have his land again: But it was said, That words make the Case, and therefore it was agreed, that upon the Statute of *Merton cap.* 6. & 7. that the profits of the lands which the Guardian taketh for the double value shall be in satisfaction of the double value, but otherwise in the Case of the single value, for the words of the said Act *cap.* 6. in Case of the double value are, *Tunc teneat terram ejus ultra terminum ætatis suæ per tantum tempus quod inde possit percipere duplicem valorem maritagii*: So that by express words the profits shall be accompted parcel of the double value: but the words of the 7 Chapter concerning the single value are, *scil. Si quis heres, &c. pro domino suo noluit se maritare non compellatur hoc facere, sed cum ad ætatem pervenerit det domino suo & satisfaciat ei, &c. pro maritagio suo antequam terram suam recipiat*: By which it appeareth, that the Guardian shall enjoy the profits to his own use until the heir satisfie him. See for this difference 27 *H.* 8. 5. *b.* 31 *Ass.* 26. 43 *E.* 3. 21. And further it was holden, that in the said Case of double value, it is in the election of the Guardian, either to bring his Writ of forfeiture of marriage, or to hold the land until he be satisfied, 18 *E.* 3. 18. *acc.* But if the Guardian choose to have

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the land, and enter into it, he ſhall not have the land but only ſo long that he might levy the double value, and his negligence ſhall be damage to him. *Vide* 15 E. 4. 5. *b.* 7 H. 6. 12. 7 H 7. 14. 11 H. 6. 8.

2. It was reſolved, That when the heir himſelf in the Caſe at Bar, or he in the reverſion or remainder in the Caſe of a leaſe, or the limitation of an uſe entreth upon him to whom the land is deviſed, demiſed, or limited as is aforeſaid, and putteth him out, in this Caſe it is in the election of the perſon ſo put out, either to bring his Action and recover the mean profits, which ſhall be accounted parcel of the ſumm, or he may reenter and retain the land over until he levy the whole ſumm, and the time in which he was ſo put out, ſhall not be accounted parcel; for when he who is to have the land again doth the wrong, againſt him and all others who claim under him, he who was put out, if he will, may reenter and hold the land, and the other ſhall not take advantage of his own wrong, nor drive him who was put out to bring an Action againſt him againſt his will for the mean profits: The ſame Law is in other Caſes, *ſcil.* of Tenant by *Elegit*, Statute Merchant, Statute Staple, Guardian, who holdeth over for the double value, if he in the reverſion who is to have the land again put him out, they have ſuch election as is aforeſaid, either to hold over, or to bring their Action, *vide* 15 H. 7. 14. So if the profits of the lands be waſted, by drowning of water, or wildfire, or any other act of God, without default or negligence in the party, there the conuſee ſhall hold the land over, *vide* 11 H. 6. 7. 7 H. 7. 12. *b.* 15 H. 7. 14. 33 H. 8. *Statute Merchant Br.* 41. But if he who hath ſuch intereſt be put out by a ſtranger, there the time ſhall incurr for the miſchief aforeſaid, and there he is put to his remedy againſt the treſpaſſor. If the deviſee in the Caſe at Bar or tenant by Statute Merchant, &c. ſurrender to him in the reverſion upon condition, and after enter for the condition broken, he ſhall not hold over, for the ſurrender is his own act, and he cannot enlarge his intereſt, and therewith agreeth 33 H. 8. *Statute Merchant Br.* 4. If Tenant by *Elegit* be interrupted to take the profits of the land by reaſon of War, he ſhall not hold over, but it ſhall be in the diſadvantage of the Tenant by *Elegit*, as it is adjudged in 19 E. 1. *Execution* 246. [b]

3. It was reſolved, That although the deviſee had not notice of the deviſe, yet if a ſtranger had occupied the land, the deviſee ought to have taken notice at his peril, for *dormientibus & non vigilantibus jura ſubveniunt*; and none by the Law in ſuch Caſe is bounden to give him notice, therefore he ought to take notice at his peril: As in Caſe of Arbitrement 1 H. 7. 5. & 8 E. 4. 1. but the Caſe at Bar is ſtronger becauſe the heir himſelf doth conceal the Will, and the deviſee hath not any remedy for the mean profits after the death of the heir who put him out.

And whereas it is holden in old Books, *ſcil.* 34 E. 1. *Gard* 129. 34 E. 1. *Covenant* 26. 33 H. 6. 42. 5 H. 7. 36. 7 H. 7. 12. 14 H. 7. 27. 15 H. 7. 8. *F. N. B.* 142. that the Guardian ſhall put out the tenant for years, but not the tenant for life, becauſe tenant for life cannot hold over as leſſee for years (as it was holden) may. It was reſolved that the Guardian ſhall not put out the one or the other, and therewith agreeth the Reſolution of all Juſtices in 36 H. 8. *Leaſes Br.* 58.

Alſo it was reſolved, That if the Guardian may put out the leſſee for years, yet for as much as his term is certain, *ſcil.* certain in the beginning, in continuance, and in the end, he cannot for any poſſibility hold over in ſuch Caſe: But in the Caſe at Bar, and in the other Caſes of tenant by *Elegit*, Statute Merchant, &c. there is no term certain, but until ſuch a ſumm be by them levied, and therefore it ſtands with ſuch intereſt that in ſome Caſe he may hold over, and ſo is the difference. And it was ſaid, That the words of the Statute of *Marlebridge*; *Salva ſit nihilominus hujuſmodi feoffatis actio ſua, quoad terminum, ſen ad feodum recuperandum quam inde habuerint*, the ſame is to be intended of an eſtate made by colluſion, for to that the purview of the Act extendeth, *ſcil.* That the Guardian ſhall put him out, and in ſuch Caſe without queſtion the leſſee ſhall not hold over. [83]

Paſch. 43 Eliz. *in the Kings Bench.*

Southcote's Caſe.

Southcote brought an Action of Detinue againſt *Bennet* for certain goods, and declared, That he delivered them to the Defendant to keep ſafe; the Defendant confeſſed the delivery, and pleaded in bar, That after the delivery one *J. S.* ſtole them feloniouſly out of his poſſeſſion; The Plaintiff replied, that *J. S.* was the Defendants ſervant, and retained in his ſervice, and demanded Judgment. And thereupon the Defendant did demurr in Law, and it was adjudged for the Plaintiff; And the reaſon of their Judgment was, becauſe that the Plaintiff delivered the goods to be ſafe kept, and the Defendant hath undertook it by acceptance upon ſuch delivery, and therefore he ought to keep them at his peril, although in ſuch Caſe he have nothing for the keeping of them. So if *A.* deliver goods to *B.* generally to be kept by him, and *B.* accept them without having any thing for it, if the goods be ſtole from him, yet he ſhall be charged in Detinue, for to be kept, and to be kept ſafe is all one. But if *A.* accept of the goods of *B.* to keep them as he would keep his own proper goods, there if they be ſtollen from him he ſhall not anſwer for them: Or if goods be pawned or pledged to him for mony, and the goods be ſtollen, he ſhall not anſwer for them, for he doth not take upon him to keep them but as he keepeth his own goods; for he hath a property in them and not a cuſtody only, and therefore he ſhall not be charged as it is adjudged [b]

in 29 *Aſſ.* 28. But if before the ſtealing he who pawneth the goods tendreth the mony, and the other refuſeth, then is there fault in him, and then the ſtealing after ſuch tender, as it is there holden, ſhall not diſcharge him: So if *A.* deliver to *B.* a cheſt lockt to keep, and he himſelf carrieth away the key, in this Caſe if the
[84] goods be ſtollen *B.* ſhall not be charged, for *A.* did not truſt *B.* with them, nor *B.* did not undertake to keep them, as it is adjudged in 8 *E.* 2. *Detinue* 69. So the doubt which was conceived upon theſe differing opinions in our Books, in 29 *Aſſ.* 28. 3 *H.* 7. 4. 6 *H.* 7. 12. 10 *H.* 7. 26. of *Keble* and *Fineux* are well reconciled, *vide Bract. lib.* 2. *fol.* 62. *b.*

But in Accompt it is a good plea before Auditors for the Factor that he was robbed, as appeareth by the Books in 12 *E.* 3. *Accompt* 111, 41 *E.* 3. 3. & 9 *E.* 4. 40. For if a Factor (although he hath wages and ſalary) do all that he can do, he ſhall be diſcharged, and he taketh nothing upon him, but his duty is to merchandize as a ſervant the beſt that he can: and a ſervant is bound to do the command of his Maſter: But a Ferryman, common Innkeeper, or Carrier, who take hire ought ſafely to keep the goods committed to them, and ſhall not be diſcharged if they be ſtollen by Thieves, *vide* 22 *Aſſ.* 41. *Br. Action ſur le Caſe* 78. And the Court held the Replication idle and vain, for it is not material by whom the Defendant was robbed, *vide* 33 *H.* 6. 1. If Traitors break the Priſon it ſhall not diſcharge the Gaoler, otherwiſe of the Kings Enemies of another Kingdom, for in the one Caſe he may have his remedy and recompence and not in the other.

Note Reader, it is good policy for him who taketh goods to keep, to take them in ſpecial manner, *ſcil.* to keep them as he keepeth his own goods, or to keep them the beſt he can at the peril of the party; or if they happen to be ſtollen or purloined, that he ſhall not anſwer for them, for it behoveth him who accepteth them, to take them in ſuch or the like manner, or otherwiſe he may be charged by his general acceptance. So if the goods be delivered to one for to deliver over, it is good policy to provide for himſelf in ſuch ſpecial manner for doubt of being charged by his general acceptance, which implieth that he took upon him to do.

Paſch 43 Eliz. Rot. 596. *between* Cottel *Plaintiff and* Lutterel *Defendant, in an Action upon the Caſe in the Kings Bench.*

Lutterel's Caſe.

[86] *Cottell* brought an Action upon the Caſe againſt *Lutterel*, and declared that 4 *Martii*, 40 *Eliz.* he was ſeiſed of two old and ruinous Fulling Mills, and that time out of mind, *magna pars aquæ cujuſdam rivoli* ran from a place called *Hodware* to the ſaid Mills, and that for all the ſaid time there had been a bank to keep the water within the current: And afterwards the Plaintiff 8 *Octob.* 41 *Eliz.* did pull down the ſaid mills, and in place of the ſaid Fulling mills, did erect two mills to grind corn; and that the water did run to the ſaid mills till the 10 of *September* next following, and that the ſame day the Defendant did dig and break the bank, and did turn the water from his mills, &c. The Defendant pleaded Not guilty, and it was found againſt him, upon which the Plaintiff had Judgmen. And thereupon *Lutterel* the Defendant brought a Writ of Error upon the new Statute in the Exchequer Chamber, and there two Errors were aſſigned.

1. That by the breaking and abating of the old Fulling mills, and by the building of new mills of another nature, the Plaintiff had deſtroyed the preſcription, and cannot preſcribe to have any courſe of water to Griſt mills: As if a man grants me a ſtream of water to my Fulling mills, I cannot (as it was ſaid) convert them to corn mills; *nec e contra.* So if I grant to one Eſtovers to burn in his Hall, he cannot turn his Hall into a Kitchin, or Malt-houſe: The ſame Law of preſcription; for preſcription in ſuch Caſe ſhall be intended to commence by grant, and in proof thereof they cited *F. N. B.* 180. and 7 *E.* 4. 27. If a man have Eſtovers by grant, or appendant to an ancient houſe, he ſhall not have them
[*b*] to a houſe which he new buildeth: And 10 *H.* 7. 13. & 16 *H.* 7. 9. where the Abbot of *Newark* granted by fine to find three Chaplains in ſuch a Chappel of the conuſee, and afterwards the ſaid Chappel fell, and there it is holden, that during the time that there is no Chappel, the Divine ſervice ſhall ceaſe, for it ought to be done in a decent and reverend manner, and not at large *ſubito*; But it is there holden, That if the Chappel be rebuilt in the place where the old ſtood, then he ought to ſay the Divine Service there: But (it was collected) if it be built in another place, there the grantee is not tied to ſay Divine Service there: If there be Lord and Tenant, and the Tenant holdeth to cover and repair the Lords Hall, as in 10 *E.* 3. 23. in this Caſe if the Hall fall, yet if the Lord build the Hall in the ſame place it was before, and of ſuch bigneſs as it was before, the Tenant is tied to cover it; But if it be greater either in length or breadth, ſo as prejudice may come to the Tenant; or if it be built in another place, or if that which was the Hall be converted to a Cowhouſe, Stable, Kitchin, or the like, he is not tied to cover it, for the Lord by his act cannot alter the nature of the tenure, nor of the ſervice which the Tenant ought to do: And in this Caſe here, it may be more beneficial to him who made the firſt grant, and to others which have his eſtate to have them Fulling mills, than Corn mills. For perhaps they have

have Corn mills so near, that the building of Corn mills shall be prejudicial to them; and it shall be against reason to extend a grant or prescription to have a watercourse to Fulling mills, to Corn mills, which is not within the purport or intention of the grant or prescription, and the grant or prescription ought to be pursued: If a man holdeth of another as of his Mannor by Homage, Fealty and Castle gard the Lord alieneth the Mannor except the Castle, the alienee shall not have Castle gard, as it appeareth by 31 *E.* 3. *Assise* 441. And it was said, that there the alienee cannot build a new Castle, for the tenure was to keep the old Castle.

Another Objection was made, that because that the Plaintiff himself hath broken and abated the Fulling mills, although that he build new mills in the same place, and of the same nature as the old were, yet he hath destroyed his prescription; for although that in Case when mills or houses have watercourse, or Estovers, or the like things appendant or appurtenant to them be overthrown by the wind, or burned by wildfire, or fall by any other act of God, that if the owner rebuild them in the same place, and in the same manner as they stood before, that they shall have the same ancient things appendants or appurtenants to this new mill or house, because the act of God shall not prejudice any one; yet if they be erased by the party himself, or fall through his default, the ancient dependants thereby are lost; for by his own act he cannot extend the prescription or grant which was in a manner appropriated to the old house, to a new house: So it was objected, that if one of his own wrong burn or overthrow the house or mill [87] which hath such appurtenances, he shall recover all in damages; and although in such Case he build the house or mill again, yet he shall not have the appendancies; *vide Perkins* 128. *b.* But it was resolved, That the prescription did extend to the new Grist mills, for it appeareth by the *Register*, and also by *Fitz N. B.* That if a man be to demand a Grist mill, Fulling mill, or any other mill, the Writ shall be general, *de uno molendino*, without any addition of Grist or Fulling 21 *Ass.* 23. agreeth of a plaint in Assise. So that the mill is the substance, and thing to be demanded, and the addition of Grist, or Fulling, are but to shew the quality or nature of the mill: And therefore if the Plaintiff had prescribed to have the said watercourse to his mill generally (as he well might) then the Case shall be without question, that he may alter the mill into what nature of a mill he will, provided always that no prejudice may thereby arise, either by diverting or stopping of the water as it was before; And it shall be intended that the grant to have the watercourse was before the building of the mills, for no body will build a mill before he be sure to have water; and then the grant of a watercourse being generally to his mill, he may alter the quality of the mill at his pleasure, as is aforesaid: So if a man hath Estovers either by grant or prescription to his house, although he alter the rooms and chambers of his house, as to make a Parlour where it was the Hall, or the Hall where the Parlour was, and the like alterations of qualities, and not of the house it self, and without making chimneys by which no prejudice doth accrue to the owner of the wood, it is not any destroying of the prescription, for then many prescriptions shall be destroyed. And although that he bild new chimneys, or maketh a new addition to his old house, by that he shall not lose his prescription, but he cannot imploy or spend any of the Estovers in the new chimneys, or in the part newly added; The same Law of conduits and water-pipes and the like.

So if a man have an old window to his Hall, and afterwards he turn the Hall to a Parlour or any other use, yet it is not lawful for his neighbour to stop it, for he shall prescribe to have the light in such part of his house: And although that in this Case the Plaintiff hath made a question, for as much as he hath not prescribed generally to have the said watercourse to his mills generall; yet for as much as in general the mill was the substance, and the addition doth demonstrate only the quality, and the alteration was not of the substance but only of the quality, or of the name of the mill, and that without any prejudice in the watercourse to the owner thereof; for these causes it was resolved, That the prescription did remain: If a Corporation have Franchises or Privileges by grant or prescription, and afterwards they [*b*] are incorporate by another name, as where they were Bailiffs and Burghesses before, they are made Mayor and Comminalty; or Prior and Covent before, and afterwards are translated into a Dean and Chapter, although in these Cases the name and quality of their Corporation be altered and changed, and chiefly in the Case of Prior or Covent, for of regular who are dead persons in Law they are made secular; yet the new Body shall have all the franchises, privileges and hereditaments which the old Corporation or Body politick had either by grant or by prescription, for no person shall be prejudiced thereby. *Vide* 14 *H.* 6. 12. 37 *Ass.* 6. 38 *Ass.* 22. 39 *H.* 6. 15.

Another reason was added, That when a man hath any thing appendant or appurtenant to a house or mill, the most perdurable part thereof is the land in which the foundation is, and upon which all the building of them doth consist; and in respect thereof, by grant of all lands, all his houses, mills and woods will pass. And so it was resolved, as *Popham* chief Justice said, by *Wray* and *Dier* chief Justices, upon conference had with divers other Justices in a Case referred to the said chief Justices. For in a *Præcipe*, where a house, mill or wood is demanded, the warrant of Attorney is *in placito terræ*: And in the Case of voucher, when Judgment is given for the tenant to have in value against the vouchee, the Judgment is *Quod habeat de terris* of the vouchee *ad valentiam*, yet thereby he shall have houses, mills, woods, &c. And in special Cases by Recovery of lands, a man shall recover houses, as it is holden by some in 4 *E.* 3. 161. 6 *E.* 3. 238. 2 *E.* 3. 37. *Plow. Comm.* 168. & 377. 28 *H.* 8. *Dier* 47. and therewith agreeth the Civil Law; for *appellatione fundi, omne ædificium & omnis ager continetur*: Then the prescription or grant shall respect the most perdurable part, and which in Judgment of Law includeth the whole. And therefore it was resolved, That although that the house or mill falleth by the act or default of the owner, or by another wrong, yet for as much as the perdurable part which includeth all the rest doth continue, he may rebuild the same without any loss of any appendant or appurtenant to it, but it ought to be upon the same place which maketh the old foundation of the old house: For as the same doth support, and in Judgment of Law include the old house when it stood, so it shall support and include the new house, and so in a manner a continuance of the old house; And so the *Quære* which

Perkins

Perkins made, *fol.* 128. well resolved. And so it was said in all the Cases of Estovers and Tenures
[88] aforesaid, when the alteration, or quality, or name of part of the house, doth not bring in any prejudice to the Terre-tenant the Estovers and services continue.

And note Reader a Case Reported by Serjeant *Bendloes*, *Mich.* 3. *H.* 8. *Rot.* 649. in the Common Pleas, in a Replevin brought by Sir *William Capel* against *Robert Apprice* and others, of taking of four horses in a place called old *Hadham* Park in little *Hadham* in the County of *Hertford*; The Defendants made conusans as Bayliffs to *Richard Bishop* of *London*, because that Sir *Thomas Brand* Knight was seised of the Manor of little *Hadham* in fee, whereof the place where, &c. was parcel, and held the same of the Bishop of *London*, *ut de Castro suo de Stortford in Com' præd'*, *per homagium*, *fidelitatem*, *& ad scutagium domini Regis xl. s. cum acciderit*, *& ad plus*, *plus*, *& ad minus*, *minus*, *& per redditum v. s. pro Ward' Castri præd' ad festum sancti Michaelis Archangeli annuatim solvend'*, *ac per redditum xiii s. iv d. pro auxilio vicecom'* at four feasts of the year; And for 15 s. for Castle gard behind for three years, &c. he avowed the taking of one of the said four horses, and for 40 s. for aid of the Sheriff behind also for three years, they did avow also the taking of three other of the horses. And the Plaintiff in bar of the Avowry as to the taking of the horse for Castle gard, said, That before the beginning of the said three years, *Castrum præd. funditus corruit & penitus in decasum extitit & adhuc existit*, *& hoc paratus est verificare*, *unde petit judicium si præd' Rich. Apprice*, *&c. pro aliquo redditu pro Wardo Castri præd' sic obruti & penitus in decasum exist'*, *capt' præd' unius equi justam cognoscere debet*, *&c.* Upon which it was demurred in Law, and as to the aid of the Sheriff it was also demurred in Law: And in this Case it was resolved, That although the Castle be fallen down and decayed, yet the rent did remain. For when the Tenant holdeth of the Lord to ward or repair the Lords Castle, and afterwards such service (as *Littleton* saith in the Case of Socage) was in ancient time changed by mutual assent of the Lord and Tenant into an annual rent, yet it is said, That such rent is paid *pro wardo Castri*, that is, in satisfaction *wardi Castri*; for in this Case and the like (*pro*) signifieth full and perpetual recompence and satisfaction, and not conditional, or satisfaction temporary, *scil.* for a time, so that the Lord may have the Castle ward when he will, for the seisin of the rent is not seisin of the Castle gard in such Case: But if the Tenant holdeth to gard the Castle of the Lord, and the Castle falleth, the service is suspended untill it be reedified, but then the tenure shall not be in such Case alledged to be by the rent, but by the Castle gard, and the avowry shall not be made as in the Case at Bar it is for the rent, but for the Castle gard: See *Lit.* 26. *b.* that if a man hold his land by cer-
[*b*] tain rent for Castle gard, *Littleton* saith, that such tenure is tenure in Socage which cannot be if the Castle gard remain, for then the tenure shall be by Knights service, for *Littleton* saith, That where the tenant ought by himself or by another to do Castle gard, that such a tenure is a tenure by Knights service; so the difference between rent for Castle gard, and service to gard the Castle. The same Law if the Tenant holdeth of his Lord by certain rent for work days, or any other service. And Sir *William Capel* the Plaintiff perceiving the opinion of the Court to be against him in both the Points, was Nonsuit: And both the said rents as the Serjeant Reporteth are paid to this day.

And when a man holdeth of another in Socage, or otherwise as of his Castle and afterwards the Castle falleth, and is utterly ruinated, yet the tenure doth remain: For it is to know, That when any tenure is of any person as of a Castle, in such Castle the Castle doth include in it self a Mannor, for *Castrum* as a Manner *est nomen generale & collectivum*, and may include in it self divers things, *scil.* demeans and services, &c. 5 *H.* 7. 9. Land may be parcel of a Castle, *vide* 29 *H.* 6. *Travers* 4. That a Hundred may be as well parcel of a Castle as it may be of a Mannor, as it is holden in 8 *H.* 7. 1. And therefore when a tenure is of any one as of his Castle (which always in such Case includeth a Mannor) although that the Castle be ruinated, yet the tenure without question doth remain: *Vide* 19 *E.* 2. *Ass.* 399. Divers tenants held of another as of his Mannor by fealty and suit to the Lords Mill, the Lord alienated the mill, with the suit of the tenants, and afterwards the vendor died, and his son entred, and conceiving that the tenants who held of his Mannor could not do suit to him who had not a Mannor, of himself made a new mill elsewhere upon parcel of the demesns, and had the suit to his own mill which the vendee ought to have had; for no man can have suit to his mill by reason of tenure if it were not of corn growing in certain land which is within his Mannor. *Vide* 17 *E.* 3. 97. 29 *E.* 3. 12. 16 *E.* 3. *Avowry* 92. And by the said Case it appeareth, that although that the ancient mill be aliened, or if it fall down, the Lord may erect a new mill in any other place within his Mannor, for the tenure in such Case is to do suit to the Lords mill generally, and not to any particular mill: Note well all these differences.

Another Error was assigned because that the prescription was that *magna pars aquæ cujusdam rivuli*, *&c.* and that was incertain how much of the water shall be comprehended within these words, *magna pars aquæ*; and declarations, and specially in Actions upon the Case, ought to be certain, and the whole Case ought to be shewed in certain, and if the truth be that if one River before it cometh to the mills divideth
[89] it self into two branches, whereof one only runneth to the mills, the better form were to prescribe to have *aquæ cursum* to the said mills, for every of the said branches is *aquæ cursus*; *Quod fuit concessum* as to this Point; but it was resolved, that although the Declaration might have been in better form, yet in substance it was well, for it was not possible to shew how much water runneth to mills, and the quantity of the water is not material, for as much as the Defendant by the breaking of the bank, turned the water which ran to the said mills, *Vide* 8. *El. Dier* 248. *b.* where in an Action upon the Case the Plaintiff declared that the Defendant *divertit multum cursus aquæ*: and another president is there cited between *Wikes* and *Serle*; That an Assise of Nusans was brought *pro diversione majoris partis cursus aquæ*, by which the Judgment by Sir *John Popham* chief Justice and his Companions Justices of the Kings Bench was affirmed. Note this Case, that it was adjudged by both the Courts.

Trin. 43 Eliz.

Drurie's Caſe.

DRury brought a Writ of Error upon a Judgment given in the Common Pleas in a *Quare impedit* brought by the Queen, where the Caſe was; A Counteſs being a Widow did retain two Chaplains, and afterwards did retain a third, which third firſt purchaced Diſpenſation to have two Benefices with Cure, and accordingly was advanced to two with Cure, whereof the firſt was above the value of 8 l. And if it were lawfully qualified within the Statute of 21 *H.* 8. was the queſtion in the Common Pleas: For if he were lawfully qualified, then the firſt Benefice by the taking of the ſecond was not void: and ſo by conſequence no title to preſent for Laps came to the Queen; And by the pleading it doth not appear that the two firſt Chaplains were living when the third was advanced, for it was averred only that the two were alive at the time when the third was retained, upon which great Queſtion did ariſe in the Kings Bench: And it was reſolved in the Common Pleas, That title to preſent for Laps was devolved to the Queen, and therefore Judgment was given there accordingly. And after many Arguments at Bar and Bench upon the Writ of Error; the Judgment given in the Common Pleas was affirmed. And in this Caſe two Points were reſolved. [b]

1. When the Counteſs retained two Chaplains, theſe two are only capable of Diſpenſation according to the ſaid Act of 21 *H.* 8. by which it is provided, That every Counteſs being a Widow may have two Chaplains, whereof every one may purchace Licence or Diſpenſation, &c. Then when ſhe retaineth two, the Statute is executed, and the retainer of the third cannot deveſt the capacity of Diſpenſation which was by their retainer in the firſt two: For although that the Counteſs might have as many Chaplains as ſhe would at the Common Law, yet ſhe cannot have more than two capable of Diſpenſation by force of the Statute; and reaſon requireth that he who hath ſerved longeſt ſhould be firſt preferred, *& qui prior eſt tempore, potior eſt jure.* And ſo this Point hath been now four times adjudged: 1. In the Common Pleas, *Paſch.* 31 *Eliz. Rot.* 724. in a *Quare Impedit* between the Queen and the Biſhop of *Lincoln*, the Preſident of *Maudlin* Colledge, and *John Skuffling* Clark. 2. In the Lady S. *John's* Caſe. 3. In this very Caſe in the Common Pleas; and 4. now in the Kings Bench, *vide Dier* 312. the opinion of *Catlyn*, *Saunders* and *Dier* If a Lord who is not allowed but three Chaplains retain ſix by his Letters teſtimonial, and all ſix are preſented to ſix ſeveral Pluralities, the three who are firſt promoted are warranted by the Statute, and yet the retainer was not according to the Statute, but *in æquali jure melior eſt conditio poſſidentis.* [90]

2. It was reſolved, That when the firſt two were retained according to the Statute, and thereby the Statute executed as aforeſaid, the retainer of the third although it were good at the Common Law, yet it was void to give him capacity to purchaſe Diſpenſation within the Statute, and therefore although that the other two were dead before the advancement of the third, yet for as much as they were alive at the time of his retainer, which retainer was at the Common Law, and not according to the Statute, therefore he ought to have a new retainer after their death and before his advancement, for *quod ab initio non valet, in tractu temporis non convaleſcet*; As if the ſon and heir apparent of a Baron retain a Chaplain, and giue unto him his Letters under his hand and ſeal; and afterwards his father dieth, and this Chaplain purchaſeth Diſpenſation, this retainer and theſe Letters Patents wall not ſerve him, becauſe they were not available at the beginning: And if a Baron retaineth two Chaplains according to the Statute, and they purchace Diſpenſation, and are advanced according to the Statute, now if the Lord diſchargeth one of them of his ſervice he cannot retain another during his life, for then by ſuch means he might advance infinite Chaplains without number, by which the Statute ſhall be defrauded, for the Statute limiteth him to three only to have benefit of the Act. And ſo was it adjudged in the Common Pleas, *Paſch.* 28 *Eliz. Rot.* 1130. in a *Quare Impedit* between the Queen and the Biſhop of *Gloceſter* and *Edward Savacre*, and affirmed by a Writ of Error in the Kings Bench; And it was ſaid, That the ſaid Act of 21 *H.* 8. ſhall be taken ſtrictly againſt Pluralities; And therefore it hath been holden, That if a Baron who by the Statute may retain three Chaplains, be made Warden of the Cinque Ports, who may have a Chaplain in reſpect of his Office, yet he ſhall have but three. And ſo if a Baron have three, and be made an Earl, yet he ſhall have but five in all, *& ſic de cæteris.* [b]

Tanfield and others were of Council with the Plaintiff in the Writ of Error, and the Attorney and others with the Defendant.

Trin. 44 Eliz.

Slade's Caſe.

[92. b] *John Slade* brought an Action upon the Caſe in the Kings Bench againſt *Humfrey Morley*, (which plea began *Hill.* 38 *Eliz. Rot.* 305.) And declared, that where the Plaintiff 10 *Nov.* 36 *Eliz.* was poſſeſſed of a Cloſe of land in *Halberton* in the County of *Devon* called *Rack Park*, containing by eſtimation 8 acres for term of divers years then and yet to come, and ſo poſſeſſed, the Plaintiff the ſaid 10 *Nov.* the ſaid Cloſe aforeſaid ſowed with Wheat and Rie, which Wheat and Rie 8 *Maii*, 37 *Eliz.* were grown into Ears: The Defendant in conſideration that the Plaintiff at the ſpecial inſtance and requeſt of the ſaid *Humf.* bargained and ſold to him the ſaid blades of Wheat and Rie growing upon the ſaid Cloſe (the tithes due to the Parſon, &c. expected) did aſſume and promiſe to the Plaintiff to pay to him 16l. at the Feaſt of S. *John Baptiſt* then next to come; and for not payment thereof at the ſaid Feaſt of S. *John Baptiſt* the Plaintiff brought the Action; The Defendant pleaded *Non aſſumpſit modo & forma*; and upon trial of this iſſue the Jurors gave a ſpecial Verdict, *ſcil.* That the Defendant bought of the Plaintiff the Wheat and Rie in blades growing upon the ſaid Cloſe as is aforeſaid, *prout* in the Declaration is alledged. And further found, that between the Plaintiff and Defendant, there was no other promiſe or aſſumption but only the ſaid bargain: And againſt the maintenance of this Action divers Objections were made by *John Dodridge* of Council with the Defendant.

1. That the Plaintiff upon this bargain may have ordinary remedy by Action of Debt which is an Action formed in the Regiſter, and therefore he ſhall not have an Action upon the Caſe which is an extraordinary Action, and not limited within any certain form in the Regiſter; for *ubi ceſſat remedium ordinarium, ibi decurritur ad extraordinarium*, as it appeareth by all our Books; *Et nullus debet agere actione de dolo, ubi alia actio ſubeſt.*

[93] The ſecond Objection was that the maintenance of this Action doth take away the Defendants benefit of Wager of Law, and ſo bereaveth him of the benefit which the Law hath given him as his birthright. For peradventure the Defendant hath paid or ſatisfied the Plaintiff in private betwixt them, of which payment and ſatisfaction he hath not any witneſs, and therefore it ſhould be miſchievous if he ſhall not wage his Law in this Caſe. And that was the cauſe (as was ſaid) that debts by ſimple contract ſhall not be forfeited to the King by outlawry or attainder, becauſe that then by the Kings Prerogative the Subject ſhould be ouſted of his wager of Law which is his birthright as it is holden in 49 *E.* 3. 5. 50 *Aſſ.* 1. 16 4. 4. *&* 9 *Eliz. Dier* 262. And if the King ſhall loſe the forfeiture and the debt in ſuch Caſe, and the debtor by Judgment of the Law ſhall be rather diſcharged of his debt, before he ſhall be deprived of the benefit which the Law hath given to him for his diſcharge, although that in truth the debt were due and payable; *a fortiori* in the Caſe at Bar, the Defendant ſhall not be charged in an Action in which he ſhall be ouſted of his Law when he may charge him in an Action of debt, in which he may have the benefit thereof.

And as to theſe Objections, the Courts of Kings Bench and Common Pleas were divided; for the Juſtices of the Kings Bench held that the Action (notwithſtanding ſuch Objections) was maintenable. And the Court of Common Pleas held the contrary. And for the honour of the Law, and the quiet of the Subject in the appeaſing of ſuch diverſity of opinions (*Quia nihil in lege intolerabilius eſt eandem rem diverſo jure cenſeri*) the Caſe was openly argued before all the Juſtices of *England*, and Barons of the Exchequer, *ſcil.* Sir *John Popham* Knight chief Juſtice of *England*, Sir *Edmund Anderſon* Knight chief Juſtice of the Common Pleas, Sir *William Periam* chief Baron of the Exchequer, *Clark*, *Gawdy*, *Walmeſley*, *Fenner*, *Kingſmill*, *Savile*, *Warberton*, and *Yelverton* in the Exchequer Chamber, by the Queens Attorney for the Plaintiff, and by *John Dodridge* for the Defendant; and at another time the Caſe was argued at Serjeants Inn before all the ſaid Juſtices and Barons by the Attorney General for the Plaintiff, and *Francis Bacon* for the Defendant; and after many conferences between the Judges and Barons, it was reſolved, That the Action was maintenable, and that the Plaintiff ſhould have Judgment. And in this Caſe theſe Points were reſolved.

1. That although an Action of debt lieth upon the contract, yet the bargainor may have his Action of debt, or Action upon the Caſe at his election, and that for three reaſons or cauſes. 1. in reſpect of the infinite preſidents (which *George Kempe* Eſquire Secundary of the Prothonotaries of the Kings Bench ſhewed to me) as well in the Court of Common Pleas as in the Kings Bench, in the reigns of King *H.* 6.
[*b*] *E.* 4. *H.* 4. *&* *H.* 8. by which it appeareth, That the Plaintiffs declared that the Defendants in conſideration of a ſale to them made of certain goods, did promiſe to pay ſo much money, &c. in which Caſes the Plaintiffs had Judgment. To which preſidents and Judgments being of ſo great number, *in* ſo many ſucceſſions of ages, and in the ſeveral times of ſo many reverend Judges, the Juſtices in this Caſe gave great regard: and ſo the Juſtices in ancient times, and from time to time did as well in matters of form as in deciding of doubts and queſtions as well at the Common Law, as in conſtruction of Acts of Parliament: And therefore in 11 *E.* 3. *Formedon* 32. it is holden, That the ancient forms and manner of preſidents are to be maintained and kept; and in 34 *Aſſ.* 7. that which hath not been according to uſage ſhall not be ſuffered: In 39 *H.* 6. 30. the opinion of *Priſot* and all the Court was, That in a Writ of meſn the Plaintiff ought to ſurmiſe the tenure between the Lord paramount and the meſn, as well as between the meſn and the tenant, and ſhew there divers reaſons and cauſes of their opinions; But when

when the Justices were informed by the Prothonotories, that the Book called *les Tales*, contained the form that had always in such Cases been used; the Book saith, That the Justices resolved, that they would not change the usage notwithstanding that their opinion was to the contrary; and according to the presidents they awarded the Declaration good 4 E. 4. 44. In a Writ of Error brought by *John Paston* to reverse an outlawry against him, he did not surmise in the Writ at whose suit he was outlawed, and all the Justices said that that was a strange Writ, and no certainty supposed thereby; for by the Writ it did not appear whether he were outlawed at the suit of the party, or at the Kings suit, or in what suit, or for what thing; and it might be that he was outlawed for felony, debt, trespass, accompt or fine to the King; But when the Court was informed that the ancient form was such, then they changed their opinions and awarded the Writ good. And resolved, that common course maketh a Law, although that now as there it was said, perhaps reason willeth the contrary: But there the Justices said, We cannot change the Law now, for that shall be inconvenient. And therewith agreeth *L.* 5. E. 4. 1. where it is said, That the course of a Court maketh a Law: *Vide* 2 & 3 *Phil. & Mar.* 120. the Statute of *West.* 2. *cap.* 12. *Quod Justic' coram quibus formatum erit appellum & terminat'*, shall enquire of damages where the Defendant is acquitted, yet presidents expound the Law against the expres letter, *scil.* That Justices of *Nisi prius* (before whom the appeal was not began) shall do it; And many others to this effect are in our Books: But for as much as presidents are not always allowable, for in our Books the Judges reject some presidents, see a notable Case in *L.* 5 E. 4. 110. for certain rules and differences in this matter; there it is agreed, That where a question was of a retorn of an Assise, and two or three presidents were shewed, which agreed with the said retorn; and the Justices said, that two or three presidents do not make a Law or custom, especially when there are here in Court 40 and more pre- [94]
sidents to the contrary; but if there were no president to the contrary it were another matter, if not that the Court do adjudge it against reason, and then it shall be amended, for perhaps the presidents passed without challenge of the party, or debate of the Justices, as then (as it is there recited) of late it was in a Writ of Error for reversing of an outlawry in the County of *Lancaster*, and the Error was because the Sheriff retorned, That *ad Com' Lancastriæ tent' ibid'*, *&c.* where it should be, *ad Com' Lancastriæ tent' apud Lancastr'*, or other certain place to which this word (*ibidem*) shall have relation; and although that there were shewed 100 presidents according to the said retorn, yet the outlawry was reversed: So in divers Cases presidents do not make a Law; and therefore it was said by the Justices to the parties, That he who will have advantage of presidents ought to search for them at his peril, and for his speed, for the Court will not search for them; for if none, or no usual presidents are not shewn, the Court ought to Judge according to Law and reason.

Out of which Book, 1. It is to be observed, that two or three or such small number of presidents do not Make a Law against the generality of presidents in such Case.

2. That the retorn of Sheriffs or Entries of Clarks without challenge of the party, or consideration of the Court being against Common Law and reason, are not allowable: But when the presidents are Judicial, *scil.* where the Justices by divers successions of ages have given judgment in Actions there brought, it shall be intended that some of Council with the Defendant, or some of the Justices before whom the Action was tried, and the Record read would have excepted against it, if in their Judgment the Action was not maintenable: but in Case of return of an Outlawry, or entries of Clarks, the Records pass in silence, and without exception of the parties, and therefore are not so authentical as Judgments upon demurrers or verdicts; and therefore in such Cases, *Multitudo errantium non parit errori patrocinium*, if such retorns or entries of Clarks and Officers be clearly in the opinion of the Justices against Law and reason: So in the Case at Bar it was resolved, That the multitude of the said Judicial presidents in so many successions of ages well prove that in the Case at Bar the Action was maintenable. [b]

The second cause of their Resolutions was divers Judgments and Cases resolved in our Books where such Actions upon the Case upon *Assumpsit* hath been maintenable, when the party might have have had an Action of debt, 21 *H.* 6. 55. *b.* 12 E. 4. 13. 13 *H.* 7. 26. 20. *H.* 7. 4. *b.* & 20 *H.* 7. 8. *b.* which Case was adjudged as *Fitz. James* citeth it, 22 *H.* 8. *Dier* 22. *b.* 27 *H.* 8. 24. & 25. in *Tatam*'s Case, *Norwood* and *Read*'s Case adjudged *Plowden*'s *Comm.* 180.

3. It was resolved, That every contract executory importeth in it self an *Assumpsit*, for when one agreeth to pay mony, or to deliver any thing, thereby he promiseth to pay, or deliver it; and therefore when one selleth any goods to another, and agreeth to deliver them at a day to come, and the other in consideration thereof promiseth to pay so much mony to the other, in this Case both parties may have an Action of debt, or an Action upon the Case upon *Assumpsit*, for the mutual executory agreement of both parties importeth in it self reciprocal Action upon the Case, as well as Action of debt, and therewith agreeth the Judgment in *Read* and *Norwood*'s Case in *Plow. Comm.* 128.

4. It was resolved, That the Plaintiff in this Action upon the Case upon *Assumpsit* shall not recover only damages for the special loss (if any be) which he hath, but also for the whole debt, so that the recovery or bar in this Action shall be a good bar in an Action of debt brought upon the same contract; so *via versa*, recovery or bar in an Action of debt is a good bar in an Action upon the Case upon *Assumpsit*, *Vide* 12 E. 4. 13. *a.* 2 *R.* 3. 14. 33 *H.* 8. *Action sur le Case Br.* 105.

5. In some Cases it shall be mischievous, if an Action of debt shall be only brought, and not an Action upon the Case, as in the Case between *Redman* and *Peck*, 2 & 3 *Phil. & Mar. Dier* 113. They bargain together that for a certain consideration *Redman* shall deliver unto *Peck* 20 Quarters of Barley yearly during his life, and for not delivery in one year it is adjudged that an Action well lieth, for otherwise it shall be mischievous to *Peck*, for if he shall be driven to his Action of debt, then he himself shall never have it, but his Executors or Administrators, for debt doth not lie in such Case till all the days be incurred, and that shall be contrary to the bargain and intent of the parties, for *Peck* doth provide it yearly for his necessary use: So 5 *Ma. Br. Action sur le Case* 108. that if a sum be given in marriage to be paid at

ſeveral days, an Action upon the Caſe lieth for non payment at the firſt day, but no Action of debt lieth in ſuch Caſe till all the days are paſt. Alſo it is good in theſe days in as many Caſes as may be done in the Law, to ouſt the Defendant of his Law, and to try the ſame by the Country, for otherwiſe it ſhall be a great occaſion of Perjury.

6. It was ſaid, That an Action upon the Caſe upon *Aſſumpſit* is as well a formed Action and contained in the Regiſter, as an Action of debt, for there is its form. Alſo it appeareth in divers other Caſes in the Regiſter, That an Action upon the Caſe will lie, although the Plaintiff may have another formed Action in the Regiſter, *F. N. B. 94. g.* & *Regiſter 103. b.* If a man hath a Mannor within any Honour, and hath a Leet within his Mannor of his Tenants, if he or his Tenants are diſtrained by the Lord of the Honour to come to the Leet of the Honour, he who is ſo diſtrained may have a general Action of Treſpaſs,
[95] or a ſpecial Writ upon his Caſe: So if any Officer take toll of him who ought to be quit of toll, he ſhall have a general Action of treſpaſs, or an Action upon the Caſe, as appeareth by *Fitz. ibid. 94.* And if a Prior or other Prelate be riding in his journey, and one diſtraineth his horſe upon which he rideth when he may diſtrain other goods, he may have a general action of Treſpaſs or an Action upon the Caſe, as appeareth in the *Regiſter 100.* & *F. N. B. 93. H.* If the Sheriff ſuffer one in Execution upon the Statute Merchant to eſcape, the conuſee may have an Action of debt, or an Action upon the Caſe, as appeareth by the *Regiſter 98 b.* & *F. N. B. 93. B. C.* So if a man put the Executors of leſſee for years out of their term, they may have a ſpecial Writ upon their Caſe, as appeareth *F. N. B. 92.* & *Regiſter 97.* and yet he may have an *Ejectionr firmæ*, or Treſpaſs. And therefore it was concluded that in all Caſes when the Regiſter hath two Writs for one Caſe, it is in the parties election to take which Writ he will: But the Regiſter hath two ſeveral Actions, Action upon the Caſe upon *Aſſumpſit*, and alſo an Action of debt, and therefore the party may elect the one or the other.

And as to the Objection which hath been made, that it ſhall be miſchievous to the Defendant that he ſhall not wage his Law, for as much as he may pay it in ſecret: To that it was anſwered, That it ſhall be accounted his folly that he took not ſufficient witneſſes to prove the payment he made; But the miſchief ſhall be rather on the other part, for now experience proves that mens conſciences grow ſo large, that the reſpect of their private commodity induceth men (and chiefly thoſe who have declining eſtates) to perjury; for *Jurare in propria cauſa* (as one ſaith) *eſt ſæpenumero hoc ſeculo præcipitium diaboli ad deſtruendas miſerorum animas ad infernum*: And therefore in debt, or any Action where Wager of Law is admitted, the Judges do not admit him to it without good warning, and due examination of the party. And as to the Caſe which was cited, That debts or duties due by ſingle contract where the party may wage his Law ſhall not be forfeit by utlagary, becauſe the debtor thereby ſhall be ouſted of his Law; To that it was anſwered by the Attorny General, that in ſuch Caſes by Law debts or duties ſhall be forfeit to the King, and ſo are the better opinions of the Books, *ſcil. 3 E. 3. Corone 343. 19 E. 2. Avowry 223.* If the tenant of a Prior alien be amerced for want of a ſuit at a Court Baron, and the King ſeiſeth the temporalties of the Prior alien, yet in an Action of debt brought for the ſame by the Prior alien, he ſhall wage his Law, as it was adjudged *6 E. 6.* in Serjeant *Bendloe*'s Reports, *28 E. 3. 92.* in *Accompt*, and *Stamford* Pleas of the Crown 188. and infinite preſidents in all ages in the Exchequer, which I have ſeen approve it. And ſo it was of late reſolved in the Exchequer, and ſo it was holden in this Caſe of *Popham*, *Anderſon*, and all the other Ju-
[b] ſtices with whom I have conferred againſt the ſudden opinions in *49 E. 3. 5. 50 Aſſ. 1. 16 E. 4. 4.* & *9 Eliz. Dier 262.* and ſo have you a doubt in our Books well reſolved.

And note Reader, that in every *Quo minus* brought by the Kings debtor in the Exchequer againſt one who is indebted to him upon a ſimple contract, the Defendant ſhall not have his Law, for the benefit of the King, as appeareth in *8 H. 5. Ley. 66. 20 E. 3. Ley. 52. 10 H. 7. 6.* and yet the King is not party, *a fortiori* when ſuch debt or duty is forfeit to the King, and the King is the ſole and immediate party: And note Reader, this Reſolution agreeth as to this point with the Judicial Law of God, upon which our Law is in this point grounded, for it appeareth by the 22 Chapter of *Exodus ver. 7, 10, 11.* If any man deliver to his neighbour money, *&c. 10.* If a man deliver unto his neighbour an aſs, or an oxe, or ſheep, or any beaſt to keep, and it die, or be hurt, or driven away, no man ſeeing it, then ſhall an oath of the Lord be between them both, that he hath not put his hands unto his neighbours goods, and the owner thereof ſhall accept thereof, and he ſhall not make it good. By which it appeareth, that it is in the election of the party, either to charge the Defendant by witneſſes if he will and to ouſt him of his Law, or to refer it to the Defendants oath. And the Text ſaith, *Nulluſque hoc viderit, ſcil.* if there be no witneſſes. So by our Law in the ſame Caſe put in the Text, the owner hath his election either to bring his Action upon which the Defendant cannot wage his Law, or an Action of debt in which he may. *Et juſjurandum in hoc caſu eſt finis*: for the Plaintiff is bound thereby, and it is the end of all controverſie. And I wonder in theſe days ſo little conſideration is had of an oath, as I daily obſerve; *Cum jurare per Deum actus religionis ſit, quo Deus teſt' adhibetur tanquam is qui ſit omnium rerum maximus, &c.*

Mich.

Mich. 44 & 45 Eliz. *in the Kings Bench.*

Adams and *Lambert's* Caſe.

IN an *Ejectione firmæ* between *Adams* and *Lambert* for lands in *Buckingham* within the County of *Buckingham*, upon Not guilty pleaded, the Jurors gave a ſpecial verdict to this effect; *Joh. Barton* was ſeiſed of the ſaid lands in fee, and made a feoffment in fee to perform his will; and afterwards by his will in writing deviſed the ſaid lands to *J. Barton* his younger Brother for his life, *ſub conditionibus ſequentibus*, viz. *Quod idem Joh. durante vita ſua, inveniat unum Capellanum pro anima dicti J. Barton ſenioris, & aliorum in Eccleſia S. Petri in villa de Buck. quotidie celebratur': Et voluit quod præd' Joh. frater ſuus annuatim durante vita ſua perſolvat dicto Capellano in præd' Eccleſia pro ſuſtentat' ſua 6l. 13 s. 4 d. de exitibus & proven' tenementor' præd'. Et inſuper voluit quod dicti' Joh. frater ſuus durante vita ſua inveniat in vill' præd' 6. pauperes homines ſive fœminas ad orand' pro anima ſua & alior' in teſtimento præd' nominat' ſingulis diebus imperpetuum: & quod daret qualibet ſeptimana durante vita ſua cuilibet ipſorum pauper' 4 d. & etiam cuilibet ipſorum manſion' prout (Deo diſponente) pro eis conſtituit & ordinavit: Ac etiam quod idem Joh. frater ſuus tota vita ſua inveniet unum lampad' ardent' ſingulis diebus & noctibus cor' ſancto Rotwaldo in Eccleſia præd', prout modo inventus eſt & ſuſtentatus; Et quod idem J. frater ſuus durante vita ſua teneat ſeu teneri faciat Anniverſarium ſuum in Eccleſia præd', in quo quidem Anniverſario inveniet idem J. frater ſuus annuatim duos cereos nocte ad* Dirige, *& die ſequente ad* Miſſ. *unum ſcilicet ad caput, & alter' ad pedes ſepulturæ dicti teſtat' ardentes, quolibet cereo ponderant' tres lib. quibus exequiis completis, voluit quod totum id quod de dictis cereis reſid' fuerit, dimittat' & reman' altari S. Jacobi in Eccleſia præd ſuper candelabrum ibidem exiſtend', capell' cantar' ſuæ præd' ſingulis diebus feſtivis ad Miſſ. quamdiu durare poterit deſervitur': Et quod idem Jo. frater ſuus tota via ſua durant', inveniat annuat' unum torcherum competent' ad altare præd' deſervitur': Et voluit quod omnia præd' tenement' poſt mortem præd' Jo. fratris ſui integr' remanerent Marg. & Iſabel. ſororibus ſuis, ad vitam earum & earum alterius diutius viven'; ſub conditione quod eadem M. & I. earum vitarum durant' faciant perimpleri & obſervari omnia opera ſuperius limitat' in forma præd'. Et poſt mortem præd' Marg. & Iſabell. voluit quod omnia præd' tenement' remaneat Will. Fow. tenend' ſibi & hær' de corpore ſuo legitime procreat'; ſub conditione quod ipſi obſervant omnia & ſingula onera ſupraſcript' in forma antedicti' imperpet'; Et ſi contingat præd' W. Fow. ſine hær' de corpor' ſuo legitime procreatis obire, tunc omni a & ſingula præd' tenementa integre remaneant Jo. Somerton conſanguineo ſuo & hæred' de corpore ſuo legitime exeun', ſub conditione quod ipſi omnia & ſingula onera ſupr' in forma præd' perimpleant & obſervent imperpet': Et ſi ipſum I. Somerton abſque hær' de corpor' ſuo legitim' exeunt' obire contigerit, quod extunc omnia prædicta tenementa integre remanen' Wil. Purfrey & hær' ſuis de corpore ſuo legit' exeunt', ſub condic' quod idem W. & hær' ſui, faciant perimpleant & obſervent omnia & ſingula onera in forma præd' imperpet': remanere pro defectu hujuſmodi exit' Magiſtro domus S. Tho. Mart' de Acon' Lond. pro 40. ann. extunc prox' ſequen' & plenar' complend': Et poſt term' ill' finit. reman' Magiſt. hoſpital. S. Bar. Lond. & ſucceſſ. ſuis pro 40. ann. extunc prox' ſequen' & plenar' complend': Cuilibet eorum ſub condic', quod quilibet eorum Magiſtr. & ſucceſſ. ſuorum durante eorum term', faciant & perimpleant omnia & ſingula onera ſupralimatat' in forma ſupradicti': Et ſi contingat præd' I. fratrem ſuum durante vita ſua in perficiend' onera ſupradicti' deficere, ſeu ill' non perimplere, aut omnia prædicta tenementa durante vita ſua non competent' ſuſtentare & reparare, ſeu ea aut aliquam parcel' earund' alienare ſive ad parvum valor' ea dimittere in præjudic' cæter' perſonarum in remaner' ſuprad' nominat'; Quod extunc bene licebit præf. Ma. & Iſ. in prædicta tenementa cum pertinen' intrare, & ea retinere ut in reman' ſuo præd' abſque contradicti' alicujus, & quod extunc ſtatus præd' Jo. fratris ſui omnino ceſſat, & nullius ſit valoris:* And the like condition or limitation of forfeiture is annexed to all the remainders in the ſame Will: and if all in remainder forfeit the ſaid tenements to remain to the ſaid *John Barton* the Teſtator and to his heirs for ever. *Supportand', &c. Et quia hæc mea volunt' pro bono Animarum patris & matris meorum, pro anima etiam mea animabuſque fratrum, ſoror', parentum & benefacti' meor' edit' fuit, & ordinat'; Precor & onero præd' fratrem meum, prout pro me & ſe voluerit reſpondere, quod ipſe tota vita ſua diligenter ſupervideat gubernation' cantar' ſupradicti'; Et quod omnia ſupraſcr', & in hac mea ultima voluntate declarat' inviolabiliter perimpleant' & conſervent': Et quod notitiam faciat omnibus iis qui in reman' præd' ſtatum habebunt in dictis tenementis, ut ipſi cognoſcant tenor' & effect' teſtamenti & ultimæ meæ volunt'. Et volo quod feoffati mei de tenement' cum ſuis pert' quod mei pauperes homines modo inhabitant' quod eſt diviſibile, facient talem ſtatum poſt mortem meam omnibus illis ſupranominat', prout habeant ex meo legato de & in tenementis in Buck. prædicti', ad uſum præd' pauperum ibidem habitan', ſupportand' reparationes illius tenementi præd' pauper' quoties indigerit: Et quia dubito ne tenement' ſuprad' ſufficiant ad ſupportand' omnia præd' onera, cauſa grandi cuſtus reparationis eorundem, volo quod feoffati mei ſtatim poſt mortem meam faciant talem ſtatum omnibus illis ſupranominatis, de omnibus illis terris & tenementis meis in villis de Bourton, Moreton, Gavecot, cum præbend' Lembergh, Thornborough, Hilleſden, Waterſtratford, Shaldeſton & Foycote in Com' Buck. ac de omnibus illis terris & tenementis meis in Woreton in Com' Oxoniæ, ac de uno tenemento meo in villa Oxoniæ in quibus feoffati extiterunt, prout habent ex meo legato de & in tenementis in Buck. præd': Ita quod ſufficienter omnia onera præd' poſſint ſuſtentare, & etiam pro labore inde rationabiliter percipere & obtinere.*

[104.b] [105] [b]

And this Caſe was often argued at the Bar, and afterwards it was openly argued in Court by *Yelverton* and *Fenner* Juſtices in one day, and by *Gawdy* and *Popham* chief Juſtices in another. And in this Caſe which extendeth to all the parts in effect of the body of the Statute of 1 E. 6. *cap.* 14.) theſe Points were reſolved.

1. Although that in this Caſe the land was deviſed to his brother for life, the remainder to his ſiſters, &c. between whom as was objected was apparent conſideration of nature, and every one by the Law of nature is bound to provide for his blood and poſterity in reaſonable manner; And although the deviſor hath limited what ſumms ſhall be employed upon the Chaplain, *Obite*, &c. by which his intent (as it was objected) appeareth to advance them of his blood (to whom he had deviſed the land) with the reſidue of the profits which remained, and whereof no diſpoſition was made by him, that by the Law the land being deviſed to them they ſhould take the ſurpluſage of the profits (of which no diſpoſition was made to their own uſe, and the apparent conſideration of advancement of his blood expreſſeth his intent, that after the Divine ſervices (as it was then thought) were performed thoſe of his blood ſhould be maintained and relieved with the reſidue, for which his blood ſhall have the land, and the Chaplains, &c. ſhould [106] have penſions, and ſo in reſpect of the perſons the land was not given to the King: Yet it was reſolved, That wives, ſons, daughters, ſiſters, couſins, and other dear friends, were perſons within this Act; for if men as well in their lives, as by their Teſtaments after their deaths, uſed to put and repoſe confidence in their kindred and dear friends, for their temporal goods, *a multo fortiori* when they intend to diſpoſe their poſſeſſions for the health of their ſouls (as it was then thought) they would convey them to them in whom they had the greateſt confidence: And in theſe Caſes of Divine ſervice concerning the health of the ſoul, ſhall not be intended to any advancement or preferment of his blood, or any other earthly conſideration, if it be not ſo declared by expreſs words; But all ſhall be intended for the advancement and continuance of the intents and purpoſes expreſſed, *ſcil.* Divine ſervices as things without all compariſon more worthy and preexcellent; and he who defraudeth ſuch truſt (the Divine ſervice being according to the Law of God) is by many degrees a greater offender than he who doth not perform any truſt or confidence concerning temporal things; for he who robbeth his ſoul committeth felony, and he who diſpoileth poor men of their living, is the greateſt thief by the Law of God, for *Panis pauperum vita pauperum, & qui defraudat eos vir ſanguinis eſt*: But he who taketh away any thing that is given for the Divine and true ſervice of God, *eſt ſacrilegus, & omnium prædonum cupiditatem & ſcelera ſuperat*: And although it appeareth by the preamble of the Act that the deviſing and phantaſing of the vain opinion of Purgatory and Maſſes ſatisfactory to be celebrated for thoſe who were dead, was great cauſe of ſuperſtition and error in Chriſtian Religion, &c. yet for as much as the deviſor and deviſees in the Caſe at Bar (as they were taught) were perſwaded that it was for Divine ſervice and the health of ſouls, it ſhall be intended that their intentions were to advance ſuch uſes, and not the private commodities of the deviſees: and therefore it was reſolved, That the perſon (be he of blood or not) ſingle, or corporate, or politick, to whom the land is deviſed or conveyed, is not to be reſpected, but all is one within the purview of this Act.

2. Although it was objected, That for as much as the land was deviſed for life the remainder in tail and a reverſion in fee expectant to the heirs of the deviſor was not deviſed; and the letter of the Act is To the finding of any Prieſt to have continuance for ever, upon which it was ſaid, that an eſtate for life and eſtate tail, which were eſtates limited and determinable, were not within the letter and intention of this Act, and ſo much the rather becauſe that the makers of the Act by the firſt branch have provided When a Prieſt was appointed to be found for ever; and by another ſubſequent branch, when he was to [b] be found for years, by which ſpecial and preciſe numbring of theſe two Caſes, the makers of the Act did intend to exclude eſtates in tail, and eſtates for life, ſo that eſtates in tail and for life are *Caſus omiſſi* as it was ſaid: Yet it was reſolved that eſtates in tail and eſtates for life were included by the equity and meaning within the former branch, for the intention and meaning of the Act as appeareth by the preamble was to extirpate out of mens minds theſe ſuperſtitious errors, and to take them utterly away, in what manner, or for what times they were given, and not to take them away only which were to have continuance for ever, and leave thoſe to have eſſence which were determinable and limited for a time: And for as much as the Statute by expreſs words doth abrogate and take away all ſuch ſuperſtitious uſes which were to have continuance for ever by equity and good conſtruction, the ſame extendeth to every leſs eſtate whatſoever. Alſo it was ſaid, that the Statute ſaith, by any manner of aſſurance, or conveyance &c. for ever. And by common poſſibility an eſtate tail may continue for ever. Alſo in this Caſe at Bar the intent of the deviſor was (as appeareth by his Will) that the Prieſt ſhall be found for ever, for he appointeth alſo his right heirs to find him: And if ſuch conſtruction ſhall not be made, the miſchief intended to be remedied by the Act ſhould remain againſt the intent and meaning of the Act: And in the clauſes of Obits, the words are, To have continuance for ever. And yet it was agreed in the Caſe of *Winchester* that an Obite being appointed to be found for 8 years, was included within the equity of the Act: So it was reſolved 22 *Eliz.* in the Dean of *Paul's* Caſe, That a Colledge or Chauntry in reputation, although that it wanteth ſufficient foundation and incorporation in Law was given to the King by the ſaid Act; and the reaſon was, becauſe the intent of the makers of the Act was to take away all ſuperſtition out of men's minds, and not to ſuffer any to have continuance; and ſuperſtition was maintained as well in reputative Chauntries, as in others; and yet it was not within the letter of the Act, for in Judgment of Law it was no Colledge, nor Chauntry; for *Reputatio eſt vulgaris opinio ubi non eſt veritas*. And this was reſolved as to eſtates deviſed to ſuperſtitious uſes within the purview of this Statute.

3. Where it was objected, That this deviſe of the land was not to the intent to find a Chauntry or Stipendary Prieſt, or to find a Prieſt as the Statute ſpeaketh; but was upon condition to find him, ſo that if the Prieſt be not found the eſtate doth ceaſe, and the third branch of the Act doth not ſpeak of any eſtate conditional, but only where the Prieſt was to be found for ever; and therefore an eſtate conditional ſhall be without the purview of the Act. It was anſwered and reſolved, That it was within the Act, for when the land is deviſed upon condition to find a Prieſt, without queſtion this land is deviſed, To the finding of a Prieſt, &c. as the Statute ſpeaketh. And it is a ſtronger Caſe where it is deviſed [107]

upon

upon condition, then where it is deviſed to the intent, or for the finding of a Prieſt, for the condition is more compulſory and penal for the maintenance of things prohibited by the Law. Note Reader, there is one Proviſo towards the end of the Act, by which it is provided, That it ſhall not be lawful to any perſon by reaſon of any reverſion, uſe or condition to enter, or claim any land for not finding of any Prieſt, or poor men, Obite, anniverſary, light or lamp after the ſaid Act to be found or made. By which it appeareth, that by the Judgment of the whole Parliament, that land given upon condition or other determination, and all eſtates whereof there were reverſions expectant, be they eſtate tails for life, or any other particular eſtate, were within the Act. And this was reſolved for the manner of conveyance or aſſurance of lands to ſuperſtitious uſes within this Act.

4. It was reſolved, That all the land in this Caſe was given to the King by the ſaid Act, which was the principal point of the Caſe, and of great conſequence, and that for divers reaſons; for the better underſtanding of which, five of the firſt branches of the Act are to be conſidered. 1. Are given to the King, all manner of Colledges, free Chappels, and Chauntries, &c.

2. All mannors, lands, tenements, &c. belonging to them, or any of them.

3. All mannors, lands, tenements, &c. by any mean aſſurance, conveyance, &c. given, aſſigned, limited or appointed to the finding of any Prieſt to have continuance for ever, and wherewith or whereby any Prieſt was ſuſtained, maintained or found, within five years, &c.

4. Alſo all annual rents, profits and emoluments at any time within five years, &c. imployed, paid or beſtowed toward or for the maintenance or finding of any Stipendary Prieſt for ever.

5. Shall be in the actual and real poſſeſſion of the King, &c. in as large and ample manner and form, as the Prieſt, Wardens, Maſters, Miniſters, Governors, or other Incumbents of them within five years, &c. had occupied or enjoyed the ſame, and as though the Colledges, free Chappels, Chauntries, Stipends, Salaries of Prieſts, and the ſaid mannors, lands, &c. were in the Act ſpecially, particularly and certainly rehearſed, named and expreſſed by expreſs words, &c.

And the conſideration of every of theſe clauſes were requiſite for the deciding of this Point, for the true expoſition of one of them ſerveth well for the good underſtanding of the other: As to the firſt clauſe it was reſolved, That ſome of the Colledges, Chauntries, &c. which were not lawfully founded, but were only in reputation, were given to the King by the ſaid Act, and ſome not; and therefore this difference was agreed, That where the Colledge, Chauntry, &c. had ſuch beginning which may have a lawful foundation but for error or imperfection in the penning or proceeding of it, nor was in judgment of Law lawfully founded, ſuch Colledge or Chauntry is given to the King by the ſaid Act: But when there is a Colledge or Chauntry only in vulgar reputation, without any commencement or countenance of a lawful foundation, or erected by ſuch mean which cannot make a lawful foundation, there ſuch Colledge or Chauntry is not given to the King by this Act. [b]

Note Reader, the Rule is, *Quod reputatio eſt vulgaris opinio ubi non eſt veritas, & vulgaris opinio eſt duplex*; ſcil. *Opinio vulgaris orta inter graves & diſcretos, & quæ vultum veritatis habet, & opinio tantum orta inter leves & vulgares homines abſque ſpecie veritatis:* And accordingly to this diſtinction it hath been adjudged and reſolved by all the Juſtices upon this firſt branch of this Act: And therefore 6 & 7 *E.* 6. *Dier* 81. which was preſently after the making of this Act, the Caſe was, That Pope *Urbane* at the requeſt of *Ralph* Baron of *Greyſtock* founded a Colledge of a Maſter and ſix Prieſts reſident in *Greyſtock*, and aſſigned to each of the Prieſts 5 marks *per ann.* beſides their bed and Chamber, and the Maſter 40 l. *per ann.* and the ſame wes certified into the book of Firſt fruits and Tenths, *Rectoriam & Collegium de Greyſtock*, and this Colledge was in being five years before the ſaid Act; and it was reſolved by the Juſtices, That this reputative Colldge was not given to the King by the ſaid Act of 1 *E.* 6. becauſe that it wanted a lawful beginning and the countenance of a lawful commencement; for the Pope cannot found or incorporate a Colledge within this Realm, nor aſſign nor licence others to aſſign temporal livings to it, but it ought to be done by the King himſelf, and by no other, *Nomen non ſufficit, ſi res non ſit de jure aut de facto*, and it is as much as if one of his own head had erected and founded a Chauntry without licence or authority derived from the King: But *Mich.* 9. & 10 *Eliz. Dier* 267. where the Caſe was, That King *E.* 1. in the 12th year of his reign by his Letters Patents under the Great Seal granted to *Tho. Beale* then Biſhop of S. *Davies* and his Succeſſors, the Advowſon of 34 Churches in *Wales* within his Dioceſſes to hold of the King and his Succeſſors; ſo that the Biſhop and his Succeſſors might appropriate them, or any of them to their Church of S. *Davies* and *Aberguelley*, or make or annex Prebends of them in the ſaid Churches of S. *Davies* and *Aberguelley*, as to them ſhould ſeem moſt convenient; And three years after the Biſhop with the Kings aſſent (as the Biſhop in his Inſtrument affirmed of the Chapter of S. *Davies*) [108] erected and eſtabliſhed a Colledge, or Church Collegiate, *Et quidquid celebratus Collegii depoſcit authoritat' ſua ſupplevit in Landwybreuy*, being one of the 34 Churches, and ordained 13 Canons ſecular there, *ſcil.* 5 Prieſts, 4 Deacons, and 4 Subdeacons, and of them made Prebends and Prebendaries, and annexed and appropriated 13 of the ſaid Churches to them, &c. And reſerved to the Biſhop himſelf and his Succeſſors as Dean, *Locum in choro, & vocem in Capitulo*, and alſo Viſitation and Corrections, &c. In which the Biſhop did not purſue the authority and power given him by the ſaid Letters Patents, for by them reciting no power was given to found ſuch a Colledge; And afterward King *E.* 3. by his Letters Patents, doubt of the the ſaid foundation and erection of the ſaid Colledge, and all other the premiſſes with ſ[illegible] of S. *Davies* and validity thereof, by his ſaid Letters Patents granted and confirmed to the ſaid Biſ[illegible] of *Mortmain*, or any his Succeſſors, all that which his predeceſſor had done in the premiſſes, the Sta[illegible] and founded, and the ap- Statute notwithſtanding; and notwithſtanding the ſaid Colledge was ere[illegible] propriations made without the Kings licence; which grant and confirmation being made to the Biſhop and his Succeſſors, cannot make the ſaid Colledge (which want[illegible]awful erection and foundation) good in Law: And yet by the ſaid Letters Patents the ſaid Colle[illegible] of *Landwybreuy* continued a Colledge in Reputation until 1 *E.* 6. And it was reſolved by the J[illegible]ices of both Benches, That this Colledge was given

given to the King by the Act of 1 *E.* 6. becauſe that this Colledge had the countenance of the Kings Letters Patents, although that they for the cauſes aforeſaid were not of any effect: And the Statute ſaith, All and all manner of Colledge, &c. And ſuch reputative Colledge is within the ſaid Act, and power is given to Commiſſioners by the ſaid Act to eſtabliſh a Vicar in every Colledge which was a Church Parochial: And ſo upon this difference concerning Reputations, it was reſolved in the Caſe of the Dean of *Pauls*, 22 *Eliz.* between *Burton* and *Wilford* by *Wray* chief Juſtice, Sir *Thomas Gawdy*, and the whole Court of Kings Bench, which Caſe is for other points ſhortly touched in 22 *Eliz. Dier* 368. And ſo in this Caſe at Bar it was reſolved, although that the deviſor name it his Chauntry twice in his Will, as it appeareth before; for he willed that the deviſee ſhould find two Tapers burning at his anniverſary, and that that which remaineth, the Chaplain of his ſaid Chauntry ſhould have: and afterwards chargeth the deviſee to overſee the Government of his ſaid Chauntry, and therefore it was commonly called *Barton Chauntry*; yet becauſe it had not any commencement or countenance of commencement of an erection and foundation of a Chauntry, theſe lands were not given to the King by the firſt branch of the ſaid Statute. [b]

And although in the proper words of Law a Chauntry may conſiſt of a Prieſt ſiging for ſouls (whereupon he is called a Chauntry Prieſt) without any incorporation, as appeareth by *F. N. B.* 209. *L.* and the *Regiſter*, That if a man giveth lands to a Religious houſe or other; to find a Chaplain ſinging Divine ſervice, if he ceaſeth for two years, the Lord ſhall have *Ceſſavit pro Cantaria*, and the Writ ſhall ſay, *Ad inveniendum unum Canonicum pro animabus anteceſſorum, &c. divina celebrant*. So in the Statute of *Weſt.* 2. c. 41. ſuch finding of a Chauntry Prieſt, is called a Chauntry, for there it is ſaid, *Et ſi forte tenementum ſic datum pro Cantaria, Luminaria, &c.* and yet there is not any Corporation of Chauntry: Although that in 40 *Aſſ.* 26. where a man deviſeth lands to *H. C.* and his heirs, to find yearly 12 marks, and two Chaplains to pray for ſouls, theſe are called Chauntry lands by *Knevet* chief Juſtice, 43 *Aſſ.* 27. yet within this firſt branch ſuch a Chauntry is only intended when the Chauntry is lawfully incorporated, or at leaſt hath the countenance, or beginning of a corporation, and that for divers cauſes as after appeareth: And ſo it was reſolved what manner of Chauntries, Colledges, &c. were given to the King by this Act, and what not.

As to the ſecond clauſe, it was reſolved; 1. That thoſe words were neceſſary to be added, for otherwiſe by the gift of a Colledge, Chauntry, or free Chappel, nothing ſhall be given to the King, but the ſcite of the Colledge, or Chauntry, or free Chappel, as is agreed in 9 *Eliz. Dier* 223. *b.* & 29 *Aſſ.* 53.

Secondly, this ſecond branch explaineth, that they ought to be incorporations in Law, or in Reputation as is aforeſaid, or otherwiſe land, &c. cannot belong to them: And when lands are deviſed to certain perſons (as in the Caſe at Bar) to find a Chaplain, the land doth not appertain to the Chaplain, but to the deviſees, and here the Chaplain hath but a penſion, and the deviſees have the lands.

As to the third branch, it was reſolved, That as the firſt branch extendeth only to Colledges and Chauntries, which are of ſome manner of incorporation or foundation as it is aforeſaid; So this third branch extendeth to Caſes, where lands are given to find a Prieſt without any foundation or incorporation: But it was objected, that in the Caſe at Bar in reſpect of the certainty of the ſumm appointed to the Prieſt, that it was out of this third branch, and within the 4 and 5 branches; for the third branch as was objected extendeth only when the land is given limited or appointed to the finding of a Prieſt to have continuance for ever: But in the Caſe at Bar nothing is limited or appointed to the Prieſt, but a certain ſtipend of 6 l. 13 s. 4 d. *pro ſuſtentatione ſua*: And therefore it was ſaid, If lands of the value of 20 l. are given for to find a Prieſt, and that the Prieſt out of the iſſues and profits thereof, ſhall have 10 l. for his ſuſtentation; It was ſaid that this Caſe was out of the ſaid third branch, and within the expreſs letter of the fourth branch, for here is the yearly ſumm of 10 l. which is a yearly profit within five years imployed for the maintenance and finding of a ſtipendary Prieſt for ever; and in the Caſe at Bar he is a ſtipendary Prieſt becauſe his ſtipend was certain. But if lands of the value of 20 l. *per ann.* are given to find a Prieſt without any limitation in certain, and the feoffees imploy 10 l. certain upon him, yet it was there agreed, that all the land was given to the King, becauſe that the gift was directly within the third branch, and not within the fourth for the incertainty. [109]

Alſo it was objected, That the fifth clauſe doth greatly enforce this Caſe, for thereby it appeareth, that all that which the Prieſt had, the King ſhall have; In as large and ample manner and form as the Prieſt at any time within five years, &c. had occupied and enjoyed the ſame: And in this Caſe the Prieſt within the five years in any times before had not by the limitation aforeſaid, nor could have above the the ſumm of 6 l. 13 s. 4 d. And to prove their pretence the Caſe of the Dean of *Pauls*, 22 *Eliz. Dier* 368. was cited: where the Caſe was, That the Executors of *A. B.* according to the Will of their Teſtator, *ann.* 6. *E.* 2. aſſigned and conveyed lands and tenements to the value of 14 l. *per ann.* to the Dean and Chapter of *Pauls*, to find a competent ſuſtentation yearly of 10 marks ſterling, for a Prieſt and his Clark to ſay Maſs every day for the Teſtators ſoul, and all Chriſtian ſouls in the Church of S. *Paul*; and Divine ſaid Dean and Chapter ought to find Bread, Wine, and Candles, and all other ornaments for the Obite for ſervice; and all the other profits of the premiſſes were aſſigned to be imployed for the yearly ſaid Teſtator in the ſaid Church; The Prieſt was maintained within five years, and had 6 l. 13 s. 4 d. *per ann.* but the Obite was not kept within the five years. And it was reſolved by the Juſtices of both Benches, and the Barons of the Exchequer, that the Queen ſhould not have more than the 6 l. 13 s. 4 d. and that for two reaſons.

1. Becauſe that the land was not belonging to any Chauntry, but appertained to the Dean and Chapter of *Pauls*: Alſo the words of the Statute are, That the King ſhall have the land or rent *in tam amplis modo & forma*, as the Prieſt himſelf had, and the Prieſt had not the land; and thoſe in effect are the words of the Book. [b]

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The second Objection was, That in this Case there was a good use, *scil.* 4 d. by the week to six poor men a peiece, which is good and charitable; and although it be added, *Ad orandum pro anima sua, & aliorum in testamento præd' nominat' in singulis diebus*, yet for as much as it is not prohibited by any branch of the said Act, it is but surplusage, and is not any impediment to the good use: For if it shall be prohibited by any clause of the Act, it shall be by the first branch concerning Obits, *scil.* To the finding of any Anniversary, Obite, or other like thing, intent, or purpose. And it may be said, That this praying for souls by these poor men, is another like intent and purpose; But the conclusion of the sentence is, In any Church or Chappel to have continuance for ever: So that the intent of the Act was to prohibit all superstitious uses, which were published in Churches for the general prejudice which might come by them; for *Malum quo communius eo pejus*, and not to forbid private Prayers in their chambers, or other private places, which could not tend to so great example.

Then the Case is no other but, That land of the value of 20 l. *per ann.* is given to the intents following, *scil.* To find a Priest to pray for souls, and that he shall have 10 l. of the profits of the land, and 6 poor men 4 d. apeice a week for ever; In this Case, this good use (as it was strongly urged) shall save the land, and the King shall have but that which was limited to the Priest, *scil.* the 10 l. for it was not the intent of the Act to take away the good use, but that the land should remain with the feoffees to perform the same, and so much as was limited to the superstitious use was limited to the King; and to prove the same two Cases were cited.

First, a Case in the Kings Bench, 21 *Eliz.* between *Hewet* and *Wotton* for lands in *Exeter*, where the Case was, That *Gervase Luistant* enfeoffed divers of the said lands, and willed that they should find a Priest to say Mass in the Church of S. *Mary* every Sunday, and a Dirge and Mass of *Requiem* once a year for his soul, and that of the issues and profits of the said lands they should pay to the said Priest 2 d. every week, and the residue of the profits to be imployed upon Books, vestiments, and other ornaments of the said Church; and it was adjudged, although the land was given to find a Priest, yet for as much as his stipend was certain, and also it was joyned with a good use, it was adjudged that the land was not given to the King by the said Act, but only the stipend which the Priest had.

Another Case was adjudged in the same Court, *Trinit.* 30 *Eliz.* but it began *Pasch.* 18 *Eliz. Rot.* 431, in Trespass between *John Chibnal* Plaintiff, and *William Witton* and *Christopher Witton* Defendants, for a house in *Fleetstreet* called, *The Angel upon the Hoop*; upon Not guilty pleaded, and upon special verdict found the Case was such; *Rennet Harlewyn* 36 *H.* 6. demised by his Will in Writing to the Master and Brethren of the Guild of Drapers of *London* 3 s. 4 d. yearly to be imployed for the relief of the poor Brethren and Sisters of the said Company; and devised the house to the Parson and Churchwardens of S. *Christophers* Parish and their Successors, *Ad inde solvend' annuatim præd' reddit' 3 s. 4 d. per me superius conces', & quod ipsi de exitibus inde solvant annuat' qualibet septimana uni Capell' in Eccles. S. Christoph. Missam celebrand' imperpet' pro anima mea 3 d. Et quod solvant qualibet septimana tribus pauperibus ejusdem parochiæ 6 d. ad orandum pro anima mea; Et quod celebrari faciant annuat' unum Anniversar' distribuend' 13 s. 4 d. in forma sequenti, viz. cuilibet Capell' interessenti illo anniversario 4 d. & quod 22 d. inde annuat' solvant custodibus operis Eccles. ad usum fabricæ corporis Ecclesiæ, & 12 d. ad sustentationem fraternitatis S. Christoph. residuum 13 s. 4 d. expendatur in pan' & potu inter Capell' & alios pauperes eo die anniversarii ad exorandum pro anima mea; Ac quod Gardiani habeant de exitibus inde 6 s. & 8 d. pro laboribus suis: Residuum de exitibus reservetur in pixide ad sustentation' & reparationem dictorum tenementorum & (cum opus fuerit) ad novam ædificationem eorund'*; And all these were imployed within five years. And it was adjudged in this Case the King should not have the land, and the reason (as was said) was because that the 3 s. 4 d. to the poor of the Company of Drapers, and also the 6 d. to the three other poor of the Parish (although that the poor were appointed to pray for souls out of the Church) were good uses, and therefore the finding of a Priest gave not the land to the King. But yet it was adjudged and resolved, that this Case at Bar was within the third branch of the said Act, and that the land was given to the King by the said Act. [110]

And for the better and more plain knowing and understanding of the Resolution of Judges in this Case, I am enforced, to avoid great length and intricacy, to reduce all their reasons and causes of their Resolutions to these six differences, all which necessarily concern the Case at Bar, as well for the confirmation of their said Resolutions, as for the confutation of all Objections, and also for the true understanding of all the former Resolutions and Judgments, amongst all which by these differences, most excellent and perfect unity and agreement doth appear. [b]

The first difference was, If a man give lands of the value of 20 l. to others, to the intent to find a Priest to pray for souls, and that the Priest shall have of the issues and profits of the lands 10 l. for his salary, without any other limitation, that in this Case, all the land is given to the King; But if land be given upon condition, or to the intent that the feoffees shall pay of the issues and profits of the lands 10 l. to a Priest to pray for souls without any other limitation, that the King shall not have the land, but only the 10 l. out of the land; And the reason of this difference is, because that the first Case is within the third branch of this Act, and the land it self was given to find a Priest, according to the letter of the Act, and in as much as he was maintained with 10 l. of the issues and profits of the lands, it was within the subsequent of the third branch, *scil.* wherewith, or whereby any Priest was maintained. For by the land and the profits thereof he was maintained, and no use shall be intended but that which the donor expresseth, and the maintenance and augmentation of it, and for as much as the land was given to find a Priest, although that he limiteth in certain how much the Priest shall have for his salary and living: yet to the finding of a Priest to pray for souls other things are necessary which are imployed in such gift, *scil.* Garments, Books, Wine, Bread, &c. And the penning of these branches concerning finding of Priests, differ much from the penning of the other clauses concerning Obits, for there the words of the first clause are, Given, assigned, or appointed, to go to be imployed wholly to

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the finding or maintaining of an anniverſary, &c. And the ſecond clauſe is, And where but part of the iſſues or revenues of any mannors, lands, &c. But no ſuch diſtinction is expreſſed within the branches concerning Prieſts; And the reaſon of the ſecond part of the difference, *ſcil.* When the feoffees are appointed to pay out of the land a certain ſumm to a Prieſt, &c. and becauſe the land it ſelf is not given upon condition, or to the intent to find a Prieſt; But the feoffees are limited or appointed to pay to the Prieſt 10 l. and therefore the King cannot have more then was given to the finding of the Prieſt, and that was 10 l. as the Prieſts ſtipend, and not the land which was not given for the maintenance, or finding of the Prieſt; and therefore the King ſhall have the 10 l. only by force of this fourth branch of this Act; for the ſame is in the nature of a yearly rent, profit, or emolument; and therewith agreeth the Judgment in the ſaid Caſe of the Dean of *Pauls*.

The ſecond difference was, If land of the yearly value of 20 l. *per ann.* be given upon condition, or
[111] to the purpoſes following, *ſcil.* to find a Prieſt to pray for ſouls, and that the Prieſt ſhall have for his ſalary 10 l. and to diſtribute between 20 of the poor men and women other 10 l. yearly for ever for their ſuſtentation, in this Caſe the King ſhall have but only the 10 l. limited to the Prieſt, and not the land: But if the ſame land had been given to find a Prieſt, and for the maintenance of 20 poor men, in this Caſe the King ſhall have all the land, although that in the imployment the Prieſt had 10 l. and the poor the other 10 l. And the reaſon and cauſe of this difference is becauſe that in the firſt Caſe there was a good uſe ſeparate and divided from the ſuperſtitious uſe; and therefore, God forbid that the *ill* uſe ſhall ſwallow up the good uſe, and a certain ſumm was appointed to the Prieſt, which ſumm the King ſhall have as a rent by force of the ſaid fourth branch; And in ſuch caſe if the land ſhall be given to the King, the good uſe ſhall be taken away, which was never the intent of the Act; for the intent of the makers was as appeareth by the preamble, to advance and continue good and charitable uſes, as Grammar Schools, increaſe of the Univerſities, and proviſions for poor men, as is expreſſed in the preamble. There is another clauſe concerning the continuance of ſuch charitable uſes in the body of the Act, by which power is given to certain Commiſſioners, To aſſign in every place wherein any Guild, Fraternity, Prieſt, or Incumbent of any Chauntry, by the foundation, ordinance, or firſt inſtitution thereof, ſhould or ought to have kept a Grammar School, or a Preacher, &c. And alſo to enquire What money, profit, or benefit any poor perſon by virtue of any conveyance, &c. had or enjoyed within five years, &c. out of any Colledge, free Chappel, or Chauntry, and other the premiſſes given, limited or appointed to the King by this Act; And thereupon to make aſſignments to the poor, which clauſe is to be intended only when the proviſion for the poor is to be derived out of a ſuperſtitious thing, or to be performed by the perſon who was to do the ſuperſtition, as out of a Colledge, or Chauntry, or free Chappel, or when all the land was given to find a Prieſt, and that the Prieſt ſhould find a Grammar School, or Preacher, or ſhould pay ſo much to poor men: And in ſuch Caſe it was needful to make ſuch proviſion; for the Colledges, Chauntries, free Chappels, and Prieſts praying for ſouls, which ſhould make diſtribution to the poor, &c. were diſſolved, and their poſſeſſions given to the King by this Act, and therefore it was very neceſſary to add the ſaid clauſe for the continuance of the ſaid charitable uſes.

[b] But the ſame doth not extend, when lands are given to divers feoffees upon condition, or to the purpoſes following, *ſcil.* To find a Prieſt, and of the iſſues of the land to pay to him a certain ſtipend, and of the reſidue of the profits, that the feoffees ſhall find a Grammar School, or ſuſtain poor men, for they are not derived out of the ſuperſtitious uſe, nor to be diſtributed by the ſuperſtitious perſons, but by the feoffees, &c. who remain perſons able to diſtribute, and to continue the good uſes, which are diſtinct from the ſuperſtitious uſes; And the reaſon of the ſecond part of the laſt difference is becauſe that the thing is limited to the ſuperſtitious uſe in certain by the donor, or deviſor himſelf, ſo that if the King ſhall not have the land, the King ſhall have nothing, but the ſuperſtitious uſe ſhall remain, and the intention of the Act (as it hath been ſaid) and ſo it ought to be expounded, was to take away ſuch ſuperſtitions; for the King cannot have any rent in ſuch Caſe, for every rent ought to be a certain ſumm; And although that in ſuch Caſes the feoffees have always imployed a certain ſumm, yet they had not power to make alteration of the ſubſtance of the gift, but the intent of the giver ſhall ſtand.

A third difference was taken, when the Prieſt hath a certain ſalary, (and yet to the finding of ſome other things, as Books, Bread, Wine, Veſtiments, &c. as hath been ſaid are *tacite* implied and requiſite which are incertain) and beyond that a good uſe is limited, there the King ſhall not have all by reaſon of the implied incertainty; But if land be given to any expreſs ſuperſtitious uſe prohibited by the Act, without limitation of any certainty for the finding of it, there all is given to the King by the ſaid Act; the reaſon of the firſt branch of this difference is, that a good uſe expreſſed ſhall be preferred before any thing implied, or incident to a ſuperſtitious uſe. 1. The finding of Books, Veſtiments, Wine, Bread, are not of themſelves ſuperſtitious, therefore the makers of the Act did not intend to reſpect them, as appeareth by divers Reſolutions and Judgments after cited, but when the expreſſed intent was not only to find a Prieſt, but alſo a good uſe, there the King ſhall have only that which the Prieſt himſelf had, or which was intended he ſhould have; The other part of this difference is reſolved before.

The fourth difference, or rather an explanation of the former differences, was taken between a ſole Prieſt to pray for ſouls within the third branch, and a ſtipendary Prieſt within the fourth branch; For when lands are given to one or divers feoffees to find one ſingle Prieſt with the iſſues and profits thereof with a certain limitation of ſome ſumm for his ſuſtenance, there if no good uſe be limited (as hath been ſaid) all the land is given to the King for the cauſes aforeſaid: But when a certain ſumm is limited to a Prieſt for his ſtipend, and further a good uſe is expreſſed, it amounteth to as much as if the land had
[112] been given that the feoffees ſhall pay a certain ſumm of money to a Prieſt; in which Caſe he is a ſtipendary Prieſt within the fourth branch of the Act, and in ſuch Caſe the King ſhall have but a rent.

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The fifth difference was taken, When a certain ſumm is limited to a Prieſt, and divers other uſes are limited, which of themſelves are not prohibited, yet if they depend upon the ſuperſtitious uſe all is given to the King. As if a man give land of the value of 20 l. and that the feoffees of the profits of the land ſhall pay to the Prieſt 10 l. and the reſidue for Veſtiments, Books, Bread, Wine, &c. for the celebration of Maſs, &c, or to one or divers to viſit, and ſee that the ſervice be done, or for the reparation of the Chappel in which the ſervice is to be done, and for the repairing of the Tenements, or to poor people to be preſent there, or for any ſuch like intents and purpoſes which depend upon the ſuperſtitious uſe, or for ornament or continuance thereof, there all is given to the King; but when the other uſes are not depending upon it, but extend to diſtinct and divided good uſes, there the good uſes ſhall ſave the land. As if land of 20 l. be given to pay a Prieſt 20 marks to ſing for ſouls in ſuch a Church, and the reſidue of the profits to repair the Church, although that that by a mean concerneth the continuance of the ſuperſtitious uſe, for as much as it is to be celebrated in the ſame Church, or in ſuch Caſe if the reſidue of the profits were limited for the finding of the Ornaments of the Church, although they are by a mean ornaments alſo for the celebration of the ſaid ſuperſtitious uſe, yet in both theſe Caſes, in as much as the reparation of the Church, or the finding of the Ornaments do not depend upon the ſuperſtitious uſe, nor immediately concern the ſuperſtitious uſe, in ſuch Caſe the land is not given to the King: So in the ſame Caſe, if part of the profits are limited for the repair of the Church, or to find the Ornaments of the Church, and the reſidue of the profits are limited for the reparation of the houſes ſo given, the King ſhall not have the land; for reparation of houſes of themſelves is not an uſe forbidden, and therefore being joyned with a good uſe ſhall ſave the land, and yet by a mean both concern the ſuperſtitious uſe: But the Statute is to be intended of immediate uſes, and not only to ſuppreſs ſuperſtitious uſes, but alſo to continue good uſes, according to the intent of the makers of the Act.

The ſixth difference was obſerved, When all the uſes are ſuperſtitious, and when not; for when all the uſes are ſuperſtitious, there in what certainty ſoever or manner they be limited, and of what value ſoever the land is, yet all the land is given to the King. As if land of the value of 20 l. *per ann.* be given to the intent, that 10 l. out of the iſſues and profits thereof ſhall be paid to a Prieſt 5 l. for the maintenance of the Obite, and 5 l. to find lamps and lights before ſuch Images in ſuch a Church: In this Caſe it was objected, That the King ſhall not have but ſeveral rents, for the Prieſt was but a ſtipendary Prieſt, and the land was not given to find him: Alſo the clauſe concerning Obits, &c. giveth to the King but a rent, when but part of the profits are limited and appointed to it; and therefore by none of the ſaid ſeveral branches by it ſelf the King ſhall have land but only ſeveral rents: But it was reſolved that in ſuch Caſe, all the land by the equity and true conſtruction upon all the ſaid Act ſhall be given to the King; for in as much as all the profits are limited to ſuperſtitious uſes, it was the intent of the Act to give all the land to the King by a reaſonable conſtruction upon the coherence and intention of all the parts of the Act: And as to the Objection which was made, That the King in the principal Caſe ſhall not have more then the Prieſt had, becauſe that the fifth branch, which is the concluſion of all the four branches precedent hath theſe words, *ſcil.* In as large and ample manner and form, as the Prieſts, Wardens, Miniſters, Governors, Rulers, or other Incumbents of them within five years, &c. had, occupied or enjoyed: It was reſolved, that theſe words do not abridge that which before was by any of the precedent clauſes given to the King. [b]

2. Theſe words cannot be referred to the third clauſe, *ſcil.* When land was given to one or divers perſons to find with the iſſues and profits a ſole Prieſt, for there the Prieſt had not the land; and therefore the ſaid clauſe was reſtrictive, and if the King ſhall not have more then the Prieſt had, the King ſhould have nothing, for the Prieſt had nothing; and yet every one agreeth, that the King in ſuch Caſe ſhall have the land. But theſe words are referred, *reddendo ſingula ſingulis*, to the 1, 2, and 4, branches, for by the firſt two the land, and by the fourth a rent is given to the King; and therefore the ſaid words may well be referred to them, and cannot be referred to the ſaid fourth branch, for the King cannot have the land, in as ample and large manner as the Prieſt had it, when in truth the Prieſt had nothing in the land, but the feoffees were ſeiſed thereof; Or the ſaid words refer only to the fourth branch concerning Stipendary Prieſts, as *Popham* chief Juſtice held: And the Caſe at Bar was within all theſe differences; for 1. The land was deviſed upon condition to find a Prieſt. 2. In this Caſe one of the ſuperſtitious uſes was incertain, for, for the finding of lamps and lights no certain ſumm was appointed: And if all the land had been given to this uncertain uſe, the King ſhould have had all the land.

3. Here was not any good uſe, for although that the maintenance and ſuſtentation of poor men was good, yet maintenance of them to pray for ſouls was ſuperſtitious, and prohited by the Act: And although that theſe Prayers were not appointed to be made in any Church, Chappel, &c. or other publick Oratory, yet it was reſolved that they were prohibited by the ſaid Act, or (as ſome held) directly within the words of the clauſe concerning Obits, *ſcil.* Anniverſary or Obite, or other like thing, intent, or purpoſe, or of any light or lamp in any Church or Chappel: So that theſe words (In any Church or Chappel) are referred to lights and lamps, and not to thoſe precedent words, Or other like thing, intent, or purpoſe. And praying for ſouls, is one like intent or purpoſe to an Anniverſary or Obite, for all was for the praying for ſouls, or as others hold by the equity of the Act which intendeth to extirpate all praying for ſouls: And it ſeems to ſome that the Caſe is ſtronger, becauſe the principal ſuperſtitious uſe is to be done in the Church. [113]

4. Theſe Prayers for ſouls by the poor men is in a manner dependant upon the other ſuperſtitious uſes, and of one kind or nature with them.

5. In this Caſe all theſe uſes were ſuperſtitious, and therefore all the land was given to the King: And by theſe differences you may better underſtand (as hath been ſaid) the Judgments and Reſolutions which have been before theſe times had upon the ſeveral branches of this Act, and every one

of them well ſtands with the other, and no contrariety amongſt them. And all theſe differences are well approved and proved by former Reſolutions, Decrees, and Judgments; and therefore I will make a ſummary Report of the former Reſolutions, Decrees, and Judgments which were cited and vouched in this Caſe: And firſt of the Reſolutions;

Sir *Bartholomew Read* by his Will in writing deviſed his lands in *London* to the Company of *Goldſmiths*, to the intent that they with the iſſues and profits thereof ſhould repair the Tenements, and ſhould pay all the rents iſſuing thereout; and ſhould keep an Obite, and ſhould ſpend at it yearly 33 s. 4 d. and find perpetually a Prieſt to ſay Maſs for his ſoul; and alſo ſhould keep a Grammar School, and chiefly for the poor, and to receive 10 l. yearly for his ſalary, and the ſaid tenements were then of greater value, *ſcil.* of 50 l. *per annum*, then the ſaid ſuperſtitious uſes. And it was reſolved by *Wray* and [b] *Anderſon* chief Juſtices, upon conference with Sir *Roger Manwood* chief Baron, and *Periam* Juſtice, That all the Tenements were given to the King by the ſaid Act; for although that there was a good and charitable uſe, *ſcil.* to find a Grammer School chiefly for the relief of the poor, yet becauſe it was mixed with a ſuperſtitious uſe, and nothing in certain was limited to a good uſe, in ſuch Caſe incertain mixture of a bad uſe with a good uſe doth infect the good uſe as a little poiſon mingled with the great quantity of wine, or as truth with falſhood (covin is ſo ill an herb that it maketh all unſavoury, and turneth the goodneſs of the one into the ilneſs of the other, as it is ſaid in *Plowdens Comm.* 51. *a.*

2. The good uſe is derived out of the ſuperſtitious uſe, and to be performed by the Prieſt; and for theſe cauſes the good uſe in this Caſe ſhall not ſave the land. Alſo although that now upon the matter it is as if the good uſe had been omitted, and that a certain ſumm of money was limited for every of the uſes, yet when all the certain uſes were ſuperſtitious, all the land ſhall be given to the King.

Another Caſe was reſolved by them, That Sir *John Tate* ſeiſed of certain houſes in *London* by his Will in writing deviſed them to the Company of *Diers* to repair the houſes, and to find a ſecular Prieſt for ever to pray for ſouls in the Church of S. *Michael* in *Cornhil*, paying to him a competent living no leſs then 8 marks by the year, and the houſes then were of greater value; and yet becauſe it was incertain what ſumm the Prieſt ſhould have; and if the ſumm had been certain, yet becauſe the land was given to find a Prieſt, and no good uſe was limited, the King ſhall have all by force of the third branch of the ſaid Act.

Another Caſe was reſolved by them, That *John Allen* by his Will in writing deviſed houſes in *Eaſtcheap* to the Company of *Goldſmiths* in *London* to find an Obite for ever, which houſes then were and ſo continued of the value of 33 l. 13 s. 4. *per ann.* and 23 s. 4. were only imployed to the ſaid ſuperſtitious uſe. And it was reſolved, that the King ſhould have all the land, for the deviſees by their certain imployment cannot ſave the land when the gift it ſelf is incertain, nor any diſpoſition incertain by the deviſees can alter the nature and ſubſtance of the gift, nor the operation of the Statute upon it.

Another Caſe was reſolved by them, One *Pele* deviſed by his Will in writing certain houſes in *London* to the *Cloathworkers* of *London*, to the intent that they for ever ſhould pay to ſuch Prieſt who ſhould pray for his ſoul in the Pariſh Church of *Chilham* 9 l. 6 s. 8. for his ſalary; The King ſhall not have the houſes, for they were not given to find a Prieſt, but to pay to a Prieſt a certain ſumm.

One *Walpool* in 23 E. 3. by his Will in writing deviſed certain houſes in *London* of the value of 30 l. *per ann.* to the Company of *Goldſmiths*, to the intent, that they with the iſſues and profits thereof ſhould find two Prieſts, paying to each of them 6 l. 13 s. 4 d. for his ſalary; And it was reſolved by the ſaid Juſtices, That the Queen ſhould have the houſes, for it was within the third branch of the Act, in as much as the land was given to find two Prieſts, and wherewith and whereby they were [114] maintained, &c. and for as much as no good uſe was limited, and all the uſe expreſſed was ſuperſtitious; for theſe cauſes it was reſolved, That the houſes were given to the King, and yet the ſalaries of the Prieſts were certain.

Anno 4 H. 8. *William Caley* by his Will in writing deviſed certain houſes in *London* of the value of 40 marks *per annum* to the Company of *Drapers*, to the intent to repair them ſufficiently for ever, and of the iſſues and profits of them to maintain a Chaplain in the Church of S. *Mary Woolnaugh*, to ſay Maſs every day for the ſouls of *Richard Shore* and his wife, and to have for his ſalary 6 l. 13 s. 4 d. and to find an Obite in the ſame Church for the ſoul of the ſaid *Richard Shore*, ſpending upon it 20 s. in form following, *ſcil.* the Wardens of the ſaid Company ſhall have part, and the Beadles part, and part to be ſpent upon Bread, Beer, and other neceſſaries at *Drapers* Hall amongſt the Brethren there, and the reſidue to be diſtributed amongſt the poor dwelling within the precinct of their Hall to pray for ſouls: And although that the ſalary of the Prieſt were certain, and the expences of the Obite certain, and the prayers for the ſouls were to be made in *Drapers* Hall, and not in any Church or Chappel, and the diſtribution amongſt the poor of bread and beer of it ſelf a good and charitable uſe, yet for as much as all the uſes were ſuperſtitious or depending thereupon, it was reſolved, That the houſes were given to the King by the ſaid Act.

Anno

Anno 5 E. 4. *Gregory* by his Will in writing demiſed his houſes in *London* of the value of 4 marks *per annum* to the Company of *Skinners*, to the intent of the profits to find an Obite for ever in the Church of S. *Anthony*, ſpending at it 6 s. 8 d. and to diſtribute amongſt the poor of the ſaid Pariſh to pray for one ſoul 6 s. 8 d. and with the reſidue of the profits to maintain the reparations, and with the overplus to new build them when need ſhould be; and although that the ſumms by the ſaid ſuperſtitious uſes, (whereof one was to be done out of the Church or Chappel) were certain; and the reparation and new building of the houſes themſelves were good, becauſe they concerned the habitation of men; yet for as much as theſe uſes were for the continuance of the ſuperſtitious uſes, and *quodammodo* depending thereupon, for this cauſe it was reſolved, That the ſaid houſes were given to the King by the ſaid Act.

Divers other Reſolutions of the ſaid Juſtices were cited, but for as much as they all tend to the effect of thoſe which have been cited before, for avoiding prolixity I have omitted them.

Note Reader, the branch of the ſaid Act next following the laſt clauſe of Obits, concerning the imployment of the ſumms of monies, or profit of any lands, by any Corporation, Guild, Fraternity, Company, or Fellowſhip of any Myſtery, or Craft, for the maintenance of a Prieſt, Obite, &c. was but explanation of the ſaid fourth branch, to ouſt a ſcruple which ſome might conceive, Whether a body incorporate may ſtand ſeiſed to ſuch intents, and upon ſuch truſts as is aforeſaid: But it appeareth by all the ſaid Reſolutions, as well bodies Politick and Corporate as private perſons are within the former branch of the ſaid Act, for the letter of the Act is general and includeth all as in this very Caſe it was reſolved. [b]

Now to proceed to Decrees. In 5 E. 6. as it appeareth in the Books of Decrees in the Office of the Kings Remembrancer, in the Exchequer divers Decrees were made upon the Will of *Comberton*, in 5 H. 4. of *Cromer* in 10 H. 6. of *William Rus* in 11 H. 6. and of divers others in the Court of Augmentation; but becauſe they are agreeable to the Reſolutions and differences before taken as I conceive, although they are not fully there written, I will omit them and proceed to Judgments given in the Queens Courts, upon argument and great conſideration.

And as to the Caſes of *Hewet* and *Wotton*, and *Chibnal* and *Witton*, they were affirmed to be good Law, and that there were two principal cauſes of the Judgment in the ſame Caſes: One becauſe that nothing was limited to the Prieſt but 2 d. or 3 d. every week, which was not within the third branch of the ſaid Act, for with ſuch petit things a Prieſt cannot be found or maintained. And the letter of the Statute is, To the finding of any Prieſt, &c. and wherewith or whereby any Prieſt was ſuſtained, maintained or found; and with ſuch ſmall allowance they cannot be maintained, ſuſtained or found. Alſo in the one Caſe he ſaid not Maſs but every Sunday, and Dirge once a year, which was (as was ſaid) within the clauſe of Obits, *ſcil.* To ſuch like intent or purpoſe. [115]

2. Admit that a certain Salary had been to the Prieſt ſufficient for his maintenance; yet becauſe there were good uſes ſeparate and divided from the ſuperſtitious uſe, *ſcil.* in the one Caſe 3 s. 4 d. to the poor, &c. And in the other to find ornaments in the Church; for theſe cauſes Judgment was given in both the Caſes, that the land was not given to the King. Alſo it was adjudged for theſe two reaſons that were given in *Hewet* and *Wotton's* Caſe (for the ſaid two agreed to the ſaid Dean of *Paul's* Caſe which the Lord *Dier* hath briefly touched in part) that the Queen ſhall not have the land for two cauſes.

1. Becauſe the land it ſelf was not given to find a Prieſt, ſo that it was not within the third branch of the Act, but to find an annual ſuſtentation of 10 marks for a Prieſt, ſo that the ſame was within the fourth branch, and not within the third.

2. It was reſolved, that in the ſaid Caſe of the Dean of *Pauls*, that if land be given to pay 10 marks to a Prieſt, and 40 s. to the maintenance of an Obite, in that Caſe if both be found within the five years, the King ſhall have all the land, becauſe that both the uſes were ſuperſtitious by the Judgment of Law, upon the coherence, as hath been ſaid, of all the Act: But in the ſame Caſe becauſe the Obite was not found within the five years, for this cauſe it was adjudged that the King ſhould not have the land: And therefore in the ſame Caſe of the Dean of *Pauls* this difference was taken and reſolved; When certain ſumms are limited to ſuperſtitious uſes, and one uſe is ſeparate and divided from the other, there the finding of the one ſhall not give the land to the King, but only the ſumm appointed to the ſuperſtitious uſe which was imployed within the five years: But if the one uſe depend upon the other, there the finding of the principal or any part thereof giveth all the land to the King. As if land be given to the intent that an Obite ſhall be in ſuch a Church or Chappel, and that upon the Obite 10 s. ſhall be diſtributed and imployed to the Prieſt, and to divers poor perſons who ſhall be preſent at it 6 s. 8 d. and the reſt of the profits to the reparation of the Church or Chappel; in this Caſe if the Obite be maintained in any part within the five years, although the 6 s. 8 d. be not imployed to the poor men, nor any thing upon the reparation of the Church or Chappel within the five years, yet all the land ſhall be given to the King, becauſe that all the uſes depend upon the former: So in the ſame Caſe *Wray* chief Juſtice ſaid that it was adjudged, That where certain houſes called the *Bull* were given to find a Prieſt to pray for ſouls, &c. and other Tenements called the *Swan* were given to the ſame feoffees to find an Obite, &c. and the feoffees imploy the profits of the ſaid ſeveral houſes to contrary uſes, *ſcil.* the profits of the *Bull* to find the Obite, and the profits of the *Swan* to find the Prieſt; yet for as much as the original gift was ſuperſtitious, and the imployment ſuperſtitious, although the imployment be not according to the gift, yet in both Caſes ſuch imployment within the five years was ſufficient to give the land to the King.

So if a man give the mannor of *Dale* and the mannor of *Sale* to find ſuperſtitious uſes, and the feoffees with the profits of the one mannor find the ſuperſtitious uſes, and imploy the profits of the other to the uſe of the poor inhabitants of the ſame Town, or to bear the common charges of the Town, yet both the mannors are given to the King; for if the feoffees imploy any of the profits of the ſame lands which

they have, and which were given for the maintenance of their ſuperſtitious uſes, all is given to the King;
[b] But if the feoffees before the five years have conveyed part of the land to another in fee, and imploy the profits of the land which remaineth in their hands for the maintenance of the ſuperſtitious uſes, and no part of the lands of the ſecond feoffee is imployed within five years, there the King ſhall not have the land of the ſecond feoffee, but only the lands which the firſt feoffees have, for the imployment of the firſt feoffees of the lands which they had cannot bind the ſecond feoffee, for the lands in which they had not any eſtate or intereſt; and that well ſtands with the words of the third branch, *ſcil.* To the finding of any Prieſt, and wherewith and whereby any Prieſt was ſuſtained, maintained, or found within five years; for as to the land conveyed to the ſecond feoffees (whereof no part of the profits were imployed to the ſuperſtitious uſes within the five years) the ſame is not within the ſaid words of (wherewith or whereby) for neither with nor by the land of the ſecond feoffees the ſuperſtitious uſes were found within five years, but only with, and by the land which remaineth with the firſt feoffees. And in the ſaid Caſe of the Dean of *Pauls*, ſome held that a Proviſo that the Act ſhall not extend to the mannors, lands, tenements, or other hereditaments of any Cathedral Church, &c. other than to ſuch Chauntries, Obits, or Lamps, or any of them within five years, &c. And in the ſaid Caſe the land was parcel of the poſſeſſions of a Cathedral Church; and the ſaid land did not appertain to a Chauntry, *ſcil.* within the firſt or ſecond branch, but that Caſe was within the fourth branch, to which this word of the Proviſo (Chauntry) doth not extend; and as to the word Obits, &c. for as much as but part was aſſigned to it, although the Obite had been found, that by that the land was not given to the King.

Trin. 18 *Eliz. Rot.* 142. In an Information of intruſion againſt *Lucas* and *Collier*, upon the general iſſue, a ſpecial verdict was found to this effect; *Turner* ſeiſed of certain houſes in fee in *London* deviſed them 3 *H.* 6. upon condition to find an Obite of 4 l. 6 s. 8 d. within the Pariſh of S. *Mary Patents* in *London*, Spending thereat ſo much as the deviſees would in their diſcretions; The deviſees expended only upon the Obite 6 s. 8 d. *per ann.* and it was adjudged that the Queen ſhould have the houſes; 1. Becauſe the appointment was incertain, although that the imployment was certain. 2. That all the uſe expreſſed by the deviſor was ſuperſtitious: And therefore it was ſaid, If land to the value of 5 l. be deviſed to find an Obite, ſpending upon it three pounds *per ann.* although that a certain ſumm be limited; yet for as much as the land is given for finding of an Obite, and no other uſe is expreſſed, the land in ſuch Caſe ſhall be given to the King, for the land is given in the ſame Caſe (wholly) as the Statute ſpeaketh to the finding of an Obite, and therefore within the firſt branch of Obites.

Trin. 20 *Eliz. Rot.* 589. between *Colborn* and *Dale* in the Kings Bench, upon a demurrer the Caſe was
[116] ſuch; *Thomas Wells* 12 E. 4. deviſed divers houſes in *London* of the yearly value of 24 l. to his wife for her life, the remainder to the Parſon and Churchwardens of S. *Edmonds* and their Succeſſors; and deviſed that his wife during her life, and after her deceaſe they in the remainder ſhould find a Prieſt to ſay Divine ſervice at the Altar in the Chappel of our Lady in the Church of S. *Edmond* for the ſouls, &c. And that the ſame Prieſt ſhould be aiding and helping to Divine Service in the Church; and that his wife during her life, and thoſe in remainder after her death ſhould pay to him for his ſalary 6 l. 13 s. 4 d. Further he deviſed that they find an Obite with ſix Prieſts, and appointed 22 s. certain to be imployed upon it, whereof part to be diſtributed amongſt the poor of the Trade of *Drapers* which ſhould come to the ſaid Obite, and could not come. Alſo he appointed 16 d. yearly to the Parſon of S. *Edmonds* for beading of Beads; Every Sunday 3 s. 4 d. to the Friers of S. *Auguſtine* to pray for his ſoul; Alſo 4 s. yearly to be paid to the Preacher at *Pauls* upon good *Friday*; To three Preachers of the *Spittle* to commend his ſoul to the prayers of the people 13 s. 4 d. Alſo 3 s. 4 d. to the Wardens of the Company of *Sheermen* to diſtribute amongſt the poor Almeſmen of the ſame Trade, to the intent that thoſe of the Wardens with eight or more of the ſaid Company upon warning ſhould come to his Obite: Alſo he appointed Accounts yearly to be taken, and that the Churchwardens of S. *Edmonds* ſhould have the letting and ſetting of the lands; and the Churchwardens of S. *Mary Wolnaugh* ſhould come yearly and have for their pains 6 d. apiece. And the Churchwardens of S. *Edmonds* to have 6 s. 8 d. And 11 s. 4 d. yearly he appointed for the finding of Books, Veſtiments and Ornaments of the Chappel, where he appointed his Obite to be celebrated; And that all the revenue coming of the premiſſes ſhall be in ſeveral keeping ſeparatrd from other monies in a Cheſt, for the reparation and new building of the tenements. And it was adjudged, that the ſaid houſes were given to the King by the ſaid Act. In which Judgment theſe things were obſerved; 1. That the deviſe was made to his wife. 2. That it was a deviſe to his wife for life. 3. That every ſuperſtitious uſe had a certain ſum appointed for the maintenance of it. 4. That all the uſes were either ſuperſtitious, or were depending upon the ſuperſtitious uſes, or tending to the maintenance or continuance of them: and that was the principal cauſe and reaſon of the Judgment.

Trinit. 30 *Eliz. Rot.* 709. between *Adams* and *Stakes* in the Kings Bench, upon a Demmurrer the Caſe was ſuch; *William Dunſton* deviſed lands to the Parſon and Churchwardens of S. *Botolphs* upon condition to find a Prieſt, and that he have for his ſalary 6 l. of the iſſues and profits of the lands. Alſo he deviſed yearly for ever to the Priſoners of *Newgate* and *Ludgate* 13 s. 4 d. at the day of his death to
[b] pray for his ſoul, beſides the ſaid ſole Prieſt, the reſidue for the reparation of the tenements, and augmentation of the Prieſts portion. And it was reſolved, That the land was given to the King by the ſaid Act; for the praying for ſouls by the ſaid Priſoners, although it was out of the ſaid Church or Chappel, was ſuperſtitious, and the augmentation of the Prieſts maintenance incertain. And this Reſolution was affirmed for good Law by *Popham* chief Juſtice and divers others; but Judgment was not entred into the Roll.

Paſch. 2 & 3 *Phil. & Mar. Rot.* 186. in the Kings Bench, *Whetſtone's* Caſe was adjudged, That where lands were given to find an Obite in ſuch a Chappel appointing a certain ſum upon it, and that the reſidue ſhould be employed for the reparation of the Chappel in which the Obite ſhould be celebrated;

brated; And it was adjudged that all the land was given to the King, for the one doth depend upon the other. And *Popham* chief Juſtice ſaid, that *Paſch.* 10 *Eliz. Rot.* 398. in an information in the Exchequer the Caſe was ſuch; one *Draiton* ſeiſed of lands in *London* in fee deviſed them to the Dean and Chapter of *Pauls* upon condition that they find two Chaplains to pray for his ſoul in a Chappel newly there built by him; and to pay to them for their ſalary 13 l. 6 s. 8 d. and to find an Obite, appointing upon it a certain ſum, and to repair the Chappel, and all this was found within the five years, and it was adjudged againſt the King; and that agreeth with the opinion in the Caſe before cited of the Dean and Chapter of *Pauls* before upon the Proviſo of this very Act.

Hill. 37 *Eliz. Rot.* 715. between *Partridge* and *Walker* in the Kings Bench, the Caſe was; That one *Hill* deviſed certain houſes in *London* to the Parſon and Churchwardens of the Church of S. *Brides* to find for ever his Anniverſary, appointing upon it 20 s. and to pay to the poor 5 s. 6 d. *in honorem & duplicationem annorum in quibus Chriſtus vixit in terra:* And it was adjudged, that the land was not given to the King; For the payment of the 5 s. 6. d. to the poor *in honorem, &c.* was a good and laudable uſe in commemoration of the years of our Saviour, the continual memory of which is moſt comfortable and neceſſary for every Chriſtian; But it was agreed in the principal Caſe at Bar, That if the deviſor had limited by expreſs words, or by any words which may imply his intent to be, that the deviſees for the advancement of his blood ſhould have the reſidue of the profits, it ſhall be a good uſe, and ſave the land; and in ſuch Caſe the King ſhall have but the rent. And this Caſe was very well and at large argued by the Juſtices; And it was the firſt Caſe that Sir *Chriſtopher Yelverton* argued after he was made Juſtice of the Kings Bench.

Hill. 45 Eliz. *in the Common Pleas.*

Acton's Caſe.

THE Queen brought a *Quare impedit* againſt the Biſhop of *Peterborough*, *Acton* Patron and *Cartmell* Incumbent, for the Church of *Claycotton* being above the value of 8 l. The Queen counted and made title to preſent by Laps *ratione acceptionis duorum beneficiorum*; The Patron and Incumbent ſevered in Pleas, but both their Pleas was to this effect; *Anne* Baroneſs *Mounteagle* in her Widowhood retained the ſaid *Cartmell* to be her Chaplain according to the Statute of 21 *H.* 8. and he having the ſaid Benefice of *Claycotton* obtained a Diſpenſation with confirmation of the Queen according to the Statute, and pleaded all at large; And afterwards he accepted the Vicarage of *G. &c.* and traverſed, without the ſaid Church of *Claycotton* by pretence of the taking of the ſaid Vicarage of *G.* according to the Statute became void, &c. The Queen replied, and confeſſed the retainer of him by the ſaid Baroneſs *Mounteagle*, and that he obtained the Letters of Diſpenſation *prout, &c.* But further ſaid, That before the ſaid *Cartmell* was preſented to the ſaid Vicarage of *G.* the ſaid Baroneſs of *Mounteagle* took to husband *Henry* Lord *Compton* one of the Barons of the Realm, and ſo was covert baron, and had loſt her dignity of Baroneſs *Mounteagle*; And afterwards *Cartmel* the Defendant accepted the ſaid Vicarage of *G.* and was thereunto admitted, inſtituted and inducted: And upon that the Defendant did demurr in Law. And it was objected by the Queens Council, That the body of the Act of 21 *H.* 8. containeth general prohibition, That if any one hath a Benefice of the value of 8 l. that he doth not take any other Benefice with Cure, then if this Caſe be not within the Proviſoes, then the firſt Benefice became void by the acceptance of the ſecond: The firſt Proviſo which is material to this purpoſe is, That every Dutcheſs, &c. and Baroneſs being widow, may have two Chaplains, whereof every one of them may purchace licence or diſpenſation, to receive, have and keep two Benefices. And the ſecond Proviſo material to this purpoſe is, Provided always that every Dutcheſs, &c. and Barons widow, which have taken, or hereafter ſhall take any husbands under the degree of a Baron, may take ſuch number of Chaplains as is above admitted to them being widows, and that every ſuch Chaplain may purchace licence, &c. as above. And it was ſtrongly urged, that this Caſe was *Caſus omiſſus*, and out of theſe Proviſoes for divers reaſons: [117] [b]

The firſt, it ought to be expounded, That the Baroneſs ought to be widow as well at the time of the acceptance, as at the time of the retainer, for if it ſhall be ſufficient that ſhe ſhall be widow at the time of the retainer, then the ſaid ſecond Proviſo ſhall be in vain, for then it ſhall not be material who ſhe afterwards marrieth, *ſcil.* Noble, or ignoble; But for as much as the makers of the Act did intend, that if ſhe marry after, that then ſhe ſhall be out of the firſt Proviſo, for this cauſe they added the ſecond. And without queſtion ſhe is out of the ſecond, for that provideth only, when ſuch noble woman doth marry with one under the degree of a Baron; and their reaſons they extended the laſt Proviſo when they marry under the degree of a Baron was, becauſe if they marry a Baron, or other Lord of degree, then the wife needeth not have Chaplains, becauſe her husband may have Chaplains by this Act, and the ſame ſhall be ſufficient for both, being one perſon in Law, and of one family. And that the retainer and the acceptance ought to concurr; It was ſaid, That if a noble man, or noble woman retaineth a Chaplain and dieth, the Chaplain cannot take two Benefices within this Act, yet the retainer was lawful, but the perſon who made the retainer ought to continue when the Chaplain accepteth his ſecond Benefice: Alſo it was ſaid, that it was adjudged in the Caſe *Ralph* Earl of *Weſtmerland*, That where

where the said Earl retained a Chaplain, and afterwards was attainted of high Treason, and afterwards and during his life the Chaplain having a Benefice of the value of 8 l. took a second Benefice with Cure. And it was adjudged, That the first Benefice was void, for although the Earl was alive, yet the quality of his person was altred, for by the Judgment he became ignoble, *vide Stamford.* As if the Treasurer or Comptroller of the Kings house, &c. retain a Chaplain, and afterwards is removed out of his office, now the Chaplain cannot accept a second Benefice, for now his quality is altered, and the cause in respect whereof he was to have two Chaplains is removed: And so where a Baroness widow taketh husband, her quality is altered, for now she is not *sui juris*, but only *sub potestate viri:* And therefore, if the latter Proviso had not been, If such Baronesses after the retainer had married with a Gentleman under the degree of a Baron, her Chaplain cannot accept a second Benefice, for the quality of the Baroness by her marriage was altered; and she ought to remain at the time of the acceptance of the second Benefice in the same quality as she was at the time of retainer.

[118] 2. It was objected, That this Case was out of the Provisoes, because that if a Baron marry a widow Baroness, in this Case the Baroness cannot retain any Chaplain within the said Act, for the words of the Act are, Every Baroness being widow, which excludeth feme coverts being Baronesses, then if she be excluded to retain, by the same reason her retainer to have power by force of the Act to take a second Benefice is lost by the marriage, for as much as she now having married with a Noble man, his Chaplain may say Divine service to them both; And the wife of a Nobleman needeth not have Chaplains by the Judgment of the whole Court of Parliament, for the Act hath not made any provision for any such wives, but only for Baronesses widows, for the wife of one under the degree of a Baron cannot have any Chaplain within this Act; But in our Case at the time of the acceptance she who retained was the wife of a Baron, and may have Chaplains by force of this Act.

3. It was said, That this Act was always construed strictly against Non residency, and Pluralities as a thing prejudicial to the service of God, and instruction of his people: And therefore if a Bishop be translated into an Archbishop, or a Baron be created an Earl, now he hath both dignities, and as it is commonly said, *Quando duo jura concurrunt in una persona, æquum est acsi essent in diversis*; But yet within this Act he can have but as many as an Archbishop or Earl may have, for although that he hath sundry dignities, yet he is but one person to whom attendance and service shall be done: So if a Baron be made Knight of the Garter, or Warden of the Cinque Ports, he shall have but three Chaplains in all, *& sic de similibus: Quod fuit concessum. Quia difficile est ut unus homo vicem duorum sustineat.* But on the other part it was argued and resolved by the Court, That in the Case at Bar *Cartmell* after the marriage might accept of the said Benefice within the letter and meaning of the said Act; for without question the retainer of *Cartmel* was not determined or countermanded by the said marriage. And as to that it was said that there were two manner of retainers: One at the Common Law, and according to that he might have as many Chaplains as he would: Another according to the said Act, and by it he is restrained to a number; and the first which he retaineth are his Chaplains according to the said Act, and shall be first preferred, as it was adjudged *Pasch.* 31 *Eliz.* in the Common Pleas in *Skefling*'s Case; and *Mich.* 41 & 42 *Eliz.* in the Kings Bench in *Drurie*'s Case. And therefore if any officer who is allowed by the Statute to have one, two, or more Chaplains, retaineth a Chaplain, and afterwards is removed out of his

[b] office, in this Case the retainer by the Common Law remaineth, but the retainer upon the Statute is determined, for after the removing he cannot be Non resident, nor accept of other Benefice: So if an Earl or Baron retain a Chaplain, and before his advancement be attainted of Treason, as the Earl of *Westmorland*'s Case, there the retainer according to the Statute is determined; and after the attainder such Chaplain cannot accept a second Benefice, because that he who is attainted, by his attainder is a dead person in Law; and now (as *Stamford* Pleas of the Crown saith) of a Noble man (by the Judgment by which his blood is corrupted) he is become ignoble, and therefore his dignity is determined; And although the wife of a Baron during the coverture cannot retain a Chaplain, yet when a Baroness widow doth retain one or two according to the said Proviso, this retainer according to the Act is the principal matter, and so long as the retainer is in force, and the Baroness continueth a Baroness, the Chaplains may well accept of two Benefices by the express letter of the Act, for it is sufficient that if at the time of the retainer the Baroness were a widow, for thereby the express words (being a widow) are satisfied: But the Statute doth not provide that she be a widow at the time of the acceptance, but the words imply the contrary, *scil.* that she need not continue widow; for the words are, Every Baroness being widow may have two Chaplains, whereof every of them may purchace, &c. so that by these words it is sufficient, if she be a widow at the time of the retainer; and there is no mischief in this Case, for the number appointed by the Statute shall not be exceeded, and the Act appointeth the Baroness widow to have two, and her husband to have three, so that the intention of the Act is not defrauded; And although that (as it hath been said) the husband and wife are but one person in Law, yet as the Text saith, *Sunt duæ animæ in carne una*, and therefore it is no reason, that the retainer of Chaplains which serveth for the instruction of souls should be determined by the marriage. Also the last Proviso, When the Baroness marrieth one under the degree of a Baron was added, because that by such marriage her dignity was determined, for the rule is, *Quando mulier nobilis nupserit ignobili, desinit esse nobilis.* But this rule is to be understood of a woman who getteth nobility by marriage, as by the marriage of a Duke, Earl or Baron; for in such Cases if she marrieth under the degree of Nobility, by such marriage with one who is ignoble she loseth her dignity which she had attained by marriage; for *eodem modo quo quid constituitur, dissolvitur:* But if a woman be Noble, as Dutchess, Countess, Baroness, &c. by descent, although that she marrieth under the degree of Nobili-

[119] ty, yet her birthright remaineth, for that is annexed to her blood, and is *Character indelebilis:* But in the Case at Bar the Baroness by her marriage with one of the Nobility doth not lose her dignity of Baroness, but rather encreaseth it. And therefore it is not like to the Case which hath been put; And the second Proviso explaineth it; for the makers of the Act well knew, That after such marriage as this is

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in this Caſe at Bar, ſhe is a Baroneſs as ſhe was before, and not in Caſe as where ſhe marrieth one under the degree of Nobility: Thereto was added, that the ſecond Proviſo doth not provide any remedy when a Baroneſs widow retaineth Chaplains, and afterwards marrieth under her degree, but leaveth the ſame to the general conſtruction of Law, and provideth only that ſuch Baroneſs after ſuch marriage may retain two Chaplains, &c. Alſo when a Baroneſs widow retaineth two Chaplains, and afterwards marrieth with a Baron, by common intendment ſhe bringeth maintenance with her to ſupport her ſtate, and prefer her Chaplains, and the retaining of her Chaplains cannot be prejudice to her husband but rather an honour to him.

If a woman Baroneſs retaineth two Chaplains according to the Statute, and afterwards taketh one of the Nobility to husband, the retainer of theſe two Chaplains remaineth; and they without new retainer may take two Benefices; for their retainer was not ended by the marriage; Alſo for the ſame cauſe ſo long as they attend upon ſuch Baroneſs in her houſe, they ſhall not be adjudged Non reſident. And it is to know, That if a Baron hath three Chaplains, and each of them hath two Benefices, and afterwards the Baron dieth, yet they ſhall enjoy the Benefices with Cure which were lawfully ſetled in them before; but although he be reſident and dwelleth upon one Benefice, yet he ſhall be puniſhed for Non-reſidency upon the other, as was Parſon *Boyton*'s Caſe, and there he ought to have of the King a *Non obſtante*. So if the Baron be attainted of Treaſon or felony, or if any Officer be removed from his office, and ſo of the like.

Paſch. 44 *Eliz.* in a *Quare Impedit* brought by the Queen againſt the Biſhop of *Salisbury* and others, it was ruled by the whole Court, That the Earl of *Southampton* being of the age of 10 years, and dwelling in houſe with the Lord Admiral to whom the Queen had granted his Wardſhip, might retain and qualifie Chaplains within this Act; for the words of the Act are general, and yet his Guardian was a Noble man, and had Chaplains by the ſaid Act allowed him; And the Earl of *Southampton* was under his cuſtody, and one of his family, as the wife was in the Caſe at Bar.

Hill. 45 Eliz. *in the Kings Bench.*

Dumport's Caſe.

IN Treſpaſs between *Dumport* and *Symmes*, upon the general iſſue, the Jurors gave a ſpecial verdict to this effect; The Preſident and Schollers of the Colledge of *Corpus Chriſti* in *Oxford* made a leaſe for years *anno* 10 *Eliz.* of the land in queſtion to one *Bold*, *Proviſo* that the leſſee or his aſſignees ſhould not alien the premiſſes to any perſon or perſons without the ſpecial licence of the leſſors, And afterwards the leſſors by their deed 13 *Eliz.* licenſed the leſſee to alien, or demiſe the land, or any part of it to any perſon or perſons whatſoever: And afterwards in 15 *Eliz.* the leſſeee aſſigned the term to one *Tubbe*, who by his laſt Will demiſed the ſame to his ſon, and by the ſame Will made his ſon his Executor and died. The ſon entred generally, and the Teſtator was not indebted to any perſon; and afterwards the ſon died inteſtate, and the Ordinary committed adminiſtration to one who aſſigned the term to the Defendant. The Preſident and Schollers by warrant of Attorney entred for the condition broken, and made a leaſe to the Plaintiff for 21 years, who entred upon the Defendant, who reentred, upon which reentry the Action of Treſpaſs was brought. And that upon the leaſe made to *Bold* the yearly rent of 33 s. 4 d. was reſerved, and upon the leaſe to the Plaintiff the yearly rent of 22 s. was only reſolved. And the Jurors prayed upon the whole matter the advice of the Court: And upon this Verdict Judgment was given againſt the Plaintiff. And in this Caſe divers Points were debated and reſolved. [b]

1. That the alienation by licence to *Tubbe* hath determined the condition, ſo that no alienation which he can afterwards make can break the *Proviſo*, or give cauſe of entry to the leſſors; for the leſſors cannot diſpenſe with an alienation for a time, and that the ſame eſtate ſhall remain ſubject to the *Proviſo* after. And although the *Proviſo* be that the leſſee or his aſſignees cannot alien, yet when the leſſors licence the leſſee to alien, they ſhall never by force of the ſame *Proviſo* defeat the term which is abſolutely aliened by their licence, in as much as the aſſignee hath the ſame term which was aſſigned by their aſſent; So if the leſſor diſpenſeth with one alienation, he thereby diſpenceth with all alienations after; for in as much as by the licence of the leſſors and of the aſſignment of the leſſee the eſtate and intereſt of *Tubbe* was abſolute, it is not poſſible that his aſſignee who hath his eſtate and intereſt ſhall be ſubject to the firſt condition: And as the diſpenſation of one alienation is the diſpenſation of all, ſo it is as to the perſons; for if the leſſor diſpenſeth with one, all the other are at liberty. And therefore it was adjudged *Trin.* 28 *Eliz. Rot.* 256. in the Common Pleas, between *Leeds* and *Crompton*, That where the Lord *Stafford* made a leaſe to three upon condition that they or any of them ſhould not alien without the aſſent of the leſſor, and afterwards one aliened with his aſſent, and afterwards the other two aliened without his aſſent; and it was adjudged that in this Caſe the condition being determined as to one perſon (by licenſe of the leſſor) was determined in all. And *Popham* chief Juſtice denied the Caſe in 16 *Eliz. Dier* 334. That if a man leaſe lands upon condition that he ſhall not alien the land, or any part of it without the aſſent of the leſſor, and afterwards he alieneth part with the aſſent of the leſſor, that he cannot alien the reſidue without the aſſent of the leſſor: And he conceived, that the ſame is not Law, for he ſaid that the condition [110]

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cannot be divided or apportioned by the act of the parties; and in the ſame Caſe, as to parcel which was aliened with the aſſent of the leſſor, the condition is determined; For although that the leſſee alieneth any part of the reſidue, the leſſor cannot enter into the part aliened by licence, and therefore the condition being determined in part is determined in all. And therefore the chief Juſtice ſaid, That he thought the ſaid Caſe to be falſe printed, for he held clear that it was not Law.

Note Reader, *Paſch.* 14 *Eliz. Rot.* 1015. in the Common Pleas, That where a leaſe was made by deed indented for 21 years of three Mannors, *A. B. C.* rendring rent, for *A.* 6 l. for *B.* 5 l. for *C.* 10 l. to be paid in one place of the land, with a condition to reenter in all the three mannors for defalt of payment of the ſaid rents, or any of them; and afterwards the leſſor by deed indented and inrolled bargaineth and ſelleth the reverſion of one houſe and 40 acres of land parcel of the mannor of *A.* to one and his heirs; and afterwards by another deed indented and inrolled, bargaineth and ſelleth all the reſidue to another and his heirs; and if the ſecond bargainee ſhould enter for the condition broken was the Queſtion: And it was adjudged, that he ſhould not enter for the condition broken, becauſe the condition being entire cannot be apportioned by the Act of the parties, but by ſeverance of part the reverſion is deſtroyed
[*b*] in all. But it was agreed, That a condition may be apportioned in two Caſes.

1. By act in Law.

2. By the act and wrong of the leſſee. By act in Law; as if a man ſeiſed of two acres in fee, one in Borough Engliſh, and the other not, and hath iſſue two ſons, and leaſeth both acres for life or years rendring rent with condition, and the leſſor dieth, in this Caſe by this deſcent, which is an act in Law, the reverſion, rent and condition are divided. 2. By act and wrong of the leſſee; as if the leſſee maketh a feoffment of part, or committeth Waſte in part, and the leſſor entreth for the forfeiture, or recovereth the place waſted, there the rent and condition ſhall be apportioned, for none ſhall take advantage of his own wrong, and the leſſor ſhall not be prejudiced by the wrong of the leſſee: And the Lord *Dier* then chief Juſtice of the Common Pleas in the ſame Caſe ſaid, That he who entreth for a condition broken ought to be in of the ſame eſtate which he had at the time of the condition created; and that he cannot have, where he hath departed with the reverſion of part: And with that reaſon agreeth *Litt.* 80. *b. Vide* 4 & 5 *Phil & Mar. Dier* 152. where a *Proviſo* in an Indenture of leaſe was, That the leſſee, his executors or aſſigns ſhould not alien to any perſon without licenſe of the leſſor, but ſo much only to one of the ſons of the leſſee; the leſſee dieth, his executors aſſigneth it over to one of his ſons, It is holden by *Stamford* and *Catlyn* that the ſon may alien to whom he pleaſeth without licence, for the condition as to the ſon was determined; which agreeth with the Reſolution of the principal point in the Caſe at Bar.

2. It was reſolved, That the Statutes of 13 *Eliz. cap.* 10. & 18 *Eliz. cap.* 11. concerning leaſes made by Deans and Chapters, Colledges and other Eccleſiaſtical perſons are general Laws whereof the Court ought to take knowledge, although they be not found by the Jurors; And ſo was it reſolved between *Claypool* and *Carter* in a Writ of Error in the Kings Bench.

Paſch. 1 Jacobi.

Buſtard's Caſe.

[121] *Mich.* 44 *Eliz.* in the Kings Bench in Treſpaſs, between *Buſtard* Plaintiff and *Boulton* Defendant, the Caſe was ſuch; *Jaſper Dormer* and *Juſtine* his wife were ſeiſed of the moity of the mannor of *Ilbury* to them and to the heirs of the body of *Jaſper*; *Jaſper* levied a fine thereof to *Gregory*, who ſuffered a common recovery, in which *Jaſper* was only vouched, and he vouched over the common vouchee which was to the uſe of *Gregory* and his heirs, who thereof enfeoffed *Buſtard*, who thereof enfeoffed *Savage* and *Darſton* in fee; and after an exchange was made by deed indented between *Savage* and *Darſton* of the one part, and *Buſtard* (who was ſeiſed in fee of the fourth part of the mannor of *Barton*) in the County of *Oxford*; by which exchange *Buſtard* gave to the ſaid *Savage* and *Darſton* and their heirs the fourth part of the mannor of *Barton* in exchange for the moity of the mannor of *Ilbury*, which moity *Savage* and *Darſton* gave unto *Buſtard* and his heirs in exchange for the ſaid fourth part of the mannor of *Barton* which exchange was executed on both parties: *Savage* and *Darſton* demiſed the fourth part of the mannor of *Barton* to the Defendant for years. *Jaſper* died, *Juſtine* his wife entred into the mannor of *Ilbury*, upon which *Buſtard* entred into the fourth part of the mannor of *Barton*; the Defendant reentred, and *Buſtard* brought an Action of Treſpaſs. And after many arguments at the Bar and Bench in divers ſeveral Terms, it was adjudged for the Plaintiff; and in this Caſe it was reſolved by the whole Court.

[*b*] 1. That in every exchange lawfully made, this word *Excambium* implieth in it ſelf *tacite* a condition, and alſo a warranty, one to give reentry, and the other voucher and recompence, and all in reſpect of the reciprocal conſideration, one land being given in exchange for the other; But the ſame is a ſpecial warranty upon the voucher, by force of which he ſhall not recover other land in value, but that only which was given in exchange; for in as much as the mutual conſideration is the clauſe of warranty, for this cauſe the ſame ſhall extend only to land reciprocally given, and not to other land: And this warrant runneth only in privity, for none ſhall vouch by force of it but the parties to the

the exchange or their heirs, and no assignee; but the assignee shall rebut by force of it although the exchange were without deed, as appeareth in 3 *E.* 3. *Formedon* 44. 2 *E.* 2. *Cui in vita* 16. The same Law in Case of partition. And as it is in Case of warranty, so it is in Case of condition, which the Law implieth upon the exchange: And therefore if *A.* exchange with *B.* and *B.* alieneth to *C.* which is a title paramount, *C.* shall not enter upon the other; for as the warranty runneth in privity to the parties to the exchange and their heirs, so also the condition in Law runneth also in privity, and doth not extend to the assignee, and so none shall have *Contra formam feoffamenti* but the feoffees or his heirs, but the assignee may rebut, *F. N. B.* 163. *c.* 22 *H.* 6. 50. *b.* 30 *H.* 6. 7. *a.* 10 *H.* 7. 11. *a.* But in the same Case, if *A.* who doth not alien be evicted, he shall reenter into the land which was given in exchange, although that *B.* hath aliened it over.

2. It was resolved, That if *A.* give in exchange three acres to *B.* for other three acres, and afterwards one acre is evicted from *B.* in this Case all the exchange is defeated, and *B.* may enter into all his land, for although the exchange had been good if *A.* had given but two acres, or but one acre or less, yet for as much as all the three acres were given in exchange for the others (and the condition which was implied in the exchange) was entire, upon the eviction of one acre the condition in Law was broken, and therefore entry given unto the whole, for it is the office of a condition to defeate the whole and not parcel, if not that the condition be especially restrained to one part only as it is not in this Case; And therefore there is not any difference between a thing which is entire, as a mannor, and several things given in exchange: The same Law of a partition, as it is agreed in 13 *E.* 4. *f.* & 42 *Ass.* 22. the Earl of *Pembroke*'s Case, where the principal Case of partition is good Law; but the opinion of *Cavendish* there, that is to say, That although an estate for life or in tail be evicted against one coparcener, that yet the partition remaineth in force, is not Law, as it was resolved by the Court in this very Case, *Vide Littleton cap. Partition* 58. *b.* But in the said Case of exchange, if one be impleaded for one acre, and he voucheth the other, and the demandant recovereth, in this Case the Tenant shall recover in value but according to the loss: For although the condition be entire and extendeth to all, yet the warranty upon the exchange may severally extend to part; and there is great difference between a warranty in Law upon [122] exchange, and a warranty in Law upon partition, as to the recovery in value; for in the Case of exchange he who voucheth shall recover in value according to the value which he lost, but so it is not in the Case of partition: For if a man seised of 6 acres in fee, every one of equal value, and dieth, having issue two daughters, and upon the partition each hath three acres, and after one sister is impleaded for one acre by one who hath title paramount, and prayeth in aid of her coparcener, she shall not recover an acre, but an half acre, so that each of them shall have an equal part; for in as much as both claim by descent which is an act in Law, and by the Law each of them ought to have equal part of the inheritance of her ancestors, for this cause she shall recover in value but the moity which she lost, so that the loss shall be equal.

So if a man be seised in fee or in tail of three acres, each of equal yearly value, and dieth, and the heir endoweth the wife of the third acre, and afterwards the wife is impleaded by one who hath title paramount, and she vouch the heir, now she shall recover in value according to that which she lost but the the third part of the two acres which remain, for by the Law she ought to have Dower but of the third part, and now upon the matter she is not to have Dower but of the third part of the two acres, as appeareth by the Book in 5 *E.* 3. *Voucher* 249. where the principal Case was, *Robert de Paris* Besaiel, *Stephen de Paris* Grandfather, *Robert de Paris* Father, and *Robert de Paris* the Son; *Robert* the Besaiel having to wife *Maud* seised of certain lands in fee, gave the same to *Stephen* and the heirs of his body, and died; *Robert* the son of *Stephen* endowed *Margery* the wife of *Stephen* of the third part of the whole; and afterwards *Robert* the Besaiel died, and *Robert* the father died; *Maud* the wife of the Besaiel brought a Writ of Dower against *Margery* wife of *Stephen*, and she vouched *Robert* the son of *Robert* who had the reversion; And there the Question was, of how much *Margery* should have in value? And by some, she shall not have but Dower having regard to the two parts which remain, because the Dower which *Maud* wife of the Besaiel demanded, is higher and elder than the Dower of *Margery* the wife of the Grandfather: And notwithstanding that the Besaiel overlived *Stephen*, and the wife of *Stephen* in the life of *Robert* the Besaiel was lawfully endowed at which time *Maud* could demand nothing, yet when her husband died, her title of Dower was more ancient; And some held the contrary, *scil.* That the wife should recover in value according to her loss; And difference was taken between Dower of the wife of an heir and of the wife of a purchasor. For if there be Grandfather, father, and son, and the Grandfather dieth, and afterwards the father dieth, and the son endoweth the wife of the father, against whom the wife of the Grandfather bringeth Dower, she shall not recover over in value, because that the Dower [b] of the wife of the Grandfather took away in Law the descent as to the freehold, and she shall be in of an estate from her husband, and by consequence after the death of the wife of the Grandfather, the wife of the father shall not be endowed of the part assigned to the Grandmother for her Dower, for now in Judgment of Law the father had but only a reversion of that part expectant upon an estate for life, *& ideo, Dos de dote peti non debet.* But in this Case the Besaiel made a gift in tail to *Stephen*, so that *Maud* demanded Dower of *Margery* who was the wife of a purchasor; and although that *Maud* recovered Dower against *Margery*, yet if *Margery* survive her she shall reenter; for Dower taketh away the estate which by Law descended, but not the estate acquired and gained by purchase, and so was it adjudged; and there *Margery* recovered generally to the value which he lost: So in Case of exchange, each party is a several purchasor, and each warranteth the whole to the other, and therefore he shall recover to the value which he loseth.

3. It was resolved, That as when the whole estate in part is evicted, all the exchange is defeated: So in the principal Case when the estate of freehold for the life of *Justine* which is but parcel of the estate is evicted in all the lands, or in part, by that the whole exchange may be defeated by force of the condition

in Law; for although that a reversion expectant upon an estate for life cannot be given in exchange for land in possession, yet when *Savage* and *Darston* in the principal Case were seised of the moity of the said mannor of *Ilbury* in their demesn as of fee, and gave the same in possession to *Bustard* in exchange, *ut supra*, when *Justine* entreth and evicteth an estate for life, *Bustard* may enter into the whole land which he gave in exchange, for all the estate which was given to him upon consideration that he depart with his land; and therefore when any estate of freehold is evicted from him by entry or otherwise, he may by force of the condition in Law enter into the land given by him: So if he in the reversion in fee disseiseth his tenant for life, and giveth this land in exchange to another for other land, and afterwards the lessee for life doth enter, now may the other enter into his land, because that the whole exchange is defeated; But if *A.* hath the reversion in fee of an acre of land expectant upon an estate for life, maketh an exchange with *B.* by deed indented, and giveth this acre by name of an acre of land, and not by the name of the reversion expectant for another acre, yet in this Case (for as much as nothing passeth by the gift of the acre of land but only the reversion) the warranty or condition cannot by the Law extend to more then passeth by the exchange, for they are incident and annexed to the estate which is given, and cannot extend to the freehold which was in the lessee; and if the Law should be otherwise
[123] great mischief would follow: For if exchange be made of divers mannors, and peradventure divers parcels of them are in lease for life, in this Case, if the exchange shall be void because it was made of a mannor in possession, it shall avoid all exchanges, which shall be mischievous, and cannot be any mischief on the other part; for when the tenants for life are in possession of the land, it shall be accounted the folly and lachess of the purchasor, if he do not know it either by survey or other intelligence. And in the Principal Case, by the fine and recovery, and other estates made, the estate which *Justine* had was devested, and she had but a right, so that *Savage* and *Darston* who gave the same in exchange had an estate in fee simple in possession, to which the warranty and condition in Law was annexed.

4. It was resolved, That although that *Bustard* had notice of the right of *Justine* at the time of the exchange, yet it was not material, but that after her entry the exchange shall be defeated, for peradventure it was one of the causes that he would not purchase *Ilbury* absolutely, but by way of exchange, so that upon the eviction he shall have his land back again.

And *Coke* Attorney General, and *Tanfield* and *Darston* were of Councel with the Defendant, and *Godfrey*, *Yelverton*, and others with the Plaintiff.

Pasch. 1 Jacobi, *in the Kings Bench.*

Beverley's Case of *Non compos mentis.*

[*b*] IN a Bill depending in the Court of Requests between *Snow* Plaintiff, and *Beverley* Defendant, the matter was; That *Snow* had made an Obligation to the Defendant in 1000 *l.* and in the said Court would be relieved, because at the time of the making of the said Obligation, he was *Non compos mentis*; And this Term I moved the Court of Kings Bench to have a stay of the said suit in the Court of Requests, because the matter was not determinable there. And upon this Case two Points upon argument and good consideration were resolved by the whole Court.

1. That every deed, feoffment, or grant which a man of *Non compos mentis* maketh is avoidable, and yet shall never be avoided by himself, because it is a Maxim in Law, That no man of full age shall be in any plea to be pleaded by him, received by Law to stultifie himself, as appeareth by *Littleton*, *Lib.* 2. *cap. Descents* 95. and therewith agreeth 39 *H.* 6. 42. *b.* 5 *E.* 3. 70. & 35 *Ass.* 19. And there another cause is given, *scil.* because that when he recovers his memory, he cannot know what he did when he was *Non compos mentis*. 2. If the Common Law had given a Writ of *Non compos mentis* to him who hath recovered his memory after alienation, truly the Law would have given him remedy for the maintenance of him, his wife, children and family, although he recovered not his memory but continued *Non compos mentis*. And it is to know, That this disability to disable himself as to some persons is personal, and extendeth only to the party himself, and as to other persons is not personal but shall bind them also: And as to that know that there are four manner of privities, *scil.* Privies in blood, as heir: 2. Privity in
[124] representation, as Executors or Administrators, who as *Littleton* saith 77. represent the person of the Testator or Intestate, 2 *Ma. Dier* 112. *acc.* 3. Privity in estate, as donee in tail, the reversion or remainder in fee, &c. 4. Privy in Tenure, as Lord by Escheat: And two of them which are privies only may disable him who was *Non compos mentis*, and avoid his deeds, grants and feoffments, and two not. For privies in blood may shew the disability of the ancestor, and privies in representation the infirmity of the Testator or Intestate; but neither privy in Estate, nor privy in Tenure shall so do. And therefore if donee in tail being *Non compos mentis* maketh a feoffment in fee, and dieth without issue, he in the reversion or remainder shall not enter or take advantage of the *Non sane memorie* of the donee: The same Law of Lord by Escheat, if his Tenant being *Non compos mentis*, maketh a feoffment in fee and dieth without heir, he shall not avoid it: But there are some acts done by a man of *Non compos mentis* which none of them shall avoid; and therefore if he levieth a fine, suffereth a common recovery, or acknowledgeth a Statute or Recognisance, neither his heirs nor his Executors shall avoid it, for these are matters of Record which shall not be avoided by a bare averment of *Non compos mentis* for the

inconvenience which may follow thereupon. Alſo ſuch averment is againſt the Office and dignity of the Judge, for he ought not to take any conuſans of a fine or recogniſance of him who is *Non compos mentis*, 18 *E.* 2. *Fines* 120. 27 *Aſſ.* 17. 17 *E.* 3.

2. It was reſolved, That the ſame being againſt an expreſs Maxim of the Common Law, that the party ſhall not diſable himſelf, that he ſhall not have for the ſame relief in any Court of equity, for that ſhall be in ſubverſion of a principal and ground in Law. *Quod nota*, And *Coke* the Attorney was of Councel with *Beverley*, and *Herle* the Queens Serjeant with *Snow*.

Note Reader, That every thing which a man *Non compos* doth, either concerneth his life, his lands, or his goods: Alſo every act which he doth is either in *pais*, or in a Court of Record: All Acts which he doth in a Court of Record either concerning his lands or his goods ſhall bind himſelf, and all others for ever: All acts which he doth concerning his lands or goods in *pais*, in ſome Caſes ſhall bind him only during his life, and in ſome Caſes ſhall bind him ever (as hath been ſaid.) But as to his life, the Law of *England* is, That he ſhall not loſe his life for felony, or murder, becauſe the puniſhment of a felon is ſo grievous, *ſcil.* 1. To loſe his life. 2. To loſe his life in ſuch odious manner, *ſcil.* by hanging, for he ſhall be hanged between heaven and earth as unworthy of both. 3. He ſhall loſe his blood as to his anceſtry; for he is as a ſon of the earth without any anceſtor, and as to his poſterity alſo, for his blood is corrupt, and he hath neither heir nor poſterity. 4. His lands. 5. His goods; and in ſuch Caſe the King ſhall have *Annum, diem, & vaſtum*, to the intent his wife and children ſhall be caſt out, his houſes pulled down, his trees eradicated and overthrown, his meadows ploughed, and all that he hath for comfort, delight, or ſuſtenance waſted and deſtroyed, becauſe that he in ſuch felonious manner offended againſt the Law; and all that was, *Ut pœna ad paucos, metus ad omnes perveniat:* But the puniſhment of a man who is deprived of reaſon and underſtanding cannot be an example to others. 2. No felony or murder can be committed without felonious intent or purpoſe; *Et ideo dicta eſt Felonia, quia fieri debet felleo animo:* But *Furioſus non intelligit quid agit, & animo & rationem caret, & non multum diſtat a brutis*, as *Bracton* ſaith, and therefore he cannot have a felonious intent, *Vide* 21 *H.* 7. 31. 26 *Aſſ.* 27. *F. N. B.* 202. *Stamf. Pleas of the Crown* 16. *b.* Alſo for the ſame reaſon, *Non compos mentis* cannot commit petit Treaſon: As if a woman *Non compos mentis* kill her husband, as appeareth 12 *H.* 3. *Forfeiture* 33. But in ſome Caſes *Non compos mentis* may commit high Treaſon, as if he kill, or offer to kill the King, it is high Treaſon, for the King *eſt caput & ſalus Reipublicæ, & a capite bona valetudo tranſit in omnes*; and for this cauſe their perſons are ſo ſacred, that none ought to do or offer them violence, but he is *Reus criminis læſæ Majeſtatis*, & *pereat unus ne pereant omnes*. And it is to know, That there are four manner of *Non compos mentis*: 1. Ideot or fool natural: 2. He who was of good and ſound memory and by the viſitation of God hath loſt it: 3. *Lunaticus, qui gaudet lucidis intervallis*, and ſometimes is of ſound memory, and ſometimes *Non compos mentis*: 4. By his own act, as a drunkard; And it hath been ſaid, that there is great difference between an Ideot *a nativitate*, and he who was of ſound memory, and cometh by the viſitation of God to be of unſound memory; for an ideot is known by his perpetual infirmity of nature *a nativitate*, for he never had any ſenſe or underſtanding to contract with any man, but he who was of good memory and underſtanding and able to make a contract, and afterwards by infirmity or caſualty becometh *Non compos mentis*, is not ſo well known to the world as a natural fool. Alſo an ideot in an Action brought againſt him ſhall appear in proper perſon, and he who pleadeth beſt for him ſhall be admitted, as appeareth in 33 *H.* 6. 18. Otherwiſe it is of him who becometh of unſound memory, for he ſhall appear by Guardian if he be within age, and by Attorney if he be of full age; But yet as to eſtates or gifts made by them, they themſelves by any plea that they can plead ſhall not avoid them, no leſs the ideot then he who becometh of unſound memory; and be the feoffment or gift made by them in perſon or by Attorney they ſhall never avoid them either by entry or Action, for it appeareth by the ſaid Maxim, that they cannot ſtultifie or diſable themſelves; But if they ſhall avoid things which they do by Attorney, they ought to ſhew that they were then ideots, or of unſound memory: But yet as unto all others, there is a great difference between an eſtate made in perſon and by Attorney; for if an ideot or *Non compos mentis* maketh a feoffment in fee in perſon, and dieth his heir within age, he ſhall not be in ward, or if he dieth without heir, the land ſhall not eſcheat as is aforeſaid: But if the feoffment be made by letter of Attorney, although that the feoffor ſhall not avoid the ſame, yet after his death as to all others in judgment of Law the eſtate was void, and therefore in ſuch Caſe if his heir be within age he ſhall be in ward, or if he dieth without heir the land ſhall eſcheat, and that is the true reaſon of the Books in 7 *H.* 4. 5. 7 *H.* 4. 12. And likewiſe in the Caſe of an infant, if he maketh a feoffment in perſon, if he dieth without heir the land ſhall not Eſcheat, but otherwiſe if it were made by letter of Attorney, but the infant himſelf ſhall not avoid it, but others ſhall; But things done by matter of Record, as Fines, Recoveries, Judgments, Statutes, Recogniſances, ſhall bind as well the ideot, as he who is *Non compos mentis*, 31 *E.* 3. *Saver de fault* 371. 1 *Ma. Dum fuit infra ætatem* 7. Alſo of a Lunatick, all acts which he doth during his lunacy are equivalent to acts done by an ideot, or he who is utterly *Non compos mentis*; but acts done by himſelf *inter lucida intervalla*, when he is of ſound memory ſhall bind him.

Laſtly, although that he who is drunken is for the time *Non compos mentis*, yet his drunkenneſs ſhall not extenuate his act, or offence, nor turn to his avail, but it is a great offence in it ſelf, and therefore doth aggravate his offence, and doth not derogate from the thing he doth in that time, and that in caſe as well touching his life, as his goods, chattels, or lands, or any other thing concerning him: When and in what Caſes lacheſs ſhall prejudice an ideot or *Non compos mentis*; ſome have taken difference between barr of his right, and barr of his entry, for in Caſe of barr of his right, his lacheſs ſhall not prejudice him, but in ſuch ſpecial Caſe if he become of unſound memory, he ſhall ſhew that he was not *Compos mentis*; As if a man *Non compos mentis* be diſſeiſed; and the diſſeiſor levieth a fine, in this Caſe at the Common Law although the year and day be paſt, yet he who was *Non compos mentis* ſhall not be

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bound thereby, but he may well enter, and that they ſay is proved by the Statute *de modo levandi fines*
[b] made *anno* 18 *E.* 1. which is but a declaration of the Common Law, *ſcil.* That a fine is ſo high barr and of ſo great force, and of ſo high nature in it ſelf, that it barreth not only thoſe who are parties and privies to the fine and their heirs, but all other of the world who are of full age, out of priſon, and of good memory, and within the four Seas the day of the fine levied, if they put not in their claim by their Action or entry in the Countrey within the year and the day; by which it appeareth that no lacheſs of a man *Non compos mentis* ſhall barr him of his right. Alſo it appeareth by the Statute of 4 *H.* 7. *cap.* 24. That in ſuch Caſe if a man levieth a fine with proclamations, and at the time of the fine levied he who hath right is *Non compos mentis*, and afterwards he recovereth his memory, that in this Caſe he ought to ſue his Action or entry within five years after he becometh of ſound memory; and in ſuch Caſe in pleading he ſhall ſhew that at the time of the fine levied, he was *Non compos mentis*, and all the ſpecial matter: But if he who hath ſuch right be an ideot, or *Non compos mentis*, and never recovereth his memory, the heir may have an Action, or make his entry when he will, for he is excepted out of the body of the Act, and is not tied to make any entry, or bring his Action within any time, but the party himſelf if he recover his memory. The ſame Law of him who is beyond Sea at the time of the fine levied and dieth, there his heir may enter or bring his Action when he will; And in ſuch Caſe the Lord by eſcheat ſhall take advantage of his *Non ſane memorie*, infancy, impriſonment, or being beyond Sea of his tenant: For if Lord and tenant be, and the tenant be diſſeiſed, and the diſſeiſor levieth a fine, the diſſeiſee being within age, *Non compos mentis*, or in priſon, or beyond Sea, and afterwards the diſſeiſor taketh back an eſtate to himſelf in fee, and afterwards the diſſeiſee within age, *Non compos mentis*, in priſon, or beyond the Sea dieth without heir, the Lord by eſcheat ſhall take advantage of every of them againſt the diſſeiſor. So if a collateral warranty deſcend upon a *Non compos mentis*, which he might have avoided by entry: But an ideot or *Non compos mentis* by their lacheſs ſhall be barred of their entry, becauſe if they be diſſeiſed, and the diſſeiſor dieth ſeiſed it ſhall take away their entry, but after their death their heir cannot enter nor take advantage of the infirmity of their auncеſtor, and his lacheſs which ſhall prejudice himſelf ſhall not prejudice his heir of his entry, and that appeareth by *Littleton Chap. Continual claim* 39. For *Littleton* ſaith, No lacheſs can be adjudged by the Law in him who hath not diſcretion in ſuch Caſe, *ſcil.* having regard to his heir, and ſo is the difference.

And as to that which is commonly objected, That the civil Law in this point is grounded upon greater reaſon then the Common Law; for by the Civil Law all acts which ideots or *Non compos mentis* do without their Tutor are utterly void, and that ſeemeth to ſome more reaſonable then the Common Law, becauſe he who is an ideot or *Non compos mentis* wanteth diſcretion or underſtanding, and the ſame cometh
[126] by the act and viſitation of God, therefore they ſay (God forbid) that his acts or lacheſs during this time ſhould bind him. Others conceive that the ancient Common Law agreeth with the Civil Law in this Caſe; for *Bracton lib.* 3. *fol.* 100 ſaith; *Furioſus autem ſtipulari non poteſt, nec aliquod negotium agere quia non intelligit quid agit*: And therefore it ſeemeth unreaſonable that things done by them who have no diſcretion nor uſe of reaſon, *Qui* (as *Bracton* ſaith) *non multum diſtant a brutis qui ratione carent*, ſhould bind them; and therefore it is (as is commonly ſaid) a great defect in Law, that no Tutor is aſſigned to them by Law, who might protect them, and principally their inheritance: As to that it is to know, That the Law of *England* hath provided for them a Tutor, and hath made proviſion for the preſervation of their inheritance, and their goods alſo: And therefore in the Caſe of an ideot, or fool natural, for whom there is no expectation but that he during his life will remain without diſcretion and uſe of reaſon, The Law hath given the cuſtody of him, and of all that he hath to the King, who (as *F. N. B.* 232.) is bounden of right by the Laws to defend his Subjects, and their goods and chattels, lands and tenements; And becauſe that every Subject is in the Kings protection, an ideot who cannot defend nor govern himſelf, nor order his lands and tenements, goods and chattels, the King of right ought to have the ordering of his lands and tenements, goods and chattels; and that appeareth was the Common Law. For *Bracton fo.* 16. who wtote in 5 *E.* 1. ſaith, That if any heir be a natural fool, by which he is not able to demand or keep his inheritance, that ſuch heirs of whomſoever they hold male or female remain in the cuſtody of the King with all their heritage. And upon that followeth the Statute of *Prærog. Regis cap.* 9. made in 17 *E.* 2. long time after *Bracton* wrote, was but a declaration of the Common Law. And therewith agreeth 18 *E.* 3. *Scire facias* 10. where it appeareth by the ſaid Statute *Prærogativa Regis, Quod Rex habebit cuſtodiam terrarum fatuorum naturalium, capiendo exitus eorundem ſine vaſto & deſtructione, & inveniet eis neceſſaria ſua, de cujuſcunque feod' terræ illæ fuerint, & poſt mortem eorundem reddat eam rectis hæredibus, ita quod nullatenus per eoſdem fatuos alienentur, nec eorum hæredes exhæredentur*: Upon which words I obſerve divers things.

1. That the Law gave the King but the cuſtody of the lands of the ideot: and although the ſame continue during the life of the ideot, yet having but the cuſtody, the King hath not the freehold or fee, but the freehold is in the ideot; For the Statute ſaith, *Quod poſt mortem eorum reddet ea rectis hæredibus*, and that appeareth alſo in 17 *E.* 3. 11. & 13 *E.* 3. *Saver default* 37.

[127] 2. Although the Statute ſaith, *Cuſtodiam terrarum*, yet the King ſhall have as well the cuſtody of the body, and of their goods and chattels, as of their lands and other hereditaments, as well thoſe which they have by purchace, as thoſe which they have as heirs by the Common Law.

3. That he ought to be ideot *a nativitate*, ſcil. *fatuus naturalis*, and not by accident or infirmity.

4. That no feoffment, gift, leaſe or releaſe that an ideot can make of his inheritance, but it may be avoided during his life, which appeareth by theſe words, *ita quod nullatenus per eoſdem fatuos alienentur, nec quod eorum hæredes exhæredentur*: Put caſe then that an ideot above the age of 21 years, maketh a feoffment in fee of his inheritance, if you ask how and in what manner it may be avoided during his life? I anſwer, that if it be found by office at the Kings ſuit, that he was ideot *a nativitate*, and that he hath aliened his lands, then upon a *Scire facias* againſt the alienee the land ſhall be ſeiſed into the Kings hands,

hands, and thereby the inheritance ſhall be reveſted in the ideot, 18 *E.* 3. *Scire facias* 10. 32 *E.* 3 *Scire fac'* 106. 50 *Aſſ.* 2. For the Statute ſaith, *Quod poſt mortem eorum reddat eam rectis hæredibus*, which the King cannot do, nor can the King have the poſſeſſion of the land to his own uſe, if not that by the office and ſeiſure ſuch conveyance made by the ideot be deſtroyed, and that doth not impugn the ſaid Maxim at the Common Law. For in this Caſe the ideot in no plea that he can plead ſhall diſable or ſtultifie himſelf: But all is found by office by the inquiſition and verdict of 12 men at the Kings ſuit, who are not concluded to ſpeak the truth; and ſuch office when it is found ſhall have relation *a tempore nativitatis*, to avoid all mean acts made by the ideot, as feoffments, releaſes, &c. and therewith agreeth 23 *E.* 3. & *Scire fac'* 106. *Stamf. Prærog.* 34. *F. N. B.* 202. *c.* But notwithſtanding the words of the ſaid Act are general and emphatical *nullatenus alienentur*, yet if he alieneth by fine, or recovery, it ſhall bind him, as hath been ſaid, for the cauſe aforeſaid. And ſo after ſuch office found all gifts made by him, of his goods or chattels, and all obligations made by ſuch ideot are utterly void; and after ſuch office found if the ideot be ſued in any Action, upon any obligation or writing that he hath made, the King by his Writ (ſo long as the Office ſtandeth in force) reciting the office ſhall ſend a *Superſedeas* to the Juſtices where the ſuit is begun: But the King ſhall not have the cuſtody of the lands of an ideot holden by Copy, for the ſame is but an eſtate at will by the Common Law; and if the King ſhould have the cuſtody thereof, it would be miſchievous to the Lord of the Mannor; But yet an alienation made by an ideot of his Copihold land after office found ſhall be avoided, *vide* 11 *Eliz. Dier* 302.

And that the King ſhall have the protection of the goods and chattels of an infant as well as of his lands, appeareth by *F. N. B.* 232. where he ſaith, That if an infant who cannot defend, govern or order his lands, tenements, goods, or chattels, the King of right ought to have him in his cuſtody, and to protect him and his goods and chattels, and the ſame appeareth alſo by the Writ in the *Regiſter*, *de Ideota inquirenda*, where it is ſaid, *Quia accepimus quod I. de B. fatuus & ideota exiſtit, ita quod regimini ſui ipſius, terrarum, tenementorum, bonorum & catallorum ſuorum non ſufficit, & quod ipſe in fatuitate ſua magnam partem terrarum & tenementorum ſuorum alienavit, & etiam magnam partem bonorum & catallorum ſuorum diſſipavit in exhæredationem ſuam, & noſtri præjudic' manifeſt', nos indemnitate ipſius in hac parte proſpicere volentes, &c.* By which it appeareth, That by the Common Law the King ſhall have as great protection of the goods and chattels of an ideot, as of his lands, and that as well the ſcattering of his goods and chattels, as the alienation of his lands is to be remedied and redreſſed by the King, to whom the Law hath given the protection and cuſtody of him. And as after office found he cannot alien, give, &c. So alienations, gifts, &c. made before office found, ſhall be avoided after office thereof found, as is aforeſaid, for no lacheſs ſhall be accounted in the King, nor no prejudice thereby ſhall accrue to the ideot for not ſuing the office before the feoffment of gift. But if the ideot dieth before office found, after his death no office can be found, for the words of the Writ are, *Et ipſum viis & modis quibus ſuper ſtatu ſuo melius poteritis informari circumſpecte examinaretis, &c.* which cannot be done when he is dead; and without office the King cannot be entituled, 16 *E.* 3. *Livery* 30. and then the former differences as to his lands and tenements and goods hold.

The ſame Law if a man who was of ſound memory become *Non compos mentis*, and afterwards alieneth his lands or his goods and chattels, and afterwards by office at the Kings ſuit it is found, that he was *Non compos mentis*, and that he hath aliened, &c. the King ſhall protect him who cannot protect himſelf, as is aforeſaid, and ſhall take the profits of his lands, and all that he hath, (which the King could not do if his alienation or gift ſhould ſtand) and therewith maintain him and his family, but the King ſhall not take any of the ſaid profits to his own uſe; and all this appeareth by the Statute of *Prærogat. Reg. cap.* 10. which was but a declaration of the Common Law; *Item Rex providebit, &c.* And obſerve that the ſaid words of *F. N. B.* 232. that the King is bound of right by his Laws to defend his Subjects; and their goods and chattels, lands and tenements, extend as well to *Non compos mentis*, as to an ideot; but in Caſe of *Non compos mentis* the King ſhall not have intereſt in the lunatick (as he hath in the ideot) becauſe that the lunatick may recover his memory which he hath loſt; and therefore in the Caſe of the ideot, the Law ſaith *Rex habebit cuſtodiam*, but in the Caſe of *Non compos mentis*, *Rex providebit*; and as to alienation made by *Non compos mentis*, the words are all one as they are in the Caſe of the ideot, *ſcil. Ita quod præd' terr' & tenementa infra præd' tempus nullatenus alienentur*; and therefore after the office found thereof, the alienation, gift, &c. of him who is *Non compos mentis*, are in equal Caſe with the alienation or gift of an ideot; and the ſaid words of the Writ in the Regiſter, *Quia accepimus quod I. de B. fatuus & ideota exiſtit, &c.* extend as well to *Non compos mentis*, as fool natural, for afterwards in the ſame Writ it is ſaid, *Diligenter inquiras ſi idem I. fatuus & Ideota ſit necne, & ſi ſit, tunc utrum a nativitate ſua, an ab alio tempore, tunc a quo tempore & qualiter & quomodo, & ſi lucidis gaudit intervallis, & ſi idem I. in eodem ſtatu exiſtens terras aut tenementa aliqua alienavit necne, &c.* So that it appeareth that in Judgment of Law, *Fatuus & Ideota* include as well *Non compor mentis*, as *Ideota a nativitate*, and therefore they are in the ſame Caſe, as to the alienation of their lands and tenements, goods and chattels. *Hill.* 28 *H.* 8. *Rot.* 401. in the Common Pleas the Caſe was; In Treſpaſs *Quare clauſum fregit*, and cutting his trees, in *Paddington* in the County of *Midd.* by *John Frauncis* againſt *William Holmes*, The Defendant pleaded that it was found by office before the Eſcheator of the ſaid County of *Midd.* that the ſaid *John Frauncis* was a lunatick, and that he was ſeiſed in fee of the land in which, &c. for which the King ſeiſed his perſon, and his land, and by his Letters Patents granted the rule, government and cuſtody of the ſame perſon and lands to the ſaid *Holmes*, *quamdiu* that the perſon was lunatick, to take the profits to his own uſe, and ſo juſtified, and prayed in aid of the King; and thereupon it was demurred in Law, if he ſhould have aid or not. And it was adjudged, That he ſhould not have aid of the King, for this grant was utterly void, for the King is bound to keep the lunatick, his wife, children and houſhold, with the profits of the lands, and without taking any thing to his own uſe, but all to the uſe of the *Non compos mentis* and his family, and all to the intent that the King may provide that he who wanteth reaſon ſhould not alien his lands,

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not

nor waſte his goods. And the King after office found, hath only proviſion, and hath not any cuſtody of the body or lands of *Non compos mentis*, as he hath of an ideot, and he hath nothing to grant over: But if the King provideth one to have care and charge of him who is *Non compos mentis*, that his family ſhall be maintained, and that nothing be waſted; or if one of his own head taketh ſo much upon himſelf, in this Caſe he is but as Baily of him who is *Non compos mentis*, and ſhall be accountable to him as Baily, or to his Executors or Adminiſtrators, and he cannot cut down trees but for neceſſary houſeboot, ploughboot and cartboot, and to repair the ancient pales, and all that the Baily may do he may do, and not otherwiſe. And therewith agreeth a Writ in the *Regiſter* directed to the Sheriff, *Diligenter inquiras utrum I. de B. a nativitatis ſuæ tempore ſemper hactenus purus Ideota exiſtit, per quod cuſtodia terrarum & tenementorum ſuorum in C. ad nos debeat pertinere, an per infortunium vel alio modo in hujuſmodi infirmitatem poſtea inciderit, propter quod hujuſmodi cuſtodia ad nos pertinere non debeat.* And ſo by theſe differences you will underſtand your Books, 18 E. 2. *Fines* 120. 3 E. 3. *Entry congeable. Statham.* 3 E. 3. *Formedon.* 5 E. 3. 70. 10 E. 3. *Scire facias* 10. and as well 32 E. 3. *Scire facias* 106. 17 *Aſſ.* 17. 17 E. 3. 11. 25 *Aſſ.* 4. 35 *Aſſ.* 10. 50 *Aſſ.* 2. 9 H. 6. 6. 39 H. 6. 24. 12. E. 4. 8. *F. N. B.* 202. *Stamf. Prærog.* 34. *Bract. lib.* 2. *fo.* 11, 12. *& lib.* 3. *fo.* 100. *Britton fo.* 66. *Br. Dum fuit infra ætatem* 9. and divers other Writs in the *Regiſter*, which are agreeable with the reaſon of the Common Law.

Note Reader, That *Ideota* or *Ideotes* is a Greek word, and properly ſignifieth a private man who hath not any publick office. Amongſt the Latines it is taken for illiterate or fooliſh. Amongſt our Lawyers *Non compos mentis.* Amongſt the Engliſh in common ſpeech, Fool natural: *Fatuus proprie dicitur a fando, quia fatur quod puer primo fatur, id eſt, quia inepta loquitur; Sed apud Juriſperitos noſtros accipitur pro Non compos mentis, & fatuus dicitur qui omnino deſipit: Stultus dicitur a ſtupore, quia ſtultus eſt qui propter ſtuporem movetur; Levius eſt eſſe ſtultum quam fatuum,* ſcil. *imprudens, improvidus, ignorans mali & boni. Inſanus qui abjecta ratione omnia cum impetu & furore facit. Amens, ab (a) quæ eſt particula privativa, & mente, id eſt, conſilio & animo. Demens, eſt qui non cogitat quid agit aut loquitur, (de) eſt particula privativa: Amens qui prorſus inſanit:* Ariſt. Ethicorum, *Amentes dicuntur qui a natura experti rationis ſolum ſenſum motum exequuntur.*

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THE

THE REPORTS OF Sir Edward Coke K^t. &c.

PART V.

Of the King's Eccleſiaſtical Law.

IN the Term of S. *Hillary*, in the 33 year of the reign of Queen *Elizabeth*, *Rot.* 340. *Robert Caudrey* Clark brought an Action of Treſpaſs againſt *George Atton* for breaking of his Cloſe at *Northluffenham* in the County of *Rutland*, the 7th day of *Auguſt*, in the 31ſt, year of the reign of the ſaid late Queen; The Defendant pleaded Not guilty, and the Jury returned and ſworn for trial of this iſſue, gave a ſpecial Verdict; that is, they found the truth of the Caſe at large, referring the ſame for the Law to the Judgment of the Court, to this effect: They found that the Plaintiff before the Treſpaſs ſuppoſed to be done, was Parſon of the Rectory of *Southluffenham* in the County aforeſaid, whereof the place wherein the Treſpaſs was alledged was parcel, and found the Statute made in the firſt year of the ſaid late Queens reign, by which in effect it is enacted; That ſuch Juriſdiction Eccleſiaſtical, as by any Spiritual or Eccleſiaſtical power hath heretofore been, or may lawfully be exerciſed for the viſitation of the Eccleſiaſtical eſtate, and perſons, and for reformation, order and correction of the ſame, and of all manner of Errors, Hereſies, Schiſms, Abuſes, Offences, Contempts and Enormities within this Realm, ſhould for ever be united and annexed to the imperial Crown of this Realm. And that her Highneſs, her heirs and ſucceſſors, ſhould have full power and authority by vertue of that Act by Letters Patents under the great Seal of *England*, to aſſign, nominate and authoriſe ſuch perſons, being natural born Subjects, as her Highneſs, her heirs or ſucceſſors ſhould think meet, to exerciſe and execute under her Highneſs, her heirs and ſucceſſors, all and all manner of Juriſdiction, Privileges and Preheminences, in any wiſe touching or concerning any Spiritual or Eccleſiaſtical Juriſdiction within this Realm of *England* and *Ireland*, and to viſit, reform, redreſs, order, correct and amend all ſuch Errors, Hereſies, Schiſms, Abuſes, Offences, Contempts and Enormities whatſoever, which by any manner Spiritual or Eccleſiaſtical power, authority or juriſdiction can or may lawfully be reformed, ordered, redreſſed, corrected, reſtrained or amended, to the pleaſure of Almighty God, the increaſe of vertue, and the conſervation of the peace and unity of this Realm. And that ſuch perſons ſo to be named, aſſigned and authoriſed, ſhould have full power and authority by vertue of that Act, and of ſuch Letters Patents under her Highneſs her heirs and ſucceſſors, to exerciſe, uſe and execute all the premiſſes, according to the tenor and effect of the ſaid Letters Patents, any matter or cauſe to the contrary notwithſtanding.

And afterwards the ſaid Queen by her Letters Patents under the great Seal of *England*, bearing date the ninth day of *December*, in the ſix and twentieth year of her reign, according to the tenor of the ſaid Act, did authoriſe the Archbiſhop of *Canterbury*, the Biſhop of *London*, and divers others, or any three or more of them, to inquire amongſt others, of the Statute of the firſt year of her reign, concerning the Book of Common Prayer, with this clauſe alſo contained in the ſaid Letters Patents, *viz.* Alſo we give and grant full power and authority to reform, redreſs, order, correct and amend in all places of this Realm, all

Errors,

Errors, Hereſies, Schiſms, Abuſes, Contempts and Enormities, Spiritual or Eccleſiaſtical whatſoever, which by any Spiritual or Eccleſiaſtical power, authority or Juriſdiction, can or may lawfully be reformed, ordered, redreſſed, corrected, reſtrained or amended by cenſures Eccleſiaſtical, deprivation, or otherwiſe, &c. And upon proof thereof had, and the offences aforeſaid, or any of them ſufficiently proved againſt any perſon or perſons, by confeſſion, lawful witneſs, or by any due manner, &c. That then you or three of you ſhall have full power and authority to order and award ſuch puniſhment to any ſuch offender by fine, impriſonment, cenſure of the Church, or otherwiſe, or by all or any of the ſaid ways, and to take ſuch order for the redreſs of the ſame, as by your wiſdoms and diſcretions ſhall be thought meet and convenient, as by the ſaid Letters Patents more at large appeareth. And further they found the Statute of the firſt year of the reign of the ſaid late Queen, by which it is enacted, That the offender againſt that Act concerning the uniformity of Common Prayer, and being thereof lawfully convicted according to the Laws of the Realm, by Verdict of twelve men, or by his confeſſion, or by the notorious evidence of the fact, ſhould forfeit for the firſt offence the value of his ſpiritual living for one whole year, and ſhould ſuffer ſix months impriſonment. For the ſecond offence to be committed after ſuch conviction, he ſhould be deprived *ipſo facto* of all his ſpiritual livings. And for the third offence to be committed after two convictions as is aforeſaid, he ſhall be deprived of all his Eccleſiaſtical Livings, and be impriſoned during his life. And that the ſaid *Robert Caudrey* before the time of the Treſpaſs ſuppoſed, was deprived of his ſaid Benefice before the ſaid high Commiſſioners, as well for that he had preached againſt the ſaid Book of Common Prayer, as alſo for that he refuſed to celebrate Divine Service according to the ſaid Book, and ſhewed particularly wherein: Which ſaid ſentence of deprivation was given by the Biſhop of *London*, *cum aſſenſu A. B. C. D. &c. collegarum ſuorum*; and the Jury concluded their Verdict; That if the ſaid deprivation were not warranted by Law, but void, then they found the Defendant guilty of the Treſpaſs: And if the deprivation were not void in Law, then they found the Defendant Not guilty.

And this Caſe was ſolemnly and oftentimes debated at Bar by the Council of either party, and at the Bench by the Judges, and after great and long deliberation and conſultation had with the reſt of the Judges, was in the Term of S. *Hillary* in the 37th year of the ſaid Queen adjudged. And it was argued by the Council of the Plaintiff, that the ſaid deprivation was void for four cauſes.

Firſt, The ſaid Book of Common Prayer being authoriſed and commanded to be obſerved by the ſaid Act of the firſt year of the Queen, upon the forfeitures and puniſhments therein compriſed, the offence of the Plaintiff is againſt that Act; for that Act only doth command the obſervation of the ſaid Book, and inflicteth puniſhments in ſeveral degrees for depraving or not deſerving of the ſame, and conſequently if the offence be againſt that Act, the Plaintiff ought to have been proceeded withal, and puniſhed according to the ſame: And it was ſaid, that the ſaid Act was an Act of great moderation and equity for the offender for his firſt offence ſhould not be *ipſo facto* deprived, but ſhould only loſe the profits of his Eccleſiaſtical livings for one year, and ſuffer impriſonment for ſix months, to the end that ſuch as were froward might have a time to repent, and the well minded a time to conſent; and ſuch care had the Act of the offenders in this behalf, as if they committed one offence, and then another, and ſo the ſecond many more; yet ſhould not the offender be deprived for any of the later offences, unleſs he had been firſt judicially convicted of record by verdict of 12 men, or by confeſſion, or notorious evidence of the fact: So as the ſecond offence for which he muſt be deprived by the ſaid Act, muſt be done and committed after ſuch a judicial and ſolemn conviction and puniſhment according to the ſaid Act; and then if ſuch an open puniſhment and infliction ſhould not give him underſtanding, and open his heart to repent, then upon a like conviction for a ſecond offence, to be committed after ſuch a conviction, deprivation ſhould follow. But in the Caſe now in queſtion, *Caudrey* the Plaintiff was deprived from his ſaid Parſonage of *Southluffenham* for his ſaid firſt offence, being never convented or convicted for any ſuch offence before. And therefore it was concluded for this firſt Point, That the ſaid high Commiſſioners had not purſued the form and order preſcribed by the ſaid Act; *Et non obſervata forma, infertur annullatio Actus*, and conſequently the deprivation of the Plaintiff is void, and therefore Judgment ought to be given for him. And it was ſaid by the Plaintiffs Council, by way of anticipation; That albeit there was a Proviſo in the ſame Act for Archbiſhops, Biſhops, and their Chauncellors, Commiſſaries, Archdeacons, and other Ordinaries, having peculiar Juriſdiction, yet that did not give any ſtrength to the ſaid deprivation for two cauſes. 1. That the Commiſſioners by force of the ſaid Act of 1 Eliz. and of the ſaid Letters Patents, are not within the ſaid Proviſo, but only Archbiſhops and Biſhops, their Chauncellors, Commiſſaries, &c. in reſpect of their ordinary Juriſdiction. 2. Admitting it ſhould extend to the ſaid high Commiſſioners, yet ought they to proceed according to the form and order of the ſaid Act, for an offence done againſt that Act.

Secondly, It was objected by the Council of the Plaintiff, that *Caudrey* the Plaintiff was not deprived either by the verdict of 12 men, or by confeſſion, or by the notorious evidence of the fact, but by default in reſpect he appeareth not, being duly precogniſated or warned, which Caſe, as it was objected, was *Caſus omiſſus, & oblivioni datus*, and not within the ſaid Act.

Thirdly, It was objected on the behalf of the Plaintiff, That the ſaid ſentence given by the ſaid high Commiſſioners was utterly void, for that they or any three or more of them having authority by force of the ſaid Act, and of the ſaid Letters Patents under the great Seal, ought to joyn in the Sentence, and that one alone with the conſent of two or more of the other Commiſſioners cannot give a ſentence, for that every Commiſſioner hath equal authority, and by the ſaid Letters Patents three or more muſt give the ſentence with conſent of others, and ſuch a Judgment given by any Commiſſioners of *Oyer* and *Terminer*, or other Commiſſioners or Judges of the Common Law, were utterly void and of none effect.

Fourthly and Laſtly, It was objected, That the ſaid Commiſſioners were not nominated and appointed, according to the ſaid Act, for the Juriſdiction and Power given by the ſaid Act to the Crown, is to name

name ſuch Commiſſioners as be natural born Subjects, and it doth not appear by the ſpecial verdict that the ſaid Commiſſioners were natural born Subjects: And albeit the Judges as private men in their particular knowledge did know them to be natural born Subjects, yet they being Judges of record ought only to ſee with judicial eyes, and to take knowledge of no more then doth appear to them within the Record, for upon that, and not upon private knowledge out of the Record, they only muſt give their Judgment, and upon that Record enter their Judgment alſo of Record. And ſeeing that the late Queen had as it was ſaid by the Plaintiffs Council, Eccleſiaſtical Juriſdiction by the ſaid Act of Parliament, and by the ſame, power was given unto her to name Eccleſiaſtical Commiſſioners, ſhe of neceſſity muſt make her nomination according to the ſaid Act, having no other power, as was objected, but by the ſaid Act; And ſeeing it was not ſpecially found that they were natural born Subjects; *Et de non apparentibus & non exiſtentibus eadem eſt ratio:* For this cauſe alſo the ſaid ſentence of Deprivation was void, as given by Commiſſioners not warranted by the ſaid Act.

As to the firſt and ſecond Objection, both being grounded upon the ſaid Act of Parliament, it was reſolved by the whole Court, that notwithſtanding theſe two Objections, the ſentence was not to be impeached for either of them, and that for three cauſes. Firſt for that the ſaid Act concerning the uniformity of Common Prayer, being in the affirmative, doth not abrograte or take away the Juriſdiction Eccleſiaſtical, unleſs words in the negative had been added, as, *and not otherwiſe, or in no other manner or form,* or to the like effect; And this appeareth by the general rule of all our Books, as appeareth in 46 *E.* 3. 4. 47 *E.* 3. 10. 20 *H.* 6. 11. 36 *H.* 6. 3. 3 *E.* 4. 27. 3 *H.* 7. 1. 14 *H.* 7. 10. 15 *H.* 7. 16. 33 *H.* 8. *Dier* 50. 4 *Mar. Dier* 135. *Stradling*'s Caſe, *Pl. Com.* 207, *&c.*

2. The Eccleſiaſtical Law and the Temporal Law have ſeveral proceedings, and to ſeveral ends; the one being Temporal to inflict puniſhment upon the body, lands, or goods; the other being Spiritual, *pro ſalute Animæ,* the one to puniſh the outward man, the other to reform the inward, and this appeareth in 12 *H.* 7. 22. *&* 10 *E.* 4. 10, *&c.* Then both theſe diſtinct and ſeveral Juriſdictions conſiſt and ſtand well together, and do joyn in this, to have the whole man inwardly and outwardly reformed.

3. The Proviſo in the ſaid Act doth make this queſtion without queſtion, for by it is provided, ordained, and enacted by the authority aforeſaid, That all and ſingular Archbiſhops and Biſhops, and every of their Chancellors, Commiſſaries, Archdeacons, and other Ordinaries, having any peculiar Eccleſiaſtical Juriſdiction, ſhould have full power and authority by vertue of that Act, as well to enquire in their Viſitation, Synods, and elſewhere within their Juriſdiction, as at any other time and place to take occaſions and informations of all and every the things above mentioned, done, committed or perpetrated within the limits of their Juriſdictions and Authority, and puniſh the ſame by Admonition, Excommunication, Sequeſtration, or Deprivation, and other Cenſures and Proceſs in like form as heretofore had been uſed in like Caſes by the Queens Eccleſiaſtical Laws, as by the ſaid Act appeareth. So as ſeeing, if that Act had never inflicted any puniſhment for depraving or not obſerving the Book of Common Prayer, yet the ſame being allowed and commanded to be obſerved for uniformity of Common Prayer, and the unity and peace of the Church; The Eccleſiaſtical Judge may deprive ſuch Parſon, Vicar, &c. as ſhall deprave or not obſerve the ſaid Book, as well for the firſt offence, as he might have done by the Cenſures of the Church, and the Eccleſiaſtical Laws, as if no form of puniſhment had been inflicted by that Act; And this doth evidently appear by the ſaid Proviſo: For thereby notwithſtanding any thing in that Act contained, they may puniſh ſuch offenders by Admonition, Excommunication, Sequeſtration, or Deprivation, and other cenſures and proceſs, in like form as heretofore hath been uſed in like Caſes by the Queens Eccleſiaſtical Laws, and are not bound to purſue the form preſcribed by the ſaid Act, which is to puniſh the offender according to the Temporal Law. And it was reſolved that if the Juriſdiction of the Archbiſhops and Biſhops and their Chancellors, Commiſſaries, Archdeacons, and other Ordinaries, having any peculiar Eccleſiaſtical Juriſdiction were provided for by the ſaid ſaid Act, *a fortiori* the High Commiſſioners authorized by another Act in the ſame Parliament were *tacite* provided for, *Quia cui licet quod majus eſt, non debet quod minus eſt non licere.*

As to the third Objection it was alſo reſolved by the whole Court, that the ſentence given by the Biſhop, by the conſent of his Colleagues, was ſuch as the Judges of Common Law ought to allow to be given according to the Eccleſiaſtical Laws: For ſeeing their authority is to proceed and give ſentence in Eccleſiaſtical cauſes, according to the Eccleſiaſtical Law, and they have given a ſentence in a cauſe Eccleſiaſtical upon their proceedings, by force of that Law; The Judges of the Common Law ought to give faith and credit to their ſentence, and to allow it to be done according to the Eccleſiaſtical Law; For *cuilibet in ſua arte perito eſt credendum.* And this is the common received opinion of all our Books, as appeareth in 11 *H.* 7. 9. 34 *H.* 6. 14, *&c.* and in *Bunting* and *Leppingwel*'s Caſe in the fourth Part of my Reports; And this is the uſual form of all the ſentences in their Eccleſiaſtical Courts: And this very Point, *Tr.* 23 *Reginæ Eliz.* in this Court between *Cheyney* and *Frankwel*, all the matter being found, as this Caſe is by ſpecial verdict was adjudged.

As to the fourth Objection, *viz.* That the ſaid late Queen had only power by force of the ſaid Act to nominate Commiſſioners for Eccleſiaſtical cauſes, and therefore your ſaid Nomination not purſuing the authority given unto her by that Act ſhould be void. Hereunto a threefold anſwer was given and reſolved by the whole Court.

1. That they which were Commiſſioners, and had places of Judicature over the Kings Subjects, ſhould be intended to be Subjects born and not aliens: But if in verity they were aliens, yet in reſpect of the general intendment to the contrary, it ought to be alledged and proved by the other party; For, *Stabitur præſumptioni donec probetur in contrarium.*

2. The Jurors have found that the Queen by her ſaid Letters Patents, did authorize them *ſecundum formam Statuti prædicti*; and therefore it doth by neceſſary conſequence amount to as much as if they had found they had been Subjects born: For if they were not Subjects born, they could not be authorized *ſecundum formam Statuti prædicti. Vide* 11 *H.* 4. 4. 13 *Eliz. Dier fol.* And the rather for that it is found by ſpecial verdict.

3. It was reſolved, That the ſaid Act of the firſt year of the ſaid late Queen concerning Eccleſiaſtical Juriſdiction, was not a Statute introductory of a new Law, but declaratory of the old; which appeareth as well by the title of the ſaid Act, *viz. An Act reſtoring to the Crown the ancient Juriſdiction over the ſtate Eccleſiaſtical and Spiritual, &c.* As alſo by the body of the Act in divers parts thereof; for that Act doth not annex any Juriſdiction to the Crown, but that which in truth was, or of right ought to be by the ancient Laws of the Realm parcel of the Kings Juriſdiction, and united to his Imperial Crown, and which lawfully had been, or might be exerciſed within the Realm; The end of which Juriſdiction, and of all the proceeding thereupon was, that all things might be done in Cauſes Eccleſiaſtical to the pleaſure of Almighty God, the increaſe of vertue, and the conſervation of the peace and unity of this Realm, as by divers parts of the ſaid Act appeareth: And therefore as by that Act no pretended Juriſdiction exerciſed within this Realm, being either ungodly or repugnant to the Prerogative, or to the ancient Law of the Crown of this Realm, was or could be reſtored to the ſame Crown, according to the ancient right and Law of the ſame: So if that Act of the firſt year of the late Queen had never been made, it was reſolved by all the Judges, that the King or Queen of *England* for the time being, may make ſuch an Eccleſiaſtical Commiſſion as is before mentioned, by the ancient Prerogative and Law of *England*. And therefore by the ancient Laws of this Realm, this Kingdom of *England* is an abſolute Empire and Monarchy conſiſting of one head, which is the King; and of a Body politick, compact and compounded of many, and almoſt infinite ſeveral, and yet well agreeing members; All which the Law divideth into two general parts, that is to ſay, *The Clergy*, and *The Laity*, both of them next and immediately under God, ſubject and obedient to the head: Alſo the Kingly head of this politick Body is inſtituted and furniſhed with plenary and entire power prerogative and juriſdiction, to render juſtice and right to every part and member of this Body, of what eſtate, degree, or calling ſoever, in all cauſes Eccleſiaſtical or Temporal, otherwiſe he ſhould not be Head of the whole Body. And as in Temporal cauſes, the King by the mouth of the Judges in his Courts of Juſtice doth judge and determine the ſame by the Temporal Laws of *England*; ſo in cauſes Eccleſiaſtical and Spiritual, as namely, Blaſphemy, Apoſtacy from Chriſtianity, Hereſies, Schiſms, ordering Admiſſions, Inſtitutions of Clerks, celebration of Divine Service, Rights of Matrimony, Divorces, general Baſtardy, ſubtraction and right of Tithes, Oblations, Obventions, Dilapidations, Reparation of Churches, Probate of Teſtaments, Adminiſtrations, and accounts upon the ſame, Simony, Inceſts, Fornications, Adulteries, Solicitation of Chaſtity, Penſions, Procurations, Appeals in Eccleſiaſtical cauſes, Commutation of Penance, and others, (the conuſans whereof belong not to the Common Laws of *England*) the ſame are to be determined and decided by Eccleſiaſtical Judges, according to the Kings Eccleſiaſtical Laws of this Realm: For as the *Romans* fetching divers Laws from *Athens*, yet being approved and allowed by the State there, called them notwithſtanding, *Jus Civile Romanorum*: And as the *Normans* borrowing all or moſt of their Laws from *England*, yet baptized them by the name of the Laws or Cuſtoms of *Normandy*; So albeit the Kings of *England* derived their Eccleſiaſtical Laws from others, yet ſo many as were proved, approved and allowed here, by and with a general conſent, are aptly and rightly called, *The Kings Eccleſiaſtical Laws of England*; which whoſoever ſhall deny, he denieth that the King hath full and plenary power to deliver juſtice in all cauſes to all his Subjects, or to puniſh all crimes and offences within his Kingdom: For that as before it appeareth the deciding of matters ſo many, and of ſo great importance, are not within the conuſance of the Common Laws; and conſequently that the King is no compleat Monarch, nor Head of the whole and entire Body of the Realm. But to confirm thoſe that hold the truth, to ſatisfie ſuch as being not inſtructed, know not the ancient and modern Laws and Cuſtoms of *England*, every man being perſwaded as he is taught; Theſe few demonſtrative proofs out of the Laws of *England*, in ſtead of many in order, *& ſerie temporum*, are here added.

Kenulphus *Rex, &c. per literas ſuas patentes, concilio, & conſenſu Epiſcoporum, & Senatorum gentis ſuæ, largitus fuit Monaſterio de* Abindon *in Com.* Bark. *ac cuidam Ruchnio tunc Abbati Monaſterii, &c. quandam ruris ſui portionem, id eſt, quindecim Manſias, in loco qui a Ruricolis tunc nuncupabatur Culnam, cum omnibus utilitatibus ad eand' pertinent', tam in magnis quam in modicis rebus in æternam hæreditatem. Et quod prad. Ruchnius, &c. ab omni Epiſcopali Jure in ſempiternum eſſet quietus, ut inhabitatores ejus, nullius Epiſcopi aut ſuorum officialium jugo inde deprimantur, ſed in cunctis rerum eventib' & diſcuſſionib' cauſarum Abbatis Monaſterii præd. decreto ſubjiciantur. Ita quod, &c.* As by the ſaid Charter pleaded in 1 *H.* 7. and vouched by *Stanford*, at large appeareth: which Charter granted about 850 years ſithence, was after confirmed *per Edwin' Britanniæ, Anglorum Regem, & Monarcham:* By which it appeareth, that the King by his Charter made in Parliament (for it appeareth to be made by the Council and conſent of his Biſhops and Senators of his Kingdom which were aſſembled in Parliament) did diſcharge and exempt the ſaid Abbot from the Juriſdiction of the Biſhop, &c. And by the ſame Charter did grant to the ſaid Abbot Eccleſiaſtical Juriſdiction within his ſaid Abbey, which Eccleſiaſtical Juriſdiction being derived from the Crown, continued until the diſſolution of the ſaid Abbey in the Reign of King *Henry* the Eighth.

In the Reign of King Edward *the Confeſſor.*

THE King, who is the Vicar of the higheſt King, is ordained to this end, that he ſhould govern and rule the Kingdom and people of the land, and above all things the holy Church, and that he defend the ſame from wrong doers, and deſtroy and root out workers of miſchief. And this ſhall ſuffice for many before the Conqueſt.

In the Reign of King William *the Firſt.*

IT is agreed, that no man only can make any appropriation of any Church having cure of Souls, being a thing Eccleſiaſtical, and to be made to ſome perſon Eccleſiaſtical, but he that hath Eccleſiaſtical Juriſdiction: But *William* the Firſt of himſelf without any other (as King of *England*) made appropriation of Churches with Cure, to Eccleſiaſtical perſons, wherefore it followeth that he had Eccleſiaſtical Juriſdiction.

In the Reign of King Henry *the Firſt.*

HEnry by the Grace of God King of *England*, Duke of *Normans*; To all Archbiſhops, Biſhops, Abbots, Earls, Barons, and to all Chriſtians as well preſent, as to come, &c. We do Ordain as well in regard of Eccleſiaſtical as Royal Power, that whenſoever the Abbot of *Reading* ſhall die, that all the poſſeſſions of the Monaſtery whereſoever it is, do remain entire and free with all the rights and cuſtoms thereof, in the hands and diſpoſition of the Prior and the Monks of the Chapter of *Reading*: We do therefore ordain and eſtabliſh this Ordinance to be obſerved for ever, becauſe the Abbot of *Reading* hath no revenues proper and peculiar to himſelf, but common with his Brethren; Whoſoever by Gods will ſhall be appointed Abbot in this place by Canonical election, may not diſpend the Alms of the Abbey by ill uſage with his ſecular Kinſmen, or any other, but in entertaining the poor Pilgrims and Strangers, and that he have a care not to give out the rent lands in fee, neither that he make any ſervitors or ſouldiers, but in the ſacred Garment of Chriſt, wherein let him be adviſedly provident he entertain not young ones, but that he entertain men of ripe age or diſcreet, as well Clerks as Lay-men.

In the Reign of King Henry *the Third.*

IN the time of *H.* 3. and his Progenitors Kings of *England*, and ever ſithence, if any man did ſue before any Judge Eccleſiaſtical within this Realm, for any thing whereof that Court by allowance and cuſtom had not lawful conuſance, the King did ever by his Writ under his Great Seal prohibit them to proceed: And if the ſuggeſtion made to the King, whereupon the prohibition was grounded were after found untrue, then the King by his Writ of conſultation under his Great Seal, did allow and permit them to proceed. Alſo, in all the Reign of *H.* 3. and his Progenitors Kings of *England*, and ever ſithence, if any iſſue were joyned upon the loyalty of marriage, general baſtardy, or ſuch like, the King did ever write to the Biſhop of that Dioceſs, as mediate officer and miniſter to his Court, to certifie the loyalty of marriage, baſtardy, or ſuch like; all which do apparently prove, that thoſe Eccleſiaſtical Courts were under the Kings Juriſdiction and Commandment, and that one of the Courts were ſo neceſſarily incident to the other, as the one without the other could not deliver Juſtice to the parties, as well in theſe particular Caſes, as in a number of Caſes before ſpecified, whereof the Kings Eccleſiaſtical Court hath Juriſdiction: Now to command and to be obeyed, belong to Soveraign and Supreme Government.

By the ancient Canons and Decrees of the Church of *Rome*, the iſſue born before ſolemnization of marriage, is as lawful inheritable (marriage following) as the iſſue born after marriage; But this was never allowed or appointed in *England*, and therefore was never of any force here: And this appeareth by the Statute of *Merton*, made in the 20*th* Year of King *Henry* the Third.

To the Kings Writ of Baſtardy, whether one being born afore Matrimony may inherit in like manner as he that is born after Matrimony, all the Biſhops anſwered, that they would not, nor could not anſwer to it, becauſe it was directly againſt the common order of the Church; And all the Biſhops requeſted the Lords, that they would conſent that all ſuch as were born afore Matrimony ſhould be legitimate, as well as they that be born within Matrimony, as to the ſucceſſion of Inheritance, for ſo much as the Church accepteth ſuch to be legitimate: And all the Earls and Barons with one voice anſwered, We will not change the Laws of *England* which hitherto have been uſed and approved.

In the Reign of King Edward *the Firſt.*

IN the Reign of King *Edward* the Firſt, a Subject brought in a Bull of Excommunication againſt another Subject of this Realm, and publiſhed it to the Lord Treaſurer of *England*, and this was by the ancient Common Law of *England* adjudged Treaſon againſt the King, his Crown and Dignity, for the which the offender ſhould have been drawn and hanged, but at the great inſtance of the Chancellor and Treaſurer, he was only abjured the Realm for ever.

The ſaid King *Edw.* 1. preſented his Clerk to a Benefice within the Province of *York*, who was refuſed by the Archbiſhop, for that the Pope by way of Proviſion had conferred it on another; The King thereupon brought a *Quare non admiſit*, the Archbiſhop pleaded that the Biſhop of *Rome* had long time before provided to the ſaid Church, as one having ſupreme authority in that Caſe, and that he durſt not, nor had power to put him out, which was by the Popes Bull in poſſeſſion: For which his high contempt againſt the King, his Crown and Dignity, in refuſing to execute his Soveraigns commandment, fearing to do it againſt the Popes proviſion, by judgment of the Common Law, the lands of his whole Biſhoprick were ſeiſed into the Kings hands, and loſt during his life; which Judgment was before any Statute or Act of Parliament was made in that Caſe. And there it is ſaid, that for the like offence, the Archbiſhop of *Canterbury* had been in worſe caſe by the Judgment of the Sages of the Law, then to be puniſhed for a contempt, if the King had not extended grace and favour to him.

Concerning men twice married (called *Bigamy*) whom the Biſhop of *Rome* by a Conſtitution made at the Council of *Lyons* hath excluded from all priviledge of the Clergy, whereupon certain Prelates (when ſuch perſons had been attainted for felons) have prayed for to have them delivered as Clerks which were made Bigamy before the ſame Conſtitution. It is agreed and declared before the King and his Council, that the ſame conſtitution ſhall be underſtood in this wiſe, that whether they were Bigamy before the ſame conſtitution or after, they ſhall not from henceforth be delivered to the Prelates, but juſtice ſhall be executed upon them as upon lay-people.

In an Act made at a Parliament holden at *Carlile* in the 25 year of the ſaid King *Ed.* the Firſt; It is declared, that the holy Church of *England* was founded in the ſtate of Prelacy within the Realm of *England*, by the King and his Progenitors, &c. for them to inform the people of the Law of GOD, and to keep Hoſpitality, give Alms, and do other works of Charity, &c. And the ſaid Kings in times paſt were wont to have their advice and counſel for the ſafegard of the Realm when they had need of ſuch Prelates and Clerks ſo advanced; The Biſhop of *Rome* uſurping the Seigniories of ſuch Benefices, did give and grant the ſame Benefices to aliens which did never dwell in *England*, and to Cardinals which might not dwell here, &c. in adnullation of the ſtate of the holy Church of *England*, diſheriſon of the King, Earls, Barons, and other Nobles of the Realm, and in offence and deſtruction of the Laws and Rights of this Realm, and againſt the good diſpoſition and will of the firſt Founders; It was enacted by the King, by aſſent of all the Lords and Comminalty in full Parliament, That the ſaid oppreſſions, grievances, and damage in this Realm, from thenceforth ſhould not be ſuffered, as more at large appeareth by that Act.

In the Reign of King Edward *the Second.*

ALbeit by the ordinance of *Circumſpecte agatis* made in the 13*th* Year of *Edw.* 1. and by general allowance and uſage, the Eccleſiaſtical Courts held plea of Tithes, obventions, oblations, mortuaries, redemptions of penance, laying of violent hands upon a Clerk, defamations, &c. yet did not the Clergy think themſelves aſſured nor quiet from Prohibitions purchaſed by Subjects, until that King *Edw.* 2. by his Letters Patents under the Great Seal, in and by conſent of Parliament, upon the Petitions of the Clergy, had granted unto them to have Juriſdiction in thoſe caſes. The King in a Parliament holden in the 9*th* Year of his Reign, after particular anſwers made to their Petitions, concerning the matters aboveſaid, doth grant and give his Royal aſſent in theſe words:

We deſiring as much as of right we may, to provide for the State of the Church of England, *and the tranquillity and quiet of the Prelates of the ſaid Clergy, to the honour of God, and the amendment of the State of the ſaid Church, and of the Prelates and Clergy, ratifying and approving all and ſingular the ſaid anſwers which appear in the ſaid Act, and all and ſingular things in the ſaid anſwers contained; we do for us and our heirs grant and command that the ſame be inviolably kept for ever: Willing and granting for us and our heirs, That the ſaid Prelates and Clergy and their ſucceſſors for ever, do exerciſe Eccleſiaſtical Juriſdiction in the premiſs according to the tenour of the ſaid anſwer.*

In the Reign of King Edward *the Third.*

AN Excommunication by the Archbiſhop, albeit it be diſannulled by the Pope or his Legates, is to be allowed, neither ought the Judges to give any allowance of any ſuch ſentence of the Pope or his Legat.

It is often reſolved that all the Biſhopricks within *England* were founded by the Kings Progenitors and therefore the advowſons of them all belong to the King, and at the firſt they were donative; And that if an Incumbent of any Church with Cure die, if the Patron preſent not within ſix months, the Biſhop of that Dioceſs ought to collate, to the end the Cure may not be deſtitute of a Paſtor; If he be negli-

negligent by the ſpace of ſix months, the Metropolitan of that Dioceſs ſhall confer one to that Church: And if he alſo leave the Church deſtitute by the ſpace of ſix months, then the Common Law giveth to the King as to the ſupreme within his own Kingdom, and not to the Biſhop of *Rome*, power to provide a competent Paſtor for that Church.

The King may not only exempt any Eccleſiaſtical perſon from the Juriſdiction of the Ordinary, but may grant unto him Epiſcopal Juriſdiction; As thus it appeareth there, the King had done of ancient time to the Archdeacon of *Richmond*.

All Religious or Eccleſiaſtical houſes, whereof the King was Fonnder, are by the King exempt from ordinary Juriſdiction, and only viſitable, and corrigible by the Kings Eccleſiaſtical Commiſſion.

The Abbot of *Bury* in *Suffolk* was exempted from Epiſcopal Juriſdiction by the Kings Charter.

The King preſented to a Benefice, and his preſentee was diſturbed by one that had obtained Bulls from *Rome*, for which offence he was condemned to perpetual impriſonment, &c.

Tithes ariſing in places out of any Pariſh the King ſhall have, for that he having the ſupreme Eccleſiaſtical Juriſdiction, is bound to provide a ſufficient Paſtor that ſhall have the Cure of Souls of that place, which is not within any Pariſh; And by the Common Laws of *England* it is evident, that no man unleſs he be Eccleſiaſtical, or have Eccleſiaſtical Juriſdiction, can have Inheritance of Tithes.

The King ſhall preſent to his free Chappels (in default of the Dean) by laps in reſpect of his ſupreme Eccleſiaſtical Juriſdiction. And *Eitzherbert* ſaith, That the King in that Caſe doth preſent by laps as Ordinary.

An Excommunication under the Popes Bull, is of no force to diſable any man within *England:* And the Judges ſaid, That he that pleadeth ſuch Bulls, though they concern the Excommunication of a Subject, were in a hard caſe, if the King would extend his juſtice againſt him. If Excommunication being the extreme and final end of any Suit in the Court at *Rome*, be not to be allowed within *England*, it conſequently followeth, that by the ancient Common Laws of *England*, no Suit for any cauſe though it be ſpiritual riſing within this Realm, ought to be determined in the Court of *Rome*; *Quia fruſtra expectatur eventus cujus effectus nullus ſequitur:* And that the Biſhops of *England* are the immediate Officers and Miniſters to the Kings Courts.

In an Attachment upon a Prohibition, the Defendant pleaded the Popes Bull of Excommunication of the Plaintiff. The Judges demanded of the Defendant if he had not the certificate of ſome Biſhop within the Realm, teſtifying this Excommunication: To whom the Council of the Defendant anſwered, that he had not, neither was it as he ſuppoſed neceſſary; For that the Bulls of the Pope under lead were notorious enough: But it was adjudged that they were not ſufficient, for that the Court ought not to have regard to any Excommunication out of the Realm; And therefore by the rule of the Court the Plaintiff was not thereby diſabled.

Reges ſacro oleo uncti, ſunt Spiritualis Juriſdictionis capaces.

Where a Prior is the Kings debtor, and ought to have Tithes of another ſpiritual perſon, he may chooſe either to ſue for ſubtraction of his Tithes in the Eccleſiaſtical Court, or in the Exchequer, and yet the perſons and matter alſo was Eccleſiaſtical: For ſeeing the matter by a mean concerneth the King, he may ſue for them in the Exchequer as well as in the Eccleſiaſtical Court, and there ſhall the right of Tithes be determined. And *Fitzherbert* in his *Nat. Bre. fol.* 30. holdeth, that before the Statute of 18 *E.* 3. *cap.* 7. that right of Tithes were determinable at the Temporal Courts at the election of the party; And by that Statute aſſigned to be determined in the Eccleſiaſtical Court, and the Temporal Court excluded thereof: And the Courts of divers Mannors of the Kings, and of other Lords in ancient times had the Probates of laſt Wills and Teſtaments, and it appeareth by 11 *H.* 7. *fol.* 12. That Probate of Teſtaments did not appertain to the Eccleſiaſtical Court, but that of late time they were determinable there: So as of ſuch cauſes, and in ſuch manner as the Kings of the Realm by general conſent and allowance have aſſigned to their Eccleſiaſtical Courts, they have Juriſdiction by force of ſuch allowance.

The King did by his Charter tranſlate Canons ſecular, into regular and religious perſons, which he did by his Eccleſiaſtical Juriſdiction, and could not do it unleſs he had juriſdiction Eccleſiaſtical.

The Abbot of *Waltham* died in the 45*th* Year of *E.* 3. and one *Nicholas Morris* was elected Abbot, who for that the Abbey was exempt from ordinary juriſdiction, ſent to *Rome* to be confirmed by the Pope; and becauſe the Pope by his conſtitutions had reſerved all ſuch collations to himſelf, he did recite by his Bull, that he having no regard to the election of the ſaid *Nicholas*, gave to him the ſaid Abbey, and the ſpiritualties and temporalties belonging to the ſame, of his ſpiritual grace, and at the requeſt (as he feigned) of the King of *England*; This Bull was read and conſidered of in Council, that is, before all the Judges of *England*, and it was reſolved by them all, that this Bull was againſt the Laws of *England*, and that the Abbot for obtaining the ſame was fallen into the Kings mercy, whereupon all his poſſeſſions were ſeiſed into the Kings hands, as more at large by the ſaid Caſe appeareth.

Where the Abbot of *Weſtminſter* had a Prior and Covent who were regular and dead in Law, yet the King by his Charter did divide that Corporation, and made the Prior and Covent a diſtinct capable Body, to ſue and be ſued by themſelves.

At a Parliament holden in the 25*th* Year of King *Edward* the Third; It was enacted by conſent of the whole Parliament, that as well they that obtained proviſions from *Rome*, as they that put them in execution, ſhould be out of the Kings protection: And that a man might do with them as with the enemies of the King; and he that offendeth againſt ſuch proviſors in body, goods, or other poſſeſſions, ſhould be excuſed againſt all people, and ſhould never be impeached or grieved for the ſame: By which Law every man might lawfully kill ſuch an offender, as a common enemy againſt the King and his Country, ſo hainous were ſuch offences then holden.

Afterwards

Afterwards in the ſame 25*th* Year of King *Edward* the Third; It was in open Parliament by the grievous complaints of all the Commons of this Realm, ſhewed that the grievances and miſchiefs aforeſaid did daily abound, to the great damage and deſtruction of all this Realm, more then ever were before, *viz.* That of late the Biſhop of *Rome* by procurement of Clerks and otherwiſe, had reſerved and did daily reſerve to his collation, generally and ſpecially as well Archbiſhopricks, Abbies, and Priories, as all other Dignities, and other Benefices of *England*, which were of the Avowry of people of holy Church, and gave the ſame as well to Aliens as to Citizens, and taketh of all ſuch Benefices the firſt fruits, and many other profits, and a great part of the treaſure of the Realm was carried away and diſpended out of the Realm, by the purchaſors of ſuch graces; and alſo by ſuch privy reſervations, many Clarks advanced in the Realm by their true Patrons, which peaceably holding their advancements by long time, were ſuddenly put out; whereupon the ſaid Commons did pray their ſaid Soveraign Lord the King, that ſithence the right of the Crown of *England*, and the Law of the ſaid Realm was ſuch, that upon the miſchiefs and damages which happened to his Realm, he ought and was bound of the accord of his ſaid people, thereof to provide remedy and Law, for the avoiding the miſchiefs and damage which thereof came, that it might pleaſe him thereupon to ordain remedy, The ſaid King *Edward* the Third, ſeeing the miſchiefs and damage before named, and having regard to the Statute made in the time of his Grandfather King *Edward* the Firſt, and to the cauſes contained in the ſame, which Statute holdeth always his force, and was never defeated nor adnulled in any point: And for as much as he was bound by his oath to ſee the ſame to be kept as a Law of his Realm, though that by ſufferance and negligence it had been ſithence attempted to the contrary, alſo having regard to the grievous complaints made to him by his people in divers his Parliaments holden heretofore, willing to ordain remedy for the great damage and miſchiefs which had happened, and daily did happen to the Church of *England* by the ſaid cauſe, by the aſſent of all the great men, and the Comminalty of the ſaid Realm, to the honour of God, and profit of the ſaid Church of *England*, and of all his Realm, did order and eſtabliſh, that the free election of Archbiſhops, Biſhops, and all other Dignities and Benefices electory in *England*, ſhould hold from thenceforth in the manner as they were granted by the Kings Progenitors, and founded by the anceſtors of other Lords, and that all Prelates, and other people of holy Church, which had advowſons of any Benefices of the Kings gift, or of any of his Progenitors, or of other Lords and donors, to do Divine Service, and other charges thereof ordained, ſhould have their collations and preſentments freely, in the manner as they were infeoffed by their Donors. And in caſe that reſervation, collation, or proviſion be made by the Court of *Rome*, of any Archbiſhop, Biſhoprick, Dignity, or other Benefice, in diſturbance of the election, collations, or preſentations afore named; That at the time of the avoidance, that ſuch reſervations, collations and proviſions ought to take effect, the ſaid King *Edward* the Third and his heirs, ſhould have and enjoy for the ſame time collations to the Archbiſhopricks, and other Dignities elective, which be of his avowry, ſuch as his Progenitors had before that free election was granted, ſithence that the elections were firſt granted by the Kings Progenitors upon a certain form and condition, as to demand licence of the King to chooſe, and after the election to have his Royal aſſent, and not in other manner; which conditions not kept, the King ought by reaſon to reſort to his firſt nature, as by the ſaid Act more at large appeareth.

In the 27*th* Year of the Reign of the ſame King, it was grievouſly complained to the King in Parliament then holden, by the great men and Commons of the Realm, how that divers of the people were and had been drawn out of the Realm, to anſwer to things whereof the conuſans pertained to the Kings Court; And alſo that the Judgments given in the ſame Court, were impeached in other Courts, in prejudice and diſheriſon of the King and of his Crown, and of all the people of his ſaid Realm, and in the undoing and deſtruction of the Common Law of the ſame Realm at all times uſed: And whereupon good deliberation had with the great men, and others of his ſaid Council, it was aſſented and accorded by the King and the great men and Commons aforeſaid, that all the people of the Kings allegiance of what condition that they be, which ſhould draw any out of the Realm, in plea whereof the conuſance pertained to the Kings Courts, or of things whereof Judgments were given in the Kings Court, or which did ſue in any other Court to defeat or impeach the Judgments given in the Kings Courts, ſhould incur the danger of *Præmunire*, as by the Act appeareth.

To nouriſh love, peace, and concord between holy Church and the Realm, and to appeaſe and ceaſe the great hurt and perils, and importable loſſes and grievances that had been done and happened in times paſt, and that ſhould happen hereafter, if the thing from thenceforth be ſuffered to paſs, becauſe of perſonal Citations and other that be paſſed before this time, and commonly did paſs from day to day out of the Court of *Rome*, by fained and falſe ſuggeſtions and propoſitions, againſt all manner of perſons of the Realm, upon cauſes, whoſe cogniſance and final diſcuſſing pertained to the King and his Royal Court: And alſo of impetrations and proviſions of benefices and offices of holy Church, pertaining to the gift, preſentation, donation, and diſpoſition of the King, and that other lay-Patrons of this Realm, as of Churches, Chappels, and other Benefices appropriated to Cathedral Churches, Abbies, Priories, Chauntries, Hoſpitals, and other poor houſes, and of other dignities, offices, and benefices occupied in times paſt, and preſented by divers and notable perſons of the ſaid Realm; For which cauſes and diſpenſing whereof, the good ancient Laws, Uſages, Cuſtoms, and Franchiſes of the ſaid Realm, had been and were greatly impaired, blemiſhed and confounded, the Crown of their Soveraign Lord the King diminiſhed, and his perſon falſly defamed, his Treaſury and Riches of the Realm carried away, the Inhabitants and Subjects of the Realm impoveriſhed and troubled, the Benefices of holy Church waſted and deſtroyed, Divine Services, Hoſpitalities, Alms-deeds, and works of Charity withdrawn and ſet apart, the Commons and Subjects of the Realm in body and goods conſumed. The King at his Parliament holden at *Weſtminſter* in the *Utas* of S. *Hillary* the 38*th* Year of his Reign, having regard to the quietneſs of his people, which he chiefly deſired to ſuſtain in tranquillity and peace, to govern according

according to the Laws, Uſages, and Franchiſes of his land, as he was bound by his Oath made at his Coronation, following the ways of his Progenitors, which for their time made certain good Ordinances and Proviſions againſt the ſaid grievances and perils, which Ordinances and Proviſions, and all other made in his time, and eſpecially in the 25*th* and 27*th* Years of his Reign, the King by the aſſent and expreſs will and concord of the Dukes, Earls, Barons, and the Commons of this Realm, and of all other whom theſe things touched, by good and meet deliberation and adviſement, did approve, accept, and confirm, as by the ſaid Act appeareth.

But thoſe which ſhould execute the ſaid good Laws againſt ſuch capital offenders, were curſed, reproved, and defamed, by ſuch as maintained the uſurped Juriſdiction of the Biſhop of *Rome*, againſt which an eſpecial Act of Parliament was made by the King and his whole Realm, prohibiting thereby ſuch Defamations and Reproofs.

King Richard *the Second.*

AGainſt an Incumbent of a Church in *England*, another ſueth a Proviſion in the Court of *Rome*, and there purſueth until he recovereth the Church againſt the Incumbent, and after brought an Action of account againſt him, as Receiver of divers ſums of money, (which in troth were the oblations and offerings which the Incumbent had received) and the whole Court was of opinion againſt the Plaintiff, and thereupon he became nonſuit.

It is declared by that Parliament, that the Crown of *England* hath been ſo free at all times, that it hath been in ſubjection to no Realm, but immediately ſubject to God, and to none other, and that the ſame ought not in any thing touching the regality of the ſame Crown, be ſubmitted to the Biſhop of *Rome*, nor the Laws and Statutes of this Realm by him fruſtrated or defeated at his will, to the perpetual deſtruction of the King, his Soveraignty, Crown, and Regalty, and of all his Realm: And the Commons in that Parliament affirmed, that the things attempted by the Biſhop of *Rome*, be clearly againſt the Kings Crown and his Regalty, uſed and approved in the time of all his Progenitors; Wherefore they and all the liege Commons of the ſame Realm, would ſtand with the King and his ſaid Crown, and his Regalty, in the Caſes aforeſaid, and in all other Caſes attempted againſt him, his Crown, and his Regalty, in all points to live and to die. And moreover they did pray the King, and him required by way of juſtice, that he would examine all the Lords in the Parliaments, as well Spiritual as Temporal ſeverally, and all the States of the Parliament, how they thought of the Caſes aforeſaid, which were ſo openly againſt the Kings Crown, and in derogation of his Regalty, and how they would ſtand in the ſame Caſes with the King, in uphoding the rights of the ſaid Crown and Regalty; whereupon the Lords Temporal ſo demanded, did anſwer every one by himſelf; That the Caſes aforeſaid were clearly in derogation of the Kings Crown and of his Regalty, as it was well known, and had been of long time known, and that they would ſtand with the ſame Crown and Regalty in thoſe Caſes eſpecially, and in all other Caſes which ſhould be attempted againſt the ſaid Crown and Regalty in all points, with all their power. And moreover it was demanded of the Lords Spiritual there being, and the Procurators of others being abſent, their advice and will in all thoſe Caſes, which Lords, that is to ſay, the Archbiſhops, Biſhops, and other Prelates, being in the Parliament ſeverally examined, making poteſtation, that it was not their mind to deny or affirm that the Biſhop of *Rome* might not excommunicate Biſhops, nor that he might make tranſlation of Prelates after the Law of the holy Church, anſwered and ſaid; That if any Executions or Proceſſes made in the Kings Court, as before were made by any, and cenſures of Excommunications be made againſt any Biſhop of *England*, or any other of the Kings liege people, for that they had made execution of ſuch commandments: And that if any executions of ſuch tranſlations be made of any Prelates of the ſame Realm, which Prelates were very profitable and neceſſary to the King, and to his ſaid Realm; Or that his ſage men of his Council, and without his aſſent, and againſt his will be withdrawn and eloined out of the Realm; So that the ſubſtance and treaſury of the Realm might be deſtroyed, that the ſame was againſt the King and his Crown, as it was contained in the Petition before named: And likewiſe the ſame Procurators every one by himſelf examined upon the ſaid matters did anſwer and ſay in the name and for their Lords, as the ſaid Biſhops had ſaid, and anſwered; And that the ſaid Lords Spiritual would and ought to ſtand with the King in theſe Caſes lawfully in maintaining of his Crown, and in all other Caſes touching his Crown and his Regalty, as they were bound by their allegiance; Whereupon the King by the aſſent aforeſaid, and at the prayer of his ſaid Commons, did ordain and eſtabliſh; That if any purchaſe or purſue, or cauſe to be purchaſed or purſued in the Court of *Rome*, or elſewhere, any ſuch tranſlations, proceſſes, and ſentences of Excommunication, Bulls, Inſtruments, or any other things which touched the King their Lord, againſt him, his Crown and his Regalty, or his Realm, as is aforeſaid: And they which bring within the Realm, or them receive, or make thereof notification, or any other execution within the ſame Realm, or without; that they, their notorious Procurators, Maintainers, Fautors, and Counſellors, ſhould be put out of the Kings protection, and their lands and tenements, goods and chattels forfeit to the King, and they be attached by their bodies if they may be found, and brought before the King and his Council, there to anſwer to the Caſes aforeſaid: Or that proceſs to be made againſt them by *Præmunire facias*, as it is ordained in other Statutes of Proviſors, and others which do ſue in any other Court in derogation of the Regalty of the King, as by the ſaid Act alſo appeareth.

In the Reign of King Henry *the Fourth.*

IT is reſolved that the Popes Collector, though he have the Popes Bulls for that purpoſe, hath no Juriſdiction within this Realm, and there the Archbiſhops and Biſhops, &c. of this Realm are called the Kings Spiritual Judges.

By the ancient Laws Eccleſiaſtical of this Realm, no man could be convicted of Hereſie, being High Treaſon againſt the Almighty, but by the Archbiſhop and all the Clergy of that Province, and after abjured thereupon, and after that newly convicted and condemned by the Clergy of that Province, in their general Council of Convocation: But the Statute of 2 *H.* 4. *cap.* 15. doth give the Biſhop in his Dioceſs power to condemn an Heretick: And that before that Statute he could not be committed to the ſecular power to be burnt, until he had once abjured, and was again relapſed to that, or ſome other Hereſie; Whereby it appeareth that the King by conſent of Parliament directed the proceedings in the Eccleſiaſtical Court in caſe of Hereſie, and other matters more ſpiritual.

The Pope cannot alter the Laws of *England.*

The Judges ſay that the Statutes which reſtrain the Popes proviſions to the Benefices of the Advowſons of ſpiritual men, were made for that the ſpiritualty durſt not in their juſt cauſe ſay againſt the Popes proviſions: So as thoſe Statutes were made, but in affirmance of the Common Laws.

Excommunication made by the Pope is of no force in *England*, and the ſame being certified by the Pope into any Court in *England* ought not to be allowed, neither is any certificate of any Excommunication available in Law, but that is made by ſome Biſhop of *England*, for the Biſhops are by the Common Laws, the immediate Officers and Miniſters of Juſtice to the Kings Courts, in cauſes Eccleſiaſtical.

If any Biſhop do Excommunicate any perſon for a cauſe that belongeth not unto him, the King may write unto the Biſhop, and command him to aſſoil and abſolve the party.

If any perſon of Religion obtain of the Biſhop of *Rome* to be exempt from obedience regular or ordinary, he is in caſe of *Præmunire*, which is an offence as hath been ſaid; *Contra Regem coronam & dignitatem ſuam.*

The Commons did grievouſly complain to the King, at the Parliament holden the *6th* Year of *H.* 4. of the horrible miſchiefs and damnable Cuſtoms which then were introduced of new in the Court of *Rome*, that no perſon, Abbot, or other, ſhould have proviſion of any Archbiſhoprick or Biſhoprick which ſhould be void, till he had compounded with the Popes Chamber, to pay great and exceſſive ſums of money as well for the firſt fruits of the ſame Archbiſhoprick or Biſhoprick, as for other leſs ſervices in the ſame Court; and that the ſame ſums, or the greater part thereof be paid before hand, which ſums paſſed the treble or the double at the leaſt of that that was accuſtomed of old time to be paid for the ſaid Chamber: And otherwiſe by the occaſions of ſuch proviſions, whereby a great part of the treaſury of this Realm had been brought and carried to the ſaid Court, and alſo ſhould be in time to come, to the great impoveriſhing of the Archbiſhops and Biſhops within the ſame Realm, and elſewhere within the King's Dominions, if convenient remedy were not for the ſame provided. The King to the honour of God as well to eſchew the damage of this Realm, as the perils of their Souls, which own to be advanced to any Archbiſhopricks and Biſhopricks within the Realm of *England*, and elſewhere within the King's Dominions, out of the ſame Realm, by the advice and aſſent of the great men of his Realm in the Parliament, did ordain and eſtabliſh, that they and every of them that ſhould pay unto the ſaid Chamber or otherwiſe, for ſuch fruits and ſervices greater ſums of money then had been accuſtomed to be paid in old time paſt, they and every of them ſhould incur the forfeiture of as much as they may forfeit towards the King, as by the ſaid Act appeareth.

No perſon religious or ſecular, of what eſtate or condition that he were, by colour of any Bulls containing priviledges, to be diſcharged of Tithes pertaining to Pariſh Churches, Prebends, Hoſpitals, Vicarages, purchaſed before the firſt year of King *Richard* the Second, or after not executed, ſhould put in execution any ſuch Bulls ſo purchaſed, or any ſuch Bulls to be purchaſed in time to come, upon the pain of a *Præmunire*, as by the ſaid Act appeareth.

In the Reign of King Henry *the Fifth.*

IN an Act of Parliament made in the third year of King *H.* 5. it is declared, That whereas in the time of King *H.* 4. father to the ſaid King, the *7th* Year of his Reign, to eſchew many diſcords and debates, and divers other miſchiefs which were likely to ariſe and happen becauſe of many proviſions then made, or to be made by the Pope, and alſo of licence thereupon granted by the ſaid late King, amongſt other things, it was ordained and eſtabliſhed, that no ſuch licence or pardon ſo granted before the ſame Ordinance, or afterwards to be granted, ſhould be available to any Benefice full of any Incumbent, at the day of the date of ſuch licence or pardon granted; Nevertheleſs divers perſons having proviſions of the Pope of divers Benefices in *England* and elſewhere, and licences Royal to execute the ſame proviſions, have by colour of the ſame proviſions, licences, and acceptations of the ſaid Benefices, ſubtilly excluded divers perſons of their Benefices, in which they had been Incumbents by a long ſeaſon of the collation of the very Patrons ſpiritual, to them duly made to their intent, to the final deſtruction and enervation of the ſtates of the ſame Incumbents. The King willing to void ſuch miſchiefs, hath ordained and eſtabliſhed, That all the Incumbents of every Benefice of holy Church, of the patronage, collation, or preſentation of ſpiritual Patrons, might quietly and peaceably enjoy their ſaid Benefices, without

without being inquieted, moleſted, or any way grieved, by any colour of ſuch proviſions, licences, and acceptations; And that all the licences and pardons upon and by ſuch proviſions made in any manner, ſhould be void and of no value; And if any feel himſelf grieved, moleſted, or inquieted, in any wiſe from thenceforth by any, by colour of ſuch proviſions, licences, pardons, or acceptations, that the ſame moleſtors, grievors, or inquietors, and every of them, have and incur the pains and puniſhments contained in the Statute of Proviſors before that time made, as by the ſaid Act appeareth.

A Statute was made for extirpation of Hereſie, and Lollardry, whereby full power and authority was given to the Juſtices of Peace, and Juſtices of Aſſiſe to enquire of thoſe that hold Errors, Hereſies, or Lollardry, and of their maintainers, &c. And that the Sheriff or other Officer, &c. may arreſt and apprehend them.

The King by conſent of Parliament, giveth power to Ordinaries to enquire of the foundation, erection, and governance of Hoſpitals, other then ſuch as be of the Kings foundation, and thereupon to make correction and reformation according to the Eccleſiaſtical Law.

In the Reign of King Henry *the Sixth.*

EXcommunication made and certified by the Pope, is of no force to diſable any man within *England*; And this is by the ancient Common Laws before any Statute was made concerning forreign Juriſdiction.

The King only may grant or licence to found a ſpiritual Incorporation.

In the Reign of King *Henry* the Sixth, the Pope writ letters in derogation of the King and his Regalty, and the Church-men durſt not ſpeak againſt them; But *Humphrey* Duke of *Glouceſter* for their ſafe keeping put them into the fire.

In the Reign of King Edward *the Fourth.*

IN the Reign of King *Edward* the Fourth, the Pope granted to the Prior of S. *Johns*, to have Sanctuary within his Priory, and this was pleaded and claimed by the Prior; But it was reſolved by the Judges, that the Pope had no power to grant any Sanctuary within this Realm, and therefore by judgment of Law the ſame was diſallowed.

There it appeareth, that the opinion of the *Kings Bench* had been oftentimes, that if one ſpiritual perſon ſue another ſpiritual man in the Court of *Rome* for a matter ſpiritual, where he might have remedy before his Ordinary, that is, the Biſhop of that Dioceſs within the Realm, *Quia trahit ipſum in placitum extra Regnum*, incurreth the danger of a *Præmunire*, a hainous offence, being *contra legiantiæ ſuæ debitum, in contemptum Domini Regis, & contra Coronam & dignitatem ſuas*; By which it appeareth, how grievous an offence it was againſt the King, his Crown and Dignity, if any Subject, although both the perſons and cauſe were ſpiritual, did ſeek for juſtice out of the Realm, as though either there wanted Juriſdiction, or juſtice was not executed in the Eccleſiaſtical Courts within the ſame, which (as it hath been ſaid) was an high offence, *contra Regem coronam & dignitatem ſuas.*

In the Kings Courts of Record, where felonies are determined, the Biſhop or his Deputy ought to give his attendance, to the end that if any man that is indicted and arraigned for felony do demand the benefit of his Clergy, that the Ordinary may inform the Court of his ſufficiency or inſufficiency, that is, whether he can read as a Clerk or not, whereof notwithſtanding the Ordinary is not to judge, but is a Miniſter to the Kings Court; And the Judges of that Court, are to judge of the ſufficiency or inſufficiency of the party, whatſoever the Ordinary do inform them, and upon due examination of the party, may give judgment againſt the Ordinaries information, for the Kings Judges are Judges of the cauſe.

The Popes Excommunication is of no force within the Realm of *England.*

In the Reign of King *Edward* the Fourth, a Legat from the Pope came to *Calleis*, to have come into *England*, but the King and his Council would not ſuffer him to come within *England*, until he had taken an Oath that he ſhould attempt nothing againſt the King or his Crown: And ſo the like was done in his Reign to another of the Popes Legates; And is ſo reported in *1 H. 7. fol.* 10.

In the Reign of King Richard *the Third.*

IT is reſolved by the Judges, That a Judgment or Excommunication in the Court of *Rome*, ſhould not bind or prejudice any man within *England*, at the Common Law.

In the Reign of King Henry *the Seventh.*

IN the Reign of King *Henry* the *7th* the Pope had excommunicated all ſuch perſons whatſoever, as had bought Alome of the *Florentines*; And it was reſolved by all the Judges of *England*, that the Popes Excommunication ought not to be obeyed, or to be put in execution within the Realm of *England.*

In a Parliament holden in the firſt year of King *Henry* the Seventh, for the more ſure and like reformation of Prieſts, Clerks, and religious men, culpable, or by their demerits openly noiſed of incontinent living in their bodies, contrary to their order; It was enacted, ordained and eſtabliſhed, by the advice and aſſent of the Lords Spiritual and Temporal, and the Commons in the ſaid Parliament aſſembled, and by the authority of the ſame; That it be lawful to all Archbiſhops and Biſhops, and other Ordinaries, having Epiſcopal Juriſdiction, to puniſh and chaſtiſe Prieſts, Clerks, and Religious men, being within the bounds of their Juriſdiction, as many as ſhall be convicted afore them by examination, and lawful proof requiſite by the Law of the Church, of advoutry, fornication, inceſt, or any other fleſhly incontinency, by committing them to ward and priſon, there to abide for ſuch time as ſhall be thought to their diſcretions convenient for the quality and quantity of their treſpaſs; And that none of the ſaid Archbiſhops, Biſhops, or Ordinaries aforeſaid, be thereof chargeable, of to or upon any Action of falſe or wrongful impriſonment, but that they be utterly thereof diſcharged in any of the Caſes aforeſaid, by vertue of this Act.

Rex eſt perſona mixta, becauſe he hath both Eccleſiaſtical and Temporal Juriſdiction.

By the Eccleſiaſtical Laws allowed within this Realm, a Prieſt cannot have two Benefices, nor a baſtard cannot be a Prieſt; But the King may by his Eccleſiaſtical Power and Juriſdiction, diſpence with both of theſe, becauſe they be *mala prohibita*, and not *mala per ſe*.

In the Reign of King Henry *the Eighth.*

BY an Act of Parliament made in the 24*th* Year of King *Henry* the Eighth. That is to ſay by the King, 24 Biſhops, 29 Abbots and Priors, for ſo many were then Lords of Parliament, by all the Lords Temporal and the Commons in that Parliament aſſembled; It is declared, That where by divers ſundry old authentick Hiſtories and Chronicles, it was manifeſtly declared and expreſſed, that this Realm of *England* is an Empire, and ſo hath been accepted in the world, governed by one ſupreme Head and King, having the Dignity and Royal eſtate of the Imperial Crown of the ſame, unto whom a Body Politick compact of all ſorts and degrees of people, divided in terms and by names of Spiritualty and Temporalty, been bound, and ought to bear next to God, a natural and humble obedience, he being alſo inſtitute and furniſhed by the goodneſs and furtherance of Almighty God, with plenary, whole, and entire power, preheminence, authority, prerogative, and juriſdiction, to render and ministe juſtice and final determination to all manner of folk reſiants, or ſubjects within this his Realm, in all cauſes, matters, debates, and contentions, happening to occur, ariſe, or begin within the limits thereof, without reſtraint or provocation to any foreign Princes or Potentates of the world: The body ſpiritual whereof having power when any cauſe of the Law divine happened to come in queſtion, or of ſpiritual learning, That it was declared, interpreted and ſhewed by that part of the ſaid Body Politick, called the Spiritualty, then being uſually called the *Engliſh Church*, which always hath been reputed and alſo found of that ſort, that both for knowledge, integrity, and ſufficiency of number, it had been always thought, and was alſo at that hour ſufficient and meet of it ſelf, without the intermedling of any exterior perſon or perſons, to declare and determine all ſuch doubts, and to adminiſter all ſuch offices and duties, as to the rooms ſpiritual did appertain; For the due adminiſtration whereof, and to keep them from corruption, and ſiniſter affection, the Kings moſt noble progenitors, and the anteceſſors of the Nobles of this Realm, did ſufficiently endow the ſaid Church both with honour and poſſeſſions; And the Laws Temporal for trial of property of lands and goods, and for the conſervation of the people of this Realm in unity and peace, without ravine or ſtrife, was, and then was adminiſtred, and adjudged, and executed by ſundry Judges and Miniſters of the other part of the ſaid Body Politick called *The Temporalty*, and both their authorities and juriſdictions did conjoyn together in the due adminiſtration of Juſtice, the one to help the other: And whereas the King, his moſt noble Progenitors, and the Nobility and Commons of the ſaid Realm, at divers and ſundry Parliaments, as well in the time of King *Edward* the Firſt, *Edward* the Third, *Richard* the Second, *Henry* the Fourth, and other noble Kings of this Realm, made ſundry Ordinances, Laws, Statutes, and proviſions for the entire and ſure conſervation of the Prerogatives, Liberties, and Preheminences of the ſaid Imperial Crown of this Realm, and of the juriſdiction Spiritual and Temporal of the ſame, to keep it from the annoyance as well of the See of *Rome*, as from the authority of other foreign Potentates, attempting the diminution or violation thereof, as often and from time to time as any ſuch annoyance or attempt might be known or eſpied; And notwithſtanding the ſaid good Statutes and Ordinances made in the time of the Kings moſt noble Progenitors, in preſervation of the authority and prerogative of the ſaid Imperial Crown as is aforeſaid; yet nevertheleſs ſithence the making of the ſaid good Statutes and Ordinances, divers and ſundry inconveniences and dangers, not provided for plainly by the ſaid former Acts, Statutes and Ordinances, have riſen and ſprung by reaſon of Appeals ſued out of this Realm to the See of *Rome*, in cauſes teſtamentary, cauſes of matrimony and divorces, right of Tithes, Oblations and Obventions, not only to the great inquietation, vexation, trouble, coſts and charges of the Kings Highneſs and many of his ſubjects and reſiants in this his Realm, but alſo to the great delay and let to the true and ſpeedy determination of the ſaid cauſes: For as much as the parties appealing to the ſaid Court of *Rome*, moſt commonly did the ſame for delay of Juſtice: And for as much as the great diſtance of way was ſo far out of this Realm, ſo that the neceſſary proofs, nor the true knowledge of the cauſe could neither be ſo well known, or the witneſſes there ſo well examined, as within this Realm; So that the parties grieved by means of the ſaid appeals, were moſt times without remedy: In conſideration thereof, the King, his Nobles and Commons, conſidering the great enormities, damages, long delaies and hurts, that as well to his Highneſs, as to his ſaid noble

ſubjects

ſubjects Commons and reſiants of this Realm, in the ſaid cauſes teſtamentary, cauſes of Matrimony and Divorces, Tithes, Oblations, and Obventions, did daily enſue; did therefore by his Royal aſſent, and by the aſſent of the Lords Spiritual and Temporal, and the Commons in that Parliament aſſembled, and by authority of the ſame, enact, eſtabliſh, and ordain, That all cauſes Teſtamentary, cauſes of Matrimony and Divorces, rights of Tithes, Oblations, and Obventions, the knowledge whereof by the goodneſs of Princes of this Realm, and by the Laws and Cuſtoms of the ſame, appertained to the ſpiritual Juriſdiction of this Realm, then already commenced, moved, depending, being, happening, or hereafter coming in contention, debate, or queſtion within this Realm, or within any of the Kings Dominions, or Marches of the ſame, or elſewhere, whether they concern the King, his Heirs or Succeſſors, or any other Subjects or Reſiants within this Realm, of what degree ſoever they be, ſhould be from thenceforth heard, examined, diſcuſſed, clearly, finally and definitively adjudged and determined within the Kings Juriſdiction and Authority, and not elſewhere, in ſuch Courts Spiritual and Temporal of the ſame, as the natures, conditions and qualities of the Caſes and matters aforeſaid in contention, or hereafter happening in contention ſhould require, without having any reſpect to any cuſtom, uſe, or ſufferance, in hinderance, let, or prejudice of the ſame, or to any other thing uſed or ſuffered to the contrary thereof, by any other manner of perſon or perſons, in any manner of wiſe; Any forreign Inhibitions, Appeals, Sentences, Summons, Citations, Suſpenſions, Interdictions, Excommunications, Reſtraints, Judgments, or any other Proceſs or Impediment, of what natures, names, qualities or conditions ſoever they be, from the See of *Rome*, or any other forreign Courts or Potentates of the world, or from and out of this Realm, or any other the Kings Dominions or Marches of the ſame, to the See of *Rome*, or to any forreign Courts or Potentates, to the let or impediment thereof in any wiſe notwithſtanding, as by the ſaid Act appeareth.

By an Act of Parliament in 25 *H.* 8. it is declared by the King, the Lords Spiritual and Temporal, and the Commons in that Parliament aſſembled, That neither the King, his Heirs nor Succeſſors, Kings of this Realm, nor any his Subjects of this Realm, nor of any other his Dominions, ſhould from thenceforth ſue to the ſaid Biſhop of *Rome* called the Pope, or to the See of *Rome*, or to any perſon or perſons, having or pretending any authority by the ſame, for licences, diſpenſations, impoſitions, faculties, grants, reſcripts, delegacies, or any other inſtruments or writings, of what kind, name, nature, or quality ſoever they be of for any cauſe or matter, for the which any licence, diſpenſation, compoſition, faculty, grant, ſcript, delegacy, inſtrument, or other writing, heretofore had been uſed and accuſtomed to be had and obtained at the See of *Rome*, or by authority thereof, or of any Prelate of this Realm; nor for any manner of other licences, diſpenſations, compoſitions, faculties, grants, reſcripts, delegacies, or any other inſtruments or writings, that in cauſes of neceſſity might lawfully be granted, without offending of the holy Scripture and Laws of God: But that from thenceforth every ſuch Licence, Diſpenſation, Compoſition, Faculty, Grant, Reſcript, Delegacy, Inſtrument, and other writing afore-named and mentioned, neceſſary for the King, his Heirs and Succeſſors, and his and their people and ſubjects, upon the due examination of the cauſes and qualities of the perſons procuring ſuch Diſpenſations, Licences, Compoſitions, Faculties, Grants, Reſcripts, Delegacies, Inſtruments, or other Writings, ſhould be granted, had, and obtained from time to time within this his Realm, and other his Dominions, and not elſewhere, in manner and form following, and not otherwiſe, that is to ſay; The Archbiſhop of *Canterbury* for the time being, and his ſucceſſors, ſhould have power and authority from time to time by their diſcretions, to give, grant, and diſpoſe by an Inſtrument under the Seal of the ſaid Archbiſhop unto the King, and unto his heirs and ſucceſſors Kings of this Realm, as well all manner ſuch Licences, Diſpenſations, Compoſitions, Faculties, Grants, Reſcripts, Delegacies, Inſtruments, and all other writings, for cauſes not being contrary or repugnant to the holy Scriptures and Laws of God, as heretofore had been uſed and accuſtomed to be had and obtained by the King, or any his moſt noble Progenitors; or any of his or their ſubjects, at the See of *Rome*, or any perſon or perſons by authority of the ſame, and all other Licences, Diſpenſations, Faculties, Compoſitions, Grants, Reſcripts, Delegacies, Inſtruments, and other writings, in for and upon all ſuch cauſes and matters as ſhould be convenient and neceſſary to be had for the honour and ſurety of the King, his heirs and ſucceſſors, and the wealth and profit of this his Realm, ſo that the ſaid Archbiſhop or any his ſucceſſors, in no manner of wiſe ſhould grant any Diſpenſation, Licence, Reſcript, or any other writing before rehearſed, for any cauſe or matter repugnant to the Law of Almighty God, as by the ſaid Act alſo appeareth.

If it be demanded what Canons, Conſtitutions, Ordinances, and Synods Provincial are ſtill in force within this Realm; I anſwer, that it is reſolved and enacted by authority of Parliament, That ſuch as have been allowed by general conſent and cuſtom within the Realm, and are not contrariant or repugnant to the Laws, Statutes, and Cuſtoms of this Realm, nor to the damage or hurt of the Kings Prerogative Royal, are ſtill in force within this Realm, as the Kings Eccleſiaſtical Laws of the ſame. Now, as conſent and cuſtom hath allowed thoſe Canons, ſo no doubt by general conſent of the whole Realm, any of the ſame may be corrected, inlarged, explained, or abrogated. For example, there is a Decree that all Clerks that have received any manner of Orders, greater or ſmaller, ſhould be exempt *pro cauſis criminalibus* before the temporal Judges; This decree had never any force within *England:* Firſt, for that it was never approved and allowed of by general conſent within the Realm. Secondly, it was againſt the Laws of the Realm, as it doth appear by infinite preſidents. Thirdly, it was againſt the Prerogative and Soveraignty of the King, that any ſubject within this Realm ſhould not be ſubject to the Laws of this Realm.

In the Reign of Queen Elizabeth.

BY the ſaid Act of Parliament (whereupon the principal Caſe then in queſtion partly dependeth) made in the firſt year of the Reign of the late Queen *Elizabeth*, it is declared; That where in the time of the Reign of King *Henry* the Eighth divers good Laws and Statutes were made and eſtabliſhed, as well for the utter extinguiſhment and putting away of all uſurped and forreign Powers and Authorities of this Realm, and other her Dominions and Countries, as alſo for the reſtoring and uniting to the Imperial Crown of this Realm, the ancient Juriſdiction, Authorities, Superiorities, and Preheminences to the ſame of right belonging and appertaining; By reaſon whereof her moſt humble Subjects from the 25*th* Year of the ſaid King *Henry* the Eighth, were continually kept in good order, and were diſburdened of divers great and intolerable charges and vexations, before that time unlawfully taken and exacted by ſuch forreign power and authority, as before that was uſurped, And to the intent that all uſurped and forreign power and authority, ſpiritual and temporal, might for ever be clearly extinguiſhed, and never be uſed or obeyed within this Realm, or any other her Dominions or Countries; It was by the authority of that Parliament enacted, That no forreign Prince, Perſon, Prelate, State or Potentate, ſpiritual or temporal, ſhould at any time after the laſt day of that Seſſion of Parliament, uſe, enjoy, or exerciſe any manner of power, juriſdiction, ſuperiority, authority, preheminence, or priviledge, Spiritual or Eccleſiaſtical within this Realm, or within any other the Queens Dominions or Countries that then were, or hereafter ſhould be, but from thenceforth the ſame ſhould be clearly aboliſhed out of this Realm, and all other her Dominions for ever; Any Statute, Ordinance, Cuſtoms, Conſtitutions, or any other matter or cauſe whatſoever to the contrary in any wiſe notwithſtanding: And it was then alſo eſtabliſhed and enacted by the authority of that Parliament, that ſuch juriſdictions, priviledges, ſuperiorities and preheminences, Spiritual and Eccleſiaſtical, as by any Spiritual or Eccleſiaſtical power or authority, had heretofore been, or might lawfully be exerciſed or uſed for the viſitation of the Eccleſiaſtical ſtate and perſons, and for reformation, order, and correction of the ſame, and of all manner of errors, hereſies, ſchiſms, abuſes, offences, contempts, and enormities, ſhould for ever by authority of that Parliament, be united and annexed to the Imperial Crown of this Realm. And that the Queen her Heirs and Succeſſors, Kings or Queens of this Realm, ſhould have full power and authority by vertue of that Act, by Letters Patents under the Great Seal of *England*, to aſſign, name, and authorize, when and as often as the Queen, her Heirs or Succeſſors ſhould think meet and convenient, and for ſuch and ſo long time as ſhould pleaſe the Queen, her Heirs or Succeſſors, ſuch perſon or perſons being natural born Subjects to the Queen, her Heirs or Succeſſors, as the ſaid Queen, her Heirs or Succeſſors ſhould think meet to exerciſe, uſe, occupy, and execute, under the ſaid Queen, her Heirs and Succeſſors, all manner of juriſdictions, priviledges, and preheminences, in any wiſe touching or concerning any Spiritual or Eccleſiaſtical Juriſdiction within theſe Realms of *England* and *Ireland*, or any other her Dominions or Countries, and to viſit, reform, redreſs, order, correct, and amend all ſuch errors, hereſies, ſchiſms, abuſes, offences, contempts, and enormities whatſoever, which by any manner Spiritual or Eccleſiaſtical power, authority, or juriſdiction, could or might lawfully be reformed, ordered, redreſſed, corrected, reſtrained or amended, to the pleaſure of Almighty God, the encreaſe of vertue, and the conſervation of the peace, and the unity of this Realm; And that ſuch perſon or perſons ſo to be named, aſſigned, authorized, and appointed by the ſaid Queen, her Heirs or Succeſſors after the ſaid Letters Patents, to him or them made and delivered as is aforeſaid, ſhould have full power and authority by vertue of that Act, and of the ſaid Letters Patents under the ſaid Queen, her Heirs or Succeſſors, to exerciſe, uſe, and execute all the premiſſes, according to the tenor and effect of the ſaid Letters Patents, any matter or cauſe to the contrary in any wiſe notwithſtanding, as by the ſaid Act alſo appeareth.

It was adjudged in the Court of *Common Pleas*, by Sir *James Dier*, *Weſton*, and the whole Court, that a Dean or any other Eccleſiaſtical perſon may reſign, as divers did to King *Edward* the Sixth, for that he had the authority of the ſupreme Ordinary.

From the firſt until the 11*th* Year of the late Queen *Elizabeths* Reign, no perſon of what perſwaſion of Chriſtian Religion ſoever, at any time refuſed to come to the publick Divine Service, celebrated in the Church of *England*, being evidently grounded upon the ſacred and infallible word of Almighty God, and eſtabliſhed by publick authority within this Realm: But after the Bull of *Pius Quintus* was publiſhed againſt her Majeſty in the 11*th* Year of her Reign, containing (amongſt other things too long to be repeated for this purpoſe) theſe words; *Pius* Biſhop ſervant of Gods ſervants, &c. She (Queen *Elizabeth*) hath clean put away the ſacrifice of the Maſs, Prayers, Faſtings, choice or difference of meats, and ſingle life; She poſſeſſing the Kingdom, and by uſurping the place of the ſupreme head of the Church in all *England*, and the chief authority and juriſdiction of the ſame, hath again brought the ſaid Realm into miſerable deſtruction. Unto her all ſuch as are the worſt of the people reſort, and are by her received into ſafe protection, &c. We make it known, that the ſaid *Elizabeth*, and as many as ſtand on her ſide in the matter above named, have run into the danger of our curſe. We make it alſo known, that we have deprived her from that right ſhe pretended to have in the Kingdom aforeſaid, and alſo from all and every her authority, dignity, and priviledge. We charge and forbid all and every the Nobles and Subjects, and people, and others aforeſaid, that they be not ſo hardy as to obey her, or her admonitions, commandments, or Laws, upon pain of the like accurſe upon them. We pronounce that all whoſoever by any occaſion have taken their oath unto her, are for ever diſcharged of ſuch their oath, and alſo from all fealty and ſervice, which was due to her by reaſon of her Government, &c. As by the ſaid Bull more at large appeareth.

After

After this Bull, all they that depended on the Pope obeyed the Bull, diſobeyed their gracious and natural Soveraign, and upon this occaſion refuſed to come to the Church: The publiſhing of this Bull by a Subject againſt his Soveraign (as appeareth by that which hath been oftentimes ſaid) was Treaſon in the higheſt degree, by the ancient Common Laws of *England*; For if it were Treaſon to publiſh a Bull of Excommunication within this Realm againſt a Subject thereof, as it was adjudged in the Reign of King *Edward* the firſt; *a fortiori* it is Treaſon in the higheſt degree to publiſh ſuch a Bull againſt the Soveraign and Monarch her ſelf. After this Bull many Bulls of Abſolution and reconciliation to the Church of *Rome* were publiſhed and diſperſed amongſt her Majeſties Subjects, to withdraw them from their natural loyalty and allegiance to their Soveraign, whereupon no ſmall inconveniences (as hereafter appeareth) followed: And therefore at a Parliament holden in the 13*th* Year of her Reign, it was declared by the whole body of the Realm; That divers ſeditious and very ill diſpoſed people, minding very ſeditiouſly and unnaturally, not only to bring this Realm and the Imperial Crown thereof (being in very deed of it ſelf moſt free) again into the thraldom and ſubjection of the forreign uſurped and unlawful Juriſdiction, preheminences, and authority claimed by the ſaid See of *Rome*, but alſo to eſtrange and alienate the minds and hearts of ſundry the Queens Subjects from their dutiful Obedience, and to raiſe and ſtir Sedition and Rebellion within this Realm, did then lately procure and obtain to themſelves from the ſaid Biſhop of *Rome*, and his ſaid See, divers Bulls and Writings, the effect whereof had been, and then was, to abſolve and reconcile all thoſe that would be contented to forſake their due Obedience to the Queen, and to yield and ſubject themſelves to the ſaid feigned, unlawful and uſurped authority: And by colour of the ſaid Bulls and writings, the ſaid perſons very ſecretly and moſt ſeditiouſly in ſuch parts of this Realm, where the people for want of good inſtruction were moſt weak, ſimple, and ignorant, and thereby furtheſt from the good underſtanding of their duties towards God and the Queen, did by their leud and ſubtil practices and perſwaſions ſo far forth work, that ſundry ſimple and ignorant perſons, had been contented to be reconciled to the ſaid uſurped authority of the See of *Rome*, and to take abſolution at the hands of the ſaid naughty and ſubtil practiſes; Whereby did grow great diſobedience and boldneſs in many, not only to withdraw and abſent themſelves from all Divine Service, then moſt godly ſet forth and uſed within this Realm, but alſo have thought themſelves diſcharged of and from all Obedience, Duty, and Allegiance to her Majeſty, whereby moſt wicked and unnatural Rebellion did enſue, and to the further danger of this Realm, was thereafter very like to be renewed, if the ungodly and wicked attempts in that behalf were not by ſeverity of Laws in time reſtrained and bridled: For remedy and redreſs whereof, and to prevent the great miſchiefs and inconveniences that thereby might enſue; It was enacted by the Queen, with the aſſent of the Lords Spiritual and Temporal, and the Commons in that Parliament aſſembled, and by the authority of the ſame; That if any perſon or perſons after the firſt day of *July* then next coming, ſhould uſe or put in ure in any place within this Realm, or in any the Queens Dominions, any ſuch Bull, writing or inſtrument, written or printed of abſolution or reconciliation, at any time heretofore obtained and gotten, or at any time hereafter to be obtained or gotten from the ſaid Biſhop of *Rome*, or any his Succeſſors, or from any other perſon or perſons, authoriſed or claiming authority, by or from the ſaid Biſhop of *Rome*, his predeceſſors or ſucceſſors, or See of *Rome*; or by any perſon or perſons, after the ſaid firſt day of *July*, ſhould take upon him or them by colour of any ſuch Bull, Writing, Inſtrument or Authority, to abſolve or reconcile any perſon or perſons, or to grant or promiſe to any perſon or perſons within this Realm, or any other the Queens Dominions, any ſuch abſolution or reconciliation by any ſpeech, preaching, teaching, writing, or any other open deed. Or if any other perſon or perſons within this Realm, or any the Queens Dominions, after the firſt day of *July*, ſhould willingly receive and take any ſuch abſolution or reconciliation. Or elſe if any perſon or perſons, had obtained or gotten ſithence the laſt day of the Parliament holden in the firſt year of her Reign, or after the ſaid firſt day of *July*, ſhould obtain or get from the ſaid Biſhop of *Rome*, or any his Succeſſors, or See of *Rome*, any manner of Bull, Writing, or Inſtrument, written or printed, containing any thing, matter or cauſe whatſoever. Or ſhould publiſh, or by any ways or means put in ure any ſuch Bull, Writing, or Inſtrument; That then all and every ſuch act or acts, offence and offences, ſhould be deemed and adjudged by the authority of the ſaid Act to be High Treaſon, and the offender and offenders therein, their procurators, abbettors and councellors to the fact, and committing of the ſaid offence or offences, ſhould be deemed and adjudged high Traitors to the Queen and the Realm; and being thereof lawfully indicted and attainted, according to the courſe of the Laws of this Realm, ſhould ſuffer pains of death; and alſo loſe and forfeit all their lands, tenements, hereditaments, goods and chattels, as in caſes of High Treaſon, by the Laws of this Realm ought to be loſt and forfeited, as by the ſaid Act appeareth.

And albeit many of her Subjects after the ſaid Bull of *Pius Quintus*, adhering to the Pope did renounce their former Obedience to the Queen, in reſpect of that Bull, yet all this time no Law was either made or attempted againſt them for their recuſancy, though it were grounded upon ſo diſloyal a cauſe. Now that theſe ſpeechleſs Bulls were declared by Act of Parliament to be ſo dangerous; Then in place of them Jeſuites and *Romiſh* Prieſts were ſent over, who in ſecret corners whiſpered and infuſed into the hearts of many of the unlearned Subjects of this Realm, that the Pope had power to excommunicate and depoſe Kings and Princes, that he had excommunicated the late Queen, deprived her of her Kingdom, and diſcharged all her Subjects of their Oath, Duties, and Allegiance to her; And therefore they ought not to obey her or any of her Commandments or Laws, under pain of the Popes curſe. This was High Treaſon by the ancient Laws of *England*; And thereupon *Campian*, *Sherwin*, and many other *Romiſh* Prieſts being apprehended, and confeſſing that they came into *England* to make a party for the Catholick cauſe when need ſhould require, were in the 21*th* year of the ſaid late Queens Reign, by the ancient Common Laws of *England*, indicted, arraigned, tried, adjudged, and executed for High Treaſon againſt

their

their natural allegiance, which they ought their liege Soveraign. But all this time there was no Act of Parliament made either againſt Recuſants, or Jeſuites, or Prieſts, her Majeſty ſtill deſiring and expecting their converſion, and that by clemency and mildneſs they might be reclaimed to their former obedience and conformity before the ſaid Bull. After Prieſts and Jeſuites were puniſhed by ſentence of Law, according to their demerits; Then great numbers of ſlanderous and ſeditious Books (*libri falſidici*) againſt her Majeſty and the State, were diſperſed and ſcattered within this Realm, tending to the inciting and ſtirring of the Subjects to Inſurrection and Rebellion.

Her Majeſty in open Parliament, having with the Lords Spiritual, Temporal, and Commons, mature conſideration of ſo weighty and important cauſes, in the 23*th* Year of her Reign made two ſeveral Laws; One againſt the makers and publiſhers of ſeditious Books, ordaining that offence to be felony; Another againſt Recuſants, inflicting the penalty of twenty pound the month for their recuſancy; And yet upon their ſubmiſſion according to the Act, to be thereof freely and abſolutely diſcharged, (a mild and merciful Law, conſidering their former conformity, and the cauſe of their revolt.) But after theſe Jeſuites and *Romiſh* Prieſts coming daily into and ſwarming within the Realm, inſtilling ſtill this poiſon into the Subjects hearts, that by reaſon of the ſaid Bull of *Pius Quintus*, her Majeſty was excommunicated, deprived of her Kingdom, and that her Subjects were diſcharged of all obedience to her, and by all means indeavoured to withdraw them from their duty and allegiance to her Majeſty, and to reconcile them to the Church of *Rome*.

In the 27*th* Year of her Reign, by authority of Parliament, her Majeſty made it Treaſon for any Jeſuite or *Romiſh* Prieſt being her natural born Subject, and made a *Romiſh* Prieſt or Jeſuite ſithence the beginning of her Reign, to come into any of her Dominions; Intending thereby to keep them out of the ſame, to the end that they ſhould not infect any of her Subjects with ſuch treaſonable and damnable perſwaſions and practices, as are aforeſaid, which without controverſie were High Treaſon by the ancient Common Laws of *England*: Neither would ever maganimous King of *England*, ſithence the firſt eſtabliſhment of this Monarchy, have ſuffered any (eſpecially being his own natural born Subjects) to live, that perſwaded his Subjects that he was no lawful King, and practiſed with them (within the heart of this Realm) to withdraw them from their allegiance and loyalty to their Soveraign, the ſame being *crimen leſæ Majeſtatis*, by the ancient Laws of this Realm.

By this and by all the Records of the Indictments it appeareth, That theſe Jeſuites and Prieſts are not condemned and executed for their Prieſthood and profeſſion, but for their treaſonable and damnable perſwaſions and practices againſt the Crowns and Dignities of Monarchs and abſolute Princes, who hold their Kingdoms and Dominions by lawful ſucceſſion, and by inherent Birthright, and deſcent of Inheritance (according to the fundamental Laws of this Realm) immediately of Almighty God, and are not tenants of their Kingdoms (as they would have it) at the will and pleaſure of any forreign Potentate whatſoever.

Now albeit the proceedings and proceſs in the Eccleſiaſtical Courts, be in the name of the Biſhops, &c. It followeth not therefore, that either the Court is not the Kings, or the Law whereby they proceed is not the Kings Law: For taking one example for many, every Leet or view of Frankpledge holden by a Subject is kept in the Lords name, and yet it is the Kings Court, and all the proceedings therein are directed by the Kings Laws; and many Subjects in *England* have and hold Courts of Record, and other Courts, and yet all their proceedings are according to the Kings Laws, and Cuſtoms of the Realm.

Obſerve (good Reader) ſeeing that the determination of Hereſies, Schiſms, and Errors in Religion, ordering, examination, admiſſion, inſtitution, deprivation of men of the Church (which do concern Gods true Religion and Service) of right of Matrimony, divorces, and general baſtardy, (whereupon depend the ſtrength of mens deſcents and inheritances) of probate of Teſtaments, and letters of Adminiſtration, (without which no debt or duty due to any dead man can be recovered by the Common Law) Mortuaries, penſions, procurations, reparations of Churches, Simony, inceſt, adultery, fornication, and incontinency, and ſome others, doth not belong to the Common Law, how neceſſary it was for adminiſtration of juſtice, that his Majeſties progenitors Kings of this Realm did by publick authority authorize Eccleſiaſtical Courts under them, to determine thoſe great and important cauſes Eccleſiaſtical (exempted from the Juriſdiction of the Common Law) by the Kings Laws Eccleſiaſtical, which was done originally for two cauſes: 1. That Juſtice ſhould be adminiſtred under the Kings of this Realm, within their own Kingdom, to all their Subjects, and in all cauſes. 2. That the Kings of *England* ſhould be furniſhed upon all occaſions either forreign or domeſtical, with learned profeſſors as well of the Eccleſiaſtical as Temporal Laws.

Thus hath it appeared as well by the ancient Common Laws of this Realm, by the Reſolutions and Judgments of the Judges and Sages of the Laws of *England*, in all ſucceſſions of Ages, as by authority of many Acts of Parliament, ancient and of later times; That the Kingdom of *England* is an abſolute Monarchy, and that the King is the only ſupreme Governor, as well over Eccleſiſtical perſons, and in Eccleſiaſtical cauſes, as Temporal within this Realm; To the due obſervation of which Laws both the King and the Subject are ſworn.

I have herein cited the very words and texts of the Laws, Reſolutions, Judgments, and Acts of Parliament, all publick and in print, without any inference, argument, or amplification; And have particularly quoted the Book, Years, Leaves, Chapters, and ſuch like certain references, as every man may at his pleaſure ſee and read the authorities herein cited.

This Caſe is reported in the *Engliſh* and *Latin* Tongues, (as ſome other Writers of the Law have done) to the end my dear Countrymen may be acquainted with the Laws of this Realm, their own birthright and inheritance, and with ſuch evidences as of right belong to the ſame; aſſuring my ſelf that no wiſe or true-hearted *Engliſh*-man, that hath been perſwaded before he was inſtructed, will refuſe to be inſtructed in the truth, (which he may ſee with his own eyes) leſt he ſhould be diſſwaded from error,

where-

wherewith blind-fold he hath been deceived; For miserable is his Case, and worthy of pity, that hath been perswaded before he was instructed, and now will refuse to be instructed, because he will not be perswaded.

Cases of Leases.

Mich. 27 & 28 Eliz. *in the Kings Bench.*

Clayton's Case.

IN an *Ejectione firmæ* between *Clayton* and *Presenham*, of lands in *Lichborow* in the County of *North.* the Case was such; Indentures of demise were engrossed bearing date 26. *Maii, anno* 25 *Eliz.* of lands in *L.* to have and to hold (for three years from henceforth) and the said Indentures were delivered at four of the Clock in the Afternoon, the 20. day of *June*, 25. *supradicto:* And when this lease by computation shall have its beginning, either from the day of the date, or from the delivery was the Question. And in this Case three Points were resolved by *Wray* Chief Justice, Sir *Thomas Gawdy*, and the whole Court. [1]

1. That (from henceforth) shall be accounted from the day of the delivery of the Indentures, and not by any computation of date; for, from henceforth is as much as to say, from the making, or from the time of the delivery of the Indentures, or *a confectione præsentium*; for the confection or making of the lease doth begin from the delivery, and these words (from henceforth) or any other words of the Indenture, are not of any effect or force until delivery, *quia traditio loqui facit chartam.*

2. That where the said Indenture was delivered at four of the Clock in the Afternoon the 20. of *June*, it was resolved that this lease should end the 19. day of *June* in the third year, for the Law in this computation doth reject all fractions and divisions of a day for the incertainty, which is always the mother of confusion. [b]

3. That in this Case the day of the delivery of the lease shall be taken *inclusive*, and the day it self is parcel of the demise: so where the demise is limited to begin from the making; but if the lease be to begin from the day of the making, or from the day of the date, there the day it self is excluded, and so the doubt in 12 *Eliz. Dier* 286. well explained. And with this Resolution agreeth 14 *Eliz. Dier* 307. And it was adjudged in the *Common Pleas*, *Trin.* 21 *Eliz.* where the words of the Statute of 27 *H.* 8. of Inrolments are (within six months after the date of the same writings indented) that if the writings have date, the six months shall be accounted from the date, and not from the delivery, but if they want date, then the six months shall be accounted from the delivery, *vide Dier*, 5 *Eliz.* 218. An Indenture of Bargain and Sale bore date the fourth day of *October*, 4 & 5 *Phil. & Mar.* was inrolled the 21. day of *March* next following, which was the last day of the six months, accounting the day of the date *exclusive*. And it was adjudged upon demurrer in the *Common Pleas* (which Plea began 4 *Eliz. Rot.* 812.) that the deed was well enrolled within the said Act; for the whole day of the fourth of *October* shall be accounted in Law the date of the Indenture, *unde sequitur*, That from the date and from the day of the date are all of one sense, for as much as in judgment of Law, the date doth include the day of the date.

Trin. 30 Eliz. *in the Kings Bench.*

Elmer's Case.

BEtween *Elmer* Bishop of *London*, and *Gale* Defendant for the scite of the Mannor of *Draiton* in *Midd.* two Points were resolved. [2]

1. That the Statute of 1 *Eliz.* is a private Act, whereof the Court without pleading of it should not take knowledge.

2. It was resolved, That where the said scite parcel of the Bishoprick was in lease for years, and *Grendon* the Bishop did put out the lessee, and made a lease (which was confirmed by the Dean and Chapter) for three lives, rendring the ancient and accustomed rent; that this lease was voidable by the successor. 1. Because the Statute of 1 *Eliz.* was in the disjunctive for 21 years or three lives, and therefore the Bishop cannot make both: But if in the Case at Bar the said lease shall be good, then a Bishop may make a lease for 21 years, and presently after make a lease for three lives, which shall be against the words and meaning of the Act. 2. The rent reserved upon the lease is not paiable within the

the meaning of the Act; for although *ex vi termini* it is paiable, because that after the lease for years determined, the lessor shall distrain for all the arrerages of the rent reserved upon the lease for lives, yet it is not paiable within the meaning of the Act; for the Act was made to maintain Hospitality, and to avoid Dilapidations, and that cannot be but by a continual revenue yearly paiable in Law, and not in expectancy, or *in futuro*. For possibilities will not repair and maintain Hospitals or Churches; And in this Case the Bishop shall have but a possibility; for the lessees for lives shall have the rent reserved upon the lease [b] for years, and if they survive the lease for years, then the Bishops and Successors shall have remedy for the rent and arrerages reserved upon the lease for lives, as it hath been said. And it was said, That where the Statute of 33 *H.* 8. *cap.* 28. provideth, that the old lease be surrendred within one year, &c. that a surrender conditional is not within the said Act: For the intent of the makers of the Act was, to have a continual and absolute surrender, and not such illusory surrender, which might be avoided the next day; for, *factum non dicitur quod non perseverat:* and *sensus verborum est anima legis.* But in the principal Case Judgment was given against the Bishop, for not pleading the said Statute of 1 *Eliz.*

Trin. 30 Eliz. *in the Kings Bench.*

Jewel's Case.

[3] BEtween *Paul* and *Maior*, the Case was; *Jewel* Bishop of *Salisbury* 6 *Eliz.* by deed indented made a lease of a Fair parcel of the possessions of his Bishoprick, with all profits thereof in *Sherburn* in the County of *Dorset* for three lives, rendring the old and accustomed rent, which was confirmed by the Dean and Chapter; And afterwards the Bishop died, and if this lease were good against the successor, and not restrained and made void by the Statute of 1 *Eliz.* not printed was the Question. And it was adjudged, that the successor should avoid the lease; for a Fair is but a franchise or liberty, [a] mainorable, out of which a rent cannot be reserved; and therefore such rent reserved the lessor and his successors have not any remedy, either by distress or Assise; and all leases of such Inheritances, out of which the ancient and accustomed rent cannot be well and lawfully reserved, are voidable by the said Act. It was also resolved, That if the lease had been made for 21 years, rendring the ancient and accustomed rent, that the successor should avoid it; for although the rent reserved shall be good by way of contract between the lessor and the lessee, yet it is not incident to the reversion, nor shall go with it; and therefore such lease shall be also voidable by the successor by the said Statute, *vide* 17 *E.* 3. 7. 9 *Ass. p.* 24. 30 *Ass. p.* 5. 14 *E.* 3. *Scire facias* 122. 10 *H.* 6. 2. 3 *H.* 6. 21, *&c.*

Mich. 31 *&* 32 Eliz. *in the Kings Bench.*

The Lord *Mountjoye's* Case.

[b] *Richard Shepheard* was Plaintiff against *Blackalor* Defendant in an *Ejectione firmæ*, of two houses and 18 acres of land in *Hemston arundel*, upon a demise made 10. *Aprilis*, 28 *Eliz.* for years; the Defendant pleaded Not Guilty, and the Jurors as to the moity of one house and 18 acres of land found the Defendant guilty, and as to the residue they have a special verdict to this effect: They found that the tenements in which, &c. were parcel of the Mannor of *Hemston arundel*, and demised and demisable time out of mind, &c. by Copy, &c. And that *Robert* Lord *Brook* was seised of the said Mannor in fee, and further found that by special Act of Parliament made 4. *Feb.* 27 *H.* 8. the said Mannor was entailed to *Anne* wife of *Charles* Lord *Mountjoy*, and to *John Pawlet* and *Elizabeth* his wife, and to the heirs of their bodies begotten with divers remainders over; By which Act it was provided as followeth, [c] *scil.* That the donees nor any of them, *non facerent aliquid in nocumentum, vel exhæredationem heredum suorum, vel eorum alicujus, vel alicujus eorum in remanere, sed tantum pro junctiuro uxoris pro termino vitæ, vel alicujus viri, &c. pro termino vitæ, vel pro termino vitæ alicujus aliæ personæ, vel pro annis, vel ad voluntatem, secundum consuetudinem Manerii; Reddend' verum & antiquum reddit' prædictarum terrarum, & tenementorum sic demisorum, &c. & quod*, all other Acts shall be void, as by the said Act appeareth: And further found, that the said Mannor did consist of divers free rents amounting to 7 *l. &c.* and 15 Copihold Te- [4] nements which were holden for lives, the customary rent of which was 3 *l.* and of the demesnes which had usually been demised by Indenture for the several rents and farms of 8 *l. &c.* And that there was one acre of waste parcel of the said Mannor, in which were divers high-ways, and common for the Tenants of the yearly value of 12 *d.* And that upon the death of every Copiholder, the Lord by custom ought to have Heriot; and that there was a Court Baron incident to the said Mannor, and perquisites of

of Court, and a Leet appertaining to the said Mannor; and that the Free rents, or Copihold rents, or Heriots, or perquisites of Courts, or Leet never were demised before for life, or years, or otherwise: And that afterwards *Charles* Lord *Mountjoy* died, after whose death the said *Anne* his wife in 6 *Eliz.* did accept of a fine of a stranger, *sur conusans de droit come ceo, &c.* of the moity of the said Mannor with the appurtenances, and of a greater number of acres which did comprehend the demesnes; By which fine the said *Anne* did grant and render the moity of the said Mannor, &c. with the appurtenances for 300 years rendring rent amounting to the free rents, the Copihold rents, the Farm rents, and 18 *d.* more, and 12 *d.* for the acre of wast to be paid at two Feasts of the years, where the old rent was payable at four Feasts. And afterwards the said *Anne* died, and the Plaintiff claimed under the said lease for 300 years: And the Defendant claimed by the Lord *Mountjoy* that now is, being heir to the same in tail. And the doubt of this Case was, If the said lease for 300 years, made in manner and form aforesaid, was to be avoided by the said clause of restraint of the said Act of 27 *H.* 8. or not. And it was agreed for the Plaintiff, (in which as much was said as the wit or heart of a man could think or invent) that the lease shall be good, and not restrained by the said Act. And all that which was said may be briefly drawn into five parts.

1. For as much as this Act doth restrain the power which the Tenant in tail had by the Laws of the land, it shall be taken strictly, as to the restraint, and beneficial for the Tenant in tail: And to this purpose the Rule put by *Read* in 21 *H.* 7. 17. & 18 *E.* 4. 16. and divers other Books upon this ground were cited.

2. It was said, That although the rents of Assise, Heriots, Leets, were never demised before, it was not material; for out of these the rent reserved doth not issue, but only out of things mainorable, to which the lessor may resort to distrain; as in 2 *Ass.* 24. lease of land multure of a Mill, rendring rent, or in 30 *Ass.* 5. lease of land and Hundred, or advowson, rendring rent, &c. all the rent shall issue out of the land, and not out of the multure, advowson, or Hundred. But the King may reserve a rent out of a Fair, or other thing not mainorable, as is adjudged in 14 *E.* 3. *Scire facias* 122. becuase he may distrain for the same in all the other lands of the grantee, *vide* 10 *H.* 6. 2. And this Point was concluded with 12 *Ass. p.* 40. That if a rent be granted out of a Mannor, that the demesne only and not the services are charged. [b]

3. Although the acre of Wast was never demised before, and although the moity was now demised, where no moity was demised of the demesnes before; and although the rent was reserved at two days of the year, where before it was reserved at four days of the year, yet *verus & antiquus redditus* is reserved within the said Act: For every rent hath quantity and quality, and *verus & antiquus redditus* is not to be intended of every quality incident to it, but of the quantity of the rent, for that is the effect and substance of the thing reserved; As if the ancient reservation of the rent were in gold, and the new reservation was to be paid in silver; or if a quarter of Wheat were anciently reserved, and now the lease is made rendring eight bushels of Wheat, all is one; for the Law doth not respect the form of words, or the quality, but the substance and effect of the matter: So if the old rent was 10 *l.* and the lessor reserveth 20 *l.* the same is not *ex vi termini verus & antiquus redditus*, but *parum differunt quæ re concordant, & qui hæret in litera, hæret in cortice.* And it needeth not to have all qualities incident to an annual rent; for if it were Customary or Copihold rent before, other rent may now be reserved by Indenture: For by that he shall have *veram & antiquam summam redditus*, which he had before, and that is the effect and substance of the matter, although that it differeth in quality; So when the rent is payable at four days of the year, and now it is reserved at two days only, it is not material. For the words are, *reddendo verum & antiquum redditum*, and doth not say, *ad usualia festa, &c.* so that he reserve the true and ancient rent it is sufficient. And it was said, That if tenant in tail be of two Farms, one which hath been at all times let for 20 *l.* rent, and the other for 10 *l.* rent, and he maketh a lease of both for 21 years, rendring 33 *l.* rent entirely out of both, the same is good, and yet it is not the accustomable rent which hath been paid, &c. for now it is one entire rent, where it was several before, and now this entire rent issueth out of both, and every one of them charged with the whole rent, where each of them was severally charged before; but entire and several are but qualities of the rent, but in substance the accustomable rent is reserved, for they both amount to 30 *l.* and that is reserved. So if tenant in tail be seised of three acres of land, each of equal yearly value, and all have been demised for 3 *s. per annum*, in such Case he may lease one of them for 12 *d. per annum*, or two of them for 2 *s. per annum*, and so *pro rata*: And yet in these two Cases it is not the accustomable rent which hath been paid. So if two Coparceners be seised of certain lands in tail, which hath been let for 10 *l.* rent, one of them may let his part or moity for 4 *l.* In all which Cases the rent reserved, although it differ in form or quality, yet in substance it is *verus & antiquus redditus* within the said Act of 27 *H.* 8. It was further said, That if a Mannor hath been always let for 10 *l.* rent, and afterwards a tenancy escheateth, yet it may be let for 10 *l.* and yet it may be argued that the same is not *verus & antiquus redditus*, for no rent was ever reserved before out of land escheated, and by consequence the rent reserved cannot be said, *verus & antiquus redditus*: But that shall be too nice and subtil interpretation, for by the same reason, when a Copihold of Inheritance is forfeited, it may be said, that becuase the rent of the Copihold was demised and not the land, it shall impeach the lease, which shall be a very hard construction, tending to the avoidance of many leases of poor men, which shall be inconvenient: So in the Case at Bar, although that the acre of wast was never demised before, yet in as much as the value thereof, or more is reserved, the purview and intent of the Act is well kept. [5]

4. It was argued, and strongly urged, That if the said render as to the said acre of wast the Services Heriots, Leets, &c. (which were never demised before the said grant and render) shall be void by the said, Act, that then it followeth that it is good for the demesnes, which have been demised; for then all the rent reserved shall go out of the demesns.

5. If it ſhall not be void as to ſuch things which were demiſed before, yet after the death of him who made the grant and render, there ſhall be apportionment of the rent for them; then for as much as the whole rent and more is reſerved for the demeſnes, (although the rents of the Freeholders and Copiholders and the acre of waſt be deducted) *& verus & antiquus redditus*, and more above them doth remain for the demeſnes, for this cauſe it was urged, that the ſaid render ſhall be good for the demeſnes; *Et id certum eſt, quod certum reddi poteſt:* And in this Caſe, after many arguments, and great deliberation and conſideration, ſix Points were reſolved.

1. Although it be provided by the ſaid Act, That all eſtates, &c. reſtrained by the ſaid Act ſhall be void, yet by conſtruction of Law, it is not void as to the tenant in tail himſelf, but ſhall be avoided by the iſſues in tail; and the intent of the Act was to provide, that the donees nor any of them, *non facerent aliquid ad nocumentum, vel exhæreditationem hæred. eorum*, and not to make void the eſtate which the donee himſelf made againſt himſelf: And all Acts of Parliament as well private as general, ſhall be taken by a reaſonable conſtruction to be collected out of the words of the Act it ſelf, according to the true intent and meaning of the makers of the Act, *vide* 14 E. 4. 1. & 43 *Aſſ. p.* 29. [b]

2. It was reſolved, That in reſpect of the ſaid acre of waſt, which was never demiſed before, the rent which is entirely reſerved out of the whole, cannot be ſaid *verus & antiquus redditus*, when it goeth out of a thing, which was never charged with any rent, by any reſervation before.

3. By the grant and render of the Mannor, he to whom the render is made hath intereſt and term in the lands holden by Copy, and when any of the Copiholders die, or it be forfeited, he may enter and enjoy the land himſelf if he will, and the rent reſerved doth iſſue out of the ſame lands holden by Copy, which lands were never charged with any Farm rent before, but always have been demiſed by Copy according to the cuſtom of the Mannor: And when the demeſnes of the Mannor have been only demiſed for rent, in the Caſe at Bar, the whole Mannor cannot be ſaid to be demiſed within the ſaid Act; Alſo the eſtates which the tenant in tail ſhall make by the ſaid Act are diſtinguiſhed by the ſaid, *ſcil.* eſtates for life, for years, and at will, according to the cuſtom of the Mannor; But by this grant and render all are put in hotchpot and jumbled together, as Sir *Thomas Gawdy* ſaid, whereas the Copiholds ought to have been granted by Copy, according to the cuſtom of the Mannor, and not by fine, or deed.

4. The reſervation of the rent at two days where the rent was reſerved and payable at four days before, maketh the grant and render void, becauſe it is *ad nocumentum* of the heirs in tail, which is reſtrained by the Act; for it is more beneficial for them to have it paid at four Feaſts then at two. And all beneficial qualities of the rent ought to be reſerved and obſerved.

5. As the Caſes which have been put, of the reſervation of ſilver in lieu of gold, or of joyning ſeveral Farms in one demiſe, with reſervation of one and the ſame rent, or to let parcel of a Farm rendring rent *pro rata*, all theſe were denied by the whole Court; But the ſaid Caſe of reſervation of buſhels of wheat in lieu of a quarter is all one in quality, value, and nature, and varieth only in weight. But *Wray* Chief Juſtice ſaid, that he did agree to the Caſe of two Coparceners, that one may let her moity, yielding the moity of the accuſtomable rent, for in as much as they are in by act of Law, or of God, it ſhould be hard that the frowardneſs of her Coparcener ſhould prejudice her of the benefit or fine which ſhe may have by making of a leaſe of her moity: And ſo a difference between this Caſe of a leaſe of one part with reſervation of rent *pro rata*, which is her own act, and which rent for parcel is not the accuſtomable rent which hath been paid. So and for the ſame cauſe, when two diſtinct Farms are joyned together, the whole rent which is reſerved out of both, is a new rent, and not the accuſtomable rent. And as to the Caſe of Eſcheat of a tenancy it was agreed for good Law. For the act of Law or of God ſhall not prejudice any one. But if the leſſor had purchaſed the tenancy it ſhould be otherwiſe, for that which is purchaſed is not parcel of the Mannor, becauſe that he acquireth it by his own act. [6]

6. It was reſolved, That no apportionment can be in this Caſe to make the render good; for firſt no apportionment can be made in this Caſe, for as much as there be Copiholders for mens lives, which depend upon the providence of God, Heriots, profits of Courts, which are accidentals, and other caſualties, which cannot be reduced to an yearly value, as it is ſaid in *Butler* and *Baker*'s Caſe; for this cauſe no apportionment can be made, for apportionment ought to be of certainty. And where it was ſaid, *Quod id certum eſt, quod certum reddi poteſt*; It was anſwered, *Quod id incertum eſt, quod certum reddi nullo modo poteſt.* 2. *Wray* Chief Juſtice ſaid, That although there ſhall or may be apportionment after the death of Tenant in tail, that will not ſerve to make the grant and render good, for if *verus* and *antiquus redditus* be not reſerved yearly, during the term (as by conſtruction of Law is implied) the power which the tenant in tail hath is not followed: For it is not ſufficient, *Quod verus & antiquus redditus* be reſerved to the heirs in tail, but it ought to be reſerved to the tenant in tail himſelf; and therefore if he reſerveth a leſs rent to him during his life, and after his death, the true and ancient rent, the leaſe is not good: And although that the Statute was made principally as hath been ſaid, for the benefit of the heirs in tail, &c. yet the reſervation ought in conſtruction in Law be of the true and ancient rent during the whole term. And therefore if the true and ancient rent be not reſerved during the life of the tenant in tail who made the grant and render (as in truth it was not in the Caſe at Bar) no apportionment after his death will make the demiſe good. And for as much as the land it ſelf holden by Copy was demiſed, it will appear upon apportionment (if any ſhall be) that the ancient rent doth not remain for the demeſnes.

And in the argument of this Caſe, the difference of penning of divers Statutes concerning leaſes was obſerved. The Statute of 32 *H.* 8. *cap.* 28. that appointeth the demiſe to begin from the day of the making, &c. not above the number of 21 years, or three lives, and that there ſhall be reſerved yearly during the ſame leaſe, &c. ſo much yearly rent, or farm, or more, as hath been moſt accuſtomably paid, &c. within 20 years before ſuch leaſe made; ſo that a leaſe for a leſſer term or a greater term is within the letter of the ſaid Statute: But the words of the Statute of 1 *Eliz.* of leaſes made by [b]

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Bishops are, Other then for the term of 21 years, or three lives (without saying, or under) from such time as any such grant or assurance shall begin, whereupon the old accustomed yearly rent, or more (without limitation of any time) shall be reserved, &c. And yet a lease for lesser time is good, and the rent ought to be reserved during the whole term. The Statute of 13 *Eliz. cap.* 10. other then for the term of 21 years, or three lives (without saying, or under) from the time as any such lease or grant shall be made, whereupon the accustomed yearly rent, or more, shall be reserved, &c. And many other matters were moved by the Council on both sides in this Case, which I purposely omit because the Court gave no resolution of them.

Look well (good Reader) that if you contract for any lease, upon any of the said, or other Statutes, or with any person who hath power to make leases, by any of the Provisoes newly invented and put into Indentures, take good advice of Council upon the sight and consideration of them in making of your lease; And my hope is, that the report of these Cases concerning leases will bring to your memory some things tending to the repose and quiet of poor Farmers.

Mich. 31 & 32 Eliz. *in the Kings Bench, in a Writ of Error.*

Justice *Windham's* Case.

IN Trespas between *Francis Windham* one of the Justices of the *Common Pleas* Plaintiff, and *John Debney* and others Defendants, in the *Common Pleas* for Trespas done in a meadow called *Sextens* meadow in *Trowse* in the County of *Norfolk*, the Case was such; The Dean and Chapter of the holy and individed Trinity of *Norwich* were seised of the said meadow called *Sextens* meadow, and of another meadow in the said Town called Cheese meadow; And by Indenture under the common Seal, 37 *H.* 8. demised Cheese meadow to *Howlins* for 40 years: And afterwards 4 & 5 *Phil. & Mary* by Indenture under their common Seal, demised *Sextens* meadow to the said *Howlins* and *Debney* for 21 years. And afterwards 12 *Eliz.* the said Dean and Chapter demised to *Nicholas Manne* both the said meadows with every *Habendum*, *scil.* to have and to hold Cheese meadow for 40 years after the end of the first lease thereof made; And to have and to hold *Sextens* meadow after the first lease thereof made, with several reservations of rents. The said *Manne* assigned his interest to *John Hoe*, who 15 *Eliz.* surrendred and took a new lease by Indenture of the said Dean and Chapter under their common Seal (in which the first leases were recited) of both the meadows, *Habendum sibi ab & post determinationem prædict. seperalium dimission', videlicet, prædict. dimission. præd.* Rob. Howlyns *in forma prædict. fact', & prædict. dimission. præfat.* Roberto Howlyns & Johanni Debney, &c. *in forma præd. fact', sive esset per sursum redditionem, determinationem, &c. usque ad finem & terminum* 40 *annorum ex tunc proxim. sequen', existen' verum numerum annorum mentionat. in dict. sursum reddit. Indentur. dict. Nicholao Manne* made: *Reddendo, &c.* the ancient rent severally for the said meadows; so that in effect the Case is; A man maketh a lease of *Sextens* meadow to *A.* for 10 years, and of Cheese meadow to *B.* for 20 years; and afterwards by Indenture reciting the said two leases, made a lease to another of both for 40 years, to begin after the end or determination of the said several leases made to *A.* and *B.* And afterwards the former lease of *Sextens* meadow endeth, and the lease of Cheese meadow continueth; and when the last lease as to *Sextens* meadow now in question shall begin was the Question. And if it shall not begin till the lease of Cheese meadow be ended, then the Plaintiff hath entred before his time, for the former lease of Cheese meadow hath yet continuance. But if the said *Habendum* in the latter lease shall be taken *respective* or *distributive*, *Reddendo singula singulis*, so that when the lease in *Sextens* meadow determineth, the new term for 40 therein shall begin, then Judgment ought to be given for the Plaintiff. And after many arguments at Bar and Bench in the *Common Pleas*, it was resolved and adjudged, That the *Habendum* in the latter lease shall be taken *respective*, that is to say, the lease of *Sextens* meadow to *John Hoe* for 40 years shall begin presently after the end of the first lease thereof made. For every deed shall be taken strong against the grantor, and most beneficially for the grantee, and it is most strong against the lessor, and most beneficial for the lessee to have the lease of *Sextens* meadow to begin presently after the first lease made thereof, then to tarry till the lease of Cheese meadow be ended. As in 9 *E.* 4. 42. & 19 *H.* 6. 4. If I release unto you all Actions which I have against you and another, in this Case notwithstanding the joynt words, all Actions which I have against you alone are released, for it shall be most beneficial to him to whom the release is made, and most strongest against him who maketh it; And the joynt words of the parties shall be taken *respective* and severally.

[7]

[b]

1. Sometimes in respect of the several interest of the grantors; as if two Tenants in common, or several Tenants joyn in a grant of a rent charge, yet in Law this grant shall be several, although that the words are joynt, as Sir *Robert Catlyn* Chief Justice holdeth in *Browning's* Case, in *Plow. Commentaries.*

2. Sometimes in respect of the several interests of the grantees, &c. as 16 *H.* 6. 63, 64. a warranty made to two of certain lands shall enure as several warranties in respect that they are severally seised, one of part of the lands, and the other of the residue in severalty, 6 *E.* 2. *Covenant Br.* 49. One joynt Covenant shall be taken several in respect of the several interests of the Covenantees, *vide* 16 *Eliz. Dier* 337, 338. between Sir *Anthony Cook* and *Wotton*, a good Case.

3. Sometimes in respect that the grant cannot take effect, but at several times, as 24 E. 3. 29. a r mainder limited to the right heirs of *J. S.* and *J. N.* (*J. S.* and *J. N.* being alive) in which Case t words are joynt, and yet the heirs shall take severally.

4. Sometimes in respect of the incapacity and impossibility of the grantees to take joyntly, as a le made to an Abbot and secular man, or a gift to two men, or to two women, and to the heirs of th two bodies begotten, the Inheritance is several, 7 H. 4. 17. *vide Chapman*'s Case, *Plow. Com.*

5. Sometimes in respect of the cause of the grant, or *ratione subjectæ materiæ*, as 15 H. 7. 14. O Coparcener granteth a rent to two other Coparceners for owelty of partition, although that the wor are joynt, yet the cause of the grant shall be respected, and the rent shall be of the quality of the lan and therefore they shall have the rent in degree and quality of coparcenary, and not joyntly. And *Knit* Chief Justice and Chancellor said in 38 E. 3. 26. that if two Coparceners make a feoffment in fee, re dring rent to them and their heirs, the heirs of the one and other shall inherit, because their right in t land was several, 22 E. 4. 25. & 2 R. 3. 18. joynt submission to arbitrement shall be taken several respect of the several causes.

6. Sometimes *Ne res destruatur, & ut evitetur absurdum*, as in 6 H. 7. 7. *in Cessavit*, where the tenu is alledged by Homage, Fealty, and Rent, and the demandant counted, that *in faciendo servitia præd cessavit*, shall be by construction taken to such services only, of which a man may cease, 17 E. 3. 1. & 2 The Prior of *Tukesford*'s Case in a *Scire facias* against the successor of the Prior upon a Judgment give in a Writ of Annuity for the arrerages in the time of the predecessor, and of the successor, and the Writ was that the predecessor and successor *nondum reddiderunt*: To which exception was taken that the pre decessor was supposed not to render that which the successor ought, & *non allocatur*; for *reddendo singula singulis* by reasonable construction the words may well stand together, *vide* 21 E. 3. 48. in a *Per que servitia*, F. N. B. 14. *in Monstraverunt*: And the reason of all these Cases is, *quod res non destruatur*, where the grant shall be taken strongest against the grantor, and shall take effect so near as it may ac cording to the intent of the parties. And such construction doth concur with two of the reasons [b] in the principal Case. 1. It shall be taken strongest against the grantor. 2. This construction doth concur with the intent and meaning of the parties, for after the *Habendum* and the number of the years these words are added, *existen' verum numerum annorum in dict' sursum reddit' Indentur' mentionat'*, i which Indenture the *Habendum* was several, so that the intent of the parties was to have several beginning in this new lease, &c. and the lessor and lessee never imagined but that the leases should begin several and not that the lessee should expect for *Sextens* meadow, until the lease of Cheese meadow, which another distinct lease, and a distinct thing, shall end. And so it was adjudged, and the Plaintiff h execution. Upon which Judgment a Writ of Error was brought; and after many arguments it w resolved by Sir *Christopher Wray*, Sir *Thomas Gawdy*, and the whole Court of *Kings Bench*, That the l to *Hoe* shall have several beginnings. And so this Case was resolved by both Courts. And afterwa the same Term in a Case between *Polard* and *Alcocke* in the Court of *Wards*, *Wray* Chief Justice clea held: That if a man be seised of three acres of lands in fee, and maketh a lease of one to *A.* for life, another acre of land to *B.* for life, and of the third to *C.* in tail, and afterwards by deed (reciting t said estates) covenanteth with his brother, That after the estates ended and determined, that he heirs would stand seised of all the said three acres to the use of his brother in tail, &c. That in this C presently by the death of *B.* the brother shall have the acre leased to *B.* and shall not tarry till all t estates, *scil.* the other estate for life, and the estate tail be ended: But *reddendo singula singulis*, by t Covenant the estates in the several acres vest presently in the brothers, and shall take effect in possessi as the several estates in possession end and determine, which was granted by the whole Court. And t the Case of *Polard*, *Wray* cited, and relied upon the said Case of Justice *Windham*. And afterwards the Plaintiff in the Writ of Error perceiving the opinion of the Court, did not proceed in their Writ of Error.

Trin. 34 Eliz. *in the Kings Bench.*

Brudnel's Case.

[9] THomas *Brudnel* Administrator of *Anthony Rone*, brought an Action of debt upon an Obligation of 200*l.* against *Thomas Skidmore*, and had Judgment to recover in the *Common Pleas*, and died; *Robert Brudnel* and *John Brudnel* Executors of the said *Thomas Brudnel* sued a *Scire facias* upon the said Judgment, and Process continued until the said *Skidmore* was outlawed; And now the said *Tho. Skidmore* brought a Writ of Error. And note, it appeareth by the Record certified, that the said *Thomas Brudnel* was Administrator to the said *Anthony*, during the minority of *Edward*, *Jeromy*, *Humphrey* and *Anne*, the Children of the said *Anthony*, and he did averr in his Declaration, that the said *Edward*, *Humphrey* and *Anne* was alive; and within age, and did not averr that the said *Jeromy* was alive, or within again; And the Plaintiffs Council assigned for Error, That when administration is committed to one during the minority of four, if one of them dieth, or cometh of full age, the whole authority doth cease; for difference was taken between a limitation annexed to an estate or interest, and a collateral or bare limitation not coupled or conjoyned with an estate or interest, of which there can be no

no ſurvivor; As if a man make a leaſe to two during their lives, there if one dieth, his eſtate ſhall ſurvive: But if a leaſe be made to *A.* during the life of *B.* and *C.* without ſaying, and during the life of the ſurvivor of them, there if one of them dieth, the eſtate (as *Popham* ſaid) was determined. But it was anſwered and reſolved by Sir *John Popham* Chief Juſtice, and the whole Court, that in the ſame Caſe put by the Plaintiffs Council, if one of the *Ceſtuy que vies* dieth, the eſtate is not determined, but *A.* ſhall have the land during the life of the ſurvivor of them: And ſo was it reſolved by all the Juſtices at *Michaelmas* Term holden at S. *Albans*, 5 & 6 *Eliz.* for *A.* hath an eſtate of Freehold by way of limitation of an eſtate during the life of two men, and by conſtruction of Law during the life of the ſurvivor of them: As if a man make a leaſe to two men during their lives, and they aſſign their eſtate over, now the aſſignee hath an eſtate for the life of the two men, and if one dieth, he ſhall have the land during the life of the ſurvivor of them. And theſe differences were taken and agreed in this Caſe. [b]

1. Between a limitation, as the Caſe before, and a Condition: For if a man leaſeth lands for 100 years if *A.* and *B.* ſo long live, in this Caſe if one dieth, the leaſe is ended, for the leaſe was conditional, and not determinable by limitation of eſtate; and there the life of man is collateral, as to the leaſe which is but a chattel.

The ſecond difference was between a limitation of an eſtate of Freehold for lives, and collateral determinations, as during the time that *C.* and *D.* ſhall be of the *Inner Temple*, or during the time that *C.* and *D.* ſhall be dwelling in *Norfolk*, or ſhall be Juſtices of Peace, or the like; for in theſe Caſes the failer of the one, ſhall determine the eſtate: But the ſaid Point moved for an Error in the Caſe at Bar was not expreſly reſolved, becauſe that another Error was moved, by which without queſtion the Judgment was reverſed, and that was, that when an Adminiſtrator hath Judgment and dieth, his Executors cannot ſue execution of the ſaid Judgment; for none ſhall have execution of that Judgment, but he who ſhall be ſubject to the payment of the debts of the firſt Inteſtate, and that the ſaid Executors are not, *vide* 26 *H.* 8. 7. And it is adjudged in 28 *H.* 8. reported by Serjeant *Bendloes*, That the Adminiſtrator, of an Executor ſhall not have execution of a Judgment given for the Executors. And the opinion of the Court was, That the ſaid Outlawry upon this Judgment was erroneous, and for this cauſe it was reverſed.

Mich. 36 & 37 Eliz. Rot. 1634. *in the Common Pleas.*

Henſtead's Caſe.

THE Caſe was ſuch; A woman Tenant for life of a houſe and certain land in *Shoram* in *Kent* made a leaſe at Will rendring rent, and afterwards took husband; And ſhe and her husband brought an Action of debt for the arrerages after the marriage; And if the leaſe at Will were determined by the intermarriage or not was the Queſtion. And it was agreed by the whole Court, That the Will was not determined by the intermarriage; for although that the woman by the taking of husband hath ſubmitted her ſelf to the will of her husband as her head; yet for as much as it may be prejudicial to the husband to have the leaſe determined (for then he ſhall loſe the rent to be paid at the next day after the marriage, and it cannot be in any manner prejudicial to the wife, if the leaſe continue, but rather to her benefit. And generally it may be great prejudice to husbands who entermarry with women who have Tenants at will for the loſing of their rents.) For theſe cauſes it was reſolved that without expreſs matter in fact by the husband after the marriage to determine the Will, it is not determined. The ſame Law, if a leaſe be made to a woman at will, and ſhe take husband, the Will doth continue notwithſtanding the marriage. [10]

So if a leaſe be made to three at Will rendring rent, and one dieth, it is no determination of the Will, and although that nothing can ſurvive, yet becauſe that every one is joyntly poſſeſſed of the whole, they ſhall be charged with the whole rent. And ſo the *Quære* in 10 *Eliz. Dier* 269. *b.* well reſolved: But in the Caſe at Bar after the marriage, the woman her ſelf cannot countermand or determine the leaſe at Will, no more then where ſhe and her husband make a leaſe at Will rendring rent during the coverture; or if a leaſe be made to them at Will: For ſhe hath ſubmitted her ſelf, and all her will to her husbands will; And ſo a feme covert may have a Tenant at will; and be Tenant at will, and yet ſhe her ſelf cannot countermand it, becauſe that ſhe by her intermarriage hath put her countermanding power in this Caſe (which doth not concern Freehold or Inheritance) into her husbands mouth. [b]

Alſo if the husband and wife leaſe lands at Will rendring rent, and the husband dieth, it is no countermand of the Will, but the leaſe doth continue. So it was ſaid, If two joyntenants make a leaſe at Will rendring rent, and one dieth, all doth ſurvive to the other, and the leſſee continueth poſſeſſion, the ſurvivor ſhall have an Action for the whole rent for the privity, and ſhall not be a countermand for one moity for the miſchief which may follow to leſſors, and ſo much the rather, becauſe that no miſchief or prejudice can come to the leſſees in ſuch Caſe.

Mich.

Mich. 39 & 40 Eliz. *which began Trin.* 38 Eliz. *in the Common Pleas.*

Ive's Case.

[11] IVe brought an Action of Waſt againſt *Sammes*, and counted of a leaſe made to the Defendant of the Mannor of *Tottenham* in the County of *Eſſex* for 30 years: The Defendant pleaded, *non dimiſit*; and by ſpecial verdict it was found, That the leſſor made a leaſe for 30 years of the ſaid Mannor, except all Woods and Underwoods growing and being upon the Mannor; and afterwards made a ſecond leaſe to the ſame leſſee of all the Woods and Underwoods growing and being upon the ſaid Mannor for the term of 62 years without impeachment of Waſt. And afterwards made a third leaſe of the ſaid Mannor to the ſaid leſſee for 30 years, without exception to begin at a day to come, *ſcil.* from the expiration of the the ſaid firſt leaſe for 30 years; and afterwards the term of 30 years expired, the leſſee cut trees, *Ive* in reverſion brought an Action of Waſt, and it was adjudged for the Plaintiff. And in this Caſe three Points were reſolved:

1. That by the exception of the Woods and Underwoods growing and being upon the Mannor, the ſoil it ſelf is excepted, 14 *H.* 8. 1. *acc'*, and by name of wood may be demanded and recovered, and that theſe words (growing or being) are words of abundance, for without them the Law will imply as much, *& expreſſio eorum quæ tacite inſunt nihil operatur*, for by the leaſe of the Wood and Underwood upon the Mannor, is implied that they are growing, and therefore to demiſe all Woods upon the Mannor, and all Woods growing upon the Mannor is all one. And ſo it was adjudged, *Trin.* 7 Eliz. in the *Kings Bench*, as it was there ſaid, *vide* 46 *E.* 3. 22. 28 *H.* 8. *Dier* 19. 33 *H.* 8. *Br. Reſervation* 39. [*b*] 7 *E.* 6. *Dier* 79, *&c.* and ſo a Queſtion in our Books well reſolved.

2. Notwithſtanding the ſaid exception, the Wood doth remain parcel of the Mannor, and by leaſe of the Mannor ſhall paſs, becauſe that the Freehold doth remain entire, and the leſſor doth remain tenant to every *Præcipe*, and there needeth not any exception, *vide Plow. Comm.* 140. *Fulmerſton's* Caſe; Otherwiſe of a leaſe for life with ſuch exception, *cauſa patet*. And therefore it was reſolved, That by the leaſe of the Mannor, the Woods ſhall paſs, *vide* 38 *H.* 6. 33. The King ſeiſed of a Mannor to which an advowſon was appendant leaſeth the Mannor, (without ſpeaking of the advowſon appendant) for life; and afterwards granted the reverſion, *Habendum una cum Advocatione*, the advowſon ſhall not paſs, for during of the life of the leſſee it was not appendant: Whereupon is to be obſerved, That if a man granteth an advowſon appendant for life, the reverſion is appendant to the Mannor: But when a man leaſes the Mannor for life, except the advowſon, the advowſon in poſſeſſion cannot be appendant to the reverſion of the Mannor expectant upon the eſtate for life: Otherwiſe upon an eſtate for years.

3. That by the acceptance of the future leaſe, to begin after divers years, the ſaid leaſe of the Wood for 62 years was preſently ſurrendred, becauſe that the leſſee by acceptance thereof hath affirmed the leſſor to have ability to make the new leaſe, which he hath not, if the firſt leaſe ſtand: As if leſſee for 20 years taketh a leaſe for three years, to begin 10 years after; it is a preſent ſurrender of the whole term, for it cannot be a ſurrender of the laſt 10 years, and remain for the firſt 10 years, and ſo to make a fraction of the term: Now he who hath a leaſe for 20 years can ſurrender the laſt 10 years by any expreſs ſurrender ſaving to him the firſt 10 years. *Vide* 14 *H.* 8. 15. 2 *Mar.* 112. 4 *Mar.* 142. 3 *Eliz.* 200. 10 *Eliz.* 272. 11 *Eliz.* 280. 35 *H.* 6. 57. 21 *H.* 7. 6. 31 *Aſſ. p.* 26. 32 *H.* 8. 46. 37 *H.* 6. 17. 14 *H.* 7. 37. 21 *H.* 7. 12, 40. 13 *R.* 2. *Dower.* 40 *E.* 3. 24, 43. 41 *E.* 3. 13. 44 *E.* 3. 25, 26. 45 *E.* 3. 13.

Trin. 41 Eliz. *which began* 40 Eliz. Rot. 747. *in the Common Pleas.*

Saunder's Case.

[12] SAunders brought an Action of Waſt againſt *Manwood* aſſignee of the term in the tenement for Waſt done for digging of Sea-coals; The Defendant pleaded in Bar, That the firſt leſſee who opened the Mine, granted to him all his intereſt in the land *cum omnibus profic' (Except' & ſemper reſervat' ſibi & hæred' ſuis tot' benefic. Miner', Anglice* the Coal-Mine) *in præd. parcell. terr. ac omnibus maremiis*: And averred that the ſaid Mine at the time of the aſſignment, and yet, is open. And in this Caſe five Points were reſolved. And upon great deliberation Judgment was given for the Plaintiff.

1. If a man hath land in part of which there is a Coal-Mine open, and he leaſeth the land for life, or for years, the leſſee may digg in it: For in as much as the Mine is open at the time, &c. and he leaſeth

leaseth all the land, it shall be intended that his intent is as general as his lease is; *scil.* that he shall take the profit of all the land, and by consequence of the Mine in it, *vide* 17 E. 3. *John de Hull*'s Case *acc'*, and so the doubt in *F. N. B.* 149. *C.* explained.

2. If the Mine were not open but included within the bowels of the earth at the time of the lease made, in such Case by leasing of the land, the lessee cannot make new Mines, for that shall be wast, *F. N. B.* 59. & 22 *H.* 6. 18. *acc'*.

3. If a man hath Mines hidden within his land, and leaseth his land, and all Mines therein, there the lessee may digg for them, for *quando aliquis aliquid concedit, concedere videtur & id sine quo res ipsa esse non potest*, and therewith agreeth 9 *E.* 4. 8. where it is said, That if a man leaseth his land to another, and in the same there is a Mine (which is to be intended of a hidden Mine) he cannot digg for it, but if he leaseth his land and all Mines in it, then although that the Mine be hidden, the lessee may digg for them; and by consequence the digging of the Mine in the principal Case was wast in the first lessee. [b]

4. It was resolved, That although the Mine was first opened by the first lessee, that if his grantee dig in it, it is wast in him.

5. It was resolved, that the Exception was void, for first by the Exception of the profits of the Mine, or of the Mine it self, the land is not excepted; and then it followeth, that he hath excepted that which he could not have taken: As if a man assigneth his term, and excepteth the timber-trees upon the land, or the gravel, or clay within the land, it is void, for he cannot except that thing which doth not belong to him by the Law. And although that it was said, That for as much as the lessee first opened the Mine, and so committed wast, and so had *quodam modo* appropriate the same to himself, and by his wrong hath subjected himself to lose the place wasted, and treble damages, it is reason that he may keep it to himself, and so continue punishable for the wast of which he was the first author; But notwithstanding that, it was resolved as above; for his wrong which he committeth cannot devest the intereſt in the Mine, being in the land demised to him out of the lessor, and therefore he cannot except that to himself which belongeth to another: And it was adjudged *Pasch.* 28 *Eliz.* in the *Common Pleas*, *Rot.* 820. between *Foster* and *Miles* Plaintiffs, and *Spencer* and *Borde* Defendants, That where the lessee for years assigneth over his term except the timber-trees, and afterwards the trees were felled, That the Action of wast was maintenable against the assignee, for the Exception was utterly void for the causes aforesaid, *quod nota bene.* And in this Case it was said, If lessee for years deviseth his term to another, and maketh his Executors and dieth, the Executors do wast, and afterwards assent to the devise, in this Case although that between the Executors and the devisee it hath relation, and the devisee is in by the devisor, yet an Action of wast shall be maintenable against the Executors in the *tenuit.* So if grantee of a term upon Condition doth wast, and afterwards the grantor entreth for the Condition broken, the Action of wast shall be maintenable against the grantee in the *tenuit*, 30 *E.* 3. 16. *acc'*.

Mich. 41 & 42 Eliz.

Rosse's Case.

BEtween *Peter Rosse* and *Aldwick* in an *Ejectione firmæ*, which began *Pasch.* 37 *Eliz. Rot.* 449. the Case was such; A lease is is made to *A.* and his assignees, *Habendum* to him during his life, and the lives of *B.* and *C.* and if this limitation during the life of *B.* and *C.* were void or not was the Question. And it was adjudged, That the limitation was good; for where it was objected, That when a man hath two estates in him, the greater shall drown the less, and that an estate for his own life is higher then for the life of another, and therefore that estate for his own life, and for the lives of others cannot stand together. To that it was answered and resolved, That in the Case at Bar, the lessee had but one estate, which hath this limitation, *scil.* during his life, and the lives of the two others, and he hath but one Freehold, and therefore there cannot be any drowning of estates in the Case, but he hath an estate of Freehold to continue during these three lives, and the survivor of them. [13]

Mich. 42 & 43 Eliz. *in the Kings Bench.*

The Countess of *Shrewsburies* Case.

THE Countess of *Shrewsbury* brought an Action upon the Case against *Richard Crompton* a Lawyer of the *Temple*, and declared, That she leased to him a house at Will, *& quod ille tam negligenter & improvide custodivit ignem suum, quod domus illa combusta fuit:* To which the Defendant pleaded Not Guilty, [b]

Guilty, and was found guilty: And it was adjudged that for this permissive Waste no Action lay, against the opinion of *Brook* in the abridgement of the Case of 48 *E.* 3. 25. *Waste* 52. And the reason of the Judgment was, because at the Common Law no Action of Waste did lie for voluntary or permissive Waste against lessee for life or years, because that the lessee hath interest in the land by the act of the lessor, and it was his folly to make such lease, and not restrain him by Covenant, or Condition, or otherwise, that he should not do Waste. So and for the same reason, a Tenant at Will shall not be punished for Waste. But the opinion of *Littleton* is good Law, *fol.* 15. If lessee at Will commit voluntary Waste, *scil.* in abatement of the houses, or in cutting of the Woods, there a general Action of Trespass lieth against him. For as it is said in 2 & 3 *Phil. & Mar. Dier* 122. *b.* when Tenant at will taketh upon him to do such things which none can do but the owner of the land, these amount to the determination of the Will, and of his possession, and the lessor shall have a general Action of Trespass without any entry: And there 15 *E.* 4. 20. *b.* is cited, That if a Bailee of goods, as of a horse, &c. kill them, the Bailor shall have a general Action of Trespass, for by the killing the privity was determined. But it was agreed that in some Cases, when there is a confidence reposed in the party, the Action upon the Case will lie
[14] for negligence, although that the Defendant cometh to the possession of them by the act of the Plaintiff, As 12 *E.* 4. 13. where a man delivereth a horse to another to keep safe, the Defendant *equum illum non negligenter custodivit, quod ob defectum bonæ custodiæ interiit*, the Action of the Case lieth for this breach of the trust. So 2 *H.* 7. 11. if my Shepherd, which I trust with my sheep, and by his negligence they be drowned, or otherwise perish, an Action upon the Case lieth: But in the Case at Bar it was a lease at Will made to the Defendant, and no consideration reposed in him; By which it was awarded, that the Plaintiff take nothing by his Bill.

Mich. 43 & 44 Eliz. *in the High Court of Parliament.*

The Case of Ecclesiastical Persons.

AT a Parliament holden the same Term upon consideration of a Bill for confirmation of Conveyances made by the Subjects to the Queen, and of Letters Patents made by the Queen to Subjects. It was resolved by the Chief Justices, *Popham* and *Anderson*, and divers other Justices assistant to the Lords of Parliament in the Upper House, That leases made to the Queen by Colledges, Deans and Chapters, Wardens of Hospitals, or any other having Spiritual or Ecclesiastical Livings, against the provision of the Act of 13 *Eliz. cap.* 10. are restrained by the same Act, as well as leases made to common persons.

1. Because the Ecclesiastical persons are disabled by the Act to make any gift, grant, feoffment, conveyance, or estate, but only in the same form as the Statute prescribeth; And if they are disabled to make
[*b*] estates, then the Queen cannot take any estate of them, which is not warranted by the said Act. For although the Queen by the Common Law hath ability to take it, yet for as much as the Parliament hath disabled them to make estates, the estates made to the Queen against the Act are void.

2. The Statute of 1 *Eliz.* which restraineth Bishops to make estates, hath special provision, that they may make estates to the Queen; which proveth, that if such provision had not been made to the Queen, for as much as the Act doth disable Bishops to make estates, the Queen cannot take estate from them against the Provision of the Act, but no such provision is in the said Act of 13 *Eliz.*

3. In divers Cases the King is bound by Act of Parliament, although he be not named in it, nor bound by expres words. And therefore all Statutes which are made to suppress wrong, or to take away fraud, or to prevent the decay of Religion, shall bind the King although he be not named: For Religion, Justice, and Truth are the Supporters of the Crowns and Diadems of Kings. And therefore it is agreed in 35 *H.* 6. 60. that the King shall be bound by the Statute of *West.* 2. *cap.* 5. which maketh provisions against torcious Usurpations, although that the King be not named in the Act. So the Lord *Barkley*'s Case reported by Master *Plowden* it is adjudged, That if a gift in tail be made to the King, he cannot alien to defraud him in the reversion, or his issue, but is bound by the Statute of *West.* 2. *De donis conditionalibus.* And the said Act of 1 *Eliz.* proveth, That Acts which restrain Ecclesiastical persons to wast their possessions, which were given to maintain the Service of God, shall bind the King, if special provision had not been made to the contrary by the same Act; *Et summa ratio est quæ pro religione facit.* Sir *Thomas Egerton* Lord Keeper of the Great Seal, agreed in opinion with the Justices aforesaid in the principal Case: Note Reader, the said Act of 13 *Eliz.* hath been construed beneficially, to prevent all intentions and evasions against the true intents of the makers of the Act. And therefore it was holden *Pasch.* 14 *Eliz.* in the *Common Pleas* in *Eitrne*'s Case, That if a Writ of Annuity be brought against a Parson or a Vicar upon a feigned prescription, or by a grant by him the Patron and Ordinary, supposed to be made before the Statute; and he prayeth in Aid of the Patron and Ordinary, and loseth by Action tried, and all the same is feigned to make an evasion out of this Act, that this invention is taken within the equity of it; for although the annuity charge the Parson or Vicar and not the possessions,

ſions, yet it is within the miſchief, *ſcil.* impoveriſhing of the ſucceſſor, cauſe of Dilapidations, and decay of ſpiritual Livings, and Hoſpitals, which are the miſchiefs mentioned in the preamble. And note this word (ſuffered) in the Act was well obſerved.

It was adjudged in the *Common Pleas*, *Mich.* 37 & 38 *Eliz.* between the Dean and Chapter of *Hereford*, and the Biſhop of *Hereford* and *Ballard*, That the grant of the next avoidance of a Benefice by the Dean and Chapter was within the purview of this Act; So it was reſolved there, If a Dean and Chapter grant a rent charge out of their poſſeſſions, it is reſtrained by the equity of the Act; and yet the rent is not any part of their poſſeſſions within the words of Act. It hath been holden, That if an Archdeacon maketh a leaſe for three lives according to this Act, and the leſſees made a leaſe for 100 years, and the Archbiſhop, Biſhop, Dean and Chapter confirmed it, yet it ſhould not bind the ſucceſſor; for if ſuch confirmation ſhould not be ſaid a conveyance within this Act, the Statute would be to little or no purpoſe, and the good intent and purview of the Act ſhall be defeated and defrauded.

And it was holden *Trinit.* 30 *Eliz.* in a Caſe depending by *Engliſh* Bill in the Exchequer-Chamber, between *Hodges* Plaintiff and *Newcomen* Defendant, by Sir *Roger Manwood* Chief Baron, and all the Barons of the Exchequer, That where the Parſon of *Weſton* in the County of *Glouceſter* 9 *Eliz.* demiſed his Rectory to *William Hodges* then Patron of the ſame Rectory for 50 years, who 14 *Eliz.* by Deed aſſigned the ſame unto Sir *John Throgkmorton*, the Biſhop confirmed this leaſe 17 *Eliz.* in the life of the leſſor, that the ſaid Confirmations were good. And in this Caſe two Points were reſolved:

1. That for as much as the ſaid leaſe was made before the Statute of 13 *Eliz.* and ſo not reſtrained by the ſaid Act, the confirmations made after the ſaid Act to perfect the ſaid leaſe, were not within the purview or intention of the Act.

2. It was reſolved, that the grant made by the Patron of the ſaid leaſe, did import in it ſelf as well a grant of the term, as a confirmation of the ſame term: And ſo one deed of one thing by one perſon, to one perſon and at one time ſhall enure to two ſeveral purpoſes, *ſcil.* to a grant of the intereſt as leſſee, and to a confirmation of the ſame intereſt as Patron. As if Tenant for life granteth a rent charge to him in the reverſion in fee, and he by deed granteth the ſame over to another and to his heirs, that is a good grant and confirmation alſo to make the rent good for ever. So if a diſſeiſor maketh a leaſe for life, the remainder to the diſſeiſee, and the diſſeiſee granteth the remainder over, it is a good grant and confirmation alſo.

And in the principal Caſe the Lords of the Parliament after the ſaid Reſolution being informed, that divers Deans and Chapters, Colledges, &c. had made leaſes to the Queen, intending that the Queen was not bound by the ſaid Act of 13 *Eliz.* cauſed a clauſe to be added in the firſt Branch of the Act of Confirmation that it ſhould not extend to make any leaſe, grant, &c. good to the Queen by any Eccleſiaſtical [b] perſon, who had not power by the Laws and Statutes of the Realm ſo to do, which is more then was in the Act of Confirmations in *anno* 18 *Eliz.* which was made to manifeſt the matter to the Lay-people; for it was holden by the ſaid Juſtices, That the general words of the ſaid Act of 18 *Eliz.* hath not enabled ſuch Eccleſiaſtical perſons to make leaſes or eſtates to the Queen, which by the ſaid Act of 13 *Eliz.* were upon good and important conſiderations diſabled. *Vide* 17 E. 3. 40. & 21 E. 3. 46. The King being the Head of the Commonwealth, cannot be an inſtrument to defeat the purview of an Act of Parliament made *pro bono publico.*

Covenants, Agreements, &c. concerning Leaſes, Aſſurances, &c.

Paſch. 25 Eliz. *in the Kings Bench.*

Spencer's Caſe.

[16] *Spencer* and his wife brought an Action of Covenant againſt *Clark*, aſſignee to *J.* aſſignee to *S.* and the Caſe was ſuch: *Spencer* and his wife by deed indented demiſed a houſe and certain land (in the right of the wife) to *S.* for term of 21 years, by which Indenture *S.* covenanted for him his Executors and Adminiſtrators with the Plaintiffs, that he, his Executors, Adminiſtrators, or Aſſignees, would build a Brick Wall upon part of the land demiſed, &c. *S.* aſſigned over his term to *J.* and *J.* to the Defendant; and for not making of the Brick Wall the Plaintiffs brought the Action of Covenant againſt the Defendant as Aſſignee: And after many arguments at the Bar, the Caſe was excellently argued and debated by the Juſtices at the Bench: And in this Caſe theſe Points were reſolved by Sir *Chriſtopher Wray* Chief Juſtice, Sir *Thomas Gawdy*, and the whole Court. And many differences taken and agreed concerning expreſs Covenants, and Covenants in Law, and which of them run with the land, and which of them are collateral, and do not go with the land, and where the aſſignee ſhall be bound without naming of him, and where not; and where he ſhall not be bound although he be expreſly named, and where not.

1. When the Covenant doth extend to a thing *in eſſe*, parcel of the demiſe, the thing to be done by force of the Covenant is *quodammodo* annexed and appurtenant to the thing demiſed, and ſhall go with the land, and ſhall bind the aſſignee although he be not bounden by expreſs words: But when

the covenant doth extend to a thing which is not in being at the time of the demiſe made, the ſame cannot be appurtenant or annexed to a thing which hath no being: As if the leſſee covenanteth to repair the houſes demiſed to him during the term, the ſame is parcel of the contract, and extendeth to the ſupport of the thing demiſed, and therefore is *quodammodo* annexed and appurtenant to houſes, and ſhall bind the aſſignee although he be not bound expreſly by the Covenant: But in the Caſe at Bar, the Covenant doth concern a thing which was not *in eſſe* at the time of the demiſe made, but to be newly built after, and therefore ſhall bind the Covenantor, his Executors, or Adminiſtrators, and not the aſſignee, for the Law will not annex the Covenant to a thing which hath no being.

[b]

2. It was reſolved that in this Caſe, If the leſſee had covenanted for him and his aſſignees, that they would make a new wall upon any part of the thing demiſed, that for as much as it is to be done upon the land demiſed, that it ſhall bind the aſſignee; for although that the Covenant doth extend to a thing to be newly made, yet it is to be made upon the thing demiſed, and the aſſignee is to take the benefit of it, and therefore ſhall bind the aſſignee by expreſs words. So on the other ſide, If a warranty be made to one his heirs and aſſignees, by expreſs words, the aſſignee ſhall take benefit of it, and ſhall have a *Warrantia Chartæ*, *F. N. B.* 135. *&* 9 *E.* 2. *Garr' de Charters* 30. 36 *E.* 3. *Garr.* 1. 4 *H.* 8. *Dier* 1. But although the Covenant be for him and his aſſignees, yet if the thing to be done be meer collateral to the land, and doth not touch or concern the thing demiſed in any ſort, there the aſſignee ſhall not be charged. As if the leſſee covenanteth for him and his aſſignees to build a houſe upon the land of the leſſor which is no parcel of the land demiſed, or to pay ſome collateral ſum to the leſſor, or to a ſtranger, it ſhall not bind the aſſignee, becauſe that it is meer collateral, and in no manner touches or concerns the thing that was demiſed, or that is aſſigned over; and therefore in ſuch Caſe, the aſſignee of the thing demiſed cannot be charged with it, no more then any other ſtranger.

3. It was reſolved, If a man leaſe ſheep or other flock of cattel, or any other perſonal goods for any time, and the leſſee covenant for him and his aſſignees at the times end to deliver the like cattel or goods as well as the things letten were, or ſuch price for them; and the leſſee aſſign the cattel over, this Covenant ſhall bind the aſſignee, for it is but a perſonal contract, and wanteth ſuch privity as is between the leſſor and leſſee and his aſſignees of the land in reſpect of the reverſion. But in the Caſe of leaſe of perſonal goods there is not any privity, nor any reverſion but meerly a thing in action in the perſonalty, which cannot bind any but the Covenantor, his Executors, or Adminiſtrators, who repreſent him. The ſame Law, If a man leaſe a houſe and land for years, with a ſtock of money rendring rent, and the leſſee covenanteth for him, his Executors, Adminiſtrators, and Aſſignees, to deliver the ſtock or ſum of money at the end of the term, yet the Aſſignee ſhall not be charged with this covenant, for although that the rent reſerved was increaſed in reſpect of the ſtock or ſum, yet the rent did not iſſue out of the ſtock or ſum, but out of the land only; and therefore as to the ſtock or ſum the Covenant is perſonal, and ſhall bind the Covenantor, his Executors and Adminiſtrators, and not his aſſignee: And it is not certain that the ſtock or ſum ſhall come to the aſſignees hands, for it may be waſted, or otherwiſe conſumed by the leſſee, and therefore the Law will not determine at the time of the leaſe made that ſuch Covenant ſhall bind the aſſignee.

[17]

4. It was reſolved, That if a man make a feoffment by this word *Dedi*, which implieth a warranty the aſſignee of the feoffee ſhall not vouch: But if a man maketh a leaſe for years by this word *Conceſſi* or *Demiſi*, which implieth a Covenant, if the aſſignee of the leſſee be evicted, he ſhall have a *Writ* of Covenant; for the leſſee and his aſſignee hath the yearly profits of the land which ſhall grow by his labour and induſtry for annual rent, and therefore it is reaſon that when he hath ſpent his labour, and imployed his coſt upon the land, and be evicted (whereby he loſeth all) that he taketh ſuch benefit of the demiſe and grant, as the firſt leſſee might, and the leſſor hath no other prejudice then his eſpecial contract, which the firſt leſſee hath bound him to.

5. Tenant by the Curteſie, or any other who cometh in in the Poſt ſhall not vouch, (which is in lieu of an Action.) But if a grant be made to a woman who taketh husband, and the woman dieth, the husband ſhall vouch by force of this word (grant) although he cometh to it by act in Law; So if a man demiſe or grant lands to a woman for years, and the leſſor covenanteth with the leſſee to repair the houſe during the term, the woman taketh husband and dieth, the husband ſhall have an Action of Covenant as well upon the Covenant in Law upon theſe words (demiſe and grant) as upon expreſs Covenant. The ſame Law is of tenant by Statute Merchant, or Statute Staple, or *Elegit* of a term, and he to whom a leaſe for years is ſold by force of any Execution, ſhall have an Action of Covenant in ſuch Caſe as a thing annexed to the land, although they come to the term by Act in Law; As if a man grant to leſſee for years, that he ſhall have ſo many eſtovers, as will ſerve to repair his houſe, or that he ſhall burn in his houſe, or the like, during the term, it is as appurtenant to the land, and ſhall go with it as a thing appurtenant in whoſe hands ſoever it cometh.

[b]

6. If leſſee for years covenanteth to repair the houſes during the term, it ſhall bind all others as a thing which is appurtenant, and goeth with the land in whoſe hands ſoever the land cometh, as well thoſe who come to it by act of Law, as by the act of the party, for all is one having regard to the leſſor. And if the Law ſhould not be ſuch, great miſchief may grow to him; and reaſon requireth, that thoſe who take benefit of ſuch Covenant when the leſſor maketh it with the leſſee, that on the other ſide he ſhould be bound by the like Covenants when the leſſee maketh it with the leſſor.

7. It was reſolved, That the aſſignee of the aſſignee ſhall have an Action of Covenant. So of the Executors of the aſſignee of the aſſignee; So of aſſignees of Executors or Adminiſtrators of every aſſignee, for all are compriſed within this word (aſſignees) for the ſame right which was in the teſtator, or inteſtate, ſhall go to his Executors or Adminiſtrators: As if a man maketh a warranty to one, his heirs and aſſignees, the aſſignee of the aſſignee ſhall vouch, and ſo ſhall the heirs of the aſſignee:

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The ſame Law of the aſſignee of the heirs of the feoffee, and of every aſſignee. So that every one of them ſhall have a Writ of *Warrantia Chartæ*. *Vide* 14 E. 3. *Garr.* 33. 38 E. 3. 21. 36 E. 3. *Garr.* 1. 13 E. 1. *Garr.* 93. 19 E. 2. *Garr.* 85, *&c.* For the ſame right which was in the anceſtor ſhall deſcend to the heir in ſuch Caſe without any expreſs words of heirs of the aſſignees.

Obſerve Reader your old Books, for they are the fountains out of which theſe Reſolutions iſſue, but perhaps by theſe differences the fountains themſelves ſhall be more clear and profitable to thoſe who will make uſe of them. For example in 42 E. 3. 3. the Caſe is; Grandfather, father, and two ſons, the Grandfather was ſeiſed of the Mannor of *D.* whereof a Chappel was parcel, a Prior with the aſſent of his Covent by deed covenanted for him and his ſucceſſors, with the Grandfather and his heirs, that he and his Covent would ſing all the week in his Chappel, parcel of the ſaid Mannor, for the Lords of the ſaid Mannor and his ſervants; The Grandfather did enfeoff one of the Mannor in fee, who gave the ſame to the younger ſon and his wife in tail; And it was adjudged, That the tenants in tail, as Terre-tenants (for the eldeſt brother was heir) ſhould have an Action of Covenant againſt the Prior, for the Covenant is to do a thing which is annexed to the Chappel, which is within his Mannor, and ſo annexed to the Mannor, as it is there ſaid. And *Finchden* relateth, That he hath ſeen it adjudged, that two [18] Coparceners made partition of land, and one did covenant with the other to acquit him of ſuit which was due, and that Coparcener to whom the covenant was made did alien, and the ſuit was behind; And the feoffee brought a Writ of Covenant againſt the Coparcener to acquit him of the ſuit; and the Writ was maintenable, notwithſtanding that he was a ſtranger to the Covenant, becauſe the acquittal fell upon the land: But if ſuch Covenant were made to ſay Divine Service in the Chappel of another, there the aſſignee ſhall not have an Action of Covenant, for the Covenant in ſuch Caſe cannot be annexed to the Chappel, becauſe that the Chappel doth not belong to the Covenantee, as it is adjudged in 2 *H.* 4. 6. But there it is agreed, that if the Covenant had been with the Lord of the Mannor of *D.* and his heirs, Lords of the Mannor of *D.* and Inhabitants therein, the Covenant ſhall be annexed to the Mannor, and there the Terre-tenant ſhall have the Action of Covenant without privity of blood. *Vide* 29 E. 3. 48. & 30 E. 3. 14. *Simkin Simeon*'s Caſe, where the Caſe was; That the Lady *Bardolfe* by Deed granted a Ward to a woman who took husband *Simkin Simeon*, againſt whom the Queen brought a Writ of right of Ward, and they vouched the Lady *Bardolfe*, and afterwards the wife died, by which the chattel real ſurvived to the husband (and reſolved the Writ ſhould not abate) the vouchee appeared, and ſaid, What have you to bind me to warranty? The husband ſhewed, how that the Lady granted to his wife before marriage the ſaid Ward; The vouchee demanded Judgment for two cauſes:

1. Becauſe that no word of warranty was in the deed; as to that it was adjudged, that this word (grant) in this Caſe of grant of a Ward (being a chattel real) did import in it ſelf a warranty.

2. Becauſe the husband was not aſſignee to the wife, nor privy. As to that it was adjudged, That he ſhould vouch, for this warranty implied in this word (grant) is in Caſe of a chattel real ſo annexed to the land, that the husband who cometh to it by act in Law, and not as aſſignee, ſhall take benefit of it. But it was reſolved by *Wray* Chief Juſtice, and the whole Court, that this word (*conceſſi* or *demiſi*) in Caſe of Freehold or Inheritance doth not import any warranty, 11 *H.* 6. 41. *acc. vide* 6 *H.* 4. 12 *H.* 4. 5. 1 *H.* 5. 2. 25 *H.* 8. *Covenant Br.* 32. 28 *H.* 8. *Dier* 28. 48 E. 3. 22. *F.N.B.* 145. *C.* 146. & 181. 9 *Eliz. Dier* 257. 26 *H.* 8. 3. 5 *H.* 7. 18. 32 *H.* 6. 32. 22 *H.* 6. 51. 18 *H.* 3. *Covenant* 30. *Old N. B. Covenant* 46. 38 E. 3. 24. See the Statute of 32 *H.* 8. *cap.* 24. which Act was reſolved to extend to Covenants which touch or concern the thing demiſed, and not to collateral Covenants.

Mich. 29 & 30 Eliz. *Writ of Error in the Exchequer Chamber.*

Slingsbie's Caſe.

SLingsbie and *Frances* his wife brought an Action of Covenant in the *Kings Bench* againſt *Roger Beckwith*, and declared upon an Indenture Tripartite between the Defendant *Roger Beckwith* of the firſt part, *William Vaviſour*, *Frances Slingsbie*, and *Elizabeth* ſiſter of the ſaid *Roger* of the ſecond part, and *George Harvy*, and the ſaid *Frances* (then his wife) one other of the ſiſters of the ſaid *Roger* of the third part. And declared, That the ſaid *Roger Beckwith* the Defendant by the ſaid Indenture, *conveniſſet, promiſiſſet, & conceſſiſſet ad, & cum dictis* Will. & Franciſco, *& ad, & cum præd.* Georgio & Franciſca *uxore ejus, & aſſignat' ſuis, & ad, & cum quolibet, & qualibet eorum, quod præd.* Rogerus *ad ſigillationem & deliberationem ejuſdem Indentur' fuit legitime & ſolus ſeiſitus de Rectoria de* Aldingfleet *in Com' Eborum:* And upon this Covenant iſſue was joyned, and the *Venire facias* was *de vicenet' Caſtri Eborum*, and the iſſue by *Niſi prius* was tried for the Plaintiff, and damages aſſeſſed, upon which Judgment was given in the *Kings Bench*. And now in a Writ of Error in the *Exchequer Chamber* before *Anderſon* Chief Juſtice of the *Common Pleas*, *Manwood* Chief Baron, *Windham*, *Periam*, and *Rodes*, Juſtices of the *Common Pleas*, and *Gent* and *Clark* Barons of the *Exchequer*, and of the Coif, It was reſolved that the ſaid Judgment was erroneous; for it appeareth by the Plaintiffs own ſhewing in his Declaration, that the Plaintiff only cannot maintain an Action of Covenant, but the other Covenantees ought to have joyned in the Action with them, notwithſtanding theſe words (*& ad, & cum quolibet & qualibet eorum*;) And as to theſe words this difference was [b]

agreed: When it appeareth by the Declaration, that every of the Covenantees hath, or is to have several interest or estate, there, when the Covenant is made with the Covenantees, *& cum quolibet eorum*,
[19] these words, *cum quolibet eorum*, maketh the Covenant several in respect of their several interests. As if a man by Indenture demiseth to *A.* black acre, to *B.* white acre, to *C.* green acre, and covenanteth with them, and *quolibet eorum*, that he is lawful owner of all the said acres, &c. in this Case in respect of the said several interests by the words, *& cum quolibet eorum*, the covenant in the deed is several: But if he demiseth to them the acres joyntly, then these words *cum quolibet eorum* are void, for a man by his covenant (if not in respect of several interests) cannot make it first joynt, and then to make it several by the same or the like words, *cum quolibet eorum*: And although that sundry persons may bind themselves, *& quemlibet eorum*, and so the Obligation shall be joynt and several at the election of the obligee; yet a man cannot bind himself to three, and to each of them to make it joynt or several at the election of several persons for one and the same cause; for the Court shall be in doubt for which of them to give Judgment, which the Law will not suffer, as it is holden in 3 *H.* 6. 44. There it appeareth that one brought a Replevin against two persons of an Ox, who made several avowries, each by himself in his own right; and there by advice of all the Justices, both the avowries did abate for the inconveniency, that if both the issues shall be found for the avowants, the Court cannot give Judgment to them severally for one and the same thing. Also the Covenantor in the Case at Bar shall be divers times charged for one and the same thing; and therefore the said words *& cum quolibet eorum*, are in such Case but words of amplification and abundance, and cannot sever the joynt cause of Action. And it was also resolved, That an interest cannot be granted joyntly and severally: As if a man granteth *proximam advocationem*, or maketh a lease for years of lands to two joyntly and severally, these words severally are void, and they are joyntenants; So if a man make a feoffment in fee by deed to three, and warrant the land to them, *& cuilibet eorum*, the warranty is joynt and not several: But in such Case if their estates were several, their warranty shall be several according: But a power, or authority, as to make livery, or to sell, &c. may be joynt and several, for there they have not any interest, or Action, but are as servants to others. *Vide* 16 *Eliz. Dier* 337, 338. *acc.* Sir *Anthony Cooke*'s Case, 6 *E.* 2. *Covenant Br.* 49. 12 *H.* 4. 18. *in Detinue*. And for this Error the Judgment was reversed. Another Error was assigned concerning the *Visne*; but as to that the Court did not deliver any opinion.

Pasch. 30 Eliz.

Rosewel's Case.

[b] BEtween *Moore* and *Rosewel* it was adjudged, That if a man bargaineth and selleth lands in fee, and covenanteth to make further assurance to the Bargainee as Council shall devise; In this Case the Bargainee himself although he be learned in the Law cannot devise the assurance, but some of his Council ought to devise it; And therewith agreeth the Books in 6 *H.* 7. *&* 11 *H.* 7. 1. for if the party himself may devise it, then it shall be no plea to say, *quod consilium non dedit advisamentum*. *Vide* 26 *H.* 8.

Pasch. 35 Eliz. *in the Kings Bench.*

Higginbottom's Case.

John Stafford Esquire brought an Action upon the Case, which began in the *Kings Bench*, *Hill.* 34 *Eliz. Rot.* 647. against *Ralph Higginbottom* Parson of *Littleton* upon *Severn*, because the Defendant upon good consideration mentioned in the Declaration, did promise that he would make a good and lawful estate and assurance in Law of the said Rectory of *Littleton* aforesaid to the Plaintiff discharged of all former bargains, sales, &c. made by the Defendant during the joynt lives of the Plaintiff and Defendant, as by Council learned of the Plaintiff upon request made, should be advised: And alledged that
[20] one *Maurice Tovy* was of the Plaintiffs learned Council, and gave his advice to the Plaintiff, That the Defendant should make a lease by Indenture to the Plaintiff of the said Rectory with the appurtenances, to have and to hold during their joynt lives, &c. and that the Plaintiff gave notice to the Defendant of the said advice, and requested him to perform it, which the Defendant did deny to do, &c. The Defendant pleaded *Non Assumpsit*, and it was found for the Plaintiff. And it was moved in arrest of Judgment, that this advice of the Plaintiffs Council ought to be given immediately by the Counsellor himself to the Defendant, and not to the Plaintiff, and he to give notice as above. And the Defendants Council did rely upon the Book of 11 *H.* 7. 21. for there it is holden by all the Justices,

Juſtices, that the Council ought to be given to him who ought to make the eſtate, and not to him with whom he is of Council: And they ſtood much upon the words of the Book; But upon conſideration had of the Book, and the reſidue of the ſaid Caſe, afterwards in the ſame year *fol.* 23. *b.* it appeareth plainly; and ſo it was reſolved, That the intent of the Judges was not, that the counſel cannot be given or ſignified to the party who ſhould make the eſtate, but only to the Covenantor, becauſe it is matter whereof by intendment he who ſhould make the eſtate (without notice given) cannot have knowledge. And it was reſolved, That it is fitter that the Councellor give his counſel to him with whom he is of counſel, and he to give notice thereof to him who ſhould make the eſtate. And although he hath two or three of his counſel, yet none of them may give advice to him who is to make the eſtate without requeſt, for peradventure he would not uſe their advice in ſuch Caſe; And it is reaſon that the counſel be given to the party with whom he is of counſel, for peradventure he may miſlike it, and would not have it given. 2. It is leſs miſchievous; for if the party himſelf notifie other advice to him who ſhould make the eſtate then the Counſellor gave, if the Covenantor knoweth it, he may refuſe; if he do not know it, and the Counſellor notified it is according to his covenant and agreement, if he perform it he is excuſed; and ſo if it be not according to his covenant and agreement he may refuſe it, and ſo no miſchief to the party; But if the Counſellor giveth advice to him who ſhould make the eſtate, he may be ignorant, whether he be his Counſel or not. And afterwards Judgment was given for the Plaintiff for the cauſes before alledged, *vide* 8 E. 4. 1. & 2. 6 H. 7. 4. 14 H. 8. 21. *b.*

Hill. 38 Eliz. *in the Kings Bench.*

Stile's Caſe.

BEtween *Frampton* and *Stiles* in debt upon an Obligation; The Defendant ſaid, that it was upon condition to perform Covenants in an Indenture, *hic in Curia prolat'*, and in truth the deed was not indented, but written, This Indenture: And it was adjudged, that it was no Indenture, although it was in two parts; for the words of a deed cannot make it indented: But to the making of an Indenture there ought to be a manual act of indenting of the parchment, or paper; And becauſe the Defendant did not ſhew any Indenture, the Plaintiff had Judgment. [b]

Paſch. 38 Eliz. *in the Kings Bench,* Rot. 42. *in Error.*

Sir *Anthony Mayne's* Caſe.

THE Caſe in effect was, That Sir *Anthony Mayne* did leaſe certain lands to *Scot* for 21 years by Indenture, and covenanted that at any time during the life of *Scot* upon ſurrender of his leaſe, &c. he would make a new leaſe during the reſidue of the years, and bound himſelf to perform the Covenants, &c. And now in Debt brought upon the Obligation by *Scot* againſt Sir *Anthony Mayne*, he pleaded that *Scot* did not ſurrender, &c. To which *Scot* replied, that after the ſaid leaſe Sir *Anthony* had accepted a fine *ſur conuſans de droit come ceo*, &c. and by the ſame fine granted and rendred the land to the conuſee for 80 years: Upon which the Defendant did demur in Law. And it was adjudged for the Plaintiff. And in this Caſe three Points were reſolved: [21]

1. That Sir *Anthony Mayne* had broke his Covenant without any ſurrender made, for by the ſaid fine levied by him for 80 years, he had diſabled himſelf either to take a ſurrender, or to make a new leaſe; and the Law will not enforce any one to do a thing which ſhall be vain and frivolous: *Lex neminem cogit ad vana ſeu inutilia peragenda:* But it ſhould be vain to compel him to make a ſurrender to him who cannot take it; and although the leſſee in this Caſe by the words of the Indenture be to do the firſt act, *ſcil.* to make the ſurrender, yet when the leſſor hath diſabled himſelf not only to take the ſurrender, but alſo to make a new leaſe according to the Covenant, for this cauſe the leſſors Covenant is broken without any ſurrender made, *vide* 32 E. 3. *Barre* 264. & 21 E. 4. 55. If you are bound to enfeoff me of the Manor of *D.* before ſuch a Feaſt, and you make a feoffment of the ſaid Mannor to another before the ſaid Feaſt, you have forfeited your obligation, although that you repurchaſe the land again before the Feaſt, becauſe you were once diſabled to make the feoffment. And therewith agreeth *Temps* E. 1. *Covenant* 29. If a man leaſe a Mannor for years, and the leſſee covenanteth to keep the houſes of the Mannor, and as much as was in the Mannor in as good plight as he found them; during the term the leſſee doth waſt in the houſes, or in cutting of Oaks, the leſſor brought an Action of Covenant during the term for the Oaks, becauſe it was impoſſible that the Covenant ſhould be performed: Otherwiſe is it of the houſes; And therewith agreeth *F. N. B.* 145. *k.* & 13 E. 3. *Covenant* 2.

2. It

2. It was reſolved, If a man ſeiſed of lands in fee, covenanteth to enfeoff *J. S.* of them upon requeſt, and afterwards he make a feoffment in fee of the lands; now in this Caſe *J. S.* ſhall have an Action of Covenant without requeſt. And that in effect is all one with the principal Caſe.

3. It was reſolved that in the Caſe at Bar, If the term for 80 years were but an intereſt of a future term, ſo that *Scot* notwithſtanding that might make the ſurrender, yet in ſuch Caſe *Scot* ſhould have an Action of Covenant without making any ſurrender; for true it is that he may ſurrender; but alſo true it is, that Sir *Anthony* after ſuch ſurrender cannot make the new leaſe, which was the effect the ſurrender ſhould produce; and therefore in as much as the leſſor hath diſabled himſelf to make a new leaſe, which is the effect and end of the ſurrender, and that which he ought to do on his part, the leſſee ſhall not be
[b] enforced to make the ſurrender, which is the firſt thing to be done on his part, for by the ſurrender he ſhould loſe his old term without poſſibility to have the new acording to the leſſors Covenant. And therewith agreeth 14 *H.* 4. 19. *a.* *J.* Parſon of the Church of *G.* was bound in an Obligation of 100 *l.* to the Prior of *E.* the Condition was, That if the Parſon reſign his Church within certain time to the Prior for a penſion as they could agree, that then the Obligation ſhould be void; And afterwards and within the time, the Prior and Parſon agreed of a penſion of 5 *l.* yet the Parſon did refuſe to reſign. And the opinion of the whole Court was, That although they had agreed of the penſion, yet the Parſon is not bound to reſign until he be ſure of the penſion, and that he cannot be without deed. And therefore in ſuch Caſe the Parſon is not tied to reſign until the Prior hath tendred to him a deed of the penſion, by which he might be ſure of it.

Trinit. 37 Eliz. *in the Kings Bench.*

Laughter's Caſe.

Thomas Eaton Eſquire, and *Roger Moxon* Gent. brought an Action of Debt upon an Obligation of 400 *l.* bearing date 26. *Sept.* 26 *Eliz.* againſt *Thomas Laughter.* The Defendant demanded *Oyer* of the Obligation and Condition; and it appeared by the Obligation, that *Richard Ramsford* was alſo bound in the ſaid Obligation with the Defendant joyntly and ſeverally; And the Condition was in effect, That if the within bounden *Rich. Ramsford* after lawful marriage had between him and *Jane Gilman* wife of *Henry Gilman* deceaſed, and together with the ſame *Jane*, do and ſhall lawfully ſell and alien in fee ſimple, or fee tail, all the great meſſuage with the little tenement thereunto adjoyning, of the ſaid *Jane*, ſcituate in *London*, now in the occupation of *William Fitzw.* Eſquire. If then the ſaid *Rich. Ramsford* do or ſhall
[22] either in his life time purchaſe to the ſaid *Jane*, and her heirs, and aſſignees, lands, tenements, and hereditaments, of as good right, and of as good value, as the money by him received or had by or upon his ſaid ſale or alienation of the premiſſes ſhall amount unto: Or elſe do or ſhall leave unto her the ſaid *Jane* as Executrix, or by legacy, or other good aſſurance or conveyance, as much money as ſhall be by him received upon ſuch, &c. that then, &c. And pleaded that the ſaid *Richard Ramsford* married the ſaid *Jane* 1 *Decemb.* 27. and that the ſaid *Jane* died 8 *Auguſt* 31. and the ſaid *Richard Ramsford* ſurvived her; The Plaintiff ſhewed by way of Replication, that the ſaid *Ramsford* and *Jane Paſch.* 30 *Eliz.* for 320 *l.* levied a fine of the premiſſes to *John Thompſon* and *William Kerwen*, and to the heirs of *John Thompſon*; and that the ſaid *Ramsford* did not purchaſe lands, tenements, or hereditaments, of the value of 320 *l.* to the ſaid *Jane* and her heirs, *neque reliquit prædict.* Jane *poſt diſceſſum ipſius* Rich. *ut executrici*, &c. And upon this plea the Defendants Council did demur in Law. And upon great deliberation Judgment was given by *Popham* Chief Juſtice and the whole Court againſt the Plaintiff: And the reaſon and cauſe of their Judgment was, That where a Condition of an Obligation doth conſiſt upon two parts in the diſjunctive, and both are poſſible at the time of the Obligation made, and afterwards one of them becometh impoſſible by the act of God, the obligee is not bound to perform the other part: for the Condition is made for the benefit of the obligee, and ſhall be taken beneficially for him, and he hath election to perform the one or the other for the ſaving of the penalty of his Bond: And when one part is become impoſſible by the act of God, it is ſo beneficial for him as if this part of the diſjunctive which is become impoſſible had been only the the Condition of the Obligation: And ſo when one became impoſſible by the act of God, which by no induſtry he could perform, his Obligation is ſaved, although he doth not perform the other, *quia impotentia excuſat legem.* And in the Caſe at Bar for as much as *Jane* died before the ſaid *Ramsford*, ſo that he could not leave to the ſaid *Jane*, either as Executrix, or by legacy, or other aſſurance, ſo much money as ſhould be received by him, &c. ſo that this part of the diſjunctive became impoſſible by the act of God. *Vide* 30 *H.* 6. *Barre* 60. 15 *H.* 7. 4. 9 *Eliz. Dier* 162. between *Arundel* and *Comb.* And the Caſe in 21 *E.* 3. 29. is not like this Caſe. For there at the time of the Obligation made, and the time when the Condition was to be performed, one part of the diſjunctive was not poſſible to be performed, for there the heir of the body was not *in rerum natura.*

Trin.

Trin. 38 Eliz. *in the Common Pleas.*

Halling's Caſe.

BEtween *Halling* and *Conuard* in Debt upon an Obligation for performing of Covenants, it was adjudged, That where the covenant was, That the Defendant ſhould make an eſtate in fee before ſuch Feaſt at the coſts of the Covenantee, that the Covenantor ought to do the firſt act, *ſcil.* notifie to the Covenantee what manner of eſtate he would have, ſo that the Covenantee might know what ſum of money to tender: And it was ſaid, All was one when the Covenant was general, and when it was particular: As to make a feoffment, the Covenantor ought to do the firſt thing, *ſcil.* ſhew what manner of feoffment he would make, either by deed poll, or by Indenture, &c. And ſo in the principal Caſe, if nothing be done before the day, the Covenant is broken, becauſe that the Covenantor ought to do the firſt act, and ſo the default is in him. [b]

Hill. 39 Eliz. *in the Common Pleas.*

Mathewſon's Caſe.

BEtween *Mathewſon* and others Plaintiffs, and *Lydeate* Defendant, the Caſe was ſuch; A Charter-party indented between the Maſter and the Owners of a Ship of the one part, and *George Lydeate* and ſix other Merchants of the other part. By which the Maſters and Owners covenant to Ship certain Merchandizes at ſuch a Port beyond Sea, and to tranſport them to the City of *London*, for which every of the Merchants covenant *ſeparatim* with the Maſter and Owner, that one Merchant ſhall pay 3 *l.* another 3 *l.* &c. *& ſic de cæteris.* And the words of the Covenant are, *conveniunt ſeparatim, &c.* and in the end is this clauſe, *Et ad performationem omnium & ſingulorum conventionum ex parte præd. Mercatorum perimplend', quilibet Mercatorum præd. ſeparatim obligat ſeipſum præfat. Magiſtro & proprietariis*, in double the fraight. And now upon one of the ſeveral Covenants an Action of Debt was brought againſt *Lydeate* one of the Merchants upon the ſaid Indenture. To which the Defendant pleaded, That a Seal of another of the Merchants fixed to the ſaid Indenture was broken from the deed; Upon which the Plaintiff did demur in Law. And in this Caſe it was reſolved: [23]

1. That although that the Merchants joyn in Covenant, *ſcil. conveniunt ſeparatim*, yet this word, *ſeparatim*, maketh it ſeveral Covenants, and not one joynt Covenant. Alſo the ſaid later clauſe, *ad performationem omnium & ſingulorum, &c.* it is in the ſeveral, by reaſon of this word *ſeparatim*; and this word ſhall be referred to the ſeveral Covenants before.

2. It was reſolved, That although that the Covenants on the parts of the Maſters and Owners were joynt, yet the Covenants on the parts of the Merchants ſtood ſeveral; and for this cauſe if the Seal of one of the Merchants be broken from the deed, it doth not avoid the deed, but only againſt him: But if any of the Seals of the Maſters or Owners had been broken from the deed, all their Covenants had been defated. And if the deed had been raſed in the date after the delivery, the ſame had gone to the whole, and all. But when the Covenants are ſeveral, they are ſeveral deeds written in one piece of parchment. And Judgment was given accordingly. *Vide* 13 *H.* 7. 14 *H.* 8. 25. 30 *E.* 3. 31. 32 *in Aſſ.* 47 *E.* 3. 3. *in Debt* Finchden, 39 *H.* 8. 36.

Trin. 41 Eliz. Rot. 3252. *in the Common Pleas.*

Lamb's Caſe.

IN Debt upon an Obligation by *Lamb* Executor of *D.* againſt *Brownewent*, with Condition, That if the Defendant ſhall in the Term of S. *Michael* next, in the Prerogative Court of the Archbiſhop of *Canterbury* give unto the ſaid *D.* his Executors or aſſignees, ſuch ſufficient releaſe and diſcharge, &c. as by the Judge of the ſaid Court ſhall be thought meet, that then, &c. The Defendant ſhewed, that Doctor *Lewyn* was Judge of the Court, *& quod idem Judex nec deviſavit, nec appunctavit aliquam relaxationem, ſeu exonerationem, &c. ſecundum formam, &c.* upon which the Plaintiff did demur in Law. And it was adjudged for the Plaintiff; For in as much as the Judge was a ſtranger to the Condition, [b]

and

and the Condition is for the benefit of the obligor, and the performance thereof ſhall ſave his Bond, he hath taken upon him to perform it at his peril; and therefore he ought not only to have done the firſt act, but ought alſo to have procured the Judge to have deviſed and directed it. Otherwiſe it is, if the obligee himſelf or his Council ſhould deviſe. *Vide* 33 *H.*6.16. adjudged according. 36 *H.* 6. 8. 32 *E.* 3. *Barre* 294. 2 *E.* 4. 2. 8 *E.* 4. 2. 15 *E.* 4. 5. 22 *E.* 4. 43. 9 *H.* 7. 17, *&c. vide* 7 *E.* 4. 13. *b.* it was ſaid, If a man be bounden to make to a man a ſure, ſufficient, and lawful eſtate in certain lands by the advice of *J. D.* if he make an eſtate unto him according to the deviſe of *J. D.* be it ſufficient or not, lawful or not lawful, yet his Obligation is ſaved.

Mich. 42 & 43 Eliz. *in the Kings Bench.*

Broughton's Caſe.

[24] IN Debt in the *Common Pleas* by *Broughton* againſt *Prettie* upon an Obligation, the Condition was; That where the Plaintiff was bounden in an Obligation of 200 *l.* for the Defendant, for the payment of 100 *l.* to *A. B.* If therefore the Defendant ſhould ſave and keep harmleſs the Plaintiff of all ſuits, quarrels, and demands touching and concerning the ſaid Bond of 200 *l.* That then this Obligation to be void. At the day of payment of the 100 *l.* the Plaintiff came to the place where the 100 *l.* ought to be paid, and perceiving no perſon there preſent to pay the 100 *l.* for the Defendant, he to ſave the penalty of his Bond paid the 100 *l.* to *A. B.* and now brought this Action upon the counter Bond; and upon *Non damnificatus* pleaded, the Plaintiff replied, and ſhewed all the ſpecial matter; and upon that the Defendant did demur; And it was adjudged that the Plaintiff ſhould recover, for the payment of the 100 *l.* is damage and harm, and if he had not paid it great harm would have followed: And it is not needful that the Plaintiff be arreſted, or ſued, &c. Alſo it was ſaid, That this plea, *Non damnificatus* implied that the Defendant had ſaved him harmleſs, as by releaſe, payment, or otherwiſe. [25] *Vide* 18 *E.* 4. 27. by *Brian* and *Littleton*, Terror of ſuit, ſo that he dare not go about his buſineſs, is damnification, although that he be not arreſted by force of proceſs.

Mich. 43 & 44 Eliz. *in the Kings Bench.*

The Dean and Chapter of *Windſor's* Caſe.

IN the *Kings Bench*, between the Dean and Chapter of *Windſor* and *Hyde*, the Caſe was ſuch; He leaſed a houſe by Indenture for years; The leſſee for him and his Executors covenanted and granted with the leſſor to repair the houſe at all times needful. The leſſee aſſigned it over to *Hyde*, who ſuffered it to decay; And the leſſor brought an Action of Covenant againſt the aſſignee. And it was adjudged [*b*] by *Popham* Chief Juſtice, and the whole Court, that the Action of Covenant did lie, although that the leſſor hath not covenanted for him and his aſſignee; and ſuch Covenant which extendeth to the ſupport of the thing demiſed is *quodammodo* appurtenant to it, and goeth with it. And in reſpect the leſſee hath taken upon him to bear the charges of the reparations, the yearly rent was the leſs, which goeth to the benefit of the aſſignee, *& qui ſentit commodum ſentire debet & onus.* If a man grant to a man Eſtovers to repair his houſe, it is appurtenant to his houſe, *vide F. N. B.* 181. 28 *H.* 8. 28. If the leſſee covenanteth to diſcharge the leſſor *de omnibus oneribus ordinariis & extraordinariis*, and to repair the houſes, an Action lieth againſt the aſſignee.

Paſch.

Paſch. 43 Eliz. *in the Kings Bench.*

Sir *Thomas Palmer*'s Caſe.

IN an Action upon the Caſe between *Baſſet* and *Maynard*, upon the general iſſue the Jurors gave a ſpecial verdict to this effect; Sir *Thomas Palmer* was ſeiſed in fee of a great Wood, and bargained and ſold to one *Cornford* and his aſſignees 600 cords of wood to be taken by the aſſignment of Sir *Thomas*, *Cornford* aſſigned his intereſt to the Plaintiff, And afterwards the ſaid Sir *Thomas* ſold to the Defendant ſuch quantity of wood as would make 4000 cords, to be taken within the ſaid great wood, at the election of the vendee. And afterwards Sir *Thomas* aſſigned to the Plaintiff 600 cords of wood to be taken by him, who felled them; and the Defendant carried them away, and converted them, &c. And Judgment was given for the Plaintiff. And in this Caſe two Points were reſolved:

1. That *Cornford* hath an intereſt which he may aſſign over, and not a thing in action, or a poſſibility; [25] For it was reſolved, That if Sir *Thomas* doth not aſſign them to *Cornford* upon requeſt, *Cornford* may take them without aſſignment, for the grantor cannot by his own act, or default, either ſubvert, or derogate from his grant; then it followeth that he hath an intereſt which he may aſſign over. *Vide* 44 *E.* 3. 43. where the Prior of *Leton* ſeiſed of a Wood called *Hoſley*, by deed by aſſent of his Covent ſold the ſaid Wood to one *Bartholmew Wilby* to be felled and carried within two years next following (except 40 of the beſt Oaks to be taken at the election of the Prior) the vendee for ſhortneſs of time upon the end of the Covenant requeſted the Prior to come and chooſe the Oaks, and he would not come, for which the vendee ſuffered 40 of the beſt Oaks to ſtand, and the other he felled. And there iſſue was taken upon the requeſt: Which Caſe is not well abridged by *Brook*, *Reſervation* 3. for there he hath omitted the requeſt. For *Fitz. tit. Barre* 204. hath truly abridged it. Take heed Reader, of all Abridgments, for the chief uſe of them is as of Tables to find to the Book at large. But I exhort every [ ] good Student to read and hold himſelf only to the Books at large, as in another place I have adviſed. And with this Reſolution agreeth the Book in 8 *E.* 3. 5. & 54. where the Caſe was; *J.* had a houſe and a plough land, and he had reaſonable Eſtovers in the Wood of another by view and delivery of the Baily, &c. If he taketh the Eſtovers without view, or livery, he is a treſpaſſor, although he take leſſer then he ought to have by the delivery of the Baily: But if *J.* demandeth the Eſtovers, and the owner of the Wood or his Baily will not deliver them to him, *J.* may have an Aſſiſe, *vide* 5 *E.* 3. 64. & 65.

2. It was reſolved, That admit the aſſignment to the Plaintiff to be void, yet after that the trees are felled, the Defendant cannot take them: As if I grant 1000 cords of wood to one to be taken at the election of the grantee; the grantor or ſtranger felleth ſome trees, the grantee cannot take them, but ought to ſupply his grant out of the reſidue.

Trin. 2 Jacobi, *in the Kings Bench.*

The Counteſs of *Rutland*'s Caſe.

Iſabel Counteſs of *Rutland* brought an Action of Treſpaſs againſt *Roger* Earl of *Rutland* for breaking [*b*] her houſe and Cloſe, called *Eykering* houſe, and Lady Park, at *Eykering* in the County of *Nottingham*: The Defendant pleaded, Not Guilty; and now this Term upon evidence to a ſubſtantial Jury at the Bar of *Kings Bench*, the Caſe upon the evidence was ſuch; *Edward* Earl of *Rutland* was ſeiſed in fee of the Mannor of *Eykering*, whereof the houſe and cloſe were parcel, &c. And by Indenture bearing date 10. *Marcii*, 21 *Eliz.* for the augmentation of the Joynture of the ſaid Counteſs, then his wife, covenanted with *Gilbert Gerrard* Knight, and *Tho. Holcroft* his brother, that he before the end of *Trinity* Term then next following, would aſſure by fine, or other conveyance the ſaid Mannor to the ſaid Sir *Gilbert* and *Thomas* in fee, which fine or other conveyance of the ſaid Mannor ſhould be to the uſe of the ſaid Earl and the ſaid *Iſabel* his wife, and to the heirs of the ſaid Earl, which Indenture the ſaid Earl acknowledged before a Maſter of the *Chancery* the 28*th* day of the ſame month, and the ſame day was enrolled; and the next day, *ſcil.* the 29*th* day of *March* by another Indenture between the ſaid Earl of the one part, and the Lord *Burghley*, Sir *Gilbert Gerrard* and others on the other part, for the advancement of thoſe which ſhould ſucceed him in the Earldom; and for the advancement of the heirs males of the body of *Thomas* Earl of *Rutland*, his Grandfather, covenanted [26] with the Lord *Burleigh*, Sir *Gilbert Gerrard* and others to convey the ſaid Mannor of *Eykering* amongſt others to the ſaid Lord *Burghley*, Sir *Gilbert Gerrard*, and others, or to ſome one of them before the Feaſt of the Annunciation of our Lady next following, which aſſurance ſhould be to the uſe of the ſaid Earl *Edward*, and to the heirs males of his body; and for default of ſuch iſſue, to the uſe of the heirs males of the body of the ſaid *Thomas* Earl of *Rutland* with divers remainders over. And

afterwards the ſaid *Edward* Earl of *Rutland* by the ſaid later Indenture covenanted and granted with the ſaid parties thereto, That if the ſaid Earl *Edward* ſhould not convey ſufficiently the ſaid Mannor amongſt others as is aforeſaid before the ſaid Feaſt of the Annunciation of our Lady, that then the ſaid Earl *Edward* and his heirs would ſtand ſeiſed of the ſaid Mannor of *Eykering* to the ſaid uſes contained in the ſecond Indenture. No fine or other aſſurance was levied or made by the ſaid Earl *Edward* before the end of *Trinity* Term: And afterwards, *ſcil.* 17. *September* next following, the ſaid Earl acknowledged a Note of a fine of the Mannor of *Eykering* only to Sir *Gilbert Gerrard* and *Thomas Holcroft*, and to the heirs of the ſaid Sir *Gilbert*; and the 18*th* day of the ſame month acknowledged another Note of a fine of the ſaid Mannor of *Eykering* amongſt many other Mannors mentioned in the laſt Indenture to the Lord *Burghley*, Sir *Gilbert Gerrard* and others, parties to the laſt Indentures, and to the heirs of the Lord *Burghley*, and both were entred in *Octab. Michaelis* then next following. And it was proved by divers witneſſes, That the ſaid Earl *Edward*, as well before the Indentures as after the fine levied ſaid to them, That the ſaid Counteſs ſhould have the Mannor of *Eykering* for her Joynture.

And in this Caſe four Points were reſolved by Sir *John Popham* Chief Juſtice, and the whole Court.

1. Although that the Indentures being made for declaring of the uſes of a ſubſequent fine, recovery, or other aſſurance to certain perſons, and within a certain time, and to certain uſes, are but only directory, and do not bind the eſtate or intereſt of the land, yet if the fine, recovery, or other aſſurance be purſued according to the Indentures, there could not be any bare averrment againſt the Indentures taken in ſuch Caſe, that after the making of the Indentures, and before the aſſurance by mutual agreement of the parties it was concluded and agreed that the aſſurance ſhould be to other uſes: But if other agreement or limitation of uſes be made by writing, or by other matter as high or higher, then the laſt agreement ſhall ſtand, for every contract or agreement ought to be diſſolved by matter of as high nature as the firſt was, *Nihil tam inconveniens eſt naturali æquitati, unumquodque diſſolvi eo ligamine, quo ligatum eſt.* Alſo it ſhall be inconvenient, that matters in writing made by advice and deliberation, and upon conſideration, and which carry the certain truth of the agreement of the parties, ſhall be controlled by averrment of the parties to be proved by the incertain teſtimony of ſlippery memory. [b] And it ſhall be dangerous to Purchaſors and Farmers, and all others in ſuch Caſes, if a nude averrment againſt matter in writing ſhould be admitted.

2. It was reſolved, That if the form of the Indentures be not purſued, as for the quantity of the land, or the time within which, &c. in theſe Caſes and other like, where the Indentures be not purſued, averrment without writing may be taken, That the fine, recovery, or other aſſurance was to another uſe or intent then is contained in the Indenture: For in as much as the Indentures are not purſued, it is reaſon that the parties ſhall be admitted, to ſhew cauſe and reaſon that they were not purſued by reaſon of the new agreement ſubſequent, that in ſuch Caſe it may be as well by word as by writing.

3. It was reſolved, That although the Indentures are not purſuant in circumſtance of time, quantity, perſon, and the like, yet if no other new agreement can be proved, the aſſurance ſhall be in Judgment of Law to the uſe contained in the Indentures.

4. That in the principal Caſe the fines could not be directed by both the Indentures, that is to ſay, by the firſt Indenture to the uſe of the Earl *Edward* and *Iſabel* his wife for their lives; and by the ſecond Indenture to the Earl and the heirs males of his body, with the remainders over limited by the ſecond Indenture, and ſo the fines to work upon both the Indentures (although peradventure ſuch was the intent of the parties) and that for three cauſes:

1. The directions and declarations of the firſt Indentures were controlled and fruſtrated by the ſecond Indentures, and therefore the fines could not be directed by both.

2. The Indentures import ſeveral, and diſtinct, and divers contracts, and eſtates, that is to ſay, one to the Earl and *Iſabel* his wife, and to the heirs of the Earl, the other unto the Earl only, and to the heirs males of his body with divers remainders over; So that the fines ought for the Mannor of *Eykering* be directed, either wholly by the firſt, or wholly by the ſecond, without any fraction or diviſion of eſtates.

3. It ſhall be againſt the words and intent of both the Indentures, to make a Hotchpotch and commixture of both, which by their creation were ſeveral and diſtinct in perſons and eſtates.

Caſes

Cases of Executors.

Hill. 26 Eliz. *in the Kings Bench.*

Russel's Case.

EDward *Russel* as Executor of *William Russel* brought an Action upon the Case against *Thomas Prat* and *Margery* his wife; And declared, that *William Russel* was possessed of a Chest with divers Jewels, Goods, and sums of Money (and declared which in certain) in it, and that the said *William* lost them, and that they came to the hands of *Margery dum sola fuit*, that is to say, 6. *Januarii*, 1 *Eliz.* And afterwards the testator died, and that the said *Margery dum sola fuit*, did convert the said goods to her own use. The Defendants pleaded in bar a release of the Plaintiff made to them, &c. To which the Plaintiff said, That at the time of the release made, he was within the age of 21 years, &c. upon which the Defendants did demur in Law. And the great Question (which was often argued at the Bar and Bench) was, Whether the release of an Infant Executor having proved the Will should bar him or not. And it was argued that the release should bar him for divers causes. [27]

1. Because the Executor doth represent the person of the Testator, and all that which he doth is in the right (and as in the person) of the Testator, and not in his own right; and therefore his Infancy is not to be respected.

2. The Law which enableth him to take upon him the charge of the Will, and to prove it, and to bring Actions, and to do things which appertaineth to the office of an Executor, the same Law enableth him to make releases and acquittances without any regard to his nonage. As the King shall not avoid leases or grants in respect of the infancy of his natural capacity; nor Mayor, Bayliff, or the Head of any other Corporation shall not avoid any of their deeds or grants, for infancy of their natural capacity, because they do them in another right and capacity. [b]

3. It shall be inconvenient that an Infant Executor shall compel the debtors of the Testator to pay the debts to him, and that he shall not have power to acquit and discharge them.

4. They cited divers Books in the Point, 16 *H.* 6. *Releases* 45. the opinion of the whole Court, That a release made by an Infant within age as an Executor is good, and he cannot make it void. The same Law is of a release made by a feme covert Executrix; and so the release of the husband is nought worth, as there it is said, 18 *H.* 6. 4. of a feme covert, and 18 *E.* 4. 10. of a feme covert, and 21 *E.* 4. 13. & 24. of an Infant and feme covert, and 16 *H.* 7. 6. But upon great deliberation, and upon conference had with *Anderson* Chief Justice of the *Common Pleas*, *Manwood* and others Justices, it was resolved by Sir *Christopher Wray* Chief Justice, Sir *Thomas Gawdy*, and the whole Court of *Kings Bench*, that the release was no bar, and principally for three causes:

1. Because if it shall be a bar it shall be a *Devastavit*, and charge the Infant of his own proper goods.

2. It shall be a wrong, which an Infant by his release can never do.

3. In making of this release he doth not pursue his office, nor perform the duty of an Executor: And therefore it was well agreed, That all things which he doth according to the office and duty of an Executor the same shall bind him: But things which he doth against the office of an Executor shall not bind him, for as much as he is within age. The office of an Executor (as appeareth in 20 *H.* 7. 5.) is to do his office truly, diligently, and faithfully, and all these he breaketh when he wasteth the goods of the dead: But it was resolved, That upon payment or satisfaction to an Infant Executor, he may acquit and discharge the debt for as much as he receiveth: But it was resolved, That a Monk Executor may release without satisfaction, for his profession shall be no impediment to the release, 21 *E.* 4. 13. *b.* And as to the said Book of 16 *H.* 6. in the Case of the Infant it is to be intended when the Infant receiveth full satisfaction, for the Book saith, The deed of an Infant as Executor, and he doth not as Executor when he releaseth, and receiveth nothing. But the opinion there as to the feme covert Executrix, was utterly denied, for although she be Executrix, yet she can do nothing to the prejudice of her husband: But without question in such Case the release of the husband is good. And so the doubts in the Books of 13 *E.* 1. *Executors* 119. 5 *E.* 3. 45. *Barbor's* Case, 18 *H.* 6. 4. & 18 *E.* 4. 10. 21 *E.* 4. 13. & 24. 2 *H.* 7. 15. 6 *H.* 7. 6. 7 *H.* 7. 13. & 14. are well explained. And afterwards upon a Writ of Enquiry of damages returned after the Statute of 27 *Eliz. cap.* 8. Judgment was given for the Plaintiff: And upon the said Act a Writ of Error was brought in the Exchequer Chamber, where it was unanimously agreed, That the said release was no bar. And so this Point was resolved by all the Judges of *England*: But divers other Errors were assigned and moved as well in the Declaration, as that the plea was discontinued; And after the parties agreed, and for the Error in the proceeding the Judgment was reversed. And note good Reader, by these Resolutions you will better understand the said Books before cited, & *alios ejusdem farinæ*. And Sir *Thomas Gawdy* said in this Case, That an Executor may well release any Action before probate, for although that he cannot have any Action, yet the interest of the Action is in him, 21 *E.* 4. 24. *acc'*. [28]

Paſch. 1 Jacobi, *in the Common Pleas.*

Middleton's Caſe.

IT was adjudged in the *Common Pleas*, between *Middleton* and *Rimot*, That an Executor before probate may releaſe an Action, although that before probate he cannot have an Action, for the right of the Action is in him; But if *A.* releaſeth and afterwards taketh adminiſtration, it ſhall not bar him, for the right of the Action was not in him at the time of the releaſe, *vide* 18 *H.* 6. 43. *Greisbrook's* Caſe, *Plow. Comm.* 277. 21 E. 4. 24. Two Executors prove the Will, the third refuſeth, yet he may releaſe, *Litt.* 177. If a man be bound to pay a ſum at a day to come, releaſe of all Actions before the day bars it, yet before the day he cannot have an Action of Debt, and ſo upon the opinion of Sir *Thomas Gawdy* in the Caſe before it was adjudged.

Hill. 40 Eliz. Rot. 119. *in the Common Pleas.*

Harriſon's Caſe.

[*b*] *Robert Green* brought an Action of Debt upon a Bond of 40 *l.* againſt *William Harriſon* adminiſtrator of the goods and chattels of *Thomas Sidney*: The Defendant pleaded, that the inteſtate was bounden in an Obligation in the nature of a Statute Staple, beyond which he had no goods, &c. The Plaintiff replied, that there were Indentures of defeaſance made to perform Covenants in certain Indentures, which were all performed hitherto; upon which the Defendant did demur. And it was adjudged that the Plaintiff ſhould recover; for a debt due by Bond ſhall be paid before a Statute made to perform the Covenants, when none of them then were, nor perhaps ever would be broken, but are things in contingency, and *in futuro*; and therefore ſuch poſſibility which peradventure may never happen, ſhall not bar preſent and due debts by Bond or other ſpecialties. And if ſuch Statutes to perform Covenants ſhould bar others of their due debts, little or no debts would be paid. And note, that it was adjudged in the *Kings Bench* by *Popham* Chief Juſtice, and the whole Court, *Hill.* 42 *Eliz.* that if a man recover debt by Judgment in the Kings Court, this Judgment ſhall be paid before Bond in the nature of a Statute Staple, or Statutes Staples, or Merchants; For Judgment given in the Kings Court is of a higher nature then ſuch Statutes which are private Records, and portable by the conuſee in his pocket. But Judgment given in the Kings Court upon ordinary and judicial proceedings, which remain in the cuſtody of a ſworn Officer, are Records which are preferred in Law before ſuch Statutes. And the Law doth preſume, *Quod judicium redditur in invitum*; And ſuch Judgments ſhall be paid before Recognizances acknowledged by the aſſent of the parties in any of the Kings Courts, which may be acknowledged in a private manner; and it is not material whether the Judgment, or [29] Recognizance, or Statute be firſt, but be the Judgment firſt or laſt, it ought to be firſt ſatisfied. And ſo it was holden by the whole Court of *Common Pleas*, between *Pemberton* and *Bartram*, *Paſch.* 32 *Eliz. Rot.* 235. which ſee before in the end of the *Sadlers* Caſe, in the fourth part of my Reports.

Hill. 40 Eliz. *in the Common Pleas.*

Piggots's Caſe.

Piggot Adminiſtrator of *Longfield durante minore ætate* of *A. Longfield* brought an Action of debt in the *Common Pleas* upon an Obligation againſt *Gaſcoigne* and *Furthee*; And averred that *A. Longfield* was within the age of 21 years; To which the Defendant pleaded an inſufficient bar; upon which the Plaintiff did demur. And for as much as the bar was inſufficient, now the Queſtion was, If the Declaration were good or not. And the doubt was, When adminiſtration is granted *durante minore ætate*, how long it ſhall endure, *ſcil.* to the age of 21 years, or to what age it ſhall continue. And thereupon the Court did confer with ſundry Doctors of the Civil Law openly in Court. And it was holden by them, That adminiſtration *durante minore ætate* ſhould ceaſe at the age of 17 years; and if ſuch adminiſtration be committed, the Executor being of the age of 17 years it is void: And for this cauſe it was adjudged by the Court, that the Declaration was inſufficient; for perhaps the Executor

Executor was of 17 or 18 years, &c. and within the age of 21 years as the Plaintiff hath averred, and yet the Plaintiffs adminiſtration was determined; for which cauſe it was awarded, that the Plaintiff ſhould take nothing by his Bill.

Mich. 41 & 42 Eliz. *in the Common Pleas.*

Prince's Caſe.

IN Treſpaſs, for breaking of his Cloſe, &c. between *John Prince* Plaintiff, and *William Simpſon* Defendant, the Caſe was ſuch; One *Jackſon* being poſſeſſed of a term for years, had iſſue *James* and *Jane*, and made his Will, and made *Jane* his daughter (then of the age of 12 years) his Executrix; and then deviſed the ſaid term to *James*, then alſo within age, and died. Adminiſtration *durante minore ætate of Jane* was committed to her mother who took husband; *James* died, the husband took adminiſtration of his goods, and ſold the ſaid term, *Jane* took husband; And the Queſtion was, if the ſaid ſale was good, or not. And in this Caſe three Points were reſolved by the Juſtices of the *Common Pleas.* [b]

1. That ſuch an adminiſtrator *durante minore ætate*, cannot ſell any of the goods of the deceaſed, if it be not for neceſſity for payment of his debts, or *bona peritura*, for he hath his office of adminiſtration *pro bono & commodo* of the Infant, and not for his prejudice. For the words of the Letters of Adminiſtration are, *Adminiſtrationem omnium & ſingulorum bonorum ad opus, commodum, & utilitatem executric' durante ſua minore ætate, & non aliter, nec alio modo committimus, &c.*

2. Such adminiſtration doth ceaſe at the age of 17 years of the Infant, as it was adjudged between *Piggot* and *Gaſcoign*, *Hill.* 40 *Eliz.* in the *Common Pleas:* And there it was alſo holden, That an Infant Executor before 17 years cannot aſſent to a Legacy, &c. And when *Jane* within age of 17 years took husband, if it had appeared that the husband was of full age, then the adminiſtration ſhould ceaſe, for ſhe hath taken a husband, who might adminiſter as Executor; but that did not appear in the Caſe whether the husband were within age or of full age. But in this Caſe it was ſaid, That Judgment was given between *Vere* and *Jeffery*, that where one hath goods only in an inferior Dioceſs, yet the Metropolitan of the Province pretending that he had *bona notabilia* in divers Dioceſſes, committeth adminiſtration, this adminiſtration is not void, but voidable by ſentence, becauſe that the Metropolitan hath Juriſdiction over all the Dioceſs in his Province, and therefore it cannot be void, but voidable by ſentence; But if an Ordinary of a Dioceſs committeth adminiſtration of goods, when the party hath *bona notabilia* in ſundry Dioceſſes, ſuch adminiſtration is meerly void, as well as to the goods within his own Dioceſs as elſewhere, becauſe that by no means he can have Juriſdiction of the cauſe: And true it is, that ſuch Judgment was given. [30]

Mich. 40 & 41 Eliz. *in the Kings Bench.*

Coulter's Caſe.

RObert *Coulter* brought an Action of debt upon a Bond of 40 *l.* againſt *William Ireland* Executor of the Teſtament and laſt Will of *Richard Hunt*; The Defendant pleaded, that he had fully adminiſtred, and ſo nothing was in his hands; upon which they were at iſſue, and the Jury gave a ſpecial verdict; That the ſaid *Richard Hunt* was bound to the Defendant and his ſon in a Bond in the nature of a Statute Staple of 500 *l.* and that the Defendant was Executor of his own wrong, and had 140 *l.* of the goods of the deceaſed in his hands, and did keep the ſaid goods in his hands to ſatisfie and pay himſelf part of the ſaid debt of 500 *l.* And if the ſaid retainer by an Executor of his own wrong were lawful or not was the Queſtion. And it was objected, that the Defendant in ſuch Caſe might retain for divers cauſes.

1. The Plaintiff hath by his Declaration affirmed him to be Executor of the Teſtament and laſt Will of *Richard Hunt*, and the Jury cannot find any thing againſt that which both the parties have agreed in pleading, as it is agreed in 28 *Aſſ. p.* 38. *in Aſſiſe*, 9 *H.* 6. 37. *in Dette*, 1 *Eliz. Dier* 167. 9 *H.* 7. 3. *in Reſcous*, *&c.* and therefore the finding, that he is Executor of his own wrong is abundant and ſurpluſage. [b]

2. Although an Executor of his own wrong cannot retain againſt a rightful Executor, or againſt an Adminiſtrator, yet he may retain againſt the Plaintiff who is a creditor as the Defendant is, and ſo much the rather becauſe he hath affirmed him to be Executor in his Declaration as is aforeſaid; and therefore againſt him he ſhall have all the priviledges of an Executor, and ſo *reſpective* he ſhall have againſt the one, and not againſt the other.

3. In

3. In divers Cases one who is in of his own wrong shall recover and retain, &c. 3 *H.6. Damages* 18. he who hath a rent of 10 *l.* issuing out of certain land, disseiseth the tenant of the land, in an Assise brought by the disseisee, the disseisor shall recover the rent in the damages, so that where the mean profits of the land in such Case were of the value of 13 *l.* the disseisee shall recover but 3 *l.* 43 *E.* 3. *Damages* 37. The disseisor shall recover all in damages which he hath expended in amending of the houses, 14 *E.*3. *Damages* 92. 24 *E.* 3. 50. & 14 *Ass. pl.* 124. *acc.* 8 *Ass. p.* 37. Rent service incurred during the disseisin shall be recovered, 9 *E.* 3. 8. 4 *H.* 7. 11. 14. *b. acc.* and in 40 *Ass. p.* 56. there the wife did retain the three parts of the profits against the King in respect of the right of Dower which she had to the same lands. So he who is Guardian in Socage of his own wrong shall have reasonable allowances. But it was resolved by the whole Court, That an Executor of his own wrong shall not retain, for thereof will ensue great inconvenience and confusion, for every creditor (and chiefly when the goods of the deceased are not sufficient to satisfie all the creditors) would contend to make himself Executor of his own wrong, to the intent to satisfie himself by retainer, by which others should be barred. And it is not reasonable that one should take advantage of his own wrong; and if the Law of God should give him such power, the Law should be cause and occasion of wrong, and of wrongful taking of the goods of the deceased. And the Law of God saith, *Non facias malum ut inde fiat bonum, & melius est omnia mala pati, quam malo consentire.* And it is clear, that all lawful acts, which an Executor of his own wrong, or a disseisor, or abator, &c. doth, is good. And therefore if a disseisor or abator endoweth a woman who hath title of Dower it is good, and shall bind the disseisee: But if a woman who hath title of Dower disseiseth the tenant of the land, she cannot endow her self by retainer. Also if a woman who hath title of Dower use the land as Guardian in Socage by her
[31] own right, and not as rightful Guardian, she shall not endow her self *de la pluis beale*, for that is in a Judgment given in the Kings Court. Also if a woman who hath righful title of Dower be party or privy or consenting to a wrong, the assignment of Dower to her is void; as if she procureth one to disseise the tenant of the land, to the intent to be endowed by him. And the naming of the Defendant Executor of the Testament and last Will, &c. doth not prove him lawful Executor, for so every Executor of his own wrong is named, and there is no other form of Writ or Count. And as to the Case of recouper in damages in the Case of rent service, charge, or seck. It was resolved, that the reason of the recovery in such Case is, because that otherwise when the disseisee reentreth, the arrerages of the rent service, charge, or seck, shall be revived, and there to avoid circuit of Action, and *circuitus est evitandus, & boni Judicis est lites dirimere, ne lis ex lite oriatur*, the arrerages during the disseisin shall be recovered in damages: But if the disseisor ought to have Common in the land, the value of the Common shall not be recovered, for by the regress of the disseisee, he shall not have any arrerages or recompence for it, as it appeareth in 27 *H.*6.10. And with this Resolution concerning recovery in Case of Common agreeth the Book in 33 *H.* 6. 32. & in *Riche's* Case. And so the doubt in 16 *H.* 7. 11. is well explained. And it appeareth that the Case of recouper doth stand upon another reason then the Case at Bar.

Mich. 41 & 42 Eliz. *in the Kings Bench.*

Hargrave's Case.

Body made a lease for years rendring rent, the lessee died intestate; *Hargrave* took Letters of Administration, and for the rent behind in his time after the death of the intestate, *Body* brought an Action of debt in the *debet & detinet*, &c. And after verdict the Defendants Council moved in arrest of Judgment, that the Writ ought to be brought in the *detinet tantum*, because the Defendant took the profits in another
[b] right, and they shall be assets in Law. And the Book in 10 *H.* 7. 5. was strongly urged, for there it is expresly holden, that in the Case at Bar the Writ shall be in the *Detinet* for the arrerages incurred in the time of the Executor of the lessee: Yet upon good consideration and conference with the other Justices, it was adjudged, that the Writ shall be in the *debet & detinet* in the Case at Bar; for when an Executor or Administrator taketh the profits nothing shall be assets but the profits above the rent; as if the land be worth 10 *l. per annum*, and 5 *l.* is reserved, in this Case nothing shall be assets but the 5 *l.* above the rent; and therefore the Writ shall be for the rent in the *debet & detinet*. *Vide Dier* 7. *E.* 6. 81. *acc.* But note, that in all Actions brought by Executors, (as Executors) the Writ shall be always in the *detinet* only, although that the duty groweth in their own time. As 18 *H.* 3. if the Executors of the lessor bring an Action of debt against the lessee for arrerages incurred in their time, the Writ shall be in the *detinet* only, 20 *H.* 6. 4. In debt upon arrerages of accompt of assignment of the auditors by themselves, the Writ shall be in the *detinet* only; for in all Cases when an Executor is bound to name himself Executor in any Action brought by him, the Writ shall be in the *detinet* only, because that the thing recovered in damages shall be assets. And it was adjudged *Pasch.* 36 *Eliz.* in the Exchequer in the Case of one *Hitchcock*, that for an escape out of execution in the time of an Executor, upon a recovery had by the Executor himself, he shall not have an Action in the *debet & detinet*, but in the *detinet* only against the Sheriff, *causa qua supra*. *Vide* 11 *H.* 6. 7, 8, 36. *Harlwin's* Case.

Hill. 45 Eliz. *in the Kings Bench.*

Pettifer's Caſe.

IN a Writ of Error between *Robinſon* and *Pettifer*, the Caſe was ſuch; In debt Judgment was given in the *Common Pleas* againſt two Executors to recover the debt *de bonis teſtatoris*; upon which a *Fieri facias* was awarded to the Sheriff to levy the debt *de bonis teſtatoris, &c.* whereupon the Sheriff returned, *Nulla bona, &c.* And upon this return an entry was made in the Roll, becauſe that *teſtatum eſt* that the Executors had ſold divers goods of the teſtator, and converted the monies to their own uſe, a Writ was awarded to the Sheriff, to enquire by the oath of good men of his Bailiwick what goods (which were the teſtators the day of his death) were waſted by the Executors; by force of which Writ the Sheriff took an inquiſition, by which it was found that divers goods of the teſtator to the value of the debt recovered were waſted by the Executors: And this was returned in Court. Upon which the Plaintiff ſued a *Scire facias* againſt the Defendant to ſhew cauſe wherefore execution ſhould not be awarded againſt the Defendant of his own proper goods. And upon two *Nihils* the Court awarded execution: And thereupon the Executors brought a Writ of Error *in redditione executionis.* And although it was ſaid that the ſaid courſe was uſual in the Court of *Common Pleas*, and more favourable then the ancient courſe was, for by that the *Devaſtavit* ſhall not be returned by the Sheriff only, but now ſhall be enquiry by enqueſt returned, and upon that a *Scire facias* ſhall be awarded. [32]

But it was adjudged that the ſaid proceeding was erroneous: For when Judgment is given againſt Executors, and upon the *Scire facias* the Sheriff returneth *Nulla bona, &c.* the Plaintiff may have a ſpecial Writ of *Fieri facias, ſcil.* that the Sheriff levy the debt of the goods of the dead, *& ſi ſibi conſtare poterit*, that the Executors have waſted the goods, then *de bonis propriis*: And that is agreeable to Law and reaſon; To Law as appeareth in 1 *E.* 3. *Executors* 73. *&* 85. 9 *H.* 6. 9. *b. &* 57. *b.* To reaſon, becauſe that in ſuch Caſe, if the Sheriff make a falſe return the party make have his remedy by Action upon the Caſe, which is a good means to force the Sheriff to make true and juſt returns in ſuch Caſe. But by the ſaid new courſe if the Sheriff take an inqueſt and return it, although that it be falſe, yet the party hath no remedy againſt the Sheriff, nor againſt any other: And although that a *Scire facias* in the Caſe at Bar was awarded againſt the Executors, yet upon two *Nihils* returned they ſhall be condemned, and charged of their own goods, and yet perhaps had no notice thereof, the Action ſometimes being brought in a forreign County, and ſometime in the Court where they dwell, and yet the Executors have not knowledge thereof, which ſhall be miſchievous; And for theſe cauſes the Execution was reverſed, but the Judgment ſtood. [b]

Paſch. 1 Jacobi, *in the Common Pleas.*

Robinſon's Caſe.

Robinſon and others Executors of *John Robinſon* brought an Action of debt upon a Bond againſt *Robinſon*; The Defendant pleaded that before the purchaſe of the Writ, one of the Plaintiffs as adminiſtrator of *John Robinſon* brought an Action of Debt upon the ſame Bond in the ſame Court againſt the Defendant, who then pleaded, That *John Robinſon* made Executors who adminiſtred; and traverſed that he died inteſtate: And then the Plaintiff replied, That adminiſtration was committed to him *pendente lite* between the Executors of the ſaid Will; upon which the Defendant did demur. And it was adjudged for the Plaintiff. And this plea was pleaded by way of eſtoppel, and Judgment demanded, If he as Executor ſhall have an Action of debt againſt the Plaintiff upon the ſame Bond; The Plaintiff replied and ſhewed the repeal of the letter of adminiſtration, and that the Plaintiffs are Executors: upon which the Defendant did demur, he pretending, that for as much as one of the Plaintiffs was barred in the former Action that they ſhould be barred for ever. And the Caſe was well debated at the Bar and Bench. And at laſt Judgment was given for the Plaintiff. For it was agreed, That by the former Judgment the Plaintiff was barred as to the Action of the Writ, *ſcil.* to have an Action as adminiſtrator: But although he then in truth was Executor, yet the miſtaking of his Action is no bar nor eſtoppel to bring his true Action; As if an heir bring a *Formedon* in the Diſcender, and be barred therein, yet he may have a *Formedon* in the Remainder, or Reverter. See 3 *E.* 3. 21. 4 *E.* 3. *Eſtoppel* 133. 19 *E.* 3. *Eſtoppel* 227. 18 *E.* 3. 31. 40 *E.* 3. 21. 2 *R.* 2. *Eſtoppel* 210. 6 *H.* 4. 4. 11 *H.* 4. 30. 2 *R.* 3. 14. 21 *H.* 7. 24. 7 *E.* 6. *Eſtopel* 162. [33]

Trin. 2 Jacobi *in the Common Pleas.*

Reade's Case.

[*b*] *Reade* brought an Action of debt againſt *Carter* Executor of *Young*, which plea began in the *Common Pleas*, *Hill.* 44 *Eliz. Rot.* 401. the Jurors found, That the ſaid *Young* made his Teſtament and laſt Will, and made one *A.* his Executor; and the day of his death was poſſeſſed of goods above the value of the debt demanded, and died; and before the Will was proved the Defendant took the teſtator's goods into his poſſeſſion, and entermedled with them; And afterwards, and before the taking forth of the Writ the Will was proved; And if upon this matter the Defendant ſhall be charged as Executor of his own wrong, was the Queſtion. And upon great deliberation Judgment was given for the Plaintiff. And in this Caſe theſe Points were reſolved:

1. When a man dieth inteſtate, and a ſtranger taketh the inteſtates goods and uſeth them, or ſelleth them, in this Caſe it maketh him Executor of his own wrong. For although that the pleading in ſuch Caſe be, That he was never Executor, nor ever adminiſtred as Executor, and therefore it was objected, that he ought to pay debt, or legacy, or do ſomething as Executor: yet it was reſolved, and well agreed, That when one taketh upon him to be Executor, nor any hath taken letter of adminiſtration, there the uſing of the goods by any one, or the taking of them into his poſſeſſion, which is the office of an Executor or Adminiſtrator is a good adminiſtration to charge them as Executor of his wrong; for thoſe to whom the deceaſed was indebted in ſuch Caſe have not any againſt whom they can have an Action for recovery of their debts.

2. When an Executor is made, and he proveth the Will, or taketh upon him the charge of the Will, and adminiſtreth, in this Caſe if a ſtranger taketh any of the goods, or claimeth them for his proper goods, and uſeth and diſpoſeth of them as his own goods, that doth not make him in conſtruction of Law an Executor of his wrong, becauſe that there is another Executor of right whom he may charge, and theſe goods which are in ſuch Caſe taken out of his poſſeſſion after that he hath adminiſtred, are aſſets in his hands: But although there be an Executor or Adminiſtrator, yet if the ſtranger taketh the goods, and claiming to be Executor, pay debts, and receive debts, or pay legacies, and intermeddle as Executors, there for ſuch expreſs adminiſtration as Executor, he may be charged as Executor of his own wrong, although there be another Executor in right; and therewith agreeth 9 *E.* 4. 13.

3. In the Caſe at Bar, when the Defendant taketh the goods before the rightful Executor hath taken upon him, or proved the Will, in this Caſe he may be charged as Executor of his own wrong, for the rightful Executor ſhall not be charged but with the goods which come to his hands after that he taketh upon him the charge of the Will. Note Reader, theſe Reſolutions and the reaſon of them, and by them you will better underſtand your Books, which otherwiſe ſeem *prima facie* to diſagree, 41 *E.* 3. 13. 50 *E.* 3. 8. 6 *H.* 4. 3. 11 *H.* 4. 83, 84. 13 *H.* 4. 4. 19 *H.* 6. 14. 21 *H.* 6. 26. & 27. 32 *H.* 7. 33 *H.* 6. 21. 21 *E.* 4. 5. 20 *H.* 7. 5. 26 *H.* 8. 7. 1 *Eliz. Dier* 166. 9 *Eliz. Dier* 255. And ſo the *Quære* in 2 *Eliz. Dier* 205. well reſolved.

Conſtruction

Conſtruction of the Statutes of Jeofails, and Amendments of Records, Fines, Common Recoveries, &c.

Mich. 25 & 26 Eliz. in the Kings Bench.

Playter's Caſe.

Playter brought an Action of Treſpaſs againſt *Warne*, *Quare clauſum fregit, & piſces ſuos cepit, &c.* (without ſhewing the number or nature of the fiſh;) The Defendant pleaded Not guilty, and was found guilty of the damage, &c. And now this Term in arreſt of Judgment it was ſhewed, That the Declaration (which by the Law ought to be certain, becauſe it is in a manner the foundation of the ſuit) was in the Caſe at Bar altogether uncertain for two cauſes. [b]

1. It doth not appear by the Declaration of what nature the fiſh were, Pikes, Tenches, Breams Garps, Roches, &c.

2. It doth not appear what the number of them were, but generally, *piſces ſuos cepit*; To which it was anſwered by the Plaintiffs Councel:

1. That the ſame was good at the Common Law, for the verdict hath found the Defendant guilty to damages, and therefore it is not material of what nature, or of what number the fiſh were, but taking of fiſh to damages, in which Caſe the verdict hath made the Declaration (if it wanteth form) good.

2. They conceived that the Declaration in an Action of Treſpaſs, without the expreſſing the number or nature of the fiſh was good enough, for as much as the fiſh themſelves are not to be recovered but damages for them: As in 20 *H.* 6. 19. in a Writ of deceit for caſting a Protection, and doth not ſhew certain of what nature the firſt Writ was (as *Formedon*, Aſſiſe, or other Writ) which was delayed by the Protection, and yet the Writ was adjudged good: In Treſpaſs upon the Caſe the Writ was, that the Plaintiff did retain the Defendant *pro quadam pecuniæ ſumma ſolvend'*, *&c.* without ſhewing the quantity of the ſumm, and yet it was holden good in 11 *H.* 6. 45.

3. If the Law doth require more certainty as to the fiſhes, then it ſhall be intended that the Judges before whom this iſſue was tried did direct the Jury to find the Defendant guilty only for the Cloſe for which the Declaration was good, and not for the fiſh for which the Declaration was inſufficient. [35]

4. Admit that the Declaration were inſufficient for the form thereof at the Common Law, and that it was not made good by the verdict, yet they conceived that it was remedied by the Statute of 18 *Eliz. cap.* 14. (for the Statute of 32 *H.* 8. *cap.* 30. doth not extend to Counts) By which Act of 18 *Eliz.* after verdicts it is provided, That all defaults in form in any Writ Original or Judicial, Count, Declaration, Plaint, Bill, or Demand, are remedied, and Judgment for them ſhall not be ſtayed. And it was ſaid, that the omiſſion of the number and nature is but of the form and not of the ſubſtance of the Action, but the ſubſtance is for the taking of the fiſh; But it was reſolved by Sir *Chriſtopher Wray* chief Juſtice, Sir *Thomas Gawdy* and the whole Court, againſt the Plaintiff.

And to the firſt and ſecond Objections it was anſwered and reſolved, That the Declaration was inſufficient, and was not made good by the verdict, for the Declaration ought to reduce the generalty of the Writ to particularity, and to declare that which is briefly touched in the Writ in certain, to which the Defendant may have certain anſwer, and upon which a Judgment certain may be given, *Quia oportet quod res certa deducatur in judicium.* And true it is, that if this Action had been brought by original the Writ ſhould be general; But the Count ought to have comprehended the fiſhes in certain; and therewith agreeth all the Precedents, and 4 *H.* 6. 11. where the Writ was *Quare piſcem cepit*, and declared of ſo many Pikes in certain; and although that the Writ was *piſcem* in the ſingular number, yet it was well, for *piſcis* is *nomen collectivum*, in which the plural number is comprehended, *vide* 21 *H.* 6. 39. *acc.* that the certainty of the fiſh ſhall be alledged in the Declaration; and great inconvenience would thereof follow, for unleſs the iſſue hath certainty with which the Jury may be charged, upon ſuch ſeveral incertainty they could not be charged in attaint, if they give a falſe verdict.

As to the third Objection it was anſwered and reſolved, That when the Jurors have found the Defendant guilty generally of the Treſpaſs in the Declaration, that without queſtion doth extend to both the Treſpaſſes, and no ſuch intendment ſhall be taken as was objected: But if the Plaintiffs Councel had done wiſely, they would have cauſed the damages to have been ſevered, that is to ſay, ſo much for the fiſh, and ſo much for the breaking the Cloſe, and then the Plaintiff ſhould recover damages for breaking the Cloſe with his coſts. [b]

As to the laſt Objection, it was agreed by the whole Court, that the omitting of the nature and number of the fiſhes was a matter of ſubſtance, and not of form to be remedied by the Statute of 18 *Eliz.* for want of form within the ſaid Act is ſuch matter of courſe, that the Clark might have ſupplied and amended it without any information of the party, for the party ought to inform the truth of the matter, and the Clark ought to draw it into a form: But in the Caſe at Bar the Clark without information of the party cannot know the nature or number of the fiſh, and therefore it is not want of form within the purview of the ſaid Act. But *Wray* chief Juſtice ſaid, That every miſpriſion of a Clark in a thing which he might have ſupplied and amended without information of the party is not remedied by the ſaid Act: As if a Writ be brought againſt Executors in the *Debet* and the *Detinet*, the ſame is the default of the Clark,

but becauſe it is in matter of ſubſtance, that is to ſay, in the Point of the Action, and not want of form as the Statute ſpeaketh, it is not remedied by the ſaid Act. So there is a difference between matter of ſubſtance, which the Clark might have amended.

Trin. 30 Eliz. *in the Kings Bench.*

Walcot's Caſe.

[36] *Loyd* brought an Action of debt in the Common Pleas againſt *Walcot* and the Lady *Arnold* his wife upon an Obligation made by the wife before marriage; The Defendant pleaded to iſſue, and found againſt him, upon which Judgment was given: The Defendant brought a Writ of Error, and divers Errors were aſſigned, which were all overruled by the Court; Then one of the Defendants Councel moved, that the Writ was brought againſt them in the *Detinet tantum*, where it ought to have been in the *debet & detinet*, for the wife who is party to the Action made the Obligation by her ſelf, and the entermarriage is a gift inLaw to the husband of all the perſonal goods,and diſpoſition of all chattels reals, and all thoſe he hath to his own uſe, and not to another uſe as Executors have. But as againſt the heir of the obligor an Action lieth in the *debet & detinet*, becauſe he hath aſſets from the ſame anceſtor in fee ſimple in his own right, ſo hath the husband the goods and Chattels of the wife to his own uſe, and therefore the Writ ſhall be brought againſt them in the *debet & detinet*, *quod fuit conceſſum per totam Curiam:* Then it was moved, That that was want of form, and therefore ſhall be amended by the Statute of 18 *Eliz. cap.* 14. becauſe it was but (as it was ſaid) the miſpriſion of the Clark, which he himſelf ought to have amended and ſupplied: But it was reſolved by the whole Court, That the ſame was matter of ſubſtance, and the very point of the Action, and the ſaid Act remedied only want of form; which Reſolution agreeth with the opinion of *Wray* chief Juſtice in the Caſe before.

Trin. 30 Eliz. *in the Exchequer.*

Baneham's Caſe.

[b] BEtween *Bayneham* and *Brook* in an *Ejectione firmæ* upon a demiſe of the Rectory of *A.* in *A. B.* & *C.* the Defendant pleaded Not guilty, and the Viſne came only out of *A.* and the Jurors found the Defendant guilty, and Judgment was given: And in a Writ of Error this Judgment was reverſed, for the viſn ought to be out of the three Towns; And this trial was reſolved to be inſufficient, and inſufficient trials are not remedied by any Statute, for the Statute of 32 *H.* 8. *cap.* 30. doth not extend to a verdict given between the demandant and the vouchee, nor to any default in the original Writ, or in the return thereof, or to want of an original; or in the Count, or unto other inſufficiency in trial, verdict, or Judgment, &c. And the Statute of 18 *Eliz. cap.* 14. helps many of the ſaid defects, but doth not remedy any inſufficient trial, but that remaineth as it was at the Common Law. And *Wray* chief Juſtice ſaid, that it was of late adjudged in the Kings Bench between *Goodwyn* and *Franklyn*, that where a *Venire facias* was awarded to the Coroners, where it ought to have been awarded to the Sheriff, and ſo the Jurors returned by one who had not authority, that it was in nature of an inſufficient trial; and therefore upon conſideration of the ſaid Statutes, and of the opinion in 21 & 22 *Eliz. Dier* 367. it was reſolved that it was not remedied by any of the Statutes; but for this cauſe a new *Venire facias* was awarded: *Et verum dixit*; for I was of Councel with *Franklyn* in the ſame Caſe: But the principal Caſe in the Lord *Dier* was holden for good Law, becauſe that there the *Venire facias* was awarded *ex aſſenſu partium, & omnis aſſenſus tollit errorem.* And in this Caſe *Wray* chief Juſtice ſaid,that it had been adjudged in this Court in *Gardiners* Caſe, that if upon the *Venire facias* but 23 be returned, and 12 appear and give their verdict, that the ſame is remedied by the ſaid Acts of 32 *H.* 8. & 18 *Eliz.*

Paſch

Paſch. 21 Jac. Rot. 301. *in the Kings Bench.*

Gardiner's Caſe.

BEtween *Tirrel* and *Gardiner* upon iſſue joyned, 23 Jurors were only returned, whereof 12 did appear and give verdict; and that was moved in arreſt of Judgment: And upon great deliberation it was reſolved, That it was remedied by the Statute of 18 *Eliz. cap.* 14. and thereupon Judgment was given accordingly; which was the Caſe which *Wray* chief Juſtice cited in the Caſe next before. [37]

Paſch. 34 Eliz. *in the Kings Bench.*

Biſhop's Caſe.

MAthew *Biſhop* brought an Action upon the Caſe againſt *Michael Harecourt* in the Common Pleas by original Writ, ſetting forth how that the Defendant in conſideration that the Plaintiff had given and delivered to the Defendant a horſe; and that the Plaintiff promiſed the Defendant that he upon 90 l. to him by the Defendant to be paid, would deliver to the ſaid *Michael* an Indenture, *inter William Ward ex una parte, & Agnetam Fawkener ex altera parte fact'*, &c. And one Obligation by which *Tho. Ward* and *Chriſtopher Biſhop* were bounden to the ſaid *Agnes*, &c. in 500 l. aſſumed, and to the Plaintiff did promiſe to pay to him 90 l. *Termino Trinit.* next following: And the Plaintiff declared, and the Writ and Declaration agreed in all but only in this, That where by the Writ the ſaid Bond of 500 l. was alledged to be made by *Thomas Ward* and *Chriſtopher Biſhop*, &c. in the Declaration he was named *George Biſhop*, &c. And the Defendant pleaded *Non aſſumpſit*, and found againſt him, and Judgment given accordingly. And the Defendant brought a Writ of Error and aſſigned divers frivolous Errors to which the Court gave no regard. And then another Error not aſſigned was moved, *ſcil.* the ſaid variance between the original Writ and the Count. For the Count in the Common Pleas always reciteth the Writ, by which it appeared that the Writ was *Chriſtopher Biſhop*, (who was one of the obligors in the ſaid Bond) and the Count was *George Biſhop*. And upon that after *in nullo erratum* pleaded, the Plaintiff by *Certiorari* out of the Kings Bench removed the original Writ, by which the variance appeared to the Court. And it was moved, That that ſhall be helped by the Statute of 18 *Eliz. cap.* 14. by which it is enacted, That after verdict no Judgment ſhall be reverſed for want of form, &c. or for any default in any original Writ, or Judicial, or default in proceſs: And here wanteth an original Writ in our Caſe, for the Action upon the Caſe conſiſts upon two parts, *ſcil.* upon conſideration and the promiſe. And as to the conſideration, the Writ and Count did vary, and ſo no original Writ to warrant this Count; and if that ſhall not be within the letter of the Act, yet it ſhall be within the meaning and intent of it, becauſe it was in equal miſchief. Alſo it was moved, That after in *Nullo erratum* pleaded, no Writ of Diminution, or *Certiorari* ſhall be awarded, as it is agreed in 7 *E.* 4. 25. 22 *E.* 4. 28 *H.* 6. 10. but if any ſhall be awarded by the diſcretion of the Court, it ſhall be only to aſſure them of the truth for the amending the Record in things amendable, and to ſalve the former Judgment, according to the truth of the Caſe, but never to reverſe the Judgment, as it ſhall be in our Caſe. [b]

But as to the firſt it was anſwered and reſolved by the whole Court, That this variance between the original Writ and the Count was not remedied by the Statute of 18 *Eliz.* nor by any other Statute; and difference was taken by the Court when it was an original Writ which in matter of ſubſtance varieth from the Count, that was not remedied by the ſaid Act, *Quia caſus omiſſus & oblivioni datus, diſpoſitioni juris communis relinquitur*; But when there is no original Writ, the ſame was expreſly remedied by the ſaid Act.

As to the ſecond Point they all agreed, That when the original Writ is moved (be it before *in nullo erratum eſt* pleaded, or after,) and a material variance appeareth to the Court between the Writ and the Count the Judgment ſhall be reverſed: And ſo it hath been before this time, as *Wray* chief Juſtice ſaid.

Trin. 34 Eliz. *in the Kings Bench.*

Tey's Caſe.

[38] THomas *Tey* and *Elenor* his wife levied a fine to *Robert Drury* and *Tho. Cannock*, and to the heirs of *Robert Drury*, of the Mannors of *Layerdelahay*, *Layer Bretton*, and of divers other Mannors, and of a great number of acres of lands, meadow, paſture, in *Layerdelayhay*, *Layer Bretton*, *Magna Bretton*, *Magna Birch*, and many other Towns in the County of *Eſſex*. And in the ſame fine divers grants and renders were made: And in the third render the Mannors of *Layerdelahay*, *Layer Bretton*, and divers other Mannors, *& tenementa prædict' in Layerdelahay*, *Layer Bretton*, *Neuerds* and *Magna Birch*, were granted and rendred to the ſaid *Thomas* and *Elenor*, and to the heirs of the ſaid *Thomas*. And by the fourth render 115 acres of land in *Layer Bretton* and *Magna Birch*, were granted and rendred to *Elenor* in tail, the remainder to the right heirs of Sir *Thomas Tey*: And after the death of *Thomas Tey*, *William Tey* his brother and heir brought a Writ of Error, and aſſigned Error in the grant and render made by *Drury* aud *Cannock*; and that was for the repugnancy between the third and fourth render, for by the third render all the tenements in *Layer Bretton* and *Magna Birch* were rendred to *Thomas* and *Elenor*, and to the heirs of *Thomas*; and by the fourth render, certain of the ſaid tenements are granted and rendred to the ſaid *Elenor* in tail, the remainder to the right heirs of Sir *Thomas Tey*; ſo that the ſame thing is granted and rendred to ſeveral perſons and of ſeveral eſtates, and ſo repugnant, and erro-
[b] neous: For it was ſaid, That a fine is like to a Judgment, for a *Scire facias* lieth to execute it, as of a Judgment, and *oportet* (as *Bracton* ſaith) *Quod certa res deducatur in Judicium:* As in Caſe where there are two demandants, and the Court adjudgeth one and the ſame thing to each demandant ſeverally, it ſhall be Error as well for the repugnancy, as for the doubtfulneſs to which of them the Court ſhall give Execution. As in the Caſe of 3 *H.* 6. 44. where two avowants are, and one avoweth for rent ſervice, and the other for rent charge, both the avowries ſhall abate; for the Court ſhall be in doubt to which of them return ſhall be awarded; ſo here in the Caſe at Bar, becauſe that the ſame thing is granted and rendred in the third render to one, and in the fourth to another, becauſe that both cannot have one and the ſame thing, for the contrariety and incertainty to whom the Court ſhall make Execution, it is erroneous. And it was objected, that a fine ought to be more certain then a Judgment, or any other Record, as it is holden in 2 *H.* 5. 7. & 21 *E.* 3. and a man cannot acknowledge the right to two, as it is holden in 27 *E.* 3, 79. Nor a fine cannot be levied upon Condition, as it is holden in 11 *H.* 6. But after many arguments at Bar and Bench, it was reſolved by them, That the fourth render, as to that which was contained in the third render ſhall be of the ſame condition and quality in conſtruction as a charter, or other conveyance between party and party, and needeth not have ſuch preciſe form as a Writ or a Judgment. But a conuſans of a fine and a grant and render ſhould have like conſtruction as another conveyance between party and party, for that hath the words of grant and render, becauſe it is a conveyance of Record. And although that a fine may be refuſed in Caſes which have been put, yet if ſuch fines ſhall be received they ſhall be good enough in all the ſaid Caſes, for *fieri non debuit*, *ſed factum valuit*; and therefore if a fine be accepted to two and their heirs, or if the conuſans of right be to two or if a fine be upon condition, in all theſe Caſes and other like the fine ſhall ſtand, and ſhall not be reverſed by Writ of Error. 2. In the argument of this Caſe, all the parts of a fine *ſur conuſans de droit come ceo*, *&c.* were recited and peruſed. And it was reſolved by the whole Court that there are five parts of every fine, that is to ſay, Original Writ, for without original Writ a fine cannot be levied, as appeareth by the Statute *De modo levandi Fines*, which order of Law will not ſuffer that a final accord be levied in Court of the King without Original writ; and ſo it is holden 37 *Aſſ.* 17. And upon every Writ, by which land is demanded, or by which the land is to be charged or bound, or within any ſort doth concern land, &c. a fine may be levied. See for that 5 *E.* 2. *Statham Fines*, & 18 *E.* 4. 22. 19 *E.*
[39] 4. 2. 21 *E.* 4. 4. 32 *E.* 3. *Scire facias* 100. *in Præcipe*, *in Warrantia Chartæ*, in a Writ of Meſn, in *Quid juris clamat*, *Per quæ ſervitia*, in *Ration' dimiſſ.* and the like.

2. There ought to be licence or leave to agree, for which licence there is a fine due to the King, which is an ancient Revenue of the Crown, and that is called the Kings ſilver; and that fully appeareth by the Statute *De modo levandi fines*. And the entry of the Queens ſilver in the Caſe at Bar was ſuch, *Robertus Drurie armig' dat dominæ Reginæ ſeptem libr' pro Licentia concordandi cum Thoma Tey armiger' & Elianora uxore ejus, de placito conventionis, de maneriis de, &c. & habet Chirographum per pacem admiſſum, coram Jacobo Dier. Et nota bene*, The uſe is that he in who the fee repoſeth paieth the Kings ſilver, and not the other conuſee who hath but for life, and all the precedents agree therewith. And note the Kings ſilver is entred upon the Writ of Covenant, and ought to expreſs, 1. The ſumm given for the licence: 2. The party who paieth it, that is to ſay, he in whom the fee repoſeth. 3. The plea and entry which, &c. And 4. the land for which the fine is paid; and all this was well obſerved in the Caſe at Bar.

3. The concord, and that beginneth thus, *Et eſt concordia talis*, ſcil. *quod præd' Thomas & Elianora recognoverunt maneria*, *&c. eſſe jus*, *&c.* And it is to be noted, that that is the foundation and ſubſtance of the fine. For if upon that the Kings ſilver be entred, although that the conuſor dieth after, the fine is good, as it was adjudged in *Carrel's* Caſe 5 *Eliz. Dier* 220. *b.* And the Note

and

and the Foot of the fine are but abſtracts out of it, but the concord is the ground and ſubſtance of the fine.

4. The note of the fine, and that is but an abſtract out of the original and the concord, and beginneth in this manner, *ſcil. Inter Robertum Drurie & Thomam Cannocke quer'*, *& Thomam T. & E. uxorem ejus deforcean' de maneriis, &c. unde placitum conventionis ſummonit' fuit inter eos*, ſcil. *quod prædictus Thomas Tey & Elianora recognoverunt maneria, &c. eſſe jus, &c.* But it was obſerved, that in old Books the note of the fine is taken for the concord, as in 12 *H.* 4. 16. that the note of a fine is pleadable before the fine engroſſed, and 22 *H.* 6. 51. *acc.* But that is intended of the concord it ſelf; and all the pleadings in *Quid juris clamat, &c.* that the leſſee had fee the day of the Note levied, are to be intended of the concord it ſelf.

5. The foot of the fine, and that beginneth ſo, that is to ſay, *Hæc eſt finalis concordia facta in Curia domini Regis, apud Weſt. a die Paſchæ in quindecem dies, anno, &c. coram Jacobo Dier, &c.* So that the foot of the fine includeth all, and hath the day, year, place, and before what Juſtices the concord was made. And a fine is ſaid to be engroſſed when the Chirographer maketh the Indentures of the fine, and delivereth them to the party to whom the conuſans was made. And it is to know, that when a fine is levied of a reverſion, the conuſee preſently after the conuſans, which is the concord, ought to ſue a *Quid juris clamat* againſt the leſſee; for if the leſſee ſtay till the fine be ingroſſed he ſhall never have a *Quid juris clamat*, for preſently by the concord and conuſans the reverſion paſſeth. *Vide F. N. B.* 147. & 22 *H.* 6. 57. *acc'*. And at the Common Law after the fine ingroſſed, it was ſent into the Treaſury, as appeareth in 17 *E.* 3. 29. But now by the Statute of 5 *H.* 4. *cap.* 14. it is enacted, That all the parts of the fine ſhall be enrolled with the chief Clark of the Bench (which is the *Cuſtos Brevium*) before that the Chirographer hath them out of Court. And note before this Statute the *Cuſtos brevium* had not any Record of the fine but the Chirographer, and nothing remaineth with the chief Juſtice of the Common Pleas but the licence to accord. And note it is provided by the ſame Statute, that the original Writ ſhall be of Record. And the uſe is to direct a Writ of Error to the chief Juſtice of the Bench, another to the *Cuſtos Brevium*, to certifie a tranſcript *pedis finis*, and another to the Chirographer to certifie *tranſcriptum notæ finis*. And note that theſe words are added in the Writ to the *Cuſtos brevium*, *cum omnibus eundem finem tangen'*, by force of which Writ he certifieth the original Writ. 3. It was reſolved that the conuſor ſhall not aſſign Error in the grant and render, by which he himſelf taketh eſtate, no more then the conuſee ſhall do in the conuſans, for that is to defeat the eſtate which by the fine is given to him, nor the recoveror ſhall bring a Writ of Error to defeat the Record in which he himſelf doth recover; for the Judgment in the Writ of Error is to be reſtored to all that which he loſt by the fine or Judgment, and not to avoid and loſe that which he hath gained by the fine or Judgment. 7 *E.* 3. 25. A man ſhall not reverſe a Judgment for Error, if he cannot ſhew that the Error is to his diſadvantage, 8 *H.* 5. 2. *b. F. N. B.* 21. *acc'*. and afterwards the fine was affirmed. [b]

Paſch. 35 *Eliz. in the Kings Bench.*

Dormer's Caſe.

William *Dormer* Eſquire, ſon and heir of *Jeffrey Dormer* brought a Writ of Error upon a Judgment given in a Writ of Entry in the Poſt, upon which a common Recovery was had in the Court of Common Pleas, between *John Crooker* and *George York* demandants, and the ſaid *Jeffrey* tenant of the Mannor of *Farninghoe cum pertinentiis, & ſex meſuagiis, ſex cotagiis, duodecim gardinis*, 400 acres of lands, 60 acres of meadow, 400 acres of paſture, 2 acres of wood, 60 acres of moor and heath, and 40 s. rent in *Farninghoe*, and of one yearly rent or penſion of 4 Marks, *exeunt' de Eccleſia ſive rectoria de Farninghoe in Com' Northampton*; and the tenant vouched *H.* the common vouchee, and Judgment was given, *Ideo conſideratum eſt quod prædictus Georgius & Johannes recuperent ſeiſinam ſuam verſus præfat' Galfridum de manerio, tenement', & reddit' prædict' cum pertinen', ac de advocatione Eccleſiæ prædict': Et quod idem Galfridus habeat de terra prædict' Henrici* the vouchee, *ad valenciam, &c.* In this Record divers Errors were aſſigned. [40]

1. Becauſe the Writ of Entry was *de uno annuali redditu ſive penſione quatuor marcarum exeun' de Eccleſia ſive rectoria*; It was ſaid that that was erroneous for two cauſes: 1. Becauſe a penſion is properly a ſumm demandable in the Eccleſiaſtical Court, and a rent is a thing demandable by our Law. 2. The demand of rent, or penſion in the diſjunctive is utterly incertain, and every *Præcipe* ought to be of a thing certain, for although that the grant be in the diſjunctive, the *Præcipe* in a Writ of Annuity ſhall be of a thing certain, *Vide* 11 *E.* 3. *Annuity* 27. 5 E. 4. 6. And ſee in my Reports Sir *Rowland Heyward's* Caſe: But otherwiſe it is in Aſſiſe, *Vide* 3 E. 3. *Aſſiſe* 175. 11 *Aſſ.* 8. & 29 *Aſſ.* 7. 11 E. 3. *Variancé* 69. *Alternativa petitio non eſt audienda.*

Another Error was aſſigned, That a Writ of entry in the Poſt is not of an advowſon, as appeareth by the Statute of *Weſt.* 2. *cap.* 5. 4 E. 3. 162. 14 *H.* 4. 33. no more then of common of paſture, 4 *E.* 3. 146. 27 H. 8. 12. But the Judgment was affirmed by the whole Court. And in this Caſe four Points were reſolved.

1. That

1. That a common Recovery is not to be likened to a Judgment or proceeding in any other real Action for three cauſes. 1. Becauſe that now the ſame by uſage and cuſtom is become a common aſſurance and conveyance of lands, &c. for it may be averred to an uſe; and if tenant for life ſuffereth a common Recovery, it is a forfeiture. 2. That the ſame is had by mutual aſſent of the parties, *& conſenſus tollit errorem*, 39 *E.* 3. 1. the demandant and tenant conſent that two of the four in the writ of Right ſhall be Eſquires, where by the Law they ought to be Knights, and well, becauſe by conſent, 44 *E.* 3. 6. trial of Villenage doth alter the natural trial by conſent. 7 *H.* 6. 7. pleading of a feoffment in fee upon Condition without deed made and reentry is good, if the other party confeſs the Condition, 34 *E.* 3. *Office de Court* 12. If 12 be ſworn and one depart, another of the pannel by conſent may be ſworn with the 11 to give verdict. 11 *H.* 6. 13. The Court in a *Quare Impedit* by conſent may give longer day then is limited by the Statute of *Marlebridge*, 11 *H.* 4. The Statute of 2 *E.* 3. & 20 *E.* 3. provide, That neither for the great Seal nor petit Seal, Juſtice ſhall not be delayed; yet when the matter doth concern the King only, if he command it, it may be ſtayed, *F. N. B.* 21. *b.* 27 *H.* 8. A tenure may be created at this day by conſent of all, notwithſtanding the Statute of *Quia emptores terrarum*, 6 *E.* 6. *Dier* 78. By ſpecial conſent of the parties, a reentry may be for defaule of payment of rent without demand of it. And divers other Caſes were put where conſent of the parties ſhall alter the form and courſe of the Law. 3. Otherwiſe no aſſurance may be of an advowſon, commons in groſs, &c. to bar remainders or reverſions expectant upon eſtates tail: The ſame Law of Common of paſture, Franchiſes, Liberties, Priviledges, as to have Felons goods, &c. Waifs, Straies, &c. *Et ſæpenumero neceſſitas vincit communem legem, & quod neceſſarium eſt, licitum eſt.* As if two joyntenants be of land to them and to one of them, they ſhall not joyn in a writ of Right. But two joyntenants and to the heirs of one of them of an advowſon ſhall joyn in a Writ of Right of advowſon. And the reaſon of the differenoe is, becauſe that in the firſt Caſe they have ſeveral ways and remedies, as it is agreed in 46 *E.* 3. 21. But in the other Caſe if the tenant for life ſhall not joyn with him who hath the fee, neither the one nor the other ſhall have any remedy; and therefore in ſuch Caſe, *neceſſitas vincit legem.* See Sir *William Pelhams* Caſe in the firſt Reports.

[41] 2. As to the demand of the rent, or penſion of 4 marks iſſuing out of the Rectory, it was reſolved, That the Writ was good enough, for here is not any incertainty, for one of two ſeveral things is not demanded, but one thing only is demanded, for the demand is of a rent or penſion of 4 marks, ſo that there is not but one 4 marks. And in this Caſe *redditus* and *penſio* as the Caſe is are *ſynonyma*. For the latter words, *exeunt de rectoria*, prove it to be rent, for if it were but an annuity, then it ſhould not be iſſuing out of the Rectory, but the perſon in ſuch Caſe ſhall be charged in reſpect of the Rectory. And in 11 *E.* 3. *Annuity* 27. there one granted by deed *quandam annuam penſionem unius robæ precii unius marcæ, vel unam marcam.* 22 *E.* 3. 4. *Lacies* Caſe, there an Abbot granted *quandam annuam penſionem*, &c. and *F. N. B.* 231. *b.* the Writ of *annuali penſione*: By which it appeareth, that *penſio & annuitas*, or *annualis redditus* are all one, and principally in the Caſe at Bar, when it is alledged to be iſſuing out of the Rectory. And if a Writ be brought *de redditu, ſive annuitate, exeunt'* out of the mannor of *D.* it is good enough for the cauſes aforeſaid.

3. It was reſolved, that common Recoveries are ſo uſual, and their form and order of proceeding ſo notorious by appearances the firſt day, and *gratis*, &c. that the Law taketh knowledge of them; and therefore the Judges *ex officio*, without allegation of the party, ſhall take notice that they are Recoveries had by aſſent of the parties for aſſurances of lands, as in *Wimbiſhe* and *Talboys* Caſe, *Plow. Comm.* 56. Recovery in *Formedon* appeareth to Judges to be by conſent of parties, becauſe the tenant was not eſſoined, nor demanded the view, &c. but appeareth the firſt day and confeſſeth the Action. *Vide Plow. Com.* 515. in *Stowels* Caſe, that the common uſage in theſe Caſes of Recoveries is to be allowed, and that in them the intent of the parties is to be obſerved.

Mich. 35 & 36 Eliz. *in the Kings Bench.*

Rowland's Caſe.

[*b*] IN an *Ejectione firmæ* between *John Rowland*, alias *Steyner* Plaintiff, and *William James*, and *William Sherive* Defendants of lands in *W.* in the County of *Worceſter*, upon Not guilty pleaded the Jury found for the Plaintiff: And now it was moved in arreſt of Judgment, that upon the *Venire facias* no return was endorſed, nor any name of any Sheriff appeared upon the back of the Writ, *nec quod executio brevis præd' patet in quodam panello, &c.* but a pannel of the Jury with their Manucaptors was annexed and ſewed to the ſaid Writ; and alſo *Tales* was awarded, and pannel of *Tales* annexed, but no return of them, nor name of Sheriff to it, but the *Poſtea* made mention that they were returned by the Sheriff *per mandatum Juſtic'*. But it was moved that that would not ſerve, for the Sheriff ought to return the Jurors, and the *Tales* alſo; and where there is no return it is not remedied by the Statute of 18 *Eliz. cap.* 14. nor by any other Statute, but inſufficient returns, or which want form; And therefore a notable precedent was cited, and Judgement given in the Common Pleas, *Trinit.* laſt paſt, between *Harbert Barney* and others Plaintiffs, and *Walkley* Defendant, *Trin.* 35 *Eliz. Rot.* 1251. which followeth in theſe words; *Poſtea continuato proceſſu inter partes præd' de placito prædict' per Jur' poſit' inde*

inter eos in respect' hic usque hunc diem, &c. Et modo ad hunc diem venerunt tam prædict' H. B. &c. quam præd' J. W. per attorn' suos præd': Et super hoc idem Johannes W. cur' hic dat. intelligi, quod quoddam breve de Venire facias hic duodecim, &c. inter partes præd' de placito præd', a die sanctæ Trin' in tres septiman' ultimo præterit', retornat' fuit album, & absque aliquo indorsamento sive scriptura super dorsum ejusdem brevis in ligulis Civitatis Glouc' annex', arraiat' inter brevia de tres septiman' sanctæ Trin' remanen' affilat', nullamque faciend' mentionem super breve illud de aliquo Vicecomite, qui retorn' brevis illius warrantizaret, nec quod executio patet in dicti' panell' eidem brevi annex', petendo quod breve illud una cum panell' de nominibus Jur' & proceſſ. inde retornat' adnihilent', & pro nullo habeantur. Super, quo brevi præd. ac dorso ejusdem brevis, una cum panell' annex', per Justic' hic vis. & inspect' dicti' allegatio dicti Johan' Walkeley comperta est vera. Ideo consideratu' est, quod præd' breve de Venire fac', ac panell' eidem brevi annexat. necnon totus processus superind' retornat', adnihilentur, & pro nullo habeantur. Et super hoc præd' H. B. &c. petunt breve dominæ Reginæ Venire facias de novo hic duodecim, &c. ad triandum exitum præd' superius junctum, & eis conceditur: Ideo præceptum est vicecomiti, quod venire faciat de novo hic in crastino sanctæ Trinit' duodecim, &c. per quos, &c. And note that the said Exception was taken after the verdict, as in our Case at Bar. And see the like precedent, *Mich.* 32 *H.* 8. *Rot.* 112. in the Commou Pleas: But there the Court would advise. And it was moved in the Common Pleas, 35 *Eliz.* in the said Case of *H. B.* that the said Writ upon examination might be endorsed and amended, *& non allocatur*; *Et judicium ut supra.* And so it was prayed in 32 *H.* 8. but there *Curia advisare vult.*

[42]

Mich. 44 & 45 Eliz. *in the Kings Bench.*

The Countess of *Rutlands* Case.

IN Debt upon an Obligation of 500 l. brought by the Countess of *Rutland*: The Defendant pleaded to issue, and it was found for the Plaintiff. And now in arrest of Judgment it was shewed, That one *Robert Moore* was returned upon the *Venire facias*, and so named in the distress, but in the pannel before the Justices of *Nisi prius*, by misprision he was named *Robert Mawre*, and so upon the *Postea*; upon which it was said, That a stranger who was not returned was sworn and gave verdict; for which cause Judgment shall not be given. But it was resolved by the whole Court, that if it may appear upon examination, that his right name is *Robert Moore*, so that he is well named in the pannel upon the *Venire facias*, and also that he is the same man who was returned, and was sworn, there the *Postea* shall be amended. And to this purpose, *vide* 9 E. 4. 14. by *Danby*, *&* 19 *H.* 6. *tit. Amendment Br.* 37. 27 *H.* 6. 5. by which Booksit appeareth, That if one be well returned in the pannel of *Venire fac'*, and misnamed in the *Distringas*, or *Habeas corpor'*, that it was amendable; but the process against the Jurors was discontinued: But at this day after verdict judgment shall not be therefore stayed, for all discontinuances are remedied by the statute of 32 *H.* 8. and 18 *Eliz.* But at this day if a Juror be misnamed in the Pannel of *venire fac'*. although he be well named in all the subsequent process it cannot be amended. And so it was adjudged *M.* 35. & 36 *Eliz.* in the Kings Bench in *Codwels* Case; And afterwards the Sheriff was examined, and upon examination it appeared that the true name of the Juror was *Kobert Moore*, and that the said *Robert Moore* who was returned appeared and gave his verdict; And thereupon for the reason aforesaid, the Record of the *Postea* was amended by the opinion of the whole Court. *viz. Popham* chief Justice, *Clench*, *Gawdy*, and *Fenner.*

[b]

Mich. 35 & 36 *Eliz. in the Kings Bench.*

Codwel's Case.

IN an appeal of Maihem between *John Codwell* Plaintiff, and *Thomas Parker* Defendant, the parties came to issue, and the Jury found for the Plaintiff; And now it was moved in arrest of Judgment that there was variance between the pannel of the *Venire facias* and the *Distringas* and *Postea* in the name of one of the Jury, who appeared and gave verdict, for in the pannel of the *Venire facias* he was named *Palus Cheale*, and in the *Distringas* and *Postea* he was *Paulus Cheale*; and because the name was misnamed in the *Venire facias*, and chiefly in his Christian name, the Judgment was stayed; but if he had been well named in the pannel of *Venire facias*, and misnamed upon the *Distringas* or in the *Postea*, upon examination it shall be amended.

Mich.

Mich. 37 & 38 Eliz. *in the Kings Bench.*

Nichol's Caſe.

Chamberlain brought debt againſt *Nichols* upon a ſingle Bill; The Defendant pleaded payment without acquittance, upon which they were at iſſue, and found for the Plaintiff; and although payment without acquittance is no plea, and iſſue is joyned upon a thing not material; for if the Defendant hath paid the ſum without acquittance, yet the ſingle Bill doth remain in force: But for as much as there was an iſſue joyned upon an affirmative and negative, which iſſue is found for the Plaintiff, it was expreſly helped by the Statutes of 32 *H.* 8. & 18 *Eliz.* and upon that the Plaintiff had Judgment; a Writ of Error was brought upon the new Statute, and there upon good conſideration the Judgment was affirmed. *Quod nota.*

Mich. 38 & 39 Eliz.

Bohun's Caſe.

[b] IN 23 *H.* 8. *Grey* and *Elizabeth* his wife being ſeiſed in the right of the ſaid *Elizabeth* of the Manner of *Empoles* in *Weſthall* in *Suffolk*, in the ſame year levied a fine thereof to *Nicholas Bohun* Eſquire and his heirs, by the name of the Mannor of *Empoles*, and of a great number of acres of lands, meadow, &c. according to the common form of fines; and the tenements were valued at 20 marks *per annum*, ſo that the fine in the Hamper was 26 s. 8 d. which was endorſed upon the Writ of Covenant; and alwayes the fine *pro licentia concordandi* (which is called the Kings ſilver, or the Poſt fine) is the fine in the Hamper, and half the ſaid fine more. As in this Caſe the fine in the Hamper was 26 s. 8 d. and the half is 13 s. 4 d. in all amounting to 40 s: and yet the Clark made entry of the Kings ſilver in this form, *Nicholaus Bohun armiger' dat dominæ Reginæ* 40 *s. pro licentia concordandi, &c. in placito conventionis* of ſo many acres of land, meadow, &c. leaving out the Mannor, and following the other words. And in this miſpriſion *Aldam* who was couſin and heir of the ſaid woman brought a Writ of Error in the King Bench, and the tranſcript of the ſaid fine. And Error aſſigned (amongſt others) in the ſaid Point, becauſe the Kings ſilver was not paid as well for the Mannor as for the tenements. And after that, the Judges of the Common Pleas were moved to amend this fine in open Court, and becauſe it appeared to them upon examination and upon ſight of all the parts of the fine, that it was but only the miſpriſion of the Clark who entred the Kings ſilver, and that the ſaid ſumm of 40 s. was in truth the fine as well for the Mannor as for the reſidue. And always the value entred upon the back of the Writ of Covenant, [44] is the warrant for the entry of the Kings ſilver; and although the tranſcript of the fine were removed by Writ of Error: yet for as much as the body of the Record did remain with them, they unanimouſly agreed, That the ſaid entry ſhall be amended, and ſhall be made in a Writ of Covenant of the Mannor aforeſaid, and of all the ſaid acres, &c. as it ought to be. And afterwards upon diminution alledged *in* the omiſſion of the ſaid Mannor, and the entry of the Kings ſilver, a Writ was directed to this purpoſe to the Lord *Anderſon*, who one day this Term moved all the Juſtices of Serjeants Inn in *Fleetſtreet* to know their opinions concerning the ſaid amendment in this Caſe depending the Writ of Error. And it was reſolved by *Popham* chief Juſtice of *England*, *Periam* chief Baron, *Clark*, *Walmſley*, *Fenner*, *Owen*, and *Ewyns*, That the ſaid Entry of the Kings ſilver ſhall be amended, and that pendant the Writ of Error. Alſo where the Writ of Covenant ſhould be *Teſte meipſo*, the Writ was, *Deſte meipſo*, which was inſenſible and vicious; and that was alſo amended by all their opinions.

Note Reader, theſe Precedents and Reſolutions of the Juſtices following in the like Caſes were ſhewed to the ſaid Juſtices before that they reſolved of the principal Caſe.

In *Eſſex*, *Dowlings* Caſe, *&c.* Fine levied, *Hill.* 6. *E.* 6. certified in a Writ of Error, *Mich.* 24 & 25 *Eliz.* and certificate by Writ of *Certiorari Paſch.* 26 *Eliz. & Trin.* 26 *Eliz. ex aſſenſu omnium Juſticiar' de Regio Banco, & Communi Banco, & Baron' de Scaccario*, pendant the Writ of Error, Proclamations endorſed *ſuper pedem finis* were amended, according to the Proclamations upon the note of the fine remaining with the *Chirographer*, *ut patet per recordum.* The Juſtices of the Kings Bench were then, *Wray*, *Thomas Gawdy*, *Ayloffe*, and *Clench*; And the Juſtices of the Common Pleas then were *Anderſon*, *Mead*, *Windham*, and *Periam*, and the Barons of the Exchequer were *Manwood* and *Shute*.

In *Kent*, *Kettle's* Caſe. The return of the Writ of Covenant was, *Oct. Purif.* 31 *H.* 8. and in truth was engroſſed *Trin. ſequen.* but was entred thus, *ſcil. & poſt conceſſ. & recordat' in craſtin' ſanct' Trinit'*, *anno* 30 *H.* 8. where it ſhould be 32 *H.* 8. and thereupon a Writ of Error was brought; And pendant the Writ of Error, the Juſtices of the Kings Bench, by the Reſolution of *Wray*, *Gawdy*, *Clench*, and *Shute* (*ſedente Curia*) the Record was amended in theſe words, *Et poſtea conceſſ. craſtin' Trinitatis* 32. And upon

That

that a Rule was entred in the Kings Bench *Ter. Mich.* 27 & 28 *Eliz.* And it appeareth by the said Rule that the Justices of the Common Pleas, that is to say, *Anderson*, *Periam*, *Windham* and *Rhodes* assented to it: And *Rodes* said, That there was a good president in 30 *H.* 8. *ubi pes finis* was amended by the note and the Proclamations, &c.

3. *Morgan*'s Case in the County of *Oxford*, *Certificatio notæ Judicis*, scil. *Concordia partium fuit in his verbis, In Præcipe de duabus partibus Rectoriæ, & de duabus part' tenem', & per vitium Clerici scriptor' in concordia, deforcian' recognovit partem ultim' quam, &c. & pes finis, & nota cum Chirograph.r' rectè ingrossant'*, viz. *recognovit partes quas, ut illas quas, &c.* And a Writ of Error depending upon this, *Hill.* 38. *Eliz.* *emendatur certificatio Judicis per notam & pedem finis, per Curiam*, before Judgment given in the Kings Bench; and thereupon the Plaintiff in the Writ of Error moved the Court of Common Pleas, that for as much as the Writ of Error was depending, that the fine might be *in statu quo prius* before the amendment; as it was certified before the Writ of Error certified. And the Justices of the Common Pleas, *scil. Anderson*, *Walmesley*, *Beamont* and *Owen* denied the motion, and awarded that the amendment should stand, although that it was after the Writ of Error brought. [b]

4. In *Suffolk*. *Down*'s Case, *Mich.* 38 & 39. by the motion of *Williams* Serjeant at Law *proclam' pedis finis* were amended *pro proclam' notæ*, in these words, Upon the foot of the fine proclamation it was indorsed to be made 30 *Julii*, which was after Trinity Term ended; and upon the note of the fine it was 30 *Junii*, and well, and duly done, and *emendatur per Curiam* after Writ of Error brought; and that assigned for Error. And so in the principal Case the Roll of the Entry of the Kings silver was amended (a Writ of Error depending and that assigned for Error) according to the Writ of Covenant, the Note, the Foot, and the Certificate of the Judge in these words (*de manerio de Empoles cum pertinentiis ac*) which by the negligence of the Clark in the entry of the Kings silver was omitted in the Roll, and are fully extant the Writ of Covenant. Note Foot, and Certificate of the Judge: And because it appeareth that the whole summ was paid to the Queen as well for the Mannor, as for the residue, and so no prejudice to the Queen, it was amended, as is above.

5. *Mich.* 33 & 34 *Eliz.* between *Pain* and *Covert*; The Records (before amendment) were *in Com' Sussex*, and amended, and made *Banc'* as the truth was, And two other fines, *M.* 33 & 34 *Eliz.* were amended, and *pro civitate* (*Eborum*) made *Eborum*.

6. *Sussex*, *Wealches Case*, *Cognitio Judicis*. The Town in which, &c. was to be *Salehurst*, as the truth was, and the Writ of Covenant, Note and Foot were *Salhurst*, and it was amended, and made *Salehurst per Curiam*. And it is to be noted, *Quod tales emendationes per mandatum Curiæ, intrantur in dorso Recordi*, by the Rule of the Court.

Pasch. 41 *Eliz. in the Kings Bench.*

Freeman's Case.

ERror by *Smith* against *Freeman* in a Recovery in Wast: The Writ was in recital of the Statute of *Glouc.* *Quod nullus faciat vastum, venditionem & destrictionem, &c.* where it should be *destructionem*. And it was prayed that this original Writ might be amended, being but the misprision of the Clark, who hath mistaken one word in the Statute of *Glouc.* upon which the Writ was grounded. And the misprision was but in one letter, that is to say, *destrictionem* for *destructionem*. And the whole Court upon good debate and consideration at two several times resolved: 1. That the same was matter of substance; for *districtio* is a Latine word, and altereth the sense of the Statute. 2. That it cannot be amended by any Statute, for matter of substance in an original Writ is not remedied by any Statute, but matter of form only. [45]

Note well Reader, upon consideration of the Statutes of 14 *E.*3. *cap.*6. *Stat'* 1. 9 *H.*5. *cap.*4. 4 *H.*6. *cap.*3. 8 *H.*6. *cap.*12. 32 *H.*8. *cap.*20. & 18 *Eliz. cap.*14. If a Writ original in this Case want form, or contain false Latin, or vary from the Register in matter of form after Judgment, no Judgment shall be stayed or reversed. But if it want substance as in the Case at Bar, although it be misprision of the Clark, it is not remedied by any Statute. *Vide* 3 *E.*6.86. 10 *E.*3.482,553. 41 *E.*3.14. 45 *E.*3.6. 4 *H.*6.16. 7 *H.*6. 40. 21 *H.*6.8. 40 *Ass.*26. 11 *H.*6.34. 27 *H.*6.6. 27 *H.*6. *Amendment* 34. 28 *H.*6.8. 2 *H.*7.11. 9 *H.*7.16. 9 *H.* 7.19. 34 *H.*6.26. 35 *H.*6.10. 30 *H.*6.4. 8 *E.*4.4. 10 *E.*4.12. 11 *E.*4.14. 22 *E.*4.21,47. 13 *H.*7.21. 14 *H.* 7.13. *Vide Mich.* 3 *E* 6. *Bendloes*, the Justices of the Common Pleas in a Writ of Partition, added the word *ostensurus*, which was omitted: And in a Writ of Aiel they amended this word *Ave*, and made it *Avie*. [a]

Trin. 41 *Eliz. in the Kings Bench.*

Gage's Case.

IN a Writ of Error by *Gage* againſt *Tawyer* to reverſe a fine levied 4 *Eliz.* and aſſigned for Error that the Writt of Error bore date 24 *Aprilis*, returnable 15. *Paſch.* (which in truth was the 15 day of *April*) and ſo the return before the *Teſte.* And it was reſolved by the whole Courtthat it ſhall be amended; for a fine and common Recovery are but common aſſurances, made by conſent of the parties, and therefore ſuch miſpriſions may be amended. But in other Actions no amendment ſhall be in ſuch Caſe: And it was ſaid, That in 18 *Eliz.* between *Norris* and *Braybrook* a Writ of Error was brought to reverſe a Recovery in 19 *H.* 8. and the *Teſte* was a day after the Return; and becauſe it appeared, that it was the miſpriſion of the Clark, in caſe of common Recovery, it was amended. *Vide* 11 *H.* 6. 2. *b.*

Trin. 41 *Eliz. in the Common Pleas.*

Cooke's Caſe.

[46] CHallenour brought a *Formedon* againſt *Cook* of the Mannor of *Iſſield* in the County of *Suſſex.* The tenant pleaded in Bar a common Recovery againſt the donee in tail of the ſaid mannor; The Plaintiff pleaded, *Nul tiel Record*, upon which they were at iſſue; And the Record was *Iſſield* by drawing a ſtroke, and making an *ſ.* an *f. ſcil. Iffield.* And the Court was moved to amend it; and it was reſolved, That if it may appear to them, that it was the miſpriſion of the Clark, or corrupted after, that it ſhall be amended. And to induce the Court to it, the tenant ſhewed, that the Recoveror enfeoffed him who was tenant in tail by deed, which recited the Recovery by the name of *Iſſield*, and that he enfeoffed him by the ſame name, and divers conveyances after the Recovery, and all by the true name of *Iſſield.* And the Court agreed that it ſhould be amended, and the rather that it was a common Recovery which is ſuffered by aſſent of the parties for aſſurance of lands. And thereupon it was amended, and Judgment given againſt the demandant.

Caſes of Pardons.

Mich. 35 & 36 *Eliz. in the Star-chamber.*

Franklin's Caſe.

[b] A Queſtion was referred to the conſideration of *Coke* the Queen's Sollicitor General, out of the Court of Star-chamber, between *Downing* Plaintiff, and *Franklin*, *Heiden* and others Defendants, upon the general Pardon, 19 *Feb.* 35 *Eliz.* and the Caſe was, That the Bill of *Downing* was exhibited into the ſaid Court five years before the laſt Parliament for Riots, Routs, &c. and what thing was pardoned by the ſaid general Pardon was the Queſtion: And that depended upon two branches of the ſaid Act, *ſcil.* And alſo except all penalties, forfeitures now due, accrued or grown, or which ſhall or may be due, accrue or grow to the Queens Majeſty by reaſon of an offence, miſdemeanor, or contempt, and whereof and for the which any Action, Bill, Plaint or Information at any time within 8 years next before the laſt day of this preſent Seſſion of Parliament, hath been or ſhall be exhibited, commenced, or ſued, and ſhall be there the laſt day of this Seſſion of Parliament depending or remaining to be proſecuted. And next following there is another Exception, *ſcil.* And alſo excepted out of this general and free Pardon, all offences, diſcords, covins, frauds, deceits and miſdemeanors, &c. whereof or for the which any ſuit by Bill, Plaint, &c. within four years next before the laſt day of this Seſſion of Parliament, is or ſhall be commenced, or exhibited: And upon conſideration of theſe two branches, the Sollicitor General did certifie, That the fine due to the Queen was excepted, and the Plaintiff or Attorney of the

the Queen may proceed for the fine which is excepted, and that the Queen ſhall have it, for without proſecution the Queen cannot have a fine, nor the party his coſts. *Et quando Lex aliquid alicui concedit, concedere videt' & id, ſine quo res ipſa eſſe non poteſt.* But he certified, that the impriſonment, and all the corporal puniſhment in the ſaid Caſe was pardoned. For in the firſt of the ſaid two Exceptions the offence it ſelf is not excepted, but the forfeiture, penalty and profit due to the Queen. And therefore the impriſonment or any other corporal puniſhment is not excepted, for it is not included within theſe words, Forfeiture, penalty, or profit. But if the Bill had been exhibited within the four years, then the offence it ſelf being excepted, by conſequence all incidents are appendants to it, as well corporal, as pecuniary, are excepted. And therefore in ſuch Caſe nothing is pardoned: Which Certificate often times ſince hath been confirmed by the opinion of the Court of Star-chamber.

Hill. 39 Eliz. *in the Star-chamber.*

Guilbert Littleton's Caſe.

BEtween *Guilbert Littleton* Eſquire, Plaintiff, and the Lord *Dudley* and others Defendants, in the Star-chamber, the Caſe was; At the laſt Parliament which began *19 Feb.* 35 *Eliz.* in the general Pardon is ſuch Exception: And alſo excepted out of this general Pardon all offences, &c. whereof, or for the which no ſuit by Bill, &c. at any time within four years next before the laſt day of this preſent [b] Parliament is, or ſhall be commenced or exhibited in the Court of Star-chamber, and now is, or the laſt day of this Seſſion ſhall be there depending. And the Bill was exhibited by *Guilbert Littleton, Hillar.* before the Parliament, and proceſs awarded returnable *Paſch.* next following, which was after the Parliament; And if this ſuit ſhall be ſaid depending before the return of the proceſs was the Queſtion. And firſt, it was objected, that the words of the Exception are, Suit by Bill depending, and it cannot be ſaid ſuit till the proceſs be returned. 2. It was obſerved, That in the next proceeding Exception concerning ſuits commenced within 8 years, there the concluſion is, Depending, or remaining to be proſecuted, which words (or remaining to be proſecuted) as it was ſaid, extend to Bills not depending, *ſcil.* when the proceſs is not returned, but no ſuch words are in this Exception. And to prove that the Bill was not returned before the proceſs returned, the Defendants Council reſembled it to Writs at the Common Law, where divers Books were cited, to prove that original Writs are not in Law depending before their returns, 21 E. 4, 55. a Writ it attamined as ſoon as it is ſealed, but it is not depending until it be returned, 18 *H.* 8. 5. *acc.* But it was anſwered and reſolved, That there was a great difference between original Writs purchaſed out of the Chancery, and returnable in the Common Pleas, or Kings Bench; for there in as much as the original cometh out of another Court, the Common Pleas, or Kings Bench hath not any Record before the return thereof: But in the Caſe at Bar, the Bill is exhibited in the Star-chamber, and proceſs iſſueth out of the ſame Court, and is returnable in the ſame Court; and therefore the ſuit by Bill ſhall be ſaid depending before the return, or ſerving of the *Subpœna.* And it was ſaid, that ſuit by Bill depending, and Bill depending are all one; for the Bill is, *Origo rei & caput ſectæ, & res denominatur a principaliori parte:* And the Attorney General ſaid, That where an original Writ is taken out of the Chancery returnable in the Common Pleas, or Kings Bench, in ſuch Caſe after the Writ ſhall be returned, the Writ ſhall be ſaid pendant from the day of the *Teſte* of it. And if the tenant alien before the return, and after the *Teſte* it ſhall be ſaid an alienation pendant the Writ; or if the Defendant take out another Writ before the return of the firſt Writ, it ſhall be ſaid a purchace pendant the firſt Writ. And it is ſaid in 9 *H.* 6. 54. that where a Writ of Covenant is purchaced to levy a fine, and before the return, *Dedimus poteſtatem* to recite, *cum breve noſtrum de conventione pendeat*; and yet the Writ of Covenant [48] then is not returned; and ſo is the common experience at this day, *vide* 2 E. 4. 11. If a *Quare Impedit* be delivered to the Sheriff in the Court of Common Pleas to be executed, it is pendant to this purpoſe, that the Plaintiff may have a prohibition for ſuit for the ſame cauſe in the ſpiritual Court: And a man may purchace his original Writ, and at the ſame time a Writ of Eſtrepement. Alſo the words of the Exception were obſerved, *ſcil.* Whereof no ſuit by Bill is, or ſhall be commenced, &c. and ſhall be depending the laſt day of this Parliament. In which this word (is) is to be intended, depending *19 Feb.* which was the firſt day of the Parliament; but (ſhall be commenced) ought to be of neceſſity after the ſaid 19. day of *Feb.* which is always out of term. And becauſe it appeareth that the makers of the Act did intend, that the putting in of the Bill only into the Star-chamber after the *19 Feb.* and before the ſaid laſt day, ſhall be ſaid depending; and ſo it appeareth that the ſaid words in the preceding Branch, *ſcil.* Depending or remaining to be proſecuted, are all one in effect; For which it was concluded, That in the Caſe at Bar, the Bill ſhall be within the true intendment of the ſaid Exception, to be ſaid depending. And thereupon ſentence in the Star-chamber did proceed againſt the Defendant in the ſaid Bill.

Pasch. 42 Eliz. *in the Star-chamber.*

Drywood's Case.

DRywood was Plaintiff against *Appleton* and others Defendants in the Star-chamber for Riots, and Routs, and other Misdemeanors; which Bill was brought before the last general Pardon in 39 *Eliz.* And afterwards the Queens Attorney informed for the same offences against the Defendants, and followed upon the first suit: And now a great Question was moved, If the said offences were pardoned [b] or not by the said general pardon. And it is to know, that the said Bill began four years before the last day of the said Parliament, and within the 8 years. And the doubt was conceived upon these words of exception of the said Pardon, *scil.* And now is, or the last day of this Session of Parliament shall be there depending, or remaining to be prosecuted: And it was said, That although that this suit was not depending, because the Plaintiff who followed for the Queen (for every suit in the Star-chamber is for the Queen and she may pardon it) was dead, yet it was said that these words (or remaining to be prosecuted) ought to have construction in Cases where no suit is depending, and yet may be prosecuted, and that is when the Plaintiff dieth, or will not follow it, then the Queens Attorney may prosecute it for the Queen. But it was resolved by the two chief Justices and the chief Baron, that these words, Or remaining to be prosecuted, ought to be construed, to be prosecuted by the party; And the said words, remaining to be prosecuted are added, to remove a scruple which some conceived, That a Bill shall not be said depending till the process be returned, although that in Judgment of Law, the Bill in such Case is said depending.

Mich. 39 & 40 Eliz. *in the Kings Bench.*

Vaughan's Case.

[49] IN a Writ of Error between *Hall* and *Vaughan* in a Writ of Entry in the *quibus* brought in *Wales*: The Defendant pleaded *Non disseisivit*, and pendant this plea the general Pardon in 35 *Eliz.* was made, by which all fines, amercements, contempts, &c. were pardoned, &c. and after divers continuances issue was found for the demandant, and Judgment given, *sed non in maneria quia pardonatur.* And the principal Error which was assigned was, because the Defendant ought to have been amerced, because the general Pardon did not discharge the amercement; for it was said that the wrong, or the disseisin was not the cause of the amercement, but the delay of the Plaintiff; for if the Defendants come the first day and render to the demandants, they shall not be amerced, as 14 *E.* 3. *amerciament* 16. 22 *E.* 3. 1 & 2. 8 *R.* 2. *tit. amerciament* 26. and divers other Books are agreed. And a Case was cited in the Common Pleas, *M.* 15 & 16 *Eliz.* where a *Precipe* was brought against an infant, and pendant the plea he came of full age, it was adjudged he should be amerced for the delay, as it was urged after his full age. So in the Case at Bar, for as much as there was delay as well after as before the pardon, and the amercement was wholly for delay, for this cause the pardon did not discharge it. But the Court resolved, the Judgment should be affirmed. And in this Case these Points were resolved.

1. That the original cause of the amercement in the Case at Bar was the wrong and contempt of the tenant that he did not render the land to the demandant, as he was commanded by the Kings Writ; and although the amercement cannot be imposed, nor the Queen entitled to it before the Judgment (because [b] that by the Judgment the wrong is discerned) and although the pardon cometh before the Judgment, yet the original cause of the amercement being pardoned, the amercement it self by consequence is pardoned, as in *Cole's* Case in *Plowd. Com.* 402. And in *Quatermoigne's* Case in 37 *H.* 8. 21. where it is agreed, that a general Pardon ought to be taken most beneficial for the Subject, and strong against the King.

2. It was resolved, That all Statutes of Jeofails extend to *Wales*, for the Statute of 27 *H.* 8. hath made it parcel of *England.* And afterwards the Judgment was affirmed. Note, he that doth wrong, and at the suit confesseth it, and obeyeth the Kings Writ shall not be amerced; for *prudenter agit, qui præcepto legis obtemperat*: But every one who doth wrong, and being commanded by the Kings Writ, *quod juste & sine dilatione reddat, &c.* and he injustly maintain the wrong upon Record in the Kings Court, and with great delay enforceth the demandant to recover it by course of Law, *peccatum peccato addit, qui culpæ quam fecit patrocinia defensionis adjungit*, and therefore he shall be amerced.

Hill. 41 *Eliz. in the Exchequer.*

Wyrral's Case.

HIll. 40 *Eliz. Rot.* 188. the Case was such; *Thomas Wyrral* and *Jasper Bosvile* were bound unto *Tho: Thwaits*, in a Recognisance in the nature of a Statute Staple 15 *Feb.* 35 *Eliz.* in 500 l. And afterwards the said *Thwaits* was outlawed in the County of *York*, 8 *Octob.* 38 *Eliz.* and afterwards the general Pardon at the last Parliament 39 *Eliz.* was made. And if this debt were pardoned or not was the Question now in this Term in the Exchequer. And that consists upon two Exceptions in the said Pardon, *scil.* And also except out of this Pardon all debts which were or be due to our Sovereign Lady the Queen, or to any to her use, by any condemnation, recognisance, obligation, or otherwise, &c. And [50]
also except out of this Pardon, all goods, chattels, debts, actions and suits already forfeited, &c. by reason of an outlawry, or whereof her Majesty by her highness Letters Patents hath before the last day of this present Session made any grant, covenant, or promise to any person, or persons. And it was resolved by the last Exception it is proved, that the intention of the Queen was not to include debts which accrued to her by Outlawry within the first Exception; for there is a special saving, and in a special manner for them by the last exception. Also the general Pardon is to be taken most beneficial for the Subject, and most strong against the Queen.

Trin. 41 *Eliz. in the Kings Bench.*

Biggin's Case.

IN Appeal between *Shugborough* and *Biggins*, the Defendant was found guilty of man-slaughter; and the Question was if the Queen might pardon the burning of the hand. And it was objected, That the Appeal is the suit of the party; and now by the Statute of 4 *H.* 7. *cap.* 13. the burning of the hand is parcel of the punishment. As if it were enacted, That he who is attainted in Appeal of Maihem, shall have Judgment of death, in this Case if one were attainted in an appeal of Maihem, the Queen cannot pardon the execution of death, because it is the punishment of the offence at the suit of the party. But upon conference had with divers other Justices it was resolved, That the Queen might pardon the burning of the hand in an Appeal, and that for two reasons.

1. It appeareth by the said Statute of 4 *H.* 7. that at the Common Law a man who had once had the [b]
benefit of his Clergy, should have it again, and so *in infinitum*, which was remedied by the said Act; so that the burning of the hand was to no other purpose but to signifie to the Judge whether he hath had his Clergy before or not.

2. The burning of the hand is not any parcel of the Judgment, for then the Queen could not pardon it, because that the Plaintiff hath interest in the Judgment, and for this cause the Case of maihem which was put on the other side was agreed. And so the doubt in *Ellen Lamb's* Case, 3 *Eliz. Dier* 201 & 202. and in *Musgrave's* Case in 9 *Eliz. Dier* 261. well explained. But there it is said, that the Queen cannot pardon the imprisonment, for that is parcel of the execution of the Plaintiff in the appeal. And *Taverner's* Case, 15 *Eliz. Dier* 323. was agreed by all, That the Queen may pardon the corporal punishment in Case of Forgery, because that all suits in the Star-chamber are but Informations for the Queen, although that the suit be exhibited by the party; and the Queen may pardon any offence for which any Subject complaineth there. But if *Taverner* had been attainted at the Common Law in an Action of Forgery of false deeds, there the Queen could not have pardoned it. 2. It was objected, That although the Queen may pardon the burning of the hand, yet the Defendant may be imprisoned at the suit of the party; for before the Statute of 18 *Eliz. cap.* 7. the King may in Case of Indictment of man-slaughter pardon the imprisonment, as appeareth in 15 *H.* 7. 9. but not in Appeal. And by the Statute of 18 *Eliz.* they cannot deliver the Prisoner before that he be burned in the hand. But it was resolved, that for as much as it was enacted by the said Statute of 18 *Eliz.* that after Clergy allowed, and burning in the hand, the Prisoner shall be presently at large, and delivered out of prison, which Act was resolved to extend to the Case of Appeal as to the Case of Indictment; and the Queen now hath pardoned the burning of the hand, for this cause the burning of the hand being discharged, the party also shall be discharged of his imprisonment by good construction of the same Act, otherwise the party should be lawfully discharged of his punishment, and yet remain perpetually in prison, which never was the intent of the makers of the Act. And thereupon *Biggins* was discharged.

Trin. 2 Jacobi, *in the Common Pleas.*

Hall's Case.

[51] ALice *Cooke* libelled in the Spiritual Court against *Rowland Hall* for defamation, for calling her *feme puteine*; and had sentence, and costs were taxed. *Et decretum fuit quod prædictus Rowlandus Hall foret movendus, & citandus, ad solvend' expens. citra tale festum.* From which sentence the Defendant did appeal, and before the Feast *Hall* obtained his pardon of the King; and thereupon got a Prohibition out of the Common Pleas. And in this Case four Points were resolved.

1. That in all Actions depending between party and party in the Spiritual Court, where the suit is only *pro salute animæ, vel reformatione morum*, as for defamation, or laying violent hands upon a Clark or the like, there the Kings pardon is a bar of the suit, for the suit is not to recover any damages, or any other thing, but only to inflict punishment upon the offender *pro salute animæ*; which punishment the King may pardon as well before as after the suit begun, for in truth such suits are only for the King, although they be prosecuted by the party, and likewise suits in the Star-chamber preferred by one subject against another, the King may pardon them; for although that a Subject prosecuteth them, yet the suits are for the King, and to punish the Defendants for their offences and misdemeanors by imprisonment and fine to the King. But if one libel for Tithes or contract of Matrimony, or for legacy, or the like, where the Plaintiff hath interest and property in the thing in demand, and sentence shall be given for him for the thing he libelleth, there the King cannot pardon the same neither before nor after the suit begun.

[*b*] 2. It was resolved that all proceedings in the Ecclesiastical Court *ex officio* are for the King. For which cause, whatsoever the suit is there the King may pardon it; for they are only to correct and punish the party for the offence, or sin, which the King may pardon, and not for the particular interest of the party.

3. It was resolved, That in the principal Case, although that the suit be for the King, the which the King may pardon, yet when sentence is given, and costs taxed for the Plaintiff, now the party hath a particular interest in them by the sentence, which the King cannot pardon, although that day be given for the paiment of them, *ut supra*. The same Law of suits aforesaid in the Star-chamber after sentence given, and costs taxed for the party, the pardon shall not discharge them. But if the pardon had been gotten before the sentence, there the pardon had discharged all, for then the Court could not have proceeded to any sentence of the principal, and by consequence not of costs, which are but accessory.

4. Although that the Defendant hath appealed, by which the sentence to divers purposes (by the opinion of Doctors by the Spiritual Law) is suspended, as it appeareth in 27 *H.* 6. *Gard.* 118. 2 *R.* 2. *Quare Impedit* 143. 1 *H.* 12. 2 *Mar.* 105. yet by the first sentence the party (notwithstanding the appeal) hath an interest in the costs, which could not be discharged by the Kings pardon. And therefore as to this purpose the first sentence is not suspended by the appeal. And afterwards a Consultation was granted for the Costs.

Mich. 29 & 30 *Eliz. in the Exchequer.*

Page's Case.

[52] IN an Information against *Page* and his wife for intrusion in certain houses in *Lyn Regis* in the County of *Norfolk*, upon demurrer, the Case was such; *Indy* seised of the said houses in fee, holden in Socage, by his Will in writing devised them to his wife (now the wife of *Page*, who was an alien born) and before the death of *Indy* the Queen by her Letters Patents under the great Seal made the said woman denizen, and afterwards *Indy* died; and the said Letters Patents under the great Seal were corrupt and raced in the *Teste*, so that now as it was raced and corrupted they bore date after the death of *Indy*, and upon that *Page* and his wife got an exemplification of the inrolment of the Letters Patents in the Chancery under the great Seal, which was with the true *Teste* according to the truth. And after an Office was found before certain Commissioners, by force of a Commission directed to them under the Exchequer Seal, by which it was found that the said woman was an alien born, &c. And in this Case these Points were resolved by Sir *Roger Manwood* chief Baron, and the whole Court of Exchequer.

1. That the Office was insufficient and void for divers causes. 1. Because the office found by force of a Commission under the Exchequer Seal is not sufficient to entitle the Queen to the lands of an alien born: For there are two manner of offices; one that vesteth the estate and possession of the land, &c. in the Queen, when she had not any right or title before, and that is called an office of entitling: As in Case of purchace by an alien, ar the Kings Villain, or by any body Politick or Corporate in Mortmain, or by a person attainted of felony, and the like: And such office which concerneth freehold ought to be by force of

of a Commiſſion under the great Seal of *England*. There is another office, and that is called an office of Inſtruction, and that is when the eſtate of the land is lawfully in the King before, but the particularity of the land doth not appear of Record, ſo that it may be put in charge. As if one be attainted of high Treaſon, all his lands, &c. are preſently by the Statute of 33 *H.* 8. *cap.* 20. in the King: Or if the Kings Tenant committeth felony and is attained, and dieth, in theſe and the like Caſes the eſtate of the land without office is in the King: But it doth not appear to the Court of Exchequer, of what lands the perſon attainted was ſeiſed of, at the time of his attainder or after, and if that be found by office by force of a Commiſſion under the Exchequer Seal, it is a ſufficient Record to inſtruct the King of the certainty of the land, &c. by which it may be put in charge. [b]

2. It was reſolved, That the office was inſufficient, becauſe it doth not appear what authority the Commiſſioners had, but generally, *Inquiſitio capta, &c. coram, &c. virtute cujuſdam Commiſſionis eis direct'*, and for divers other groſs imperfections the office was adjudged inſufficient.

3. It was reſolved, That in the Caſe of an alien, perſon attainted, ſo long as he liveth, the Kings Villain, alienation in Mortmain, condition broken, alienation *contra formam collationis*, and the like, the inheritance of freehold of the land is not veſted in the King till office found under the great Seal, for that is an office of entitling. *Vide* 35 *E.* 3. *Villenage* 22. 8 *E.* 4. 4. 9 *H.* 7. 2. *Mortmain*, 2 *H.* 7. 8. *Condition* 29 *H.* 8. *Charter de Pardon* 26. If an alien and a Subject born purchace lands to them and to their heirs, they are joyntenants, and ſhall joyn in an Aſſiſe, and the ſurvivor ſhall hold place till office found. *Plow. Com. Nichols Caſe, fol.* 477. & 11 *Eliz. Dier* 282. *alien nee. Vide Stanf. Prærogat. Regis, cap.* 18. *fol.* 53.

4. The great Queſtion of the Caſe was, If the Defendants ſhould plead the ſaid exemplification of the inrolment of the ſaid Letters Patents of alienation, by force of the Statute of 3 *E.* 6. *cap.* 4. or 13 *Eliz. cap.* 6. And it was objected, that neither an exemplification, nor a *conſtat* of any Letters Patents were pleadable at the Common Law, as appeareth by the preambles of both Statutes; and that this Caſe of Denization was out of the words of both Statutes, for the words of the purview of the Statute of 3 *E.* 6. are, All and every perſon or perſons, bodies Politick or Corporate, which lawfully have or may claim by force of any Patent made ſince the 4. of *Feb.* 27 *H.* 8, &c. and all other that now have, or hereafter ſhall have any good or lawful eſtate, right, title, rent, profit, &c. of, in, to, or out of any lands, tenements, hereditaments, or offices under any ſuch Patentee or Patentees, &c. ſhall and may, &c. make and convey to themſelves title unto the ſaid honours, lands, tenements, offices, and other the premiſſes, [53] by, from and under the ſaid Patentees or any of them, &c. by ſhewing forth of any exemplification or conſtat of the roll, &c. And in the Caſe at Bar, the woman doth not claim any eſtate, right, title, &c. of or in any lands, tenements, &c. by force of any Letters Patents, but only to be made denizen, which extendeth only to ability and capacity of her perſon, and not to any lands, tenements, &c. nor unto any thing iſſuing out of them. And it was objected, That this Caſe was out of the Statute of 13 *Eliz. cap.* 6. for the letter of that is, that all and every Patentee and Patentees, their heirs, ſucceſſors, executors and aſſignees, and all and every other perſon and perſons, having by or from them or any of them, or under their title any eſtate, or intereſt of, in or to any lands, tenements or hereditaments, or any other thing whatſoever to ſuch Patentee or Patentees heretofore granted, &c. For which it appeareth for the reaſon aforeſaid, that he who claimeth to be made a denizen is out of theſe words; alſo the Statute doth intend ſuch hereditament, or thing only as may be aſſigned or transferred over, which appeareth by the ſaid words. And all and every perſon and perſons having by or from them, &c. any eſtate, &c. of, in or to any lands, &c. to ſuch Patentee, &c. granted. But when the Queen by her Letters Patents maketh one a denizen, the ſame is an individual and incident inſeparable to the perſon of him who is made denizen which cannot be paſſed over, and therefore this Caſe is out of the ſaid Act: But it was anſwered and reſolved by the whole Court.

1. That true it is, that an exemplification, nor a conſtat was pleadable, and to be ſhewed to the Court at the Common Law, becauſe they were but the tenor of the inrolment, and the tenor of a Record is not pleadable by the Law. And with this agreeth the preamble of both the ſaid Statutes, and the Statute of 6 *R.* 2. *cap.* 4.

2. It was reſolved, That the ſaid Act of 13 *Eliz.* did extend to the ſaid Letters Patents of denization; for it was a great Queſtion conceived upon the ſaid Act of 3 *E.* 6. Whether the Patentee himſelf might plead the exemplification or conſtat of inrolment of his own Letters Patents by reaſon of the ſaid words in the body of the ſaid Act, Shall and may, &c. make and convey to themſelves title, &c. unto the ſaid honours, lands, tenements, &c. by, from or under the ſaid Patentees, &c. So that by the words of the Act, the Patentees themſelves were left to the Common Law, *vide* 1 *Eliz. Dier* 167. Sir *Thomas Wrothes* Caſe; for the remedy whereof, the Act of 13 *Eliz.* was made, which is more liberal and beneficial than the ſaid Act of 3 *E.* 6. for the ſame by expreſs words extendeth to all Patents whatſoever, without any reſtraint: For it was reſolved that theſe words, All and every Patentee and Patentees, their heirs, ſucceſſors, executors and aſſignees, is a diſtinct clauſe of it ſelf, and extendeth to all Letters [b] Patents whatſoever, either concerning lands, &c. or perſons, &c. or any thing, or matter whatſoever. And in the next clauſe the words are, any lands, tenements, hereditaments, or any thing whatſoever. And afterwards towards the end, as ſhall and may ſerve to and for ſuch title, claim or matter; and therefore this Act doth extend to Letters Patents of creation of Dukes, Marqueſſes, Earls, Viſcounts and Barons. Alſo to pardons of Treaſons, Felonies, &c. Outlawries, Infranchiſements of Villains, and all other Letters Patents which at the time of the exemplification or conſtat are in force, not lawfully ſurrendred, or cancelled, concerning any inheritance, free-hold or Chattels, or any other thing, or matter real, perſonal, or mixt whatſoever. *Vide* the opinion of *Meruin* in 32 *H.* 8. *tit. Patents Br.* that a conſtat was pleadable at the Common Law, but not an *Inſpeximus*. And the opinion of *Fiſher*, 12 *H.* 7. 12. *b.* and ſee *Lib. Entries*, Aid granted upon pleading of a conſtat. But by this Reſolution you will better underſtand the Law in theſe Caſes.

Note

Note Reader, that for as much as the said Acts of 3 E. 6. & 13 *Eliz.* extend to make an exemplification or constat of the inrolment of Letters Patents pleadable, it is requisite to shew you the difference between an exemplification and a constat, and the signification also of these words by which Letters Patents are commonly named, *Inspeximus*, *Innotescimus*, *Vidimus*; And it is to know, that an Exemplification, and an *Inspeximus*, as an *Innotescimus* and *Vidimus* are all one: An *Inspeximus* or Exemplification beginneth in this form; *Eliz. Dei gratia, &c. omnibus, &c. inspeximus irrotulament' quarund' literarum paten', &c.* and reciteth them word by word, and concludeth in such form, *Nos autem tenorem literarum paten' præd, &c. ad requisitionem A. B. duximus exemplificand' per præsentes. In cujus rei testimonium, &c.* And it is called *Inspeximus*, because it beginneth after the Kings style, with this word, *Inspeximus*; And it is called Exemplification *a re ipsa*, because the Record is thereby exemplified, as appeareth by the end of it, *duximus exemplificand' per præsentes.* And a constat after the Kings style beginneth; *Constat nobis per Inspectionim Rot' Cancel' nostræ quod dominus Henricus nuper Angliæ octavus pater noster præcharissimus, literas Patentes fieri fecit in hæc verba: Henricus Dei gratia, &c.* and recite all the Letters Patents word by word, and conclude, *Nos autem pro eo quod literæ nostræ Patent' prædict' sunt casualiter amissæ, sicut A. B. nobis in Cancellar' nostra personalit' constit' sacram' præstitit corporale, & quod ipse literas præd', si eas imposter'* [54] *reperir' contigerit, nobis in Cancell' nostram præd' restituerit cancelland' tenorem irrotulament' præd' ad requisitionem J. S. duximus exemplific' per præsentes. In cujus, &c.* And is called a *constat*, because that after the Kings style it beginneth with this word, *Constat, &c.* And it is to be observed, That by none of them any thing is to be exemplified, but the tenor of the Record. Also by that it appeareth, that a man cannot have a *constat* without an *affidavit*, as by the form of the *constat* appeareth. But an *Inspeximus* may be without *Affidavit*. An *Innotescimus* or *Vidimus* are all one, and are always of a Charter of feoffment, or some other instrument which is not of Record; and the *Innotescimus* beginneth in this form; *Regina, &c. omnibus, &c. Inspeximus quoddam script' fact' per A. B. Radulpho D. sigill' ipsius A. sigill' (ut dic') in hæc verba: Sciant præsentes, &c.* and recite the Instrument word by word.. *Et hoc omnibus quorum interest aut interesse poterit in præmissis Innotescimus per præsentes. In cujus rei, &c.* And it is called *Innotescimus*, because of this word *Innotescimus* in the end of it. And sometimes it beginneth, *Vidimus quoddam scriptum, &c.* and then it is called a *Vidimus*; For the antiquity of an *Inspeximus* or Exemplification in the form that now is used, I have read in the Chronicles of the Monastery of S. *Martin* of *Battaile*, that King *Henry* the first invented the said form; for these are the words of the Chronicle, *Contigit unam ex chartis Will' fundatoris de Bello vetustate dissolvi, unde Odo Abbas a Rege Hen. petiit, ut sigillo suo remunis renovet'. Rex assentit. Ac ubi in chartis antiquis, posterior solet mention' facer' prioris in hujusmodi verbis: Sicut charta talis Regis vel hominis testatur. Rex Henr', ne clausula illa rescriberet', sed aliam antea inusitat', ipse dictavit hoc modo: Quoniam inspeximus chartam Will', &c.* (reciting the whole first Chapter) *Et inclytus Rex reddidit hanc rationem facti sui. Si enim (inquit) clausula, quæ suppressa est, minime inserta fuisse charta posterior sine prio' modicum conferret, nunc vero, nulla de præcedente facta mentione, hæc charta sola sufficit, etiamsi omnes alii deperiissent, quoniam ego ipse, quæ in persona vidi testifico.*

Mich. 30 & 31 Eliz. *in the Common Pleas.*

Knight's Case.

[b] IN an Action of Trespass between *Knight* and *Breech*, the Case was; The Prior of S. *Johns* of *Jerusalem*, *anno* 29 *H.* 8. made a lease by deed indented with the assent of his Covent under their common Seal, of divers houses in *Clerkenwell* in the County of *Midd.* for years yet enduring, yielding the yearly rent of 5 l. 10 s. 11 d. at four Feasts in the year, usual in the City of *London*, *scil.* for one house 3 l. 11 d. for another house 20 s. and for the other houses several rents residue of the said rent of 5 l. 10 s. 11 d. with Condition that if the said rent of 5 l. 10 s. 11 d. be behind in part or in all, at any of the said Feasts, that then the Prior and his successors should reenter. And afterwards the said Priory and all the possessions thereof came to King *H.* 8. by surrender of the said Prior and his Covent, and by the Statute of 31 *H.* 8. which King *H.* 8. in the 36 year of his reign by his Letters Patents under his great Seal granted one of the houses (for which 20 s. of the rent was for the said lease reserved) to the lessee and another in fee, and afterwards the lessee died; And afterwards it was found by inquisition, by force of a Commission under the Exchequer Seal, that 37 s. 5 d. parcel of the said rent of 5 l. 10 s. 11 d. reserved by the said demise for the residue was behind at the feast of S. *Michael* then for a quarter of a year then last past: And that the said feast of S. *Michael* was one of the usual feasts in *London*; and that after the Queen, and before the Commission returned, and before any entry or seisure by her, by her Letters Patents under the great Seal, granted the residue of the houses to one in fee, who made the lease to the Plaintiff *Knight*, upon which *Breech* the Defendant assignee of the Executor of the first lessee entred, against whom *Knight* the Plaintiff brought an Action of Trespass. And this notable Case was often argued at Bar in the Common Pleas, and openly by the Justices at two several days; and because that the Court was divided in opinion, this Case was argued in the Exchequer Chamber before all the Justices of *England*. And after arguments at Bar, and divers conferences had amongst the Justices at Serjeants Inn it was adjudged for the Plaintiff: And in this Case these Points were resolved.

1. That

1. That it was one intire leaſe, and conſiſted upon ſix unities: 1. The demiſe is made by one word of demiſe. 2. To one leſſee. 3. To have one beginning. 4. One term of years. 5. One determination of it. 6. One reſervation of rent in groſs at the firſt; and the (*videlicet*) afterwards doth not make ſeverance of it as this Caſe is, but is rather a ſeveral declaration of ſeveral values of each parcel, by which it appeareth how and for what rates the whole rent of 5l. 10s. 11d. is reſerved. But it was reſolved, that upon one leaſe ſeveral yearly rents by apt words may be reſerved, for the reſervation of the rent is not of the ſubſtance of the leaſe, for the leaſe may conſiſt without any reſervation, either for part, or for all. And therefore if a man make a leaſe to *B.* of the Mannors of *Dale*, *Sale* and *Down*, to have and to hold to him the ſaid mannors for 21 years, rendring yearly out of the mannor of *Dale* 10l. in this Caſe the mannor of *Dale* is only charged with the ſaid rent, and the mannors of *Sale* and *Down* are not charged with it; And in this Caſe the rent is incident to the reverſion of the mannor of *Dale* only; and if in this Caſe the leſſor granteth over the reverſion of the mannors of *Sale* and *Down*, yet all the rent of 10l. doth remain with the leſſor, and the leſſor or his leſſee cannot diſtrain for this rent in the mannors of *Sale* and *Down*: And in the ſame Caſe the leſſor might have reſerved a rent of 5l. out of the mannor of *Dale* during 5 years, and 10l. out of the mannor of *Sale* during 10 years after, and one upon a Condition precedent, another upon Condition ſubſequent, and the third abſolutely, and to be paid at ſeveral days and places; in which Caſes without queſtion the rents are ſeveral, and for the rent of the one, the leſſor cannot diſtrain in any of the other: And a ſurrender of one mannor ſhall not extinct the rents for the other. And therewith agreeth 14 *Eliz. Dier* in *Winter's* Caſe 308 & 309. by three Juſtices, 17 *E.* 3. 75. *b.* 17 *Aſſ. p.* 10. & 9 *E.* 3. 12. And ſuch conſtruction agreeth with the true intent of the parties, which is always to be obſerved, when the ſame by reaſonable conſtruction may ſtand with the rule and reaſon of the Law. *Vide* 29 *E.* 3. 39. 29 *Aſſ. p.* 52. 18 *Eliz. Dier* 350. 5 [b] *Aſſ. p.* 6. 7 *Aſſ. p.* 1. 15 *Aſſ. p.* 11. But in the Caſe at Bar it was reſolved, that the rent was entire, becauſe the leſſor doth reſerve the yearly rent (in the ſingular number) of 5l. 10s. 11d: and afterwards when the leſſor cometh to his condition for payment of the ſaid rent, the condition is alſo in the ſingular number, *ſcil.* if the ſaid rent of 5l. 10s. 11d. be behind in part or in all, ſo that the ſame doth agree with the words of the Indenture (which import the intent of the parties) that in this Caſe it ſhall be one intire rent; and if it ſhall be ſeveral rents, then queſtion may be made of the validity of the condition which extendeth to the ſaid rent, &c. in the ſingular number, *Sed benigne faciendæ ſunt interpretationes chartarum propter ſimplicitatem laicorum, ut res magis valeat quam pereat.* And by this conſtruction all the parts of the ſaid Indenture well agree with themſelves, and with the Law alſo. And the difference between this Caſe and *Winter's* Caſe is, becauſe that there the reſervations are ſeveral, and here (upon conſideration of the whole Indenture) intire, *quod nota.*

2. It was reſolved, That admitting they had been ſeveral rents, yet for as much as the condition was intire, giving one intire entry into the whole for default of payment of any part, by the ſeverance of any part of the reverſion (if it were in the Caſe of a common perſon) all the condition ſhall be deſtroyed. And therewith agreeth the Judgment in *Winter's* Caſe, 14 *Eliz. Dier* 308, 309.

3. The great doubt was, Whether the ſame being in the Kings Caſe, if the condition by the ſeverance of part of the reverſion ſhall be deſtroyed or apportioned. And, 1. It was objected, That the leaſe in the Caſe at Bar was made by common perſons, and the reverſion thereof was inveſted in the King by their ſurrender, and by the act of 31 *H.* 8. in which Caſe the King cannot take the ſame in other manner than the ſubject had it before. For the Parliament which gave the ſame to the King, ſhall bind the King as well as the Subject, and his prerogative ſhall not be extended to do wrong or injury to any Subject, as it is holden in 13 *E.* 4. 8. *a.* 19 *H.* 6. *Br. Quinzim.* 5 *E.* 3. 6. 17 *E.* 3. 40. *Stamford* 543. *Plow. Comm. Nichols* Caſe 246. 2. It was objected, That if the Condition in this Caſe ſhall be divided, the Law and nature of the thing ſhall be altered by the Kings grant, and that the King cannot do; for he cannot alter nor change the Law, or Cuſtom of the land by his Patent. *Vide* 11 *H.* 4. 73. 37 *H.* 8. *Patents Br.* 100. &c. If the Condition ſhall be divided, he ſhall make two Conditions of one, and the leſſee ſhall be ſubject to two, and for the not payment of the rent to one, the other ſhall enter, and many abſurdities would follow thereupon; all which ſhall be avoided, if according to the Rule of Law the Condition ſhall not be divided. But upon great deliberation, the Juſtices of the Common [56] Pleas having divers conferences with *Wray* chief Juſtice of *England*, *Manwood* chief Baron of the Exchequer, and all other the Juſtices, at laſt, upon mature conſideration it was reſolved, that the Patentee of parcel, ſhould not take advantage of the Condition. But it was alſo reſolved, That as to the reſidue the condition doth remain with the reverſion which the King hath, and ſo no prejudice to any party, nor wrong done to any by the Kings prerogative, nor the King by his grant doth not alter the Law. For the Law doth make a difference between the Kings grants, who always is preſumed to intend *ardua regni pro bono publico omnium, &c.* and the grants of Subjects who may follow their private buſineſs, for the grants of Subjects ſhall be always taken ſtrong againſt them, but the grants of the King ſhall be interpreted by a favourable and beneficial interpretation, ſo that no prejudice ſhall grow to him by conſtruction or implication upon his grant more than he truly intended by it. And therefore if the King grant land to *J. S.* and his heirs, and in truth *J. S.* is the Kings Villain, it ſhall not enfranchiſe the Villain by implication. The ſame Law of an alien born, 17 *E.* 3. 39. Advowſon of a Prebend holden of the King was aliened to an Abbot and his ſucceſſors; and the King granted to the Abbot and his ſucceſſors, That the Abbot and his ſucceſſors ſhould hold the Prebend to his own uſe, yet he ſhall ſeiſe the advowſon for the alienation in Mortmain, and ſhall deſtroy the appropriation, for he ſhall not be ouſted of his right to the advowſon by implication. And in 2 *K.* 3. 4. 21 *E.* 4. 46. & 34 *H.* 6. If two are indebted to the King, and the King releaſeth to one it ſhall not diſcharge the other. And in 6 *H.* 7. 15. 11 *H.* 7. 10. if the King releaſeth all demands, a right of inheritance ſhall not be releaſed. 21 *H.* 7. 7. The King grants lands in fee upon condition that he ſhall not alien, the ſame is good; but in

all these Cases it is otherwise in the Case of a common person. And in many Cases the King who claimeth by a Subject shall be in better case in respect of the dignity and prerogative incident by the Law to the person of the King, then the Subject himself by whom he claimeth. As if the King had a rent seck by attainder of Treason, or by grant, he shall distrain for the same not only in the land charged, but in all his other lands, and yet the Subject by whom he claimeth shall not distrain for the same. If a Subject have a Recognisance or Obligation, and afterwards is outlawed, or attainted, the King shall seise all the land of the conusor, or obligor, whereas he himself can have but a moity: So in the Case at Bar, the King shall take advantage of the Condition without demand, and yet the Prior himself under whom [b] the King claimeth cannot reenter for default of payment of the rent without a demand. And if the King purchace a Seigniory of which land was holden by posteriority, the King shall be in better condition than the Subject from whom he claimeth, and shall have the priority. And so shall his grantee have in such Case, as it is holden in 24 *E.* 3. 65. *Garde* 27, 47.

4. It was resolved, That although there was 37 s. 5 d. which was found to be behind at *Michaelmas*, which was more than was due at any one quarter of the year, yet that sufficeth for the King when the office hath matter and substance, for the sole and substantial point which proveth the breach of the Condition, is the not payment of the rent, or any part of it, and it is not material how much rent was behind, for if any part was behind it sufficeth; and the party who traverseth, ought not to traverse that the said sum of 37 s. 5 d. was behind, but that the said sum of 37 s. 5 d. or some part of it was behind; and every office being the finding of Lay people which hath matter of substance, shall serve the King, although the manner of it be not so formal as it may be. And therefore if it be found, that the rent for one whole quarter was behind, and in truth but part of it was behind, it shall suffice for the King. Also that the Jurors in *Midd.* might find which were the usual Feasts in *London* being another County.

5. It was resolved, That although without office the lease was not void, because that one clause of reentry is only reserved, as appeareth before, and no limitation, that for non payment the lease shall be void, and although the office be not returned before the date of the Patent; yet for as much as the office was found before the grant, and afterwards it was returned of Record, the grant was good, and that in this Case of reentry, by the office without seisure, the lease was void.

6. It was resolved, Although the Commission was under the Exchequer Seal, yet for as much as thereby a chattel, *scil.* a lease for years shall be void, the Inquisition found by force thereof was good enough, although the Commission were not under the great Seal.

And so note a difference between this Case and *Pages* Case before. And afterwards the Plaintiff according to these Resolutions had Judgment to recover.

Hill. 32 Eliz. *in the Kings Bench in a Writ of Error.*

Specot's Case.

[57] HUmfrey *Specot* Esquire, and *Elizabeth* his wife, *Pasch.* 28 *Eliz.* brought a *Quare Impedit* against the Bishop of *Exeter*, and counted, that *John Arscot* was seised of the Mannor of *Tedcote* in the County of *Devon*, to which the advowson of the Church of *Tedcote* was appendant in fee, and held the same in Socage; and so seised, 1 *Jan.* 4 & 5. *Phil. & Mary*, by his Will in writing devised the said Mannor with the appurtenances to which, &c. to the said *Elizabeth* for term of her life, and died, by which *Elizabeth* entred into the said mannor, and was thereof seised for term of her life, and took husband the said *Humfrey*, and they presented to the said Church aforesaid then being void *David Walter*, who was admitted, instituted and inducted in time of peace, &c. And afterwards the Church became void by the death of the said *David Walter*, and yet is void; and so it doth appertain to the Plaintiff to present, and that the Bishop did disturb him, &c. The Bishop pleaded, that the said Church was within his Dioces, and that he hath nothing, nor claimeth nothing in the said Church, &c. but admission, institution, and induction of the Incumbent. And that the said Church is a Benefice with Cure of souls, &c. And that the said *David Walter* 24 *Nov.* 27. died, and that the said Church became void, *ipso Episcopo ad tunc ejusdem Ecclesiæ Ordinario existen'. Et ulterius idem Episcopus dicit quod prædict' Humfrid' infra sex menses, proxim' post mortem prædict' David, apud civit' Exoniæ, in Com' ejusdem civit' præsentavit eidem Episcopo tunc Ordinar' Ecclesiæ præd' quendam Johannem Holmes ut clericum suum, ad Ecclesiam prædictam sic vacantem, eundem Episcopum requirent', quod ipse eundem Johannem Holmes admitteret, ipsumque in ead' Ecclesia instituer', induci facere dignaret': Super quo idem Episcopus, ut Ecclesiæ præd' Ordinarius, apud, &c. prædict' Johann' Holmes sic præsentat' de habilitate & idonietate sua in hac parte, secundum Leges Ecclesiasticas examinavit, ut de Jure debuit: Et super hujusmodi examinationem suam, idem Episcopus ad tunc & ibidem invenit præfat' Johannem Holmes fore schismaticum inveteratum, ac eundem Johannem Holmes ea occasione per legem sacrosanct' Ecclesiæ fore personam inhabilem, & minime idoneam, ad acceptandum aliquod beneficium cum cura animarum, per quod idem Episcopus ut Ecclesiæ illius Ordinarius adtunc & ibidem recusavit admittere prædict' Johannem Holmes ad Ecclesiam prædictam*; and pleaded that he of the cause of refusal aforesaid gave notice to the said *Humphrey*, &c. upon which the Plaintiff did demurr in Law: And it was adjudged in the Common Pleas, That the Bishops plea was insufficient, because that he shewed

ſhewed generally that he was *ſchiſmaticus inveteratus*. And upon this Judgment a Writ of Error was brought in the Kings Bench by the ſaid Biſhop, and two Errors were aſſigned within the Record.

1. Becauſe that no preſentment was alledged in the deviſor, but only in the deviſees for life; but it was not allowed, for the preſentment of the leſſee is a ſufficient title for him without queſtion, 8 *H.* 5. 10.

2. Error was aſſigned, That the Court erred in Law in giving Judgment againſt the Biſhop for the inſufficiency of his plea, where his plea was ſufficient. And it was objected by the Biſhops Councel, that the Biſhop ought not to ſhew any particular Schiſm, for if he ſhew the ſame, the Court cannot either decide, or determine it, or examine it, becauſe it is a ſpiritual thing which lieth not in their conuſans, as it is holden 27 *H.* 8. 14. That for calling a man Heretick no Action upon the Caſe lieth in our Law, for thoſe of the Common Law cannot determine what is Hereſie; And in 15 *H.* 7. 7, 8. it is agreed by all the Juſtices, That the Biſhop in examination is Judge, and not a Miniſter, and therefore the Law giveth faith and credit to his Judgment. And it was ſaid, That it is a good cauſe to remove a Coroner from his office generally, becauſe he is *minus idoneus ad officium illud exequend'*, as appeareth by the *Regiſter* and F. N. B. 163. But it was anſwered and reſolved, That the plea of the Biſhop was inſufficient. Firſt, it is declared by the Statute *De Articulis Cleri cap.* 14. that *De idonietate præſentat' ad beneficium pertinet examinatio ad Judicem Eccleſiaſticum, &c. ut propter defect' ſcientiæ & aliarum cauſarum rationabilium*: So that it appeareth that there ought to be reaſonable cauſe, *& cauſa vaga & incerta non eſt rationabilis*, for it is commonly ſaid, *Quod doloſu verſatur in univerſalibus*: And by the reaſon which hath been made, that the general allegation of the Plaintiff ſhall be good in the Caſe at Bar, is good, becauſe that the Biſhop in examination is Judge; By the ſame reaſon it may be maintained that he may refuſe any Clark, becauſe that he is not *idoneus* generally, or becauſe he is *criminoſus* generally: But although that he is Judge in examination, yet for as much as the proceedings of the Biſhop are not of Record, the cauſe of the refuſal is traverſable, and if it be traverſed, and the party refuſed be alive, it ſhall be tried by the Metropolitan, and if he be dead, it ſhall be tried by the Country. And if ſuch general allegation of Biſhops ſhall be admitted (to which the Patron ſhall not have anſwer, becauſe the Biſhop in his examination is Judge, the cauſe being ſpiritual, as it hath been objected) Patrons ſhould ſuffer great prejudice in theſe times in their Preſentation: In 38 *E.* 3. 2. the Biſhop Plaintiff ſhewed for cauſe of refuſal that the preſentee had acknowledged himſelf to be perjured, &c. and ſo *criminoſus*, by which it appeareth, that the alledging that he is *criminoſus* generally is not good, for no certain iſſue can be taken thereupon. And it is doubted there if the Biſhop ought not to ſay *in facto* that he is perjured, and not that he hath confeſſed that he is perjured. In 5 *R.* 2. *Trial* 54. it was agreed for good Law, That if a miſcreant or ſchiſmatick be preſented, admitted, and inducted, it is a good cauſe of deprivation. So if he be irreligious he may be refuſed, as it is ſaid in 5 *H.* 7. 6. But when he is charged with the one, and refuſed for the other, it ought to be alledged in particular, ſo that the party may anſwer to it. And it was obſerved, that it appeareth in our Books, that the cauſe of refuſal ought to be certain, as in 5 *H.* 7. 19. & 11 *H.* 7. 7. & 37. That the preſentee is a Baſtard, Villain, within age, or illiterate, &c. And 15 *H.* 7. that the Patron had been excommunicated by 40 days, and therefore his preſentee not to be admitted; or that his preſentee hath committed manſlaughter, as it is holden in 38 *E.* 3. 2. or that the preſentee is outlawed, for then he is not *idonea perſona*, or one who is *mere laicus*, *Mich.* 12 & 13 *Eliz. Dier* 292. *Vide* 8 & 9 *Eliz. Dier* 154. The Biſhop of *Norwich* refuſed one becauſe he was a hunter of Taverns, and a player at unlawful games, *ob quod & diverſa alia crimina*, he was *criminoſus*, *& non idoneus*, And it was adjudged, that the particular cauſes were not ſufficient, for they were not *mala in ſe*, but *mala prohibita*. And *quod ob diverſa alia crimina*, he was *criminoſus*, *& non idoneus*, was too general and incertain. As 40 *E.* 3. 6. in tender of a marriage and refuſal, the heir ought to alledge a certain cauſe of the refuſal, whereof iſſue may be taken. [58]

And it was reſolved, That all ſuch as were ſufficient cauſes of deprivation of an Incumbent, are ſufficient cauſes to refuſe a preſentee. And although it doth not appertain to the Kings Court to determine Schiſms and Hereſies, yet the original cauſe of the ſuit being matter whereof the Kings Court hath conuſans, the cauſe of the Schiſm, or Hereſie, for which the preſentee is refuſed ought to be alledged in certain, to the intent that the Kings Court may conſult with Divines to know, if it be Schiſm or not; and if the party be dead, thereupon to direct the Jury to try it. And as to the Caſe of the Coroner which hath been put, it was anſwered, That it was not to be compared to the Caſe of a preſentee, for ſuch general allegation is not ſufficient, as it is confeſſed by both ſides, either to refuſe a preſentee, or to deprive an Incumbent, becauſe he is *perſona minus idonea* generally. And the Coroner at the Common Law hath but the keeping of the Rolls of the pleas of the Crown, but the Incumbent hath the care and keeping of ſouls, and therefore the Law doth require more circumſpection and certainty in the one Caſe then in the other. 2. The King may remove a Coroner by Writ directed to him for a cauſe which ſhall not be traverſed, as appeareth in *F. N. B.* 163. and ſo not like. [b]

Then another Error not aſſigned was moved, *ſcil.* That for the inſufficiency of the Biſhops plea, the Court gave Judgment for the Plaintiff: *Ideo conſideratum eſt quod prad' H. & E. recuperent verſus prædictum Epiſcopum præſentationem ſuam ad Eccleſiam prædictam, & habeant breve Joh. Archiepiſcopo Cantuar' totius Angliæ primat', loci illius Metropolitano, eo quod prædictus Epiſcopus eſt pars, &c. Et idem Epiſcopus in miſericordia.* And afterwards a Writ of enquiry of the value of the Church was awarded, and the value and other points of the Writs found and returned; And upon that Judgment was entred again, *ſcil.* That the Plaintiff ſhall have a Writ to the Archbiſhop, *ut ſupra. Et quod recuperent verſus prædictum Epiſcopum damna, &c. Et prad' Epiſcopus in maneria*: So that the Biſhop was twice amerced, and every amercement of a Biſhop is 5 l. and in this Caſe he ought not by the Law to be twice amerced; and therefore this difference was taken. And therefore if a man bring treſpaſs againſt two, and one is found

guilty to damages by himself, and the other is found guilty to damages by himself, in this Case each Defendant shall be severally amerced; and the Plaintiff shall be also severally amerced against each of them, as appeareth in 47 *E.* 3. 20. But in an Action against one Defendant or Tenant, and the Defendant or Tenant plead one plea to part, and another plea to part, and another plea to the residue, or confesseth part, and pleadeth to issue for the other part, and the several issues be found against him, yet the Defendant or Tenant shall not be twice amerced. And therewith agreeth 9 *E.* 3. 6. by *Herle*, & 22 *H.* 6. for which it was concluded, That for as much as the Bishop being one person was twice amerced, in this Case it was error.

Against which it was answered by one of the Councel of the other side, That the latter was but only a recital of the first, and so to give a full Judgment of all with the damages, and not a new Judgment; for he cannot have two Writs to the Archbishop or Metropolitan, no more then he can be twice amerced. But if it were *gratia argumenti*, admitted, that the latter Judgment were erroneous, yet the first Judgment is good and perfect in it self, and shall not be impeached for any Error in the second Judgment; for the first Judgment was the Judgment which was in the *Quare Impedit* at the Com-
[59] mon Law, for before the Statute of *West.* 2. *cap.* 5. the Plaintiff in a *Quare Impedit* did not recover damages. And the Plaintiff after the Statute may take the Judgment at the Common Law, and leave the benefit of the Statute if he will, which was granted by the whole Court; for which cause the Councel prayed that the Judgment might be affirmed, and so it was.

Note Reader, the matter in Law was resolved and adjudged in both Courts.

Hill. 32 Eliz. *in the Kings Bench.*

Foster's Case.

John Foster and *Ursula* his wife brought a Writ of false Imprisonment against *Robert Smith*, and upon the pleading as special verdict, the Case was such; *scil.* That the Town of *Brancaster* is within the Hundred of *Smithden* in the County of *Norfolk*; and that the Defendant was *præd' tempore quo, &c.* one of the Constables of *Brancaster*. And that *Nathaniel Bacon* Esquire, then one of the Justices of Peace within the said County, made a warrant sealed with his seal directed amongst others to the Constables of *Brancaster*, reciting that *John Lane* of *Brancaster* was in fear of his life, and mutilation of his members, and burning of his houses by *Ursula* the Plaintiff, &c. *Vobis, &c. præcipimus quod præd' Ursulam coram aliquo Justiciarior' nostrorum ad pacem in Com' prædict' assign' venire faciat', seu aliquis vestrum venire faciat*
[b] *sufficient' manucapi', quod ipsa prædict' Ursula præfat' Johann' Lane damnum & malum aliquod, &c. non faciat, nec fieri procurabit. Et si hoc facere recusaverit, tunc ipsam sic recusantem proxim' prison' nostræ in Com' præd' duci facias, &c. ibidem moratur' quousque gratis hoc facer' voluerit, &c.* By force of which warrant the Defendant did arrest the said *Ursula*; and afterwards the Plaintiff and one *John Hamond* offered them to go to *Thomas Farmor* Esquire, one of the Justices of Peace of the same County to be bounden to the Queen according to the purport of the said warrant; And that the said *Robert Smith* did refuse to go to the said *Thomas Farmor*, upon which the Plaintiffs went with the said *John Hamond* to the said *Thomas Farmor*, and there acknowledged a Recognisance to the Queen to appear at the next Sessions to be holden within the Hundred of *Smithden* (the which was not according to the warrant) and that the Defendant *prædict' tempore quo, &c.* by force of the said warrant brought the said *Ursula* before the said *Nathaniel*, before whom she refused to find sureties; for which the said Defendant carried the said *Ursula* to the Gaol by force of the said warrant. And in this Case two Points were resolved by *Wray* chief Justice and the whole Court.

1. That upon the said general Warrant, *scil. Coram aliquo Justiciar', &c.* it is at the election of the Constable, who is an Officer and minister of Justice, to carry the party arrested to what Justice he will, for it is more reason to give election to the Officer, who in presumption of Law is a person indifferent and sworn to do and execute his Office duly, then to give the election to the Delinquent himself, who by presumption of Law will seek excuses, and perhaps will carry the Constable, being for the most part a poor man, to the farthest part of the County, by reason whereof such Constable would be more negligent and remiss of such Warrants for fear of travel, and loss of their time. Which Judgment is against the opinion of *Fineux* 21 *H.* 7. 20. *obiter*, whereof the Reporter maketh a *Quære*. But it agreeth with the opinion of the Lord *Brook* in abridging the Case of 21 *H.* 7. *tit. Faux imprisonment* 11. Note Reader, the Law adjudged in the point, which never (as I know) was adjudged before.

2. It was resolved, That after that the Officer in the Case above, had brought the party before the Justice, and before him she refused to find sureties, the Officer without a new Warrant or commandment may carry the party to Prison, and that by the words of the said Warrant, *Et si hoc facere recusaverint, &c.* And *Wray* chief Justice said, That a Justice of Peace may in such Case make a Warrant to bring the party before himself, and the same shall be good and sufficient in Law: For, for the most part, he who maketh the Warrant, hath best knowledge of the matter, and therefore most fit to do Justice in the Case.

Mich.

Mich. 32 & 33 Eliz. *in the Kings Bench.*

Gooch's Caſe.

BEtween *Rous* Plaintiff, and *Gooch* Defendant, as heir to his father in Debt, upon an Obligation made by the father, in which he bound himſelf and his heirs: The Defendant pleaded that he had nothing by deſcent; And the Plaintiff maintained Aſſets at *I.* in the County of *Suff.* And at the *Niſi prius* before *Wray* chief Juſtice of *England*, one of the Councel with the Plaintiff gave in evidence that his father was ſeiſed of lands in *I.* aforeſaid in fee, and died thereof ſeiſed; and that they deſcended to the Defendant, by which, &c. All which was agreed by the other ſide: But the Defendants Councel gave in evidence, That long time before this Action brought, the Defendant had enfeoffed one *W. G.* in fee of the ſame lands, which was alſo confeſſed; but the Plaintiffs Councel alledged and proved, that this feoffment was made by fraud and covin to defraud the Plaintiff of his Action; and therefore was void by the Statute of 13 *Eliz. cap.* 5. as to the Plaintiff. But it was ſtrongly urged and ſtood upon, That the ſame ought to have been pleaded and could not upon this iſſue (of nothing by deſcent the day of the Writ purchaſed) be given in evidence: But upon the importunity of the Plaintiffs Councel, *Wray* chief Juſtice directed the Jurors to find the ſpecial matter; and ſo they did. And now this term upon argument at Bar and Bench, two Points were reſolved by *Wray* chief Juſtice, and the whole Court. [60]

1. That the matter aforeſaid may be well given in evidence for two cauſes; 1. Becauſe the Statute doth enact generally, That the eſtate as to the creditor ſhall be void, and Acts of Parliament made in prevention and ſuppreſſion of fraud ought to have a favourable interpretation. 2. If this matter ought to be pleaded, it ſhall be miſchievous to creditors, and ſhould add much to the maintenance of fraud and covin; for fraud and covin (becauſe they are odious) are ſo ſecretly hatcht in a hollow tree, *in arbore cava & opaca*, and ſo artificially covered and concealed that the party grieved hath not means to find, or know of it, then to drive the Plaintiff who is altogether a ſtranger to plead the feoffment (whereof he hath not knowledge) and that the ſame was made by fraud, &c. ſhall be miſchievous and againſt Law and reaſon. And Judgment was given for the Plaintiff. And in this Caſe *Wray* chief Juſtice ſaid, If *A.* ſeiſed of land in fee make a fraudulent conveyance (to the intent to deceive and defraud purchaſors againſt the Statute of 27 *Eliz.*) and continueth in poſſeſſion, and is reputed as owner, *B.* entreth into ſpeech with *A.* for the purchace of it, and by accident *B.* hath notice and knowledge of this fraudulent conveyance, and notwithſtanding he concludes with *A.* and taketh aſſurance of it from him; in this Caſe *B.* ſhall avoid the ſaid fraudulent conveyance, notwithſtanding his notice; for the Act hath by expreſs words made the fraudulent conveyance void as to a purchaſor; And for as much as it is within the expreſs purview of the Act, it ought to be ſo taken and expounded in the ſuppreſſion of fraud. And according to the opinion of the Lord *Wray*, it was unanimouſly agreed and reſolved by the whole Court of Common Pleas, *Paſch.* 3. *Jacobi* in evidence to a Jury in an *Ejectione firmæ*, upon a leaſe made by *Standen* at the houſe of the Plaintiff, againſt *Bullock* Defendant, That where one *Bullock* had made a fraudulent eſtate of his land within the ſaid Act of 27 *Eliz.* unto *A. B.* and *C.* and afterwards notwithſtanding offered to ſell the land to *Standen*, and before aſſurance thereof made by *Bullock*, *Standen* had notice of the ſaid fraudulent conveyance, and notwithſtanding proceeded, and took his aſſurance of *Bullock*, that *Standen* ſhould avoid (by the ſaid Act) the ſaid fraudulent conveyance; for the notice of the purchaſor cannot make that good which an Act of Parliament hath made void as to him. And true it is; *Quod non decipitur qui ſcit ſe decipi.* But in this Caſe the purchaſor is not deceived; for the fraudulent conveyance whereof he hath notice, is void as to him by the ſaid Act, and therefore ſhall not hurt him, nor he as to that is in any manner deceived. [b]

Mich. 32 & 33 Eliz. *in the Exchequer.*

Sparry's Caſe.

ISrael *Owen* brought an Action upon the Caſe againſt *James Sparry*, of trover of a certain quantity of cotton wooll, and ſelling it to perſons unknown, and converſion to his own uſe: The Defendant pleaded, that the Plaintiff hath another Action upon the Caſe depending in the Kings Bench for the ſame trover and converſion of the ſame goods; and this ſuit is proſecuted pendant the other: And demanded Judgment of the Bill: And thereupon the Plaintiff did demurr in Law. And it was reſolved by Sir *Roger Manwood* chief Baron, and the whole Court of Exchequer, that the Bill ſhould abate for two cauſes. [61]

1. Be-

1. Becauſe that by the rule of Law a man ſhall not be twice vexed for one and the ſame cauſe, *Nemo debet bis vexari, ſi conſtet Curiæ quod ſit pro una & eadem cauſa.* But the old difference in our Books is between Writs which comprehend certainty as in Debt, Detinue, &c. And Writs which comprehend no certainty, as Aſſiſe, Treſpaſs, &c. For it is true that in Writs (be they real, perſonal, or mixt) which are certain it is a good plea to ſay, That the Writ is brought pendant another, but in Writs real or perſonal, where no certainty is certain, there is no plea. As in Aſſiſe the Writ is general *de libero tenemento*, and Writ of Treſpaſs is, *Quare bona & catalla cepit, &c.* generally without any certainty, either of the thing, or of the time, &c. or of any convenient certainty which may be put in iſſue; for the Law requireth, *Quod res certa deducatur in exitum, & non poteſt conſtare curiæ, quod ſit pro una & eadem cauſa.* But in Aſſiſe, Treſpaſs, &c. after plaint or declaration made, which plaint or declaration doth reduce the
[b] generalty of a Writ to a certainty, then the Writ purchaſed after ſuch plaint or declaration ſhall abate, as appeareth in 14 *E.* 3. *Brief* 270. adjudged in the point, where in Aſſiſe of *Novel diſſeiſin* the tenant pleaded, That the Plaintiff had another Writ of Aſſiſe depending of the ſame tenements between the ſame parties; and ſo this Writ purchaſed pendant the other, Judgment of the Writ: And becauſe plaint was not made in the firſt Writ, ſo that it may *conſtare Curiæ*, of what tenements he made his plaint, the Writ was awarded good, and he pleaded to the iſſue. And therewith agreeth 14 *Aſſ. p.* 7. 29 *Aſſ. p.* 20. *Vide* 18 *E.* 3. *Brief* 318. A Writ of Reſcous brought depending another ſhall abate, if it be of Record that the Plaintiff hath declared in the firſt Writ, or otherwiſe not. And 39 *H.* 6. 12. *acc'* by *Priſot* in Aſſiſe after plaint; and in Treſpaſs after declaration the plea is good. But in the Caſe at Bar, the firſt Action upon the Caſe upon Trover and Converſion, be it by Writ or Bill, is here as certain as an Action of Treſpaſs is after declaration. But the reaſon in 5 *H.* 7. 15. (which as it ſeemeth the Reporter miſtook) was utterly denied by the Court, where it is ſaid, That becauſe that divers treſpaſſes may be done the ſame day, for this cauſe it is no plea (as it is there ſaid) in Treſpaſs, that another Action is depending, &c. for the ſame Treſpaſs: For by the ſame reaſon after that the Plaintiff hath recovered in Treſpaſs, and brought his Action for the ſame Treſpaſs again, the defendant cannot averr that all is one and the ſame Treſpaſs. But the Book in 20 *H.* 6. 44, 45. was affirmed to be good Law; where in forgery of falſe deeds, the defendant demanded Judgment of the Writ, becauſe the Plaintiff had the like Writ of forgery of the ſame deeds, to which he hath appeared, and that this Writ was brought depending the other. For the Writ of forgery of falſe deeds is general. *Quare diverſa falſa facta fabricavit, vel quoddam falſum factum fabricavit:* And the Defendant hath not pleaded that the Plaintiff hath declared in the firſt Action whereby the certainty may appear. And for this cauſe *Newton* compared the ſame to a Writ of Treſpaſs and awarded the Defendant to anſwer. *Vide* 14 *H.* 7. 12. & 22 *H.* 6. 15. that in an Action of Treſpaſs for a horſe, which by the Declaration is reduced to certainty, it is a good plea to the Writ, that there is a Replevin dependant of the ſame taking, where averrment is allowed, that all is for one and the ſame taking, and yet there may be ſeveral takings in one day, which is againſt the reaſon of 5 *H.* 7. and agreeth with this Reſolution. And therewith agreeth alſo the Book in 22 *H.* 6. 52. *a.* where the Caſe of Treſpaſs is adjudged; for there in Treſpaſs the Defendant ſaid that the Plaintiff had another Writ depending againſt the Defendant for the ſame Treſpaſs, upon which he hath declared. Judgment of the Writ brought pendant the other? and *Newton* and all the Court awarded that the Writ ſhould abate. Note, there is parcel of the plea to the Writ, that the Plaintiff hath declared, by which he hath made
[62] the thing certain; and that is the difference between this Caſe and the Caſes in 20 *H.* 6. 44. & 5 *H.* 7. 15. for the principal Caſe in 5 *H.* 7. was affirmed for good Law, for there it was not parcel of the plea that the Plaintiff hath declared. And the Caſe at Bar was ſtronger, for it ſhall not be intended that there was divers ſales and converſions in one day. Alſo it was reſolved, that although the firſt Action was in another Court, *ſcil.* in the Kings Bench, or *via verſa*, that the plea is good, *vide* 43 *E.* 3. 24. *acc.* and that the Book in 34 *E.* 3. *Brief* 789. is good Law; for it doth not appear by the plea, that the Plaintiff or Defendant was priviledged in the Exchequer. And then by the Statute of *Articuli ſuper Chartas cap.* 4. it is enacted, that no common plea ſhall be holden in the Exchequer: But in 43 *E.* 3. 27. it appeareth that the Defendant was priviledged in the Exchequer, and therefore the plea there to the Writ was good. But if a man bring an Action of Debt in *London* or *Norwich*, or in any inferiour Court, and afterwards bringeth an Action of Debt in the Common Pleas, this ſuit in a higher Court which is brought pendant the ſuit by Bill in an inferiour Court ſhall not abate, as it appeareth in 7 *H.* 4. 8. & 3 *H.* 6. 15. *Vide* 43. *E.* 3. 22. 27. & 7 *H.* 4. 44. *Brininghams* Caſe. But it is ſaid 9 *E.* 4. 53. that all the Kings Courts at *Weſtminſter*, have been time out of mind, &c. and ſo a man cannot tell which of them is the ancienteſt Court.

And afterwards it was adjudged that the plea was good, and the Plaintiff took nothing by his Bill. And ſo note Reader, all the Books which *prima facie* ſeem to diſagree, upon pregnant reaſon are agreed and reconciled.

Case of By-Laws and Ordinances.

Mich. 32 & 33 Eliz. *in the Kings Bench.*

The Chamberlain of *London's* Case.

THE Chamberlain of *London* brought an Action of Debt in *London* in the *Guild-Hall* there againſt divers perſons: And it was grounded upon an Act of Common Council, or Ordinance made by the Mayor, Aldermen and Comminalty of the City at their common aſſembly (which they make by cuſtom, and which amongſt others is confirmed by divers Acts of Parliament) by which it was ordained, That if any Citizen, freeman or ſtranger within the ſaid City put any Broad-cloth to ſale within the City of *London* before that it be brought to *Blackwell-Hall* to be viewed and ſearched, ſo that it may appear to be ſaleable, and that Hallage be paid for the ſame, *ſcil.* 1 d. for every cloth, that he ſhall forfeit for every cloth 6 s. 8 d. And further it was ordained, For ſuch forfeiture the Chamberlain of *London* for the time being ſhould have an Action of debt, &c. And becauſe the Defendants have broken the ſaid Ordinance, for the penalty inflicted by the ſaid Ordinance, the Chamberlain of *London* brought an Action of debt in *London*, and the ſame was removed by *Habeas Corpus* into the Kings Bench. And it was moved that thoſe in *London* cannot make Laws and Ordinances to bind the Kings Subjects, and principally ſtrangers, for then they ſhall have as high authority as an Act of Parliament: And 2. The ſaid Ordinance (as it was urged) was againſt Law, and the freedom and liberty of the Subject, to compel him to bring his Cloaths to any one place. 3. The impoſition of 1 d. for Hallage was a charge to the Subject, and by the ſame reaſon they may impoſe 1 d. they may impoſe 2 d. and ſo *in infinitum*. And one of the Inner Temple of Council with the City moved to have a *Procedendo*. It appeareth by many precedents, That it hath been uſed within the City of *London* time out of mind, for thoſe of *London* to make Ordinances and Conſtitutions for the good order and government of the Citizens, &c. conſonant to Law and reaſon, which they call Acts of Common Council. Alſo all their Cuſtoms are confirmed by divers Acts of Parliaments, and all ſuch Ordinances, Conſtitutions or By-laws are allowed by the Law, which are made for the true and due execution of the Laws and Statutes of the Realm, and for the well government and order of the Body incorporate. And all other which are contrary and repugnant to the Laws and Statutes of the Realm are void and of no effect: And as to ſuch Ordinances and By-laws, theſe differences were obſerved; Inhabitants of a Town without any cuſtom may make Ordinances or By-laws for the reparation of the Church, or a high way, or any ſuch thing which is for the general good of the publick; and in ſuch Caſe the greater part ſhall bind all the reſt without any Cuſtom. *Vide* 44 E. 3. 19. But if it be for their own private profit, as for their well ordering of their Common of Paſture, or the like, there without Cuſtom they cannot make By-laws: And if it be a Cuſtom, then the greateſt part ſhall not bind the leſs, if it be not warranted by the Cuſtom. For as Cuſtom createth them, ſo they ought to be warranted by the Cuſtom. *Vide* 8 E. 2. *Aſſiſe* 413. Alſo Corporations cannot make Ordinances or Conſtitutions without Cuſtom, or the Kings Charter, if not for things which concern the Commonwealth, as reparations of Church or common high ways, and the like. *Vide* 44 E. 3. 19. 8 E. 2. *Aſſiſe* 413. 21 E. 4. 54. 11 H. 7. 13. 21 H. 7. 20. & 40. 15 *Eliz. Dier* 322. [b] [63]

And as to the Caſe at Bar many Statutes were made for the true making of woollen Cloth, which is the principal Commodity of this Realm; and to the intent the ſaid Statutes might be the better executed without any deceit, the ſaid Act of Common Council was made, that they ſhall be brought to *Blackwell-Hall*, as to a publick place and known, to the intent they might be ſearched and viewed, if they were made according to the ſaid Statutes. So the ſaid Ordinance being made for the better keeping and execution of the ſaid Laws, to prevent all frauds and falſities, was good and allowable by the Law. Alſo the aſſeſſing of the ſaid 1 d. was good, becauſe it was *pro bono publico*, and it was competent and reaſonable, having regard to the benefit which the Subject enjoyed by reaſon of the ſaid Ordinances; and ſuch aſſeſſments being for the maintenance of the publick good, and not *pro privato lucro*, were maintenable by the Law; and it was not to be ſaid a burthen or charge to the Subject when he reaped a benefit by it. But it is like to Pontage, Murage, Toll, and the like, as it appeareth in 13 *H.* 4. 14. in which Caſes the ſum for reparations of Bridges, Walls, &c. ought to be ſo reaſonable, that the Subject have more benefit thereby then charge. [b]

Alſo the penalty inflicted upon the offender, be he Citizen or ſtranger, is lawful, the offence being done within the City, and the ſum being competent and proportionable to the offence, and without a penalty the Ordinance ſhall be in vain; for *Oderunt peccare mali formidine pœnæ*. And the appointing of their Chamberlain, being a publick Officer to bring the Action of Debt was well, and allowable by Law; and the Ordinance being according to Law, may be put in execution without any other allowance, notwithſtanding the Statute of 19 *H.* 7. *cap.* 7.

And after great deliberation *Wray* chief Juſtice, by the advice of the other Juſtices, granted a *Procedendo*. *Vide* 2 E. 3. 7. *John de Brittains Caſe*. The King granted by his Charter, that all manner of Ships coming to ſuch a Haven laden with Merchandizes, ſhould be unladen at a certain place, and not elſewhere, to the intent he might be better anſwered his Cuſtoms and other duties.

Trin.

Trin. 38 *Eliz. in the Common Pleas.*

Clark's Case.

[64] IN an Action of false Imprisonment brought by *Clark* against *Gape*; the Defendant justified the imprisonment, because that King *E.* 6. did incorporate the Town of S. *Albans* by the name of Mayor, &c. and granted to them to make Ordinances: And shewed, that the Queen appointed the Term to be kept there, and that they with the assent of the Plaintiff and other Burgesses, did assess a sum upon every inhabitant for the charges in erecting the Courts there; and ordained, That if any refuse to pay it, that he should be imprisoned, &c. and because the Plaintiff being a Burgess, &c. refused to pay, &c. he as Mayor justified; And it was adjudged no plea, for this Ordinance is against the Statute of *Magna Charta cap.* 29. *Nullus liber homo imprisonetur*; which Act hath been confirmed above 30 times, and the Plaintiffs assent cannot alter the Law in such Case: But it was resolved, that they might have inflicted a reasonable penalty but not imprisonment, which penalty they might limit to be levied by distress, or by Action of Debt, and the Plaintiff had Judgment.

Mich. 31 & 32 *Eliz. in the Kings Bench.*

Jeffrey's Case.

[b] *William Jeffrey* Gent. brought a Prohibition against *Abraham Renshley* and *Thomas Foster*, and declared, That by the Law of this Realm, the Parishioners of every Parish where they are dwelling ought to repair their own Church, and not the Parishioners of any other Parish, &c. The said *Thomas* and *Abraham* being Church-wardens of the Parish of *Halysham* in the County of *Sussex*, have sued the Plaintiff in the Spiritual Court before Doctor *Drury* in the Dioces of *Chichester* for certain monies imposed upon the said *William Jeffrey* without his assent for 30 acres of Marsh and 100 acres of land which the said *William Jeffrey* hath, and occupieth in the said Parish of *Halysham*, for the reparation of the Church of *Halysham*, and have constrained him to answer to certain Articles, *scil.* that the said Church was in decay, and which cannot be repaired for less than 70*l.* And that the said Church-wardens of the said Church for the time being, *anno Dom.* 1589. and two years before, with the assent of the greater part of the Parishioners of the said Parish, *juxta quantitatem & qualitatem possession' & reddit' infra dict' parochiam existen'*, determined and agreed to make a taxation for the repair of the said Church; and that notice of such meeting was given in the said Church, and also proclaimed in the Market; and that at the day appointed, the Church-wardens and greater part of the Parishioners of *Halysham* who were there met together made a Tax, *scil.* of every acre of Marsh land 4 d. and of every acre of arrable land 2 d. to be paid by the occupiers of them in *Halysham* aforesaid; and that the said *William Jeffrey* the said 30 acres of Marsh, and 100 acres of land did occupy, or receive rent for them; and that all the said Tax of the said Town did not exceed 50*l.* And further declared, That the said *William Jeffrey* at the time of the said Tax, and long time before, and yet is an inhabitant of the Parish
[67] of *Chiddingly* within the said County of *Sussex*, and did not inhabit within the Parish of *Halysham*, and that he hath pleaded the said matter in the Spiritual Court, and the Judge refused to allow it. And upon this Declaration *Coke* of Council with the Defendant did demurr in Law. And after many Arguments at the Bar and Bench it was adjudged, That a Consultation shall be granted. And in this Case these Points were resolved.

1. That the Spiritual Court hath conusans *de reparatione corporis sive navis Ecclesiæ*; and that appeareth by *Britton* who wrote in 5 *E.* 1. *lib.* 1. *cap.* 4. *fol.* 11. and in the Statute of *Circumspecte agatis, &c.* but *in rebus manifestis errat qui authoritates legum allegat, quia perspicue vera non sunt probanda*, because that he who endeavoureth to prove them, obscureth them. And where it was objected, That the cause that every Parishioner is charged to the reparations of the Church, and to provide convenient ornaments in it for the greater convenience and honour of Divine Service, is first for the spiritual comfort which he hath in hearing of the word of God there for his instruction in the true way to heaven in celebration of the Sacraments, and in presenting to God their prayers, not only privately, but with the great Congregation to be thankful to God for all his benefits, and to desire of him all things necessary, &c. in respect of which inestimable benefits, he is chargeable to repair his proper Church in which he receiveth them. But shall not be forced to the reparation of any other Church in another Parish in which he doth not inhabit. And the description of this word *(Parochia)* was observed, *Parochia est locus in quo degit populus alicujus Ecclesiæ.*

2. It was objected, That it shall be hard to charge the said *Jeffreys* to such tax, because he was dwelling in another Town, and never consorted with them of *Halysham* at any of their assemblies or meetings for such purposes.

3. It

3. It was objected, That the Libel in the Spiritual Court against the said *Jeffrey* was in the disjunctive, that the said *William Jeffrey* occupied the said lands, or received rent for them, upon which Libel if *Kenshley* and *Foster* shall have a Consultation, although that *Jeffrey* doth not occupy the lands himself, but a farmor in *Halysham* who payeth to him rent, that yet *Jeffrey* may be charged, which shall be against Law and reason, and against the common experience of all *England*. 1. It was answered and resolved first, That although that the house wherein *Jeffrey* dwelt be in another Parish, yet for as much as he hath lands in the Parish of *Halysham* in his proper possession and manurance, he is in Law *Parochianus de Hayleſham*. For the place where he lieth, sleepeth or eateth, doth not make him Parishioner only; but also for as much as he manureth lands in *Hayleſham*, and by that is resident upon it, that maketh him a Parishioner of *Hayleſham* also as to this purpose. [b]

2. If in this Case *Jeffrey* shall not be charged to the reparation of the Church of *Hayleſham*, for those lands which himself occupieth there, no person shall be charged for them, upon which great inconvenience will follow; for one who inhabiteth in the next Town, may occupy the greatest part of the lands in another Town; and so Churches in these days shall come to ruin: But it was resolved, when there is a farmor of the same lands, the lessor who receiveth rent for them shall not be charged in respect of his rent, because that there is an inhabitant, and Parishioner who may be charged; and the receit of the rent doth not make the lessor a Parishioner.

3. In this Case the charge is upon the person, and not upon the land, but is upon the person in respect of the land, for the more equality and indifferency. *Vide Register* 44. *inter Conſultationes. Conſultatio ad procedendum contra parochianos ſuper emendationem corporis ſive navis Eccleſiæ, &c. ubi prohibitio de laico feodo prius porrecta fuit*, which is to be intended when the Tax was of the person in respect of his land.

4. Although that he dwell in another Town, yet for as much as in Judgment of Law he is inhabitant and Parishioner of *Hayleſham*, he may come if he will to the assemblies of the Parishioners of *Hayleſham*, when they meet together for such purposes: And Sir *Christopher Wray* chief Justice said, That for as much as the conusans of the reparations of Churches doth not belong to the Spiritual Court, it was needful to hear the opinion of those who profess the Ecclesiastical Law as to this Point; and so it was done. And thereupon divers of them under their hands in writing did certifie their opinions, That *Jeffrey* by their Law was a Parishioner of *Hayleſham* as to this purpose, and chargeable to the reparations of the Church of *Hayleſham*: And that the Churchwardens and greater part of the Parishioners (upon such general warning) met together, might make such a Tax by their Law, and that the same shall not charge the land but the person in respect of the land for equality and indifferency.

5. As to the Objection, That the Libel was in the disjunctive, &c. it was answered and resolved, That although that the Libel be so, yet the Defendants shall have a Consultation only in respect of such lands which the said *William Jeffrey* at the time of the said Tax had in his own hands, and so much the rather because that the said *Jeffrey* hath confessed in his Declaration, that he at the time of the Tax had the said lands in his own Occupation. And a special Consultation was awarded: And that was the first leading Case that ever was adjudged and Reported in our year Books as to this purpose.

And afterwards *Pasch.* 41 *Eliz.* between *Paget* and *Ba.* in the Kings Bench in the time of *Popham* chief Justice, the Point came again in question upon another Tax, a Prohibition being gotten after many arguments and great deliberation, at length upon view of the Record of the Case at Bar, which was adjudged in the Point, it was resolved again by *Popham* chief Justice and the whole Court, that a Consultation should be granted according to this Judgment; and now it is generally allowed and received for Law. [68]

Observe Reader this Case to many purposes, and the consequents of it, for it is a good Case to many purposes.

Mich. 33 & 34 *Eliz. in the Court of Wards.*

The Lord *Cheyney's* Case.

SIR *Thomas Cheyney* Knight, Lord Warden of the Cinque Ports, 1 *Eliz.* made his Will in writing, and thereby devised to *Henry* his son divers Mannors, and to the heirs of his body, the remainder to *Thomas Cheyney* of *Woodley*, and to the heirs males of his body, upon condition that he or they or any of them shall not alien, discontinue, &c. And it was a Question in the Court of Wards, between Sir *Thomas Perot* heir general to the Lord Warden, and divers of the purchasors of Sir *Thomas Cheyney*, if the said Sir *Thomas* shall be received to prove by witnesses that it was the intent and meaning of the devisor, to include his son and heir within these words of the Condition (he or they) and not only to restrain *Thomas Cheyney* of *Woodley* and his heirs males of his body: But *Wray* and *Anderson* chief Justices upon conference had with the other Justices resolved, That he shall not be received to such averment out of the Will, for the Will concerning lands, &c. ought to be in writing, and construction of Wills ought to be collected out of the words of the Will in writing, and not by any averment out of it; for it shall be full of great inconvenience, that none shall know by the written words of a Will, what construction to make, or advice to give, but that it shall be controlled by collateral averments out of [b]

the Will: But if a man hath two sons both baptized by the name of *John*, and conceiving that the eldest (who hath been long absent) is dead, deviseth his land by his Will in writing to his son *John* generally, and in truth the eldest is living, in this Case the younger son may in pleading or in evidence alledge the devise to him, and if the same be denied, he may produce witnesses to prove his fathers intent, that he thought the other to be dead; or that he at the time of the Will made, named his younger son *John*, and the writer left out the addition of younger: As in 47 E. 3. 16. the Case was; *Robert Peynel* had issue two sons baptized by the name of *William*, and levied a fine to Sir *John Fannenbrigges* and others *comeeo, &c.* who granted and rendred to *Robert* and *William* his son generally; and after the death of *Robert*, *William* the younger son brought a *Scire facias* against the heir of *William* the eldest; and the youngest by the rule of the Court did averr, that the fine was levied to make him heir; and upon that issue was taken. And no inconvenience can rise if averment in such Case be taken in Case of devise by Will, for he who seeth such Will that his land is devised to his son *John*, cannot be deceived by any secret, invisible averment; for when he seeth the devise to his son *John*, he ought at his peril to inquire which *John* the testator intendeth, which may easily be known by him who writeth the Will, and others who were privy to his intent; and if no direct proof can be made of his intent, then the devise is void for the incertainty, as the render shall be also in the said Case of a fine, as to *William*, for the Law shall not make the one or the other by construction inheritable, for neither the eldest son shall have it by course of Law, because the eldest needeth not have addition, nor the younger shall have it by construction, by the reason the father neded not to have limited the land to the eldest, because that the land after the death of the father shall descend to the eldest. But he shall have it who the father intended to advance with it, and for want of proof of such intent, the Will or the render for the incertainty (as hath been said) is void; and so the doubt in 11 *H.* 6. 13. well explained.

Cases of Usury.

Mich. 33 & 34 *Eliz. in the Kings Bench.*

Burton's Case.

[69] IN a Replevin brought by *Humphrey Burton* against *H. H.* he avowed, because *Thomas Woodhouse* Esquire was seised of the place where, &c. containing 10 acres in *Hicklyn* in the County of *Norfolk*, *inter alia*; and so seised 17 *Julii anno* 21 *Eliz.* by his deed granted to *A. G.* Esquire a yearly rent of 20 l. issuing out of the place where, &c. *inter alia*, to perceive to him and his heirs at the feasts of the Nativity of Christ and S. *John Baptist* yearly to be paid; The first payment to begin at the feast of the Nativity of Christ, which shall be in *anno Domini* 1580. And afterwards *A.* by deed acknowledged before Justices of Peace, and Clark of the Peace of the said County, and enrolled according to the Statute did bargain and sell the said rent to the Defendant and his heirs, who for the rent behind did avow: The Plaintiff in bar of the said avowry, pleaded the Statute of Usury, and alledged, that the said 17 *Julii*, *anno* 21. *inter eosdem Thomam Woodhouse*, *& A. G. taliter concordatum fuit per viam corruptæ barganiæ*, scil. *quod prædictus A. mutuo daret præfat Thomæ Woodhouse centum libras*, *& quod idem Thomas concederet* to the said *Anthony* and his heirs the rent of 20 l. under Condition, That if the said *Thomas* should pay to the said *A.* 100 l. 17 *Julii*, 1580. that then the said rent should cease; upon which corrupt agreement *Thomas* there then received the said 100 l. and there then granted the said rent according [b] under such Condition as is aforesaid, according to the said agreement; *Qui quidem annuus reditus pro prædict' 10 l. in forma prædict' solubil' excedit secundum rat' 10 l. pro 100 l. pro uno anno, contra formam Statuti, &c.* and conveyed a lease of the land to the Plaintiff for 21 years. And note the distress was 27 *Decemb. anno* 33. for 20 l. behind at *Michaelmas* then past; upon which the avowant did demurr in Law; and Judgment was given for the avowant. For althought it was objected, That the Plaintiff in bar of his avowry hath alledged, that the said grant was upon a corrupt contract against the Statute, and the avowant hath demurred thereupon, by which he hath confessed all matters in fact, yet because that upon the matter disclosed in the Bar, it appeareth to the Court, that it was not a corrupt contract against the said Statute, and so his allegation of the same repugnant to the matter shewed by himself in his bar to the avowry; and a demurrer is not a confession of all matters in fact, but of all such matters in fact which are well and sufficiently pleaded; for this cause Judgment was given for the avowant.

And the cause that the same was not against the Statute of Usury was, That nothing was to be paid by *Thomas Woodhouse* the grantor within a year and a quarter after the grant made; for within the 17 of *July* 1579. and *Christmas* 1580. no rent is appointed to be paid. And if the grantor had paid the 100 l. the 17th of *July* 1580. the rent should cease without any thing paying for the said 100 l. So that the Court said, It was a plain bargain, and purchace conditional of such a rent, and no Usury. It was in the election of the grantor to have paid the said 100 l. and to have frustrated the rent, so that the grantee (as the nature of usury is) was not assured of any recompence for the forbearance of his 100 l. for

for a year, and the ſaid rent of 20 l. *per annum* is not that penalty to the grantor, and aſſurance to the grantee for the payment of the ſaid 100 l. But it was reſolved by the whole Court, That if it had been agreed between the grantor and grantee, that notwithſtanding ſuch power of redemption, that the 100 l. ſhall not be paid at the day, and that the clauſe of redemption was inſerted to make evaſion out of the Statute, then it had been an uſurious bargain and contract within the ſaid Statute. For if in truth the contract be uſurious againſt the Statute, no colours nor ſhews of words will ſerve, but the party may ſhew the ſame, and ſhall not be concluded or eſtopped by any deed, or any other matter whatſoever; for the Statute giveth averment in ſuch Caſe.

And *Popham* chief Juſtice ſaid, If *A.* come to *B.* to borrow a 100 l. *B.* lendeth it to him if he will give him for the loan of it for a year 20 l. if the ſon of *A.* be then alive, the ſame is uſury within the Statute, for if it ſhould be out of the Statute for the incertainty of the life, the Statute ſhould be of little effect: And by the ſame reaſon he may add one life, he may add many; And ſo like to a Mathematical line, which is *diviſibilis in ſemper diviſibilia.* [70]

Paſch. 37 *Eliz.* Rot. 1915. *in the Common Pleas.*

Clayton's Caſe.

BEtween *Reighnolds* Plaintiff, and *Clayton* Defendant, in an action of Debt upon an Obligation of 60 l. the Caſe was, *Clayton* requeſted *Reighnolds* to lend him 30 l. and upon communication betwixt them, *Reighnolds* doth lend *Clayton* 30 l. *6 Decemb.* 34 *Eliz.* until the ſecond day of *June* next following, to pay to him for the principal and loan of it 33 l. at the ſaid ſecond day of *June*, if the ſon of the obligee be then alive, and if he die before the ſaid day, that then he ſhall pay him but 27 l. which was 3 l. leſs than the principal. And it was reſolved by the whole Court, That it was an uſurious contract within the Statute, according to the opinion of *Popham* chief Juſtice before, and the reaſons there given by him, *Uſura dicitur ab uſu, & ære, quaſi uſu æra*, i.e. *uſus eris*: *Et Uſura eſt commodum certum, quod propter uſum rei mutatæ recipitur.* And this deſcription agreeth with that Judgment: For if upon the firſt contract he who lendeth reſerveth no certain ſumm for the loan; but *ſecundario ſperet de aliqua retributione ad voluntatem ejus qui mutuatus eſt, hoc non eſt vitioſum. Vide Ganvile lib. 7. cap. 16. & lib. 10. cap. 1.* what was the old Law of this land concerning Uſuries. See alſo the Laws of S. *Edward, &c.* [b]

Paſch. 34 *Eliz. in the Kings Bench*, Rot. 275. *in Debt.*

Hoe's Caſe.

IN an Action of Debt brought by *Hoe* in the Kings Bench, *Phelix Marſhal* was bail for the Defendant; and afterwards before Judgment, the Plaintiff releaſed to *Phelix Marſhal* all Actions, duties, and demands; and afterwards Judgment was given againſt the Defendant, and upon default of the Defendant a *Scire facias* iſſued againſt *Phelix Marſhal*, who pleaded the ſaid general Releaſe; upon which the Plaintiff did demurr: And it was adjudged that this releaſe ſhall not bar the Plaintiff; for the words of the bail are conditionally, that is to ſay, *Si contingeret prædict' defendentem debit' & damn' ill' præfat' quer' minimè ſolvere, aut ſe priſonæ Mareſchall' ea occaſione non reddere, &c.* ſo that it cannot be by the ſaid bail any duty till Judgment be given, for before that none can know to what ſumm the debt and damages will amount: ſo that he who is bail for the Defendant is not bound in any ſumm at the firſt: But his recogniſance being general, ſhall be reduced to a certainty by the Judgment, and not before; And therefore there is a difference between a certain duty upon condition ſubſequent, for that may be releaſed before the day of performance of the condition, and a duty uncertain at the firſt, and upon condition precedent to be certain after; that in the mean time is but a meer poſſibility, and therefore cannot be releaſed, for this recogniſance doth not create a duty preſently, but ſhall produce a duty after upon a *Contingat.* [71]

Note, that it was adjudged, *Trin.* 4 *Eliz. Rot.* 1207. in the Common Pleas, That by the releaſe of all Actions, ſuits, and quarrels, a Covenant before the breach of it is not releaſed, becauſe that there is not any cauſe of Action, nor any certain duty before the breach of it, but the breach of it ought to precede the Action, and the cauſe of the duty, and for this cauſe ſuch releaſe was no bar. *Vide Dier* 5 *Eliz.* 217. *acc.* And *vide Littleton* in his Chapter of Warranty 170. That by releaſe of all demands

a warrantry (which is a Covenant real) as is there ſaid, is extinct, yet it is executory and incertain. But there the feoffee to whom the warranty is made may preſently have a *Warrantia Chartæ*, and bind the land *pro loco* and *tempore*. But ſee 35 *H.* 8. *Dier* 57. that by the releaſe of Covenants, the Covenant is diſcharged before the breach of it, which is proved by *Littleton* alſo, *fol.* 170. & 16 *E.* 3. *Barr.* 245. A woman hath title of Dower, and releaſeth to him in the reverſion, and afterwards tenant for life ſurrendreth to him, and it ſeemeth a good barr; and yet the woman hath not cauſe of Action againſt him in the reverſion at the time of the releaſe made. But the reaſon is becauſe the woman hath right to the land, and he in the reverſion hath an eſtate upon which a releaſe can enure, and by recovery of her Dower his eſtate ſhall be charged, 21 *H.* 7. the laſt Caſe. Releaſe in time of vacation to the Patron, diſchargeth an annuity with which the Parſon is charged in reſpect of the Parſonage. *Vide* 40 *E.* 3. 21. 18 *E.* 3. *Avowry* 77. 13 *R.* 2. *Avowry* 89. 14 *H.* 4. 4. in the long *Recordare*.

Trin. 34 Eliz. *in the Kings Bench.*

Seint John's Caſe.

[*b*] GArdener had a Judgment in the Kings Bench againſt one *Seint John* of the County of *Bedford*, and had a *Capias ad ſatisfaciend'* againſt him, and got a Warrant from the Sheriff to a ſpecial Baily to arreſt him, who came to *Seint Johns* houſe to arreſt him, and becauſe he feared reſiſtance he brought with him a Dagge. And *Seint John* being then one of the Juſtices of Peace of the ſaid County of *Bedford*, having notice of it, ſent one of his ſervants for him, who finding him armed with a Dagge, arreſted him, and brought him before the ſaid *Seint John* being the next Juſtice of Peace; who upon examination of the matter committed him to the next Gaol, there to remain till he had paid 10 l. according to the Statute of 33 *H.* 8. *cap.* 6. which prohibiteth the ſhooting in, or carrying, &c. of any Handgun. And it was objected, that a Dagge was not within the word Handgun, for it was ſaid, That Dagges were not in uſe at the time of the making of the ſaid Act, but invented after; and although they are uſed with the hand, yet it is not known by the name of Handgun, no more then Hagbut, or Demyhake, which were uſed with the hand, but notwithſtanding are known by particular names, and are not comprehended within this word Handgun: For they are not particularly named with the Handgun in the Statute: So a Dagge is to be diſtinguiſhed by ſpecial name from a Handgun. Wherefore for theſe reaſons, 1. That it was not in uſe at the time of the making of the Act; 2. That it was known by a ſpecial name, It was objected, that the carrying of the ſaid Dag was not within the ſaid Act. But it was reſolved by the whole Court, that it was within the ſaid Statute, and comprehended within the word (Hand-gun) for although no Gun was known by the name of a Dagge at the time of the making of the ſaid Act, [62] and although that in common ſpeech a Dagge is known by a ſpecial name, yet for as much as he who made the Dagge, had his invention from the Handgun, and it is not any new kind in ſubſtance, but hath only a little alteration in the form and quality, for this cauſe it is comprehended within this word (Handgun,) for if a little alteration or addition ſhall defeat the penalty of the Act, the Statute ſhall be of ſmall effect. And it hath been explained by ſundry Proclamations, That Piſtols, Dagges, &c. were within the ſaid Act: And it was ſaid, That where the Act doth forbid Croſs-bows, thereby alſo Stone-bows alſo are forbidden, *cauſa qua ſupra*. And the preamble of the ſaid Act ſpeaketh of a little Handgun. But it was reſolved for another cauſe, That the carrying of the Dagge was not forbidden by the ſaid Act, for the Sheriff, or any of his miniſters, for the better execution of Juſtice, may carry with them Handguns, or other Weapons invaſive, or defenſive, and the ſame is not reſtrained by the general prohibition of the ſaid Act. *Vide* 3 *H.* 7. 1.

Mich. 34 & 35 Eliz. *in the Kings Bench.*

Williams's Caſe.

[*b*] THomas *Williams* Eſquire brought an Action upon the Caſe in the Kings Bench againſt *Henry Jones* Clark, and declared where the ſaid *Henry* being Vicar of *Alderbury* in the County of *Shrewsbury*, ought and is bound by himſelf or another Chaplain to celebrate Divine Service at *Wollaſton* in his Chappel of S. *John* within the ſcite and precinct of his Mannor of *Wollaſton* aforeſaid, and within the Pariſh of *Alderbury* aforeſaid, there of ancient time built, every Sunday by the year, and every feaſt day *per annum*, before noon of the ſame day; and to adminiſter the Sacraments to the ſaid *Thomas*, *hominibus, tenentibus*,

tenentibus & servientibus suis infra præcinctum ejusdem manerii inhabitan' commoran'. Idemque Henricus Vicarius & omnes prædecessores sui Vicarii Ecclesiæ paroch' de Alderbury præd', a tempore cujus contrarii memoria hominum non existit, per seipsum vel hujusmodi Capellanum ad celebrand' divina servitia in forma prædicta in in Capella præd', ac sacrament' & sacramentalia præfat' Thom' Williams & antecessor' suis, ac omnibus illis quorum statum idem Thomas modo habet, ac hominibus servientibus, & tenentibus suis infra dictum scitum manerii præd' commorantibus, per totum annum ministrand' vel administratur' annuatim exhibere & sustentare consueverunt. Prædictus tamen Henricus Jones nunc Vicarius Ecclesiæ parochialis de Alderbury præd', per seipsum vel hujusmodi Capellan' divinum servicium in Capella præd' in forma præd', ac ad Sacramenta & sacramentalia eidem Thomæ ac hominibus, servient', & tenent' suis ibidem in forma præd' ministrand', licet sæpius requisit', per magnum tempus, videlicet, a festo Pentecoste ultim' præterit' ant' exhibition' hujusmodi billæ, usque exhibition' hujusmodi bill' exhibere & sustentare recusavit, unde dicit quod deterioratus est, &c. And the Defendant pleaded, Not guilty, and was found guilty: And after divers motions in arrest of [73] Judgment, and the matter well debated at the Bench, at last it was resolved by *Popham* chief Justice, and the whole Court, that in this Case an Action upon the Case doth not lie, but the remedy which the Plaintiff hath is to sue in the Spiritual Court: But if the Chappel had been private for him and his servants and family within the said Mannor, there a private Action upon the Case upon prescription shall be maintenable by the Lord of the Mannor, &c. for in such Case he himself only (and none of his family) shall have the Action; and although that the Divine Service be spiritual, yet for as much as the same by prescription doth belong to a private person, and to be celebrated for his ease within his Mannor, which shall be intended to begin at first by grant, for this cause for the not doing of the spiritual Service an Action upon the Case lieth, and damages shall be recovered for them; and therewith agreeth 22 *H.* 6. 46. in the Prior of *Woodburn*'s Case. But when the Chappel is not private to him and his family, but publick and common to all his tenants in the same Mannor, which may be many and of great number; there no Action upon the Case lieth by the Lord, for then every of the tenants may have his Action upon the Case as well as the Lord himself, and so infinite Actions for one default, *Et boni Judicis est, lites dirimere, & expedit reipublicæ ut sit finis litium propter communem omnium utilitatem*; and yet they shall not be without remedy in such Case, for (as it hath been said) they may and ought to sue for such default in the spiritual Court, and there the same shall be redressed. *Lit. lib.* 2. *cap. Frankalmoigne* 30. *b. Vide* 27 *H.* 8. 27. *a.* A man shall not have an Action upon the Case for a Nusans done in the high way, for it is a common Nusans, and then it is not reason that a particular person have the Action; for by the same reason that one person shall have an Action for it, for the same reason every one may have an Action, and then he shall be 100 times punished for one and the same cause. But if any particular person after the Nusans done hath more particular damage than any other, there for his particular injury, he shall have a particular Action upon the Case: And for common Nusances, which are equal to all the Kings liege people, the Common Law hath appointed other Courts for the Correction and reforming of them, *scil.* Leets and Tourns, &c. 5 E. 4. 2. *b. acc. vide* 2 *E.* 4. 9. *a.*

Pasch. 35 Eliz. *in the Kings Bench.*

The Case of the Orphans of *London.*

NOte it was resolved by the whole Court, That if any Orphan of *London*, who is by the custom of *London* under the Government of the Mayor and Aldermen of the said City sue in the Eccleſi- [b] astical Court, or in the Court of Requests, &c. for any goods, monies, or chattels due to them either by the custom of *London*, or by any devise or legacy in the Will of their ancestor, or to have an account, that a Prohibition will lie, because the Government of the Orphans doth appertain to the Mayor and Aldermen, and they have Jurisdiction of them. And *Popham* said, That if the Lord of a Mannor have probate of Wills within his Mannor, if any such Will be to be proved in the Ecclesiastical Court, a prohibition lieth, because the Jurisdiction belongeth to another, otherwise the party may have double trouble. And I have seen two presidents of Prohibitions granted upon the Custom of Orphans of *London.*

Mich.

Mich. 35 & 36 *Eliz. in the Kings Bench.*

Wymarke's Caſe.

[74] ABel Dun brought an *Ejectione firmæ* againſt *William Law*, and declared of a leaſe made by *Richard Sleford*, 9 *Nov.* 34 *Eliz.* of a houſe, &c. in *Northluffenham* in the County of *Rutland*, for three years: The Defendandant pleaded, That *ante præd' tempus quo. &c.* the ſaid *Richard Sleford* was ſeiſed in fee of the tenements aforeſaid; and 9 *Maii* 32 *Eliz.* by his deed indented and inrolled within 6 months according to the Statute, *Quod quidem ſcriptum indentat' hic in Cur' profert, &c.* bargained and ſold the ſaid tenements to *Edward Wymark* Gent. in fee, by which and by force of the Statute he was ſeiſed, till by the ſaid *Sleford* diſſeiſed, who made the leaſe in the declaration mentioned, upon whom the defendant by the commandment of *Edward Wymark* entred, &c. To which the Plaintiff replied and confeſſed the bargain and ſale by the ſaid deed enrolled to *Wymark*, *Modo & forma prout, &c. Et idem Abel ulterius dicit, quod in eodem ſcripto indentato, proviſ. exiſtit modo & forma ſequentibus, videlicet, quod ſi præd' Edwardus Wymark, &c.* do not pay 300 l. 2 *Nov.* 1592. to *Eleford*, that then the ſaid bargain and ſale ſhall be void; and ſheweth the breach of the Condition, and reentry, and the leaſe made to the Plaintiff, and the Ejectment *prout* in the declaration, without that that the ſaid *Sleford* diſſeiſed the ſaid *Edward Wymark, &c.* upon which the Defendant did demurr in Law. And ſhewed this cauſe according to the Statute, becauſe the Plaintiff in his replication did not ſhew forth the deed indented, which comprehended the condition. And after good debate and conſideration of the matter in Law, it was adjudged for the Plaintiff. And in this Caſe two Points were reſolved by *Popham* chief Juſtice, and the whole Court.

[*b*] 1. When any deed is ſhewed in Court, the deed by Judgment of Law doth remain in Court all the Term in which it is ſhewed; but in the end of the Term if the deed be not denied, then the Law doth adjudge it to be in the cuſtody of the party to whom it belongeth; for all the term in Law is but one day, and therefore ſhall be intended to remain in the Court all the Term in which it is ſhewed, but when the Term is cloſed and ended, then there is no Officer in ſuch Caſe to whom the cuſtody of the deed by the Law is appointed, and therefore the party who ſheweth it ſhall have the keeping of it: For a mans evidences are as the ſinews of his lands. And where it appeareth by 38 *H.* 8. 2. that becauſe the deed in another Term is in the keeping of the party, and not in Court, the defendant ſhall not have Oyer of it; and therewith agreeth 4 *H.* 7. 18. & 21 *H.* 7. 20. Alſo *Lit. fol.* 88. if the tenant in Aſſiſe pleads feoffment by deed poll of the Plaintiff, and ſhew the ſame in Court, in this Caſe (*Littleton* ſaith) that for as much as the deed is in Court, the feoffee may ſhew to the Court, how that in the deed there are Conditions, &c. but that is to be intended, that he ſhall take advantage of the Condition in the deed in the ſame Term that it was pleaded and ſhewed forth. And therewith agreeth 24 *E.* 3. 73. *b.* that when a deed is in Court, one may take advantage of it without having of the deed, 38 *E.* 3. 8. & 40 *Aſſ. pl.* 34. *acc'.* and in 45 *E.* 3. *tit. Feoffm' & Faits.* In Aſſiſe againſt ſundry tenants, ſome pleaded as to ſome parcel the deed of the anceſtor of the Plaintiff to them with warranty ſhewed forth in Court; and ſome other of the tenants as to other parcels pleaded in bar by the ſame deed without ſhewing it, and the ſame was challenged, becauſe the deed ought to be ſhewed in Court againſt one, the other could not have advantage of the deed without ſhewing it, but *non allocatur.* Note when the deed is by one ſhewed in Court, it is not reſpective as to him, but all others ſhall take advantage thereof, 21 *E.* 4. 49. in the Abbot of *Waltham's* Caſe. If Letters Patents be enrolled in any Court of Record, one may plead them in the ſame Court without ſhewing them, notwithſtanding that they were not pleaded before; And difference was taken between Letters Patents and other matters of Record, which of their own nature are of Record, and matter in fait; For although that a deed be enrolled in Court, one cannot plead it in the ſame Court without ſhewing of it, *Vide* 19 *H.* 6. 6. 19 *E.* 4. 9. *b.* 22 *H.* 8. *Record Br.* 65. But if a deed be pleaded and ſhewed in Court, and denied, then it ſhall remain in Court for ever, for if it ſhall be found not his deed, it ſhall be damned. 41 *Aſſ.* 29. 12 *H.* 4. 8. 7 *H.* 4. 39. 11 *H.* 4. 73.

[75] 45 *E.* 3. 11. And if a deed be denied in Court, for which it remaineth there, this deed may be pleaded in another Court without ſhewing of it, 12 *H.* 4. 8. & 43 *E.* 3. 20. *acc'.* for *lex non cogit ad impoſſibilia.* Note a good Caſe in 42 *E.* 3. 18. where the Caſe was, That a feme ſole made a leaſe for life, the leſſee committed Waſt, the husband releaſed and delivered the deed in Owel main to be delivered to the Defendant upon certain conditions performed; the Defendant performed the conditions, the husband got the deed of releaſe and kept the ſame from the leſſee, and he and his wife brought an Action of Waſt, the leſſee upon this ſpecial matter ſhall plead it without ſhewing of it forth. *Vide* 10 *E.* 3. 40. If huſband and wife be impleaded in a real Action, where the default of the wife is the default of both, if the demandant taketh the wife of the tenant from him, the ſame ſhall not turn to the default of the tenant. So in Dower, Detinue of Charters, &c. by the demandant is a good plea. 20 *H.* 7. 5. Tenant by Statute Merchant, or Staple, &c. ſhall not ſhew the deed, for he cometh to the poſſeſſion of the land by proceſs of Law againſt the will of him who hath the deed, and hath no means to come to it; Otherwiſe it is of a leaſe for life or years, &c. Becauſe he cometh in by the leſſor, and might have taken a covenant, or other ſecurity for his peaceable enjoying of the land let to him. And in caſe when the deed is denied, the Law which hath appointed the deed to remain in Court, alſo hath appointed an Officer to have the keeping of it, and that is the *Cuſtos Brevium*, as appeareth in *F. N. B.* 244.

2. It

2. It was resolved, That the course of the Kings Bench is, that although that the Plaintiff after the bar pleaded hath day to reply two or three Terms after, no mention shall be made in the Roll of any imparlance or continuance, but when he replieth, the Entry shall be *ut supra*; *Et præd' Abel dicit quod ipse per aliqua per ipsum Williel' superius placit' ab actione sua præcludi non debet, &c.* But otherwise it is of a bar there, for that containeth the imparlance and continuance, and is in such form, *Et modo ad hunc diem*, scil. *diem Veneris, &c. isto eodem termino, usque quem diem præd' Willielmus habuit licentiam interloquend'*; but no such entry is made upon any Replication, Rejoynder, &c. by which it shall be intended, when they are generally entred upon Record, that they were done in the same Term, in which the bar was pleaded; And by consequence the Plaintiff in the Case at Bar, may take advantage of the condition comprised in the deed shewed forth by the Defendant.

Mich. 35 & 36 Eliz. in the Common Pleas.

Clifton's Case.

IN a Writ of Waste between *Thomas Southcote* Esquire, and *John Clifton* Defendant, the form of the Writ was such; *Si Thom' Southcote Arm' fecerit, &c. summon' Johannem Clifton quod sit, &c. quare cum, &c. idem Johannes de terris, domibus, boscis & gardinis in Otterie, quæ tenuit ad vitam Margaretæ nuper uxor' suæ, in jure ipsius Margaret', de præfat' Tho. ex dimissione quam idem Thomas inde fecit præfat' Margaretæ, & cuidam Petro Carewe Militi quondam viro suo, ad vitam eorundem Petri & Margaretæ, fecit vastum, venditionem & destructionem, ad exhæreditationem ipsius Thomæ, & contra formam provision' prædict', ut dicitur, &c. & habeas, &c. Teste 8 Februar' anno 35.* [b]

And it was resolved by the whole Court in the Common Pleas, that the said Writ doth not lie; for the recital of the Writ is, *Quare cum de communi consilio Regni nostri Angliæ provisum sit, quod non liceat alicui vastum, venditionem, seu destructionem facere de terris, &c. sibi dimissis ad terminum vitæ vel annorum, &c.* And in this Case the husband had not any estate for life in this land, but the wife had the estate for life, and the husband had it but in the right of the wife, and so he is not within the said Act; and therefore if a woman tenant for life take husband who committeth Waste, and the wife dieth, the husband shall not be punished for this Waste.

Note Reader, this Judgment was given upon consideration of the Statute of *Gloucester cap.* 5. and of the opinions *obiter* in 10 *H.* 6. 11. & 12. by *Strange* and *Cotesmoore*, 46 *E.* 3. 25. 46 *E.* 3. Waste in *Statham.*

Pasch. 43 Eliz. in the Kings Bench.

Pilkington's Case.

BEtween *Pilkington* Plaintiff, and *Hastings* and others Defendants in a Replevin, it was resolved by the whole Court, That when a distress is taken for damage feasant, that the party may tender amends till the cattel are impounded, but after they are in the custody of the Law, then the tender cometh too short, *vide* 13 *H.* 4. 17. & 27 *E.* 3. 88. And so it was adjudged *Trin.* 33 *Eliz.* between *Nevil* and *Segrave.* [76]

2. It was resolved, That tender of amends to the Bailiff is not good, for he cannot deliver the distress once taken, no more than he can change the avowry of his Master, or demand a rent upon condition of reentry.

Mich.

Mich. 35 & 36 Eliz. in the Kings Bench.

The Earl of *Pembrook's* Case.

IN an Action upon the Case by the Earl of *Pembrook*, against Sir *Henry Barkley*, for interrupting him of certain Walks in the Forest of *Selwood*; The Defendant pleaded a grant of them by the said Earl to
[b] the Lord *Maurice Barkley* in tail by deed shewn forth. It was holden by *Popham* chief Justice, and the whole Court, That in the same Term the Plaintiff may pray that the deed be entred *in hæc verba*, and afterwards he may demurr, or take issue at his pleasure, but at another Term the deed shall not at his prayer be entred *in hæc verba*, although he would demurr upon it, for then the deed is out of Court: And afterwards the deed upon the prayer in the same Term was entred *in hæc verba*. The Earl pleaded, that *ulterius per scriptum prædictum provisum fuit*, (without shewing forth any part) because that the deed was entred *in hæc verba*; *quod nota*, good policy. And the Earl shewed the condition and the breach of it: *Nota bene*.

Mich. 35 & 36 Eliz. in the Common Pleas.

Paget's Case.

BEtween *William Paget* Esquire Plaintiff, and *Edward Cary* and *Elizabeth* his wife Defendants in Wast, in the Common Pleas, it was resolved, That if there be tenant for life, the remainder for life, the remainder in fee, if tenant for life doth Wast in trees, and afterwards he in the remainder for life dieth, the Action of Wast is maintenable for Wast done in the life of him in the remainder for life, for it was to the dis-inheritance of him in the remainder in fee; and now the impediment, which was the mean estate for life is taken away. *Et remoto impedimento emergit actio.* And as it was there said, so it was adjudged in 9 *Eliz.* The same Law if he in the remainder for life after the Wast surrender his estate to him in the remainder or reversion in fee. And where it was objected, That at the time of the Wast it could not be to the damage of him in the remainder in fee in respect of the mean estate for life: To that it was answered and resolved, when the tree is severed, the property thereof belongeth to him in
[77] the remainder in fee; And where it is said in some Books that he in the remainder or reversion in fee shall not have an Action of Wast, it is to be intended during the continuance of the mean remainder; And where in other Books it is said, That in such Case the Action of Wast well lies, it is to be intended after the death of him in the remainder for life. *Quia cum aliquid impeditur propter unum, eo remoto, tollitur impedimentum:* And so all your Books are well reconciled. *Vide* 11 E. 3. *Receit* 118. 4 E. 3. 18. 6. *Cottes Case*, 33 E. *Wast* 114. 5 E. 3. 3. 10 E 4. 9. F. N. B. 58, 59. and the Writ in the *Register*, 74. b. and the *Nota* there, *fol.* 75.

Trin. 36 Eliz. in the Common Pleas.

Boothe's Case.

GGeorge *Booth* brought an Action of Wast against *Skevington*, and counted that Sir *William Booth* demised for years to *Ensor*, who assigned it to *Skevington*. The Defendant pleaded an assignment to *Elizabeth Cave*, before which assignment no Wast was done; The Plaintiff in his Replication shewed the Statute of 11 *H.* 6. *cap.* 5. and that the grant to *Elizabeth Cave* was to the intent, that they might not know against whom to bring his Action of Wast; and averred that he took the profits; The defendant rejoyned, that *Elizabeth Cave* granted her estate to *A.* who demised to the Defendant at Will, without that that he granted to the intent, &c. upon which the Plaintiff did demurr. And in this Case three Points were resolved.

1. That although that the words of the Act are, That where tenant for life or years have leased or granted their estate, to the intent that those in the reversiou, *scil.* their lessors, their heirs or assignees may not know their names; and afterwards the first tenants continually occupy those lands, &c. and commit Wast, &c. it is ordained and established, that he in the reversion in such Case shall maintain a Writ of Wast against

againſt the ſaid tenants for life or years. And there is Proviſo that the firſt tenants, &c. Yet it was reſolved, that every aſſignee of the firſt leſſee mediate or immediate is within this Act: For the Statute was made to ſuppreſs fraud and deceit, and therefore ſhall be taken beneficially.

2. It was reſolved, that he in the remainder is within the ſaid Act, as well as he in the reverſion, for in equal miſchief, yet the preamble and body of the Act ſpeak only of him in the reverſion.

3. It was reſolved, that the intent aforeſaid was not traverſable in this Caſe but the pernancy of the profits; for that was the thing notorious, whereof the Country might have knowledge, and in the pernancy of the profits, the intent is implied. *Vide* 4 *H.* 7. 9. in a *Formedon*, the tenant pleaded Nontenure, the demandant ſaid, that he made a feoffment to perſons unknown to defraud him of his tenancy, and took the profits: The pernancy of the profits, and not the feoffment is traverſable. 4 *E.* 4. 29. and many other Books agree.

Trin. 36 *Eliz.* Rot. 877. *in the Kings Bench.*

Samon's Caſe.

Samon brought an Action upon the Caſe upon *Aſſumpſit*, and declared; that where controverſies were between the Plaintiff and Defendant concerning divers lands in *D.* The defendant in conſideration of 6 d. aſſumed and promiſed to pay 200 l. to the Plaintiff, if he did not perform the award of *J. S.* &c. which *J. S.* made an award, That the Defendant ſhould enter into a Bond to the Plaintiff, that the Plaintiff and *Elizabeth* his wife ſhall enjoy the ſaid land, &c. which he hath not done; upon which the Plaintiff did demurr. And it was adjudged againſt the Plaintiff, and the reaſon and cauſe of the Judgment was, becauſe that the award was void for incertainty; for it doth not appear of what ſumm the Bond ſhould be, for the Arbitrators are Judges of the Caſe; and their Judgment ought to be certain, ſo that thereby the controverſie be decided; and that the ſame be not for reaſon of incertainty a new cauſe of controverſie. And the Arbitrators cannot aſſign their power over, but they themſelves ought to determine it, and therefore neither the Plaintiff nor the Defendant may aſſeſs the ſumm. But it was agreed that if *I.* covenant with *B.* to enter into a Bond to him for the enjoying of ſuch land, and do not expreſs what ſumm, he ſhall be bound in ſuch ſumm, as amounteth to the value of the land, as it is agreed in 10 *E.* 3. If a man grant an annuity to one of 10 Marks till he be promoted to a convenient Benefice, the Law doth expound the ſame to be of the value of the annuity or more; but the reaſon of that is, becauſe the ſame is the act of the covenantor himſelf which cannot be void, but it is otherwiſe in the Caſe at Bar. Alſo the award was void as to the wife, for ſhe was a ſtranger to the ſubmiſſion. [78]

Hill. 37 Eliz. Rot. 601. *in the Kings Bench.*

Gray's Caſe.

IN a *Replevin* between *Gray* and *Fletcher*, in barr of the avowry for damage feaſance, the Plaintiff by cuſtom entitled himſelf to have Common of paſture in the place where, &c. to his Copihold, the which cuſtom was traverſed. And it was found that he ought to have the ſame Common, but that every Copiholder had uſed to pay time out of mind, &c. *Pro eadem communia unam gallinam, & quinque ova annuatim.* And it was adjudged, that upon this verdict the Plaintiff ſhall have Judgment; for the Plaintiff needeth not to ſhew more then maketh for him, and that is of his part. And the doubt was, what remedy the Terre-tenant ſhould have for the hens and eggs; for if the Terre-tenant have no remedy for them, then the Commoner ſhall have his Common *ſub modo*, *ſcil.* paying ſo much, &c. and then it ſhall be againſt the Plaintiff: But if the Terre-tenant have remedy for the hens and eggs, then as the verdict is found, it is not *modus communiæ*, *ſcil.* a manner of commoning, nor parcel of the iſſue as to the Common, but a collateral recompence to be paid for the Common, whereof every one hath equal remedy. And *Popham* chief Juſtice ſaid, that it was adjudged in a *Devonſhire* Caſe, That where a man did preſcribe to have pot water out of the River, &c. and the Jury found that he ought to have it paying 6 d. yearly. And it was adjudged that he had failed of his preſcription, for he hath preſcribed abſolutely, and the Jury hath found it conditionally, or *ſub modo*. And there if he do not pay the mony he cannot take the water, and the Terre-tenant in ſuch Caſe may diſturb him, which is all the remedy that the Terre-tenant hath. And in the Caſe at Barr, the Terre-tenant may diſtrain the Cattel of the Commoner upon his own land for the hens and eggs; and therewith agreeth 26 *H.* 8. 5. But in the Caſe at Bar, if the Jury had found, that the Plaintiff ſhould have Common paying ſo many hens [b]

and eggs, the iſſue had been found againſt him, becauſe it is parcel of the cuſtom: But in the Caſe at Barr, the cuſtom as to the Commoning is perfect without the ſaid payment, and the payment doth not limit or qualifie the cuſtom, but it is a recompence for the Common, for which recompence the Terre-tenant hath remedy. But if the Terre-tenant hath not recompence, as in the Caſe put by the chief Juſtice, but only to make diſturbance, as is aforeſaid, then the ſaid manner of payment (although it be found as it is in the Caſe at Bar) is parcel of the Cuſtom. Note a good difference. And the like Judgment was given in the Common Pleas, *Paſch.* 37 *Eliz. Rot.* 723. between *Lovelace* and *Reighnolds*, *quod vide* there. *Vide* 10 E. 4. 17. *F. N. B.* 107. *a.* 15 E. 3. *Aſſiſe* 111.

Paſch. 37 Eliz. *in the Kings Bench.*

Fitzharbert's Caſe.

[*b*] THE Caſe in effect was; Tenant for life, the remainder to his ſon and heir apparent in tail by covin and agreement between him and *A.* and *B.* to the intent to barr his ſon of his remainder by a collateral warranty made a leaſe to *A.* for years, who maketh a feoffment to *B.* in fee, to whom the father releaſeth with warranty, and all this by covin and conſent between the parties, to the intent aforeſaid; and afterwards the father dieth, and the warranty deſcendeth upon the ſon being then of full age. And it was reſolved by *Popham* chief Juſtice and the whole Court, that this warranty ſhall not barr the ſon; for the feoffment of the leſſee for years is a diſſeiſin, and the father himſelf is *particeps criminis*, and agreeing to it, and then although the releaſe with warranty is made after the diſſeiſin, yet for as much as the diſſeiſin was to that intent and purpoſe, the Law ſhall adjudge upon the whole Act; as it is agreed in 19 *H.* 8. 12. If a man diſſeiſeth another to the intent to make a feoffment with warranty although he make the feoffment 20 years after the diſſeiſin, yet the Law ſhall adjudge upon the whole Act, and the diſſein and the warranty ſhall be coupled together, according to the intent of the parties; and therefore in ſuch caſe the Law ſhall adjudge the warranty to commence by diſſeiſin, although that they be made at ſeveral times. As if a man make a leaſe for years of lands in two ſeveral Counties reſerving one intire rent, although that the livery be made at ſeveral times, firſt in one County, and then in the other, yet the rent is iſſuing out of the lands in both Counties; So if a man make a charter of feoffment with warranty, and deliver eth the deed, and afterwards maketh livery *ſecundum formam charte*, now the Law ſhall judge upon the whole Act, and although the deed were delivered at one time, and the livery upon the land at another time; and although a warranty ought to enure upon an eſtate, yet upon all the matter the warranty is good.

[80] 2. It was reſolved, that although the diſſeiſin was made to the father himſelf who made the releaſe; yet for as much as the father agreed and conſented to the diſſeiſin, and that he who made the warranty did procure the diſſeiſin, it ſhall not hinder, but that the warranty doth commence by diſſeiſin, for *conſentientes & agentes pari pœna plectentur. Vide Litt.* 151. in the Chapter of *Remitter*. If the husband diſcontinue the wives right, all is one as to the Remitter, if they procure or aſſent to the diſſeiſin, and afterwards take a feoffment of the diſſeiſor, as if they themſelves had diſſeiſed the diſcontinuee; and ſo are the Books in 44 *E* 3. 46. 18 *H.* 8. 13. 11 *E.* 4. 2. &c.

3. Although that the diſſeiſin was not made immediately to the ſon who is to be bound by the warranty; yet for as much as this diſſeiſin was a wrong to him, and did deveſt his remainder out of him, it ſhall not hinder, but that the warranty ſhall commence by diſſeiſin. And ſo is the Book in 31 *E.* 3. *Warranty* 28. where one brother maketh a gift in tail to another, and the unckle doth diſſeiſe the donee, and maketh a feoffment with warranty, the unckle dieth, and the warranty deſcendeth upon the donor, and afterwards the donee dieth without iſſue; the donor bringeth a *Formedon* in the Reverter, and the feoffee pleadeth the feoffment with warranty, the demandant ſhall avoid the ſame becauſe it began by diſſeiſin, and yet the diſſeiſin was to the donee and not the donor, but by the diſſeiſin wrong was done to him, and his reverſion by it was deveſted. And in this Caſe *Popham* chief Juſtice ſaid, That this very Point was in queſtion between *Pawlet* and *Putenham*, and *Pawlet* who was in remainder enjoyed the land. And by great advice it was reſolved, that he was not bound by the warranty: But it was not adjudged. *Vide* Reader the Books 14 E. 3. *Warranty* 5. *Temp.* E. 1. *Warranty* 86. 27 E. 3. 89. 12 *Aſſ. p.* 9. 4 *Ma. Dier* 148. &c. and the Statutes of *Glouceſt. c.* 3. and the Statutes of 11 *H.* 7. *cap.* 20. That the Releaſe with warranty of tenant by the Curteſie, tenant in Dower, or tenant for life to the diſſeiſor was a collateral warranty by the Common Law, and ſhould bind the heir: But that is to be intended when there was not any covin or colluſion to make diſſeiſins. But after diſſeiſins made without covin there ſuch releaſe in caſe of tenant by the Curteſie, or of the husband ſeiſed in the right of the wife before the Statute of *Glouceſter*; or of Tenant in Dower, or in Joynture, before the Statute of 11 *H.* 7. was a barr, as a releaſe by another Tenant for life is at this day. But a releaſe at this day by tenant for life made to a diſſeiſor, or any other without covin; and yet to the intent to barr him in the reverſion, ſhall barr him, for intent without covin and diſſeiſin ſhall not avoid the warranty. As if the father in the Caſe at Barr had made a feoffment with warranty, and died, this warranty ſhould bind the ſon, although
[*b*] it was made of purpoſe to barr him, for there was not any diſſeiſin; and therefore ſuch a warranty cannot be avoided by averrment of covin, becauſe there was not any diſſeiſin in the Caſe, for a warranty commencing by wrong ſhall not be avoided, but a warranty which commenceth by diſſeiſin.

And

And although it is said in our Books (and it is true) That warranties are much favoured in Law, because they extend to establish him who is Terre-tenant in possession; yet when they are mixt with covin, which is so odious, and so much abhorred in Law, the warranty shall lose, not only his favour, but his force also: For covin is like to poison, which will infect all the good things wherewith it is mixt.

Note Reader, a good Resolution, for if such covenous invention shall be allowed in Law, every father, or other ancestor, who upon consideration of marriage, or other good consideration hath assured and established his lands after his death upon his heir apparent, might by such covenous and sinister device disinherit his heir apparent, which should be very inconvenient.

Pasch. 37 Eliz. in the Common Pleas.

Foord's Case.

BEtween *Bettisford* and *Foord* in a Replevin the Case was such; The Prebendary of *Kingstone* in the County of *Dorset* in the Cathedral Church of *Salisbury* in the time of King *H.* 8. made a lease of the said Prebend for 70 years. The Bishop Patron of the said Prebendary, and the Dean and Chapter by their several Instruments under their common Seal (reciting the said lease) confirm *dimissionem prædictam in forma prædict' fact' pro termino* 51 years *tantum, & non ultra.* And afterwards the said Prebendary made another lease to begin after the determination of the first lease, &c. And if the first lease shall continue after the 51 years, if the confirmation shall extend to the whole term, or for the 51 years only was the Question. And it was adjudged, that the Confirmation (as the Case is) shall extend to the whole term; for when the Bishop and Dean and Chapter (reciting the said demise for 70 years) have confirmed *dimissionem prædict' in forma præd'*, these words (*pro termino* 51 years) *& non ultra*, come too late, and the lease being for 70 years, it is repugnant to confirm *dimissionem prædict'* for 51 years; for it is as much as if they had confirmed the lease and term for 70 years for 51 years. But if the Bishop and Dean and Chapter had rented the lease, and had confirmed the land to the lessee for 51 years, the same had been good enough, for then there shall not be any such repugnancy in the confirmation. [81]

And observe a difference between a bare assent without any right or interest, and an assent accoupled with a right or interest: for the tenant who is to perfect a grant by his attornment, cannot assent for a time, nor upon condition, nor for part of the thing granted, but it shall absolutely enure to all, because he hath but a bare assent, which cannot be qualified, or apportioned: But the Bishop who is Patron, and the Dean and Chapter have an interest in the Prebend, and every part of it, for the Patron hath *Jus conferendi*, and a release unto the Patron of an annuity in the time of vacation is good, as it is holden in 21 *H.* 7. 41. 8 *E.* 3. 28. *Persey's* Case. 33 *E.* 3. *Aide de Roy* 103. 8 *H.* 6. 24. *acc'*. Also it is holden in 31 *E.* 3. *Graunts* 90. 16 *E.* 3. *Annuity* 23. 8 *R.* 2. *Annuity* 53. That the Patron and Ordinary may charge the Glebe in time of vacation, therefore they have an interest; And *Fitz. N. B.* 49. saith, that the right is in the Patron and Ordinary. *Vide Litt.* Chapter *Discontinuance* 144, 145. So if a lease be made of 20 acres, they may make a confirmation as to part of the land, as to one or more acres: So they may confirm part or all upon condition; by which it appeareth that they have not a bare assent, as in case of attornment, but an assent clothed with an interest. [b]

Another difference was taken between a lease for years, and a lease for life, a gift in tail, or a feoffment in fee; For if a Prebendary make a lease for years, a confirmation may be made of the land, as hath been said before, for less years, for the years are several, although the lease or term be one.

If I sell to you any thing for 100 l. to be paid 20 l. *per annum* for 5 years, I shall not have an Action of debt till all the years be incurred, because all is but one contract: But if a man make a lease of lands for five years, rendring every year 20 l. there in the Case of a lease for years, the years are several, and he shall have an Action of debt for every year, as it is adjudged in 45 *E.* 3. 8. But if a Prebendary make a lease for life, or a gift in tail, or a feoffment in fee, and confirmation is made of the land to the lessee, donee or feoffee for one hour, it is good for ever, for an estate of freehold or inheritance is intire: And therefore if he who hath a freehold or inheritance be disseised, and confirmeth the land to the disseisor for one hour, it is good for ever.

So if a disseisor make a lease for life, or a gift in tail, and the disseisee confirm the land to the lessee or donee for one hour, it shall confirm the whole estate, but it shall not enure to the remainder or reversion, because he doth confirm the land to the lessee or donee only, and the estate for life or in tail, and the reversion are several distinct estates: But if the disseisor make a lease for years of 20 acres, the disseisee may confirm all, or any part of the land to the lessee, to have and to hold to him for all, or for any of the years, upon or without condition; for although that the term or demise be one, and therefore if the term or demise be confirmed for an hour, it is good for ever, as it is resolved in the Case at Bar; yet the years and acres are several, and therefore the confirmation may extend to part of them: *Pari ratione*, if my tenant for life make a lease for years, I may confirm the land to him for less years: So if Tenant in tail maketh a lease for 40 years, and dieth, the issue in tail may confirm the term or part for less years. The same Law of a woman after coverture. *Vide Litt.* Chapter *Confirmations* 119, 120, &c. [82]

Cases of Customs.

Trin. 37 Eliz. in the Common Pleas.

Snelling's Case.

[b] BEtween *Snelling* and *Norton* the Case was such; Debt was brought by *Snelling* against *Norton* administrator of *N.* upon an Obligation; The Defendant shewed the Custom of *London*, That if a contract be made by a Citizen in *London* to pay mony to another Citizen, and he who ought to pay dieth intestate, that the administrator shall be bound to pay it as well as if it were by Obligation. And shewed, that the intestate was a Citizen of *London*, and was indebted upon contract to one such Citizen, who after the death of the intestate hath recovered against him, upon which the Plaintiff did demurr in Law, and Judgment was given against the Plaintiff. And in this Case three Points were resolved.

1. That the said Custom was good against the opinion of *Dier*, 8 *Eliz.* 247. for although that none was chargeable at the Common Law by the name of Administrator, because that before the Statute of 31 *E.* 3. no Action lay against an Administrator by such name, and the Custom cannot begin after 31 *E.* 3. which is within time of memory; yet for as much as they were chargeable at the Common Law as Executors by their administration, so that the name of the charge is only changed, and yet in
[83] substance is all one, for every Executor is an Administrator of goods; and the pleading is, *unques executor ne unques administravit come executor*; and an Administrator hath the office and quality of an Executor, for this cause the custom alledged in such general manner was resolved to be good.

2. It was resolved, if the Ordinary take the goods into his possession, he was chargeable by the Common Law. And the Statute of *Westm.* 2. *cap.* 19. *Cum post mortem alicujus*, was made in affirmance of the Common Law. *Vide* 17 E. 3. *Brief* 822. 24 E. 3. 55. 11 E. 3. *Executors* 77. 18 *H.* 8. 23. 9 E. 4. 33. 11 *H.* 7. 12. *F. N. B.* 120.

3. It was resolved, although the Plaintiff were a stranger and no Citizen, yet this Custom was good to bind him. *Vide* 1 E. 4. 6. *a.*

Hill. 38 Eliz.

The Case of Market overt.

[b] AT the Sessions at *Newgate* now last past, it was resolved by *Popham* chief Justice of *England*, *Anderson* chief Justice of the Common Pleas, Sir *Thomas Egerton* Master of the Rolls, the Attorney General, and the Court, That if Plate be stollen and sold openly in a Scriveners shop on the Market day (as every day is a Market day in *London* except the Sunday) that this sale shall not change the property, but the party shall have restitution; for a Scriveners shop is not a Market overt for Plate; for none shall search there for such thing, *& sic de similibus*, *&c.* But if the sale had been openly in a Gold-smiths shop in *London*, so that any one that stood or passed by the shop might see it, there it changeth the property. But if the sale be in the shop of a Gold-smith, or behind a Hanging, or behind a Cupbord upon which his Plate standeth, so that one that stood or passed by the shop cannot see it, it shall not change the property: So if the sale be not in shop, but in the Ware-house, or other place of the house, it shall not change the property, for that is not in Market overt, and none will search there for his goods. So every shop in *London* is an open Market for such things only which by the trade of the owner are put there to sale; And when I was Recorder of *London*, I certified the Custom of *London* accordingly. Note Reader, the reason of this Case doth extend to all open Markets in *England*.

Trin. 41 *Eliz. in the Common Pleas.*

Periman's Case.

IN a Replevin between *Bowyer* and *Periman*, the Defendant did avow as for damage feasance in his free- [84]
hold; and issue taken upon the freehold, and a special verdict was found to this effect; *R. R.* seised of lands in fee did enfeoff divers persons by deed in fee, and died without heir, and found a Custom in this manner, *Infra maner' de Porchester, a tempore cujus contrarii, &c. habebatur consuetudo, Quod si aliquis tenens aliquorum terrarum sive tenementor' de manerio prædict' tent' alienaverit sive concesserit hujusmodi terr' sive terram præscript' sive feoffament' inde confect', vel per testament' suum hujusmodi terr' sive tenementa dederit sive legaverit, quod tunc hujusmodi alienatio, concessio, don', seu legatio fact', vel ad proxim' Cur' ejusdem manerii fuerunt præsentat', & præsentari consueverint, vel ad aliqua Cur' ejusdem maner' infra annum post hujusmodi alienationem, concession', sive feoffament', donum, sive legationem fact', vel ad proxim' Cur' ejusd' manerii post annum illud tenend': Et si aliqua talis alienatio, concessio, &c. in forma præd' non præsentat' fuerit, tunc hujusmodi alienatio, concessio, &c. sic minime præsentat' per consuetudinem manerii illius vacua fuerit:* And found that the said land was holden of the said Mannor; and that the said feoffment was not presented according to the Custom. And if that were a reasonable or lawful Custom or not was the Question; And it was adjudged, that it was a reasonable Custom: But against the Custom it was objected:

1. That if this Custom shall be allowed, what remedy if the tenants will not present it? or if the Steward will reject the presentment? To that it was answered by the Court, That the like objection may be made upon a bargain and sale by deed, what remedy if the Clark will not enrol it? And in Case of Copihold, what remedy if the Copyholders will not present a surrender made out of Court? *Et caveat emptor*, and he at his peril is to perfect all that which is requisite to his assurance. And it is not like to the Case in 2 *H.* 4. 24. where a Custom was pleaded, that none should use his Common in such place, till the Lord entreth with his cattel; and *per totam Curiam* that cannot be a Custom, for if [b]
the Lord will not enter, it is not reason that the Commoner should lose his Commmon.

2. It was objected, That once it was a feoffment; Then to say that the Custom of the Mannor shall devest an estate of freehold and inheritance vested by solemn livery shall be against Law. To which it was answered and resolved, That the reason of the Common Law, that land shall pass by solemn livery, was to give notice to the Country who were owners of the land, to the intent that none might be deceived in taking of leases and estates, and every one have notice who shall be tenant to the *Præcipe*; and Lords shall have better knowledge of their tenants to have Wards, Escheats, &c. And therefore a Custom which fortifieth the reason of the Common Law with greater solemnity and notice, is good, as in this Case, to have the feoffment openly presented in open Court, to the intent the Lord and all his tenants may take notice; and therefore if it be not presented according to Custom, then the livery is become void, because it wanteth presentment, which is part of the essence of the livery: and it was said, that there is not *plenum & perfectum feoffamentum* in this Case, till the presentment made in Court according to the custom; but *opus inchoatum & non perfectum*; and yet if the feoffor or feoffee dieth, and afterwards it is presented according to the custom, it is good. As if a man deliver a writing as an escrow, to be his deed upon certain conditions performed, and afterwards the obligor or obligee dieth, and afterwards the condition is performed, the deed is good, for there was *traditio inchoata* in the life of the parties, *sed postea consummata existens* by the performance of the condition taketh his effect by force of the first delivery, without any new delivery: So in the Case at Bar, when the feoffment is presented according to the custom, then it takes its effect by force of the first livery before: And it was said, that it was a custom in *Kent*. That if the free Tenants of a Castle do not pay their rents, that they shall lose their land holden of it. And the custom of *Lidford* Castle in the County of *Devon* is, That a freeholder of inheritance cannot pass his freehold if not by surrender into the Lords hands: And the custom of *London* is, That a devise of land by Will being enrolled is good, for it hath greater solemnity added to the Will than in other Towns and Boroughs where lands are devisable: And so Judgment was given in the principal Case, that the Custom was good and lawful. And this plea began *Hill.* 40 *Eliz. Rot.* 159. in the Common Pleas.

Pasch.

Paſch. 38 Eliz. *in the Kings Bench.*

Sir *Henry Knivet's* Caſe.

[85] BEtween Sir *Henry Knivet* Plaintiff, and *Pool* and others Defendants, upon a ſpecial verdict the Caſe was ſuch; Tenant for life, the remainder in fee to the Plaintiff, Tenant for life leaſeth for years, the leſſee for years is ouſted, and the tenant for life diſſeiſed; The diſſeiſor maketh a leaſe for years, and his leſſee ſoweth the land; and tenant for life dieth. Sir *Henry Knivet* who had the remainder in fee entred; The Defendants took the Corn ſowed, and for it Sir *Henry Knivet* brought an Action of Treſpaſs; and upon Not guilty pleaded, the Jury found the ſpecial matter aforeſaid. And it was adjudged, that the Plaintiff being he in the remainder, hath not right to the corn. It was alſo reſolved, That the Defendants claiming by the leſſee of the diſſeiſor had not the mere right in them, but in reſpect of his poſſeſſion ſhould bar the Plaintiff; but the mere right was in the leſſee of the tenant for life, and he may have an Action of Treſpaſs, and recover all the mean profits againſt the leſſee of the diſſeiſor; therefore he in the reverſion ſhall not have remedy for them alſo, nor recover damages for them, for then the leſſee of the diſſeiſor ſhall be twice charged: But as to the entry into the land to the taking of the Emblements, it was good matter of juſtification; but for as much as they have pleaded Not guilty, the Plaintiff had Judgment for the entry, and was barred for the reſidue.

And note Reader in the principal Caſe, the leſſee of the tenant for life had right to the land, and by conſequence to the corn ſowed, as things annexed to the land, and the death of the leſſee for life doth determine his intereſt to the land; but his right to the corn ſowed remaineth, and that was the principal [b] reaſon of the Judgment.

Trin. 38 Eliz. *in the Kings Bench.*

Penryn's Caſe.

IN a Writ of Error between *William ap Richard*, and *William Penryn* upon a Judgment given in *Wales* in the County of *Mountgomery*, before Sir *Richard Shutleworth* Juſtice there, in a *Quod ei deforceat* in the nature of a Writ of right (as the uſe and precedents are there) the Error was aſſigned in the matter in Law, which was ſuch; *William ap Richard* brought a *Quod ei deforceat* in the nature of a Writ of right of certain land in the County of *Mountgomery* againſt *Penryn*, who appeared and joyned the miſe upon the mere right, and thereupon a Jury by *Venire fac.* was returned, whereof 12. were ſworn and charged; and before Verdict the demandant was Nonſuit, upon which final Judgment was given; *ſcil. Quod tenens teneat terram illam ſibi & hæred', in pace verſus petentem & hæred' ſuos imperpetuum.*

And afterwards the ſame demandant brought another *Quod ei deforceat*, in the nature of a Writ of right againſt the ſame tenant for the ſame land, who pleaded the final Judgment in bar: Upon which the demandant did demurr. And Judgment was given againſt him; And upon this latter Judgment the demandant brought a Writ of Error. And after many arguments and long deliberation the Judgment was affirmed. And in this Caſe three Points were reſolved.

1. That although by the Statute of *Rutland*, made 12 *E.* 1. it is provided, that trial in *Wales* in a Writ of right ſhall be by common Jurors and by 12. yet Judgment final ſhall be there given, as it was [86] before the Statute, although the manner and dignity of the trial were altered; for the Statute hath altered the trial, but the Judgment which appertaineth to the Action doth remain as it was before.

2. If Judgment final be given in a Writ of right where it ought not be, yet it ſhall bind till it be reverſed.

3. It was reſolved, That if the tenant after the miſe joyned make default, Judgment final upon this default ſhall not be given (as *Fitzherbert* in his *N. B.* 6. holdeth) but a *petit Cape* ſhall iſſue; for peradventure he may ſave his default. See *temps E.* 1. *Droit* 41. 13 *E.* 1. *Droit* 51. 7 *E.* 3. 67. 8. 11 *E.* 3. *Statham, Droit.* 27 *E.* 3. 85. 33 *E.* 3. *Judgment* 252. 44 *E.* 3. 13 *H.* 4. *Judgment* 245. 3 *H.* 6. 55. 10 *H.* 6. 2. 9 *E.* 4. 16. 12 *H.* 7. 26 *H.* 8. 8. 35 *H.* 8. *Dier* 56. 1 *Mar. Dier* 98, 103. where Judgment final in a Writ of right ſhall be given.

Cases of Executions.

Mich. 38 & 39 *Eliz.* Rot. 259. *in the Kings Bench.*

Blumfield's Case.

IN an *Audita querela* between *Blumfield and Usewicke* the Case was; Two men were bound joyntly and severally in an Obligation, one was sued, condemned, and taken in Execution; and aftewards the other was sued, condemned, and taken in Execution, and afterwards the first escaped, and the other brought *Audita querela*: And although the Plaintiff may have an Action upon the escape against the Sheriff, yet until he be satisfied in deed, the other cannot have *Audita querela*; and peradventure the Sheriff is worth nothing; and if the Defendants had been sued by one Writ by several *Præcipes*, although the entry shall be, *quod unica fiat executio*, the same is to be intended of an Execution with satisfaction, for he shall have both their bodies in Execution, 4 *H.* 7. 8. & 29 *H.* 8. *Execution Br. acc'*. And so is the Book in 4 *E.* 4. 38. & 5 *E.* 4. 4. to be intended. *Hill.* 33 *Eliz.* in the Common Pleas it was adjudged between *Linacre* and *Rhodes*, That notwithstanding that the conusor upon a Statute Staple be taken and escape, yet his goods and lands upon the same Statute may be extended, for the escape and the Action which the Plaintiff hath against the Sheriff for the escape, is no satisfaction of the debt. So if the conusor be taken and dieth in Execution, the conusee shall have Execution of his goods and lands. And it was adjudged *Pasch.* 24 *Eliz.* in the Common Pleas between *Jones* and *Williams*, That where two men were condemned in debt, and one was taken and died in Execution, yet the taking of the other was lawful. And then it was resolved by the whole Court, That if the defendant in debt dieth in Execution, the Plaintiff may have a new Execution by *Elegit*, or by *Fieri facias* for divers reasons. [b]

1. Because the Plaintiff shall not be prejudiced, nor the Defendant benefited by the act and wrong of the Defendant, in not payment of his debt, when no default is in the Plaintiff, he having followed the due and ordinary course of Law. [87]

2. The Execution of the body is no satisfaction (as it appeareth in 4 *H.* 7. 9. & 33. *H.* 6. 47. *Hillaries* Case adjudged) but a gage for the debt; As where a man hath returned irrepleviſable award, as it is said in 33 *H.* 6. 46. and therefore after his death he shall resort to a new Execution. And the words of the *Capias ad satisfaciendum* are, *Cap. I. de S. Ita quod habeas corpus ejus coram Justiciariis nostris, &c. ad satisfaciend' G. de K. de debito & damnis, &c.* So that his body is taken to the intent that he satisfie; and when the Defendant payeth the mony he shall be discharged out of Prison.

3. The death of the Defendant is the act of God, which shall not turn to the prejudice of the Plaintiff of his Execution by the act of Law, which doth not wrong to any one.

4. It shall be mischievous to the Plaintiff to lose his debt without any default in him, and no mischief if new execution shall be done, for nothing shall be liable to his new execution, but the lands and goods of the Defendant, which in Law and all equity ought to be subject to the payment of his debts. And is not like when the the Plaintiff hath execution of the lands of the Defendant, and afterwards his lands are evicted, therefore the Statute of 32 *H.* 8. he shall not have new execution, for the execution of his lands was valuable and accounted in Law a satisfaction, and for avoiding of infiniteness there shall be but one valuable Execution, or Execution with satisfaction at the Common Law; But Execution of the body is no valuable Execution, and therefore the Plaintiff after his death shall have new Execution, till he hath had valuable Execution, which is the end and fruit of his suit: *Et finis rei attend' est, & fines mandatorum Domini Regis per rescripta sua (scil. brevia) diligenter sunt observandi.*

So note Reader, good differences between Executions not valuable, &c. (as of the body of the Defendant) and Executions valuable, as of lands, &c. And therefore if a villain be delivered to one in execution, upon a recovery in value, and afterwards the Villain dieth without issue, yet the demandant shall never have a new execution, for his first execution was valuable, and by the Law a man shall never have but one valuable execution. Note also a difference between an execution final, as where the Sheriff levieth the money of the defendants goods, or extendeth his lands and delivereth them to the Plaintiff, for that the party taketh in satisfaction, and that is the end of the suit, and all that the Kings Writ commandeth to be done; and between execution with a *quousque, &c.* tending to an end, which is not final, as in the *Capias ad satisfaciendum, &c.* it is not final, but his body is to be taken to the intent and purpose that he shall satisfie the party, and his imprisonment is not absolute, but until the Defendant satisfie the party: But execution final is when the party is satisfied; and therefore when he dieth before satisfaction it standeth with Law and equity, that the Plaintiff do resort to a new execution; *Vide Regist.* & *F. N. B.* 246. If a man hath recovered damages in Trespass before Justices of Oyer and Terminer, and hath the body of the party in execution *quousque satisfaceret* the Plaintiff, and he who is in execution dieth, he who recovered shall sue a *Certiorari* to the Justices to remove the Record into the Kings Bench, that the Justices there may do upon that Record as the Law requireth in such Case; and that is to award a new execution, 47 *E.* 3. 3. *Execution* 41. If in Trespass the Plaintiff recover, and the Defendant is taken for the Kings fine, if he pray that the Defendant remain in Prison till he be satisfied, [b]

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he ſhall not have *Elegit*, becauſe he hath taken execution of his body and hath it; But if the party dieth in Priſon, ſo that he hath not execution with ſatisfaction, wherein is no default of him, he ſhall have an *Elegit* after, becauſe he cannot have ſatisfaction according to the firſt election; and theſe are the words of the ſaid Book. And therewith agreeth *Fitz. N. B.* 246. *b.* And if the conuſor of a Statute Merchant or Staple, &c. be taken and dieth in execution, yet the conuſee ſhall have execution without doubt of his goods and lands, as it was reſolved in *Linacres* Caſe. And ſo you will better underſtand your Books in 22 *Aſſ.* 43. 33 *H.* 6. 46, 47. 4 *E.* 4. 38. 5 *E.* 4. 4. *Br. Execution* 79. 41 *E.* 3. 13. *in Accompt, &c.*

Hill. 40 Eliz. Rot. 114.

Garnon's Caſe.

[18] BEtween *Layton* Plaintiff, and *Garnon* Sheriff of the County of, &c. Defendant, the Caſe was ſuch; *Layton* recovered againſt *Wallwen* in the Common Pleas in Action of Debt, and ſued forth a *Capias ad ſatisfaciendum*, and *ex poſt Ca.* and outlawed the Defendant; The Defendant brought a Writ of Error, and the Judgment was affirmed: and thereupon within the year a *Capias utlagatum* was awarded, and the Defendant was arreſted, and the Sheriff ſuffered him to eſcape before the return of the Writ; and upon this eſcape the Plaintiff brought this Action. And in this Caſe three Points were reſolved.

1. If one at the Common Law have Judgment in an Action of debt, and after the Judgment outlawed the Defendant, the Plaintiff was at the end of his ſuit as to any proceſs to be ſued by himſelf, for he could not have a *Scire fac'*, or any other proceſs upon the Judgment, but was put to his new original as it is agreed in 13 *H.* 4. 1. *a.* 21 *E.* 3. 55. 20 *E.* 3. *Nonability* 8. *acc.* And although before the Statute of 25 *E.* 3. *Capias* did not lie in debt, nor the body of the defendant before that Statute was ſubject to execution for debt, as it appeareth before in *Matthew Harberts* Caſe: yet if the Defendant were taken by *Capias utlagatum* at the Kings ſuit no lacheſs being in the Plaintiff in continuing of his proceſs he ſhould be in execution for the Plaintiff if he would: For in as much as the King by the original ſuit of the party is intitled to have all his goods and chattels, and the profits of his lands by the outlawry, and his body alſo in priſon, it is reaſon that if the Defendant in ſuch Caſe be arreſted at the Kings ſuit, that as the King ſhall have benefit by the ſuit of the party, ſo the party ſhall have benefit by the ſuit of the King.

2. It was reſolved, That if Judgment be given in the Common Pleas, and removed by a Writ of Error, and Judgment affirmed within the year, they ſhall award a *Capias*, or a *Fieri facias*, and the Plaintiff is not put to a *Scire facias*, although it be in another Court, againſt the opinion of 14 *H.* 7. 15, 19 *vide* 21 *Aſſ. p.* 14. *F. N. B.* 267.

3. It was reſolved, That in the Caſe at Barr, when he was taken by *Capias utlagatum* which iſſued [b] out of the Kings Bench, he ſhall be in execution for the Plaintiff preſently after his arreſt if he will, although his body be never brought in Court, and although the Court do not commit him in execution for the party, *vide* 7 *H.* 6, 7. Note, that in all Caſes when the Plaintiff may have a *Capias ad ſatisfaciendum*, and the party defendant is taken by *Capias pro fine*, there the defendant is in execution preſently, if the Plaintiff will, without any prayer of the party. Alſo in all Caſes when the Plaintiff may have execution preſently by *Fieri facias*, although he cannot have a *Capias*, nor *Capias pro fine* in ſuch Action, as in Aſſiſe with force and Rediſſeiſin, &c. and the party is taken by *Capias pro fine*, and is committed at the Kings ſuit, there the Plaintiff may pray that he remain in execution for his damages, but without prayer he ſhall not be in execution, although he may have an execution by *Fieri facias*. And when the Plaintiff hath Judgment and ſurceaſeth his time, ſo that he cannot have preſent execution neither by *Capias* nor by *Fieri facias*, &c. but is put to a *Scire fac'*, there if the Defendant be taken by *Capias pro fine*, the Plaintiff may pray that he remain in execution for him, but that ſhall not be without prayer of the party. See for proof of theſe differences 11 *H.* 7. 15. 13 *H.* 7. 21. 7 *H.* 6. 6. *a.* 36 *H.* 6. 23. *F. N. B.* 121. 6 *t.* 4. 4. *a.* 2 *R.* 2. *Execution* 16. 7 *H.* 4. *&c.* Obſerve good Reader this Caſe well, and all theſe Books, for theſe points touching execution (which is the life of the Law) are neceſſary to be known.

Trin. 41 Eliz. *in the Common Pleas.*

Frost's Case.

FRost recovered Debt and Damages against *B.* in the *Common Pleas*, 29 *Eliz.* and upon *ex post Capias* the Defendant was outlawed, and after the year the Plaintiff procured *Capias utlagatum* against him, and delivered it to the Sheriff of *London*. And that one *Laborn* one of the Sheriffs Serjeants of *London* had arrested the said *B.* in *Fleetstreet* at the suit of one *A. ad respondend'*, *&c.* before the Sheriff, *Laborn* kept *B.* in his house, and then *Frost* came to *Laborn* with the Sheriffs warrant to arrest him upon the *Capias utlagat'* which he refused to do. And upon this matter *Frost* brought an Action upon the Case against the Sheriff, and supposed that the Sheriff arrested the said *B.* by force of the said *Capias utlagat'*, and that the Sheriff suffered him to go at large: The Defendants pleaded, *Non permiserunt eum ire ad largum*; and the Jury found all the said special matter. And Judgment was given for the Plaintiff. [89]

For 1. they resolved, That when a man is in the custody of the Sheriff by process of Law, and afterwards another Writ is delivered to him to arrest the body of him who is in his custody, presently he is in his custody by force of the second Writ by Judgment of Law, although he do not actually arrest him; for to what purpose shall he arrest him who is and was before in his custody? *Et lex non præcipit inutilia, quia inutilis labor stultus*: And the words of the *Capias ad satisfaciendum* are not only, *quod Capiat, &c.* but, *quod salvo custodiat, &c. Ita quod habeat corpus, &c.* So that although he cannot take him who he hath in his keeping, yet he may safely keep him; and therewith agreeth 7 *H.* 4. 30.

2. The Verdict doth well warrant the Declaration, for in Judgment of Law it is equipollent, and amounteth to as much as if the Sheriff had arrested the said *B.* [*b*]

3. Although the *Capias utlagat'* was sued after the year, so that the Defendant could not be in execution without prayer of the party, &c. yet the Plaintiff is prejudiced by his escape, for he ought not to be discharged of imprisonment till he find sureties to satisfie him, by the Statute of 5 *E.* 3. *cap.* 12.

Trin. 42 Eliz. *in the Exchequer.*

Hoe's Case.

BEtween *Clement Hoe* Executor of *John Hoe* Plaintiff, and *Boulton* Defendant, the Case was such; *John Hoe* the Testator had Judgment to recover in the *Kings Bench* against *Boulton* 75 *l.* 3 *s.* 4 *d.* *John Hoe* assigned the same by Deed inrolled to the Queen in satisfaction of a debt due to her as Collector of Fifteens, with Proviso, that if the Treasurer and Barons of the *Exchequer*, or any two of them, because the said debt cannot be levied in convenient time, or for any other cause disallow of the said assignment, and revoke it by writing under their hands, that the assignment should be void. And afterwards *Boulton* brought a Writ of Error according to the new Statute, and there Judgment was affirmed, and 5 *l.* costs upon the affirmance of the Judgment: And afterwards (upon Process which is called a Writ of Prerogative out of the *Exchequer* upon the said Assignment) the lands of *Boulton* were extended, and his goods which were of value above the said debt were seised by force of the said Writ, but the Writ was not returned. And afterwards *Periam*, *Ewens*, and *Sotherton*, three of the Barons did revoke the assignment after the Testators death, because the Testator had satisfied the debt due to the Queen as Collector. And now the Plaintiff as Executor of *John Hoe* sued a *Scire facias* to have execution of the said 75 *l.* 3 *s.* 4 & 5 *l.* costs: And the said matter being discloſed by special pleading, a demurrer in Law was joyned. And in this Case three Points were resolved: [90]

1. That the Execution for the Queen was good without question, as to goods, although the Writ was not returned. And so is it in Case of a common person, if the Sheriff by force of a Writ of *Fieri facias* levy the debt, and deliver the same to the party, the Execution is good without return of the Writ as it is adjudged 20 *H.* 6. 24. & 21 *H.* 6. 5. And so was it adjudged in the *Common Pleas*, *Pasch.* 23 *Eliz.* between *Rook* and *Willimote*: and *Trinit.* 23 *Eliz.* between *Mount* and *Androws*; and therewith agreeth 44 *E.* 3. 18. So if a man be taken upon a *Capias ad satisfaciendum*, the Execution is well done, although the Writ be never returned: And the difference is apparent between *Capias* in process, and *Capias ad satisfaciendum*, for if the *Capias* in process be not returned, the arrest is torcious, for there the end of the arrest is to the intent the party should appear and answer to the Plaintiff; but in all Writs of Executions, when the Sheriff alone doth it, as *Capias ad satisfaciendum*, *Habere facias seisinam*, or *possessionem*, *Fieri fac'*, *Liberat'*, *&c.* if the Execution be duly done it is good, although that the Writ be not returned, for there the Plaintiff hath the effect of his suit, and nothing is to be done on his part after: But in Case of *Elegit*, because that there the Extent is to be by Jury,

and not by the Sheriff only, it ought to be returned, otherwiſe it is nought worth. So by theſe Reſolutions in the Caſe at Bar, and by the ſaid Judgments here cited, you will learn the Law, and better underſtand your Books in 19 E. 3. *Scire facias*, 11 H. 4. 73. *b.* and in *Fulwood's* Caſe in the fourth Reports.

Note Reader, that the ſaid Judgments given in Caſe of *Fieri facias*, where Execution was done, and no return of the Writ, were done upon great reaſon.

1. Becauſe the levying of the debt was lawful, and well done, and the party Defendant cannot reſiſt the Sheriff to levy the money.

2. The effect of the authority which the Sheriff had by force of the *Fieri facias* was executed.

3. The great prejudice that the Defendant (whoſe goods are ſold by the Writ and Proceſs of Law, for the ſatisfaction of his debt) ſhould have, if the Sheriffs not returning of the Writ ſhould cauſe a new Execution to be ſued forth againſt him, and leave the Defendant to his Action againſt the Sheriff.

[b] 4. If the ſale of the goods by force of the Writ, ſhall be for not returning the Writ wrongful, then the Sheriff will not find buyers of the Defendants goods by force of any Writ of Execution, which would be very inconvenient, and great delay of Executions, which are the fruit and the life of every ſuit; And where the words of the Writ of *Fieri facias* are, *Ita quod habeas denarios, &c.* they are but words of command to the Sheriff to make return, which if he do not he ſhall be amerced, but yet the execution ſhall ſtand in force.

2. It was reſolved, That after Execution had by the Queen, the revocation came too late, for then the Queen had had the effect and end of the ſaid aſſignment; and that which was executory when it was aſſigned, is now executed by lawful proceſs of Law, and therefore cannot be revoked; for when one hath a power of revocation, yet if he ſuffer any thing to be lawfully executed by force of it, as to that, he cannot make any revocation: As if a man make a Letter of Attorney to make livery, before execution he may revoke it, but after execution lawfully executed, it is executed, and cannot be revoked. *Vide* 7 H. 6. 41. in Detinue, where the Caſe was; In Detinue of a Statute Merchant, the Defendant prayed Garniſhment, the Plaintiff recovered againſt the Garniſhee by erroneous Judgment, by force whereof the Defendant delivered the Statute to the Plaintiff, who had execution; and afterwards the Garniſhee reverſed the Judgment in a Writ of Error, by which he hath reſtored all that he loſt, by that the Execution ſhall not be avoided: But I conceive in ſuch Caſe he ſhall be helped by *Audita querela*. *Vide* 7 E. 4. 2. If one, to whom another is endebted, be outlawed, and he who is endebted pay the money to the Queen, and after the outlawry is reverſed, now the creditor ſhall recover his debt againſt him. So if the goods of a man outlawed be ſold by the Sheriff upon the Writ of *Capias utlagatum, &c.* and afterwards the utlagary is reverſed by Writ of Error, the Defendant ſhall have reſtitution of his goods: But if the Sheriff by force of a *Fieri facias* ſell goods, and afterwards the Judgment is reverſed by Writ of Error, the Defendant ſhall not have reſtitution of his goods, but the value of thoſe which were ſold; and there are two reaſons of this difference: 1. If the ſuit of the Sheriff by force of a *Fieri facias* ſhall be avoided by ſubſequent reverſal of the Judgment, there would be no buyer, and by conſequence no execution ſhall be done. 2. In the Caſe of a *Fieri facias*, the Sheriff is compellable to levy the debt of the Defendants goods; and therefore it is great reaſon that it ſhould ſtand: But in the Caſe of *Capias utlagatum*, the Sheriff, or Eſcheator is not compellable to ſell them, but may keep them for the Kings uſe, and therewith agreeth 20 *Eliz. Dier* 363. and *vide* 3 E. 3. 51. Recompence in value upon voucher once lawfully executed, ſhall not be deveſted, although that the title of the demandant to the land be diſaffirmed, and evicted. [91]

3. It was reſolved, That the recovation by three, if no execution had been had, had been ſufficient; for if three revoke, two do it; but if the words of the clauſe of the revocation had been by them joyntly, or ſeverally, then the third of them could not have done it, for that had not been joyntly, but ſeverally. And therewith agreeth 36 H. 8. *Dier* 61, 62. & 27 H. 8. And ſo note a good difference.

Mich. 2 Jacobi, *in the Kings Bench.*

Semayne's Caſe.

IN an Action upon the Caſe by *Peter Semayne* Plaintiff, and *Richard Greſham* Defendant, the Caſe was ſuch; The Plaintiff and one *George Berisford* were Joyntenants of a houſe in *Black-Fryers* in *London* for years, *George Berisford* acknowledged a Recognizance in the nature of a Statute Staple to the Plaintiff, and being poſſeſſed of divers goods in the ſaid houſe, died, by which the Defendant was poſſeſſed of the houſe by ſurvivor, in which the goods continued and remained; The Plaintiff ſued Proceſs of extent upon the ſaid Statute to the Sheriffs of *London*; The Sheriffs returned the conuſor dead, upon which the Plaintiff had another Writ to extend all the lands which he had at the time of the Statute acknowledged, or any time after, and all his goods which he had at the day of his death; which Writ the Plaintiff delivered to the Sheriffs of *London*, and told them that divers goods which were the ſaid *George Berisford's* goods at the time of his death were in the ſaid houſe: And thereupon the Sheriffs by virtue of the ſaid Writ, charged a Jury to make enquiry according to the Writ, and the Sheriff

Sheriff and Jury came to the said house, the door of the said house being open, and the goods aforesaid being then in the said house, and they offered to enter the said house, to extend the said goods according to the said Writ; And the Defendant, *præmissorum non ignarus*, intending to disturb the execution, *ostio prædict. domus tunc aperto existen', claudebat contra Vicecom' & Juratos' præd'*, by which they could not enter, and extend the said goods, nor the Sheriff seise them, by which he lost the benefit and profit of his Writ: And in this Case these Points were resolved. [b]

1. That the house of every one is to him his Castle and Fortress, as well for defence against injury and violence, as for his repose; and although the life of a man is precious and favoured in Law; so that although a man kill another in his defence, or kill one by *infortunium*, without any intent, yet it is felony, and in such case he shall forfeit his goods and chattels, for the great regard which the Law hath of a mans life; But if Thieves come to a mans house to rob him, or murther, and the owner or his servants kill any of the Thieves in defence of himself and his house, it is no felony, and he shall lose nothing, and therewith agreeth 3 *E.* 3. *Coron.* 303. & 305. & 26 *Ass. pl.* 23. So it is holden in 21 *H.* 7. 39. every one may assemble his friends or neighbours to defend his house against violence: But he cannot assemble them to go with him to the Market, or elsewhere to keep him from violence: And the reason of all the same is, because that *domus sua cuique est tutissimum refugium.*

2. It was resolved, That when any house is recovered by any real Action, or by *Ejectione firmæ*, the Sheriff may break the house to deliver possession to the demandant or Plaintiff, for the words of the Writ are, *Habere facias seisinam*, or *possessionem*, &c. and after Judgment it is not the house in right and judgment of Law of the Defendant or Tenant.

3. In all Cases when the King is party, the Sheriff (if the doors be not open) may break the parties house, either to arrest him, or to do execution of the Kings process, if otherwise he cannot enter. But before he break it, he ought to signifie the cause of his coming, and to make request to open the doors; and that appeareth by the Statute of *Westm.* 1. *cap.* 17. (which is but an affirmance of the Common Law) as it hereafter appeareth, for the Law without default in the owner doth abhor destruction or breaking of any house which is for the habitation and safety of a man, by which great damage and inconvenience may follow to the party, when no default is in him; for perhaps he doth not know of the process, which if he hath notice of, it is presumed that he will obey it, and that appeareth in 18 *E.* 3. *Execution* 252. where it is said, That the Kings Officer who cometh to do execution, &c. may open the doors which are shut, and break them, if he may not have the Keys; which proveth, that he ought first to demand them: 17 *E.* 3. 16. *J.* hurteth *R.* so as he is in danger of death, *J.* flieth, and thereupon Huy and Cry is made, *J.* getteth into the house of *T.* those who pursue him, if the house be kept and defended with force (which proveth that first request ought to be) he may lawfully break the house of *T.* for it is at the Kings suit, 27 *Ass. p.* 66. The Kings Bailiffs may distrain for issues in Sanctuary, 28 *Ass. p.* 35. By force of a *Capias* upon indictment of Trespass the Sheriff may break his house to arrest the party; but in such Case, if he break the house when he may enter without breaking of it, (that is, upon request, or if he may open the door without breaking) he is a trespassor, 41 *Ass.* 15. Upon issue joyned upon a traverse of an Office in *Chancery*, *Venire fac.* was awarded returnable in the *Kings Bench*, without mentioning *non omittas propter aliquam libertatem*, yet for as much as the King is party, the Writ of it self is *non omittas propter aliquam libertatem*, 9 *E.* 4. 4. That for felony, or suspition of felony, the Kings Officer may break the house to apprehend the felon, and that for two reasons: 1. For the Commonwealth, for it is for the Commonwealth to apprehend felons. 2. In every felony the King hath interest, and where the King hath interest, there the Writ is *non omittas propter aliquam libertatem*; and so the liberty or privilege of the house doth not hold against the King. [92]

4. In all Cases, when the door is open the Sheriff may enter the house, and do execution at the suit of any Subject, either of the body, or of the goods; and so may the Lord in such Case enter the house to distrain for his rent, or service, 38 *H.* 6. 26. 8 *E.* 2. *Distr.* 21. & 33 *E.* 3. *Avowry* 256. the Lord may distrain in the house, although he holds lands in which he may distrain, *vide* 29 *Ass.* 49. But the great Question in this Case was, if by force of a *Capias* or *Fieri facias* at the suit of the party, the Sheriff after request made to open the door, and denial, may break the Defendants house to do execution, if the door be not opened. And it was objected, That the Sheriff had done well for divers causes: 1. Because it is by process of Law; and it was said, That it will be granted that a house is not a liberty, for if a *Fieri fac'*, or a *Capias* be awarded to the Sheriff at the suit of a common person, and that he make a mandate to the Baily of a Liberty who hath return of Writs, that *nullum dedit responsum*, in this Case another Writ shall issue forth with *non omittas propter aliquam libertatem*, yet (it will be said on the other side) that he shall break the Defendants house, as he shall do of another Liberty: As in the County of *Suffolk* are two Liberties, one of S. *Edmund* of *Bury*, and the other of S. *Etheldred* of *Ely*, put case a *Capias* come at the suit of *A.* to the Sheriff of *Suff.* to arrest the body of *B.* the Sheriff maketh a mandate to the Bailiff of the Liberty of S. *Etheldred*, who maketh no answer, in this Case the Plaintiff shall have a Writ of *Non omittas*, by force of which he may arrest the Defendant within the Liberty of *Bury*, although that no default be in him. 2. Admit it be a Liberty, the Defendant himself shall not take advantage of a Liberty: As if the Bailiff of a Liberty be Defendant in any Action, and Process of *Capias* or *Fieri facias* cometh to the Sheriff against him, the Sheriff shall execute the process against him, for a Liberty is always for the benefit of a stranger to the Action. 3. For necessity the Sheriff shall break the Defendants house after a denial as is aforesaid, for at the Common Law a man shall not have any execution for debt, but only of the Defendants goods. Put case then the Defendant will keep all his goods in his house, and so the Defendant by his own act shall prevent not only the Plaintiff of his just and true debt, but it shall be also a great imputation to the Law, that there should be so great defect in it; that in such Case the Plaintiff by such shift without any default in him should be barred of his execution. And the Book in 18 *E.* 2. *Execution* 252. was cited [b]

to prove, where it is ſaid, That it is not lawful for any one to diſturb the execution of the Kings Officer, who cometh to execute the Kings Proceſs; for if a man may ſtand out in ſuch manner, a man ſhall never have execution; but there it appeareth (as hath been ſaid) that there ought to be requeſt made before the Sheriff break the houſe. 4. It was ſaid, that the Sheriff is an Officer of great authority, in whom the Law repoſeth great truſt and confidence, and are of ſufficiency to anſwer all wrongs which ſhall be done; And they have *cuſtodiam Comitatus*, and therefore it ſhall not be preſumed that they will abuſe the houſe of any one by colour of doing their office in execution of the Kings Writs, againſt the duty of their Office, and their Oath alſo: But it was reſolved, That it is not lawful for the Sheriff (upon requeſt made and denial) at the ſuit of a common perſon, to break the Defendants houſe, *ſcil.* to execute any proceſs at the ſuit of any Subject, for thereof would follow great inconvenience, that men in the night as in the day ſhould have their houſes (which are their Caſtles) broken, by force of which great damage and miſchief may follow, for by colour thereof, upon a feigned ſuit, the houſe of any man at any time might be broken, when the Defendant may be arreſted elſewhere, and ſo men ſhould not be in ſafety, or reſt in quiet in their own houſes: And although that the Sheriff be an Officer of great authority, and truſt, yet it appeareth by experience, that the Kings Writs are executed by Bailiffs, perſons of little or no value: And it is not to be preſumed, that all the ſubſtance a man hath is in his houſe, nor that a man will loſe his liberty which is ſo ineſtimable, if he have ſufficient to ſatiſie his debt. And all the ſaid Books which prove that when the proceſs toucheth the King, that the Sheriff may break the houſe, implies that at the ſuit of the party, the houſe may not be broken, otherwiſe the addition (at the ſuit of the King) ſhould be vain and frivolous. And with this Reſolution agreeth the Book in 9 *E.* 4. 9. and the expreſs difference there appeareth between the Caſe of felony, which (as hath been ſaid) con-
[93] cerneth the Commonwealth, and the ſuit of any other Subject, which is for the particular intereſt of the party, as there it is ſaid in 18 *E.* 4. 4. by *Littleton* and all his Companions it is reſolved, That the Sheriff cannot break the Defendants houſe by force of a *Fieri facias*, but he ſhall be a treſpaſſor by the breaking, and yet the execution which he then doth in the houſe is good. And it was ſaid, that the ſaid Book of 18 *E.* 2. was but a *Nota*, and not any judicial Judgment, and it doth not appear at whoſe ſuit the Caſe is intended, but it is an obſervation or collection (as it ſeemeth) of the Reporter. And if it be intended of a *Quo minus*, or other Action in which the King is party, or is to have benefit, the Book is good Law.

5. It was reſolved, That the houſe of any one is not a Caſtle or priviledge but for himſelf, and ſhall not extend to protect any perſon who flieth to his houſe, to prevent a lawful execution, and to eſcape the ordinary proceſs of Law; for the priviledge of his houſe doth extend only to him and his family, and to his own proper goods, or to thoſe which are lawfully and without fraud or covin there; And therefore in ſuch Caſes after denial upon requeſt made, the Sheriff may break the houſe; and that is proved by the Statute of *Weſt.* 1. *c.* 17. by which it is declared, That the Sheriff may break a houſe or Caſtle to make Replevin, when the goods of another which he hath diſtrained are by him conveyed to his houſe or Caſtle, to prevent the owner to have a Replevin of his goods; which Act is but an affirmance of the Common Law in ſuch Points. But it appeareth there, that before the Sheriff in ſuch Caſe break the houſe, that he is to require the goods to be delivered to him; for the words of the Statute are, After that the Caſtle ſhall be ſolemnly demanded by the Sheriffs.

6. It was reſolved, admitting that the Sheriff after denial made may break the houſe, as the Plaintiffs Council pretend he may, then it followeth that he hath not done his duty, for it doth not appear, that he made any requeſt to open the door of the houſe. Alſo the Defendant as this Caſe is, hath done that which he may well do by the Law, *ſcil.* to ſhut the door of his own houſe.

Laſtly, the general allegation, *præmiſſorum non ignarus* was not ſufficient in this Caſe, where the notice of the premiſſes is ſo material; but in this cauſe it ought to have been certainly, and directly alledged, for without notice of the proceſs of Law, and of the coming of the Jury to execute it, the ſhutting of the door of his own houſe was lawful. And Judgment was given againſt the Plaintiff.

Trin. 39 Eliz. *in the Exchequer.*

Barwick's Caſe.

[b] IN an Information of intruſion into a houſe and certain lands in *Sutton* in *Galters* in the County of *York*, againſt *Peter Barwick* and others, the Caſe was ſuch: King *E.* 6. by his Letters Patents 19. *Maii*, *anno* 4. demiſed the Mannor of *Sutton*, whereof, &c. to *Thomas Tirril* for 21 years: And afterwards Queen *Elizabeth* having the reverſion, by her Letters Patents 11. *Maii*, in the 10*th* year of her Reign reciting the ſaid leaſe, did demiſe the ſaid Mannor to *Humphrey Barwick* for 21 years in reverſion: *Humphrey Barwick* 2. *Auguſti*, 10 *Eliz.* by Indenture granted to one *Story* a houſe and croft parcel of the Mannor, from the Feaſt of S. *Michael* the Archangel 1597. for 21 years, &c. and 20 *Maii*, 16 *Eliz.* demiſed to *John Ragget* another parcel of the ſaid Mannor for 21 years, from the ſaid Feaſt of S. *Michael*; and another demiſe of another parcel to one *William Simpſon* for the like term. And afterwards Queen *Elizabeth* 21. *Nov. anno* 23. by her Letters Patents (reciting the ſaid leaſe to *Humphrey Barwick*) *pro & in conſideratione rurſum redditionis totius ſtatus, tituli, termin' annor', & intereſſe, de & in*

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præmiſſ. per prædict. literas paten' eidem Humfrido *conceſſ.* demiſed and granted the ſaid Mannor to the ſaid *Humphrey* for 21 years, where in truth the ſaid *Humphrey* had not ſurrendred all the ſaid term granted to him, for he had made divers aſſignments and demiſes as is aforeſaid. And afterwards Queen *Eliz.* 28. *Julii, anno* 26. in conſideration of a ſurrender of the ſaid Letters Patents of *anno* 23 *Eliz.* and of all the eſtate, term and intereſt by them demiſed and granted, demiſed and granted the ſaid Mannor to the ſaid *Humphrey, Habendum a die confectionis earundum literarum patentium*, for the lives of three others and the ſurvivor of them: And under this latter demiſe the Defendants claimed. And if this latter leaſe were good or not, was the Queſtion. And after many Arguments at Bar and Bench Judgment was given by Sir *William Periam* Chief Baron, and the whole Court of Exchequer for the Queen. And in this Caſe two Points were reſolved: [94]

1. In as much as the valuable material conſideration of the ſaid Letters Patents for three lives being falſe, and thereby the Queen deceived, by conſequence the ſaid leaſe for three lives was void; for the conſideration was, That the ſaid former leaſe ſhall be ſurrendred, and in truth the former leaſe was void, ſo as the motive cauſe of making the ſecond leaſe was falſe; and for this cauſe the latter leaſe made upon ſuch conſideration was void alſo. And the former leaſe in *anno* 23. was void, becauſe the ſame was in conſideration of a ſurrender of all the eſtate, term, and intereſt demiſed by the Letters Patents made 10 *Eliz.* whereas in truth all the eſtate was not ſurrendred: For he made divers demiſes and grants of ſeveral parcels of the ſaid Mannor before, and that may be very miſchievous to the Queen, for her leſſee may demiſe all the land to him demiſed ſaving a ſmall parcel, and for a ſmall term in reverſion, and after ſurrender to the Queen, and take a new leaſe with reſervation of rent, and condition of reentry; and in this Caſe neither the new rent, nor the condition ſhall extend to the eſtates and intereſts derived out of the firſt leaſe. And it is a Maxim, That if the conſideration which is for the benefit of the Queen, being executed, or executory, or be it on Record or not on Record, be not true or not performed, or if prejudice may accrue to the Queen by reaſon of not performing of it, the Letters Patents are void. And in the Caſe at Bar it was for the advantage and benefit of the Queen, that all the former term of *anno* 10 *Eliz.* ſhall be ſurrendred according to the expreſs conſideration, to the intent that the rent, and condition reſerved upon the new leaſe of *anno* 23. ſhould extend to all the land demiſed according to the purport and true intention of the ſaid Letters Patents. Alſo when the Queen made the leaſe for three lives in conſideration of a ſurrender of the ſaid leaſe of *anno* 23. which leaſe was void, thence it followeth that the demiſe made in conſideration of this ſurrender was void alſo, becauſe that the Queen was deceived in the conſideration of her demiſe; for the ſurrender of the former term was a principal motive to induce the Queen to make a new leaſe, and perhaps to mitigate ſome of the fine; which conſideration being valuable and material, ought to be truly and duly performed.

2. It was reſolved, That when the Queen 28. *Julii, anno* 26. demiſed the ſaid Mannor to *Humphrey Barwick, Habendum ſibi a die confectionis earundem literarum patentium*, that the ſaid 28. day of *July* it ſelf is without queſtion excluded, and the ſaid demiſe cannot begin, nor the leſſee enter, before 29. of *July*, for this (*a*) or (*ab*) *eſt dictio ſignificativa primi termini, a qua, ſicut dictio* (*uſque*) *termini, ad quem*; and (*a*) or (*ab*) *accipitur excluſive.* [b]

3. It was reſolved, That an eſtate of Freehold cannot by the Common Law begin *in futuro*, but ought to take effect preſently in poſſeſſion, reverſion, or remainder. And the difference is between a leaſe for life, and a leaſe for years: For a leaſe for years may begin *in futuro*, but not a leaſe for life. As if a man make a leaſe for years to begin at *Michaelmas* next, it is good; but if a man make a leaſe for life to begin at *Michaelmas* next it is void; And the reaſons and cauſes of the ſaid difference are; 1. Becauſe a leaſe for years may be made without livery and ſeiſin, but ſo cannot an eſtate of Freehold without livery, either in fact or in Law: And therefore when a man maketh a leaſe for life to begin at a day to come, he cannot make preſent livery to a future eſtate; and therefore in ſuch Caſe nothing paſſeth: And it was ſaid, that Letters Patents under the Great Seal do amount to a livery in Law; and therefore by Letters Patents a leaſe cannot be made for life to begin at a day to come. 2. If any Freehold ſhall paſs preſently by the Letters Patents at a day to come, then the Queen in the mean time ſhould have a particular intereſt and term without any donor or leſſor, which ſhall be againſt the rules of the Law. But no ſuch conſequent will follow in the Caſe of a leaſe for years; and therefore it was reſolved in the Caſe at Bar that the leaſe for three lives was void, becauſe it was to begin the next day after the *Teſte* of the Letters Patents: And if the leaſe ſhall be good, the Queen ſhall have an intereſt for the 28. day; and although the leaſe were to begin the day after the *Teſte* of it, it is all one in Law as if it had been to begin 20 or 40 days or years to come, for the diſtance of the time doth not make the alteration of the Law in this Caſe: And in this Caſe it was agreed, That if a man make a leaſe for years to *A.* and *B.* the remainder to *C.* for life, in this Caſe the leſſor ought to make livery to *A.* and *B.* before their entry, and by the livery to *A.* and *B. C.* ſhall take preſent eſtate by way of remainder, by force of the livery made to the leſſees for years. And therewith agreeth *Litt. lib.* 1. *fol.* 12. And in ſuch Caſe difference was taken by ſome, between two joynt Attorneys, who have expreſs authority to take livery and ſeiſin by deed, and two joynt leſſees in the Caſe aforeſaid who have power to receive livery for the benefit of another by warrant of Law; for livery made to one Attorney in the name of both is not good, for he doth not follow his expreſs warrant, for he alone hath no warrant, for they both make but one Attorney: But in the Caſe of two joynt leſſees, there the livery made to one in the name of both is good, for they have an intereſt in the land before their entry, and livery to one in the name of both, maketh actual poſſeſſion in both, which is ſufficient to ſupport the remainder to *C.* And in the one caſe the livery is made to the leſſees who have intereſt, and in the other to him who maketh the warrant of Attorney by his Attorneys, which have but a bare authority. And although that livery cannot be made to one in the name of him and of another who is abſent, whereby any eſtate of Freehold ſhall paſs to him who is abſent without deed, becauſe his eſtate is only to begin by the livery: yet when a [95]

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leaſe is made to two for years without deed, the remainder for life, the leſſees preſently have intereſt in the lands before any livery made; and therefore livery made to one who hath an intereſt in the name of him and the other is ſufficient to that purpoſe.

Note (good Reader) I have Reported this Caſe, to the intent that the imperfections in the Letters Patents made to *Barwick*, by which he loſt his leaſe, ſhall be avoided in leaſes, and principally to poor men to be made in times to come.

Mich. 39 & 40 Eliz. *in the Kings Bench.*

Goodall's Caſe.

[b] BEtween *Cutbert Godall* Plaintiff, and *John Wyot* Defendant, in an *Ejectione firmæ* of lands in *Aileſbury* in the County of *Buck.* which began *Hill.* 37 *Eliz. Rot.* 805. The Defendant pleaded Not Guilty: And the Jurors gave a ſpecial verdict to this effect; Sir *John Packington* was ſeiſed of the tenements aforeſaid in fee, and by his Deed indented, 1. *Julii*, 35 *Eliz.* did thereof enfeoff *Robert Woodcliffe* and his heirs, *Proviſo ſemper quod ſi præd.* Johannes *infra unum annum poſt deceſſum ipſius* Roberti *ſolvat, ſeu ſolvi faciat hæred', executor', ſive adminiſtrator' ipſius* Roberti *ſumm' centum marcarum legalis mon'* Angl', *quod tunc & deinceps præſens charta indentata & ſeiſina inde habita, vacua ſit, & nullius vigoris, &c.* *Robert Woodcliffe* did thereof enfeoff *Edward Woodcliffe*, whoſe eſtate by divers mean conveyances *Thomas Goodall* the leſſor of the Plaintiff had: And afterwards 7. *Jan.* 35 *Eliz.* the ſaid *Robert Woodcliffe* died, and after whoſe death *Drue Woodcliffe* being his ſon and heir, and *Anne* his wife took Letters of Adminiſtration of his goods; by which *Drue* and *Anne* made a Letter of Attorney to *Tho. Goodall* to demand and receive the ſaid 100 Marks upon the ſaid Proviſo or Condition, of which the ſaid *Thomas Goodall* gave notice to the ſaid Sir *John Packington*; And afterwards and within the ſaid year, it was agreed between the ſaid Sir *John* and the ſaid *Drue*, that the ſaid Sir *John* ſhould pay to the ſaid *Drue* but 32 *l.* of the ſaid 100 Marks, and no more, and yet in appearance for the better performance of the Condition, that the whole ſum of 100 Marks ſhall be paid, and that the reſidue over 32 *l.* ſhall be repaid to Sir *John*; upon which the ſaid Sir *John* paid within the ſaid year 100 Marks to the ſaid *Drue*, [96] and preſently all was repaid to Sir *John* but the ſaid 32 *l.* only, according to their preceding agreement aforeſaid: And afterwards the ſaid Sir *John* did reenter into the ſaid tenements, pretending that he had performed the Condition, upon whom the ſaid *Tho. Goodall* did enter, and made the leaſe to the Plaintiff, who entred and was poſſeſſed, until the ſaid *John Wyot* ouſted him, (without conveying any intereſt or authority to the ſaid *Wyot* under Sir *John Packington*) but the Jury did conclude, *Si ſuper totam materiam, &c. prædict. ſolutio prædict. centum marcarum per prædict.* Johannem Packington *Milit' præfat' Drogoni fact', ſit bona & legalis ſolutio in lege earundem centum marcarum, ſecundum formam proviſionis præd', Juratores prædicti ignorant: Et ſi, &c.* So that the doubt which the Jury conceived was only upon the ſaid payment; and whether the ſaid payment as is aforeſaid were ſufficient in Law to give title of entry by force of the ſaid Condition to the ſaid Sir *John Packington* upon the ſaid *Thomas Goodall*: And it was objected on the Defendants part, That although before the payment it was agreed between the ſaid Sir *John Packington* and the ſaid *Drue Woodcliffe*, that the ſaid *Drue Woodcliffe* ſhould have but 32 *l.* of the ſaid 100 Marks, yet Sir *John* paid the whole, and *Drue* received the whole, and the property of all the monies was in *Drue*; and if *Drue* would not have repaid to him the reſidue above the 32 *l.* Sir *John Packington* had not any remedy, but an Action upon the Caſe (if any Action upon the matter would lie.) And for this cauſe they concluded that it was a good payment to ſatiſie the Condition.

But to that it was anſwered and reſolved by *Popham* Chief Juſtice and the whole Court, that it was not any performance of the Condition, and their reaſon was, becauſe an eſtate of Inheritance was by the payment of the ſaid monies to be deveſted out of *Thomas Goodall* the aſſignee of the land; and therefore the Condition ought to have been performed in truth by a true and effectual payment, and not by a ſhadow or colour of payment: And in the Caſe at Bar the precedent agreement did guide the ſubſequent payment, and their intent was that but the ſaid 32 *l.* ſhould be enjoyed and kept, although that more was in appearance paid; And eſtates of third perſons ſhall not be deveſted by colourable or covenous payments, but by true and effectual payment, as is aforeſaid. *Vide* 19 *H.* 6. 54. 20 *E.* 3. *Accompt* 79. & 18 *E.* 4. 18. where it appeareth, That conditions ought to be performed truly and effectually, *Quia* [b] *factum non dicitur, quod non perſeverat.*

2. It was reſolved, That if all the money had been paid to the heir *bona fide* (although that *Robert Woodcliffe* his father hath conveyed his whole eſtate over in the land) it had been ſufficient. For the heir is a perſon expreſly named in the condition to whom the payment ſhall be made, and the feoffor is a ſtranger to the conveyance that the feoffee and his aſſignees made, and the feoffor ſhall not take notice at his peril of the validity of them, nor of the conditions or limitations annexed to them.

3. It was reſolved, That as this condition is in the Caſe at Bar, the feoffor could not have paid it to *Goodall* the aſſignee of the land, for heirs, executors, and adminiſtrators were expreſſed in the condition, and the aſſignee not, as in the Caſe of *Littleton*, Chap. *Condition* 78. If the Condition were, That if the feoffor pay to the feoffee, or to his heirs, ſuch a ſum ſuch a day, there after the death of the feoffee,

feoffee, if he die before the day limited, the payment ought to be made to the heir at the day ſet, where this word (ought) which importeth neceſſity was obſerved; And therefore in ſuch Caſe the money ſhall not be paid to the Executors. And ſo the doubt in 12 *E.* 3. *Condition* 9. and *Dier* 2 *Eliz.* 181. well reſolved: But the aſſignee of the land, although he be not named in the Condition amongſt the perſons who ſhall pay the money, yet he may well pay the money for the ſaving of his tenure, as *Littleton* ſaith, *fol.* 77. So note the difference, that the monies ſhall not paid to the aſſignee of the land without naming of him in the Condition, for there the payment goeth to the defeaſance of the Inheritance, but the monies ſhall be paid by the aſſignee in ſalvation of his Inheritance. *Mich.* 23 & 24 *Eliz.* in the Court of Wards, the Caſe was ſuch, *Edward Randal* ſeiſed in fee of certain lands of Inheritance within the County of *Surrey* by Deed indented and inrolled according to the Statute, did covenant with *John Brown*, that if the ſaid *Brown* did pay to the ſaid *Randal*, his heirs or aſſignees 400 *l.* the fourth day of *March* then next following, at a certain place, that then the ſaid *Edward* and his heirs would ſtand ſeiſed of the ſaid lands to the uſe of *Brown* and his heirs; And before the ſaid day *Edward Randal* died, and having iſſue a ſon, made his Will in writing, and made *Alice* his wife, *Raph Hare*, and *Hugh Hare* his Executors, and deviſed the ſaid land to his wife during the minority of his ſon, and died, his iſſue within age, and in Ward to the Queen; and before the day, the wife did renounce, and took Letters of Adminiſtration. And now the Queſtion was, to whom the monies ſhall be paid. And in this Caſe three Points were reſolved by the Chief Juſtices *Wray* and *Dier*, and the whole Court of Wards, that is to ſay, That in the ſaid Caſe theſe words (aſſignees) ſhall be only intended of the aſſignees of the eſtate of *John Brown*, for he hath an eſtate in him aſſignable, and the Law will never find an aſſignee in Law, when there may be an aſſignee in fact: But if *Edward Randal* had made a feoffment in fee, upon Condition that the feoffee ſhould pay the money to the feoffor, his heirs or aſſignees, &c. there becauſe he departeth with his whole eſtate in fee, and hath but a bare Condition which he cannot aſſign over, the Law which ſhall never reject any word, if by any reaſonable conſtruction it may take effect, ſhall make conſtruction which perſon ſhall be moſt apt as his aſſignee in Law to receive the ſaid monies; and thoſe the Law doth adjudge to be his Executors, becauſe they repreſent the perſon of the Teſtator for all goods and chattels, and in ſuch Caſe the feoffor cannot have any aſſignee in fact. And ſo a good difference; and therewith agreeth 27 *H.* 8. 2. *a.* 2. It was reſolved in the ſaid Caſe of *Randal*, that the wife having by the deviſe but a particular intereſt in the land, was not aſſignee of the land within the Proviſo: So if the ſaid *Edward* had made eſtate for life or years, &c. for none ſhall be aſſignee in this Caſe: But when the Covenantor departeth with his whole eſtate, as if he make a feoffment in fee, a gift in tail, a leaſe for life with the remainder over in fee, in ſuch Caſe the leſſee for life, or donee in tail is the aſſignee: But ſo long as the Covenantor hath the reverſion remaning in him, the payment ought to be made to him. So it was ſaid, that if *Edward Randal* had made an aſſignment of his whole eſtate in part, as long as any part remained with *Edward Randal*, the tender ought to be made to him or his heirs. 3. It was reſolved in the ſaid Caſe of *Randal*, That the tender ought to be made to the heir, and not to the Executors, becauſe the heir was expreſly named, which excludeth Executors and Adminiſtrators. *Et expreſſum facit ceſſare tacitum.* [97]

4. It was reſolved, That although that in the Caſe at Bar no title was found for the Defendant, but is as a meer ſtranger, yet the Court in a ſpecial Verdict, ſhall never doubt but of that which only the Jurors doubt: And therefore for as much as they rely and conclude upon the payment, if it be a performance of the Condition or not, the Court ought not to give Judgment till they have reſolved that which the Jurors have referred to their conſideration, and all other matters ſhall be intended and ſupplied, but only that which the Jurors have referred to the conſideration of the Court. And ſo it was adjudged *M.* 30 & 31 *Eliz.* between *Scovel* and *Cabel*: And afterwards Judgment was given for *Cuthbert Godall* the Plaintiff: Upon which Judgment the Defendant brought a Writ of Error in the Exchequer Chamber: And all the Court upon argument and debate of the Caſe there again did concur in opinion with the Juſtices of the *Kings Bench*, and affirmed the Judgment. And ſo this Caſe was reſolved by all the Judges of *England*. [b]

Mich. 39 & 40 Eliz. *in the Common Pleas.*

The Counteſs of *Northumberland*'s Caſe.

FItton and the Counteſs of *Northumberland* his wife, Sir *Thomas Cecil* Knight, and *Dorothy* his wife, *William Cornwalleis* Eſquire, and *Lucy* his wife, and the Lady *Davers*, daughters and heirs of the Lord *Latimer*, brought a *Quare Impedit* againſt *Hall* and others, who pleaded a Releaſe of *William Cornwalleis* pendant the Writ; Judgment of the Writ: upon which the Plaintiffs did demur. And it was adjudged that it went in bar but againſt *William Cornwalleis* and his wife, and the Writ ſtood for the others: *Vide* 45 *E.* 3. 10. in the Caſe of *Ward*. *Et nota*, That in all Caſes of a thing entire, and in the realty, as preſentation to a Church, Wardſhip of the body, &c. the releaſe of one ſhall enure to the benefit of the other: Then it was moved, That the Count was inſufficient, for the Plaintiffs in their Count intitle themſelves, that the Lord *Latimer* was ſeiſed of the advowſon in fee, and granted the next avoidance to Dean *Carew*, and afterwards the Church being void, Dean *Carew* preſented, and

ſo

ſo convey the deſcent to them without alledging any preſentment in the Lord *Latimer* or any other bu
only in the grantee of the next avoidance; And if this preſentment were good title for the grantor an
his heirs or not, was the Queſtion. And it was adjudged that it was a ſufficient title, for he doth it in th
[98] right and title of the grantor, and therefore ſhall ſerve for him to make a title in a *Quare Impedit*. Th
ſame Law of leſſee for years, leſſee for life, tenant in Dower, tenant by the Curteſie, Guardian, tenan
by Statute Merchant, Staple, &c. and that agreeth with divers opinions in 7 *E.* 4. 20. 22 *E.* 4. 9. *b.*
16 *H.* 7. 18. *a.* 9 *H.* 7. 23. *Br. Quare Impedit* 122. 23 *Eliz. Dier* 300. And true it is that it is a com-
mon learning in our Books, that where tenant for years, or for life, bring a *Quare Impedit*, he ought to
alledge ſeiſin in him who hath fee, and that regularly is true. And yet preſentations by themſelves do
ſuffice, as it appeareth 8 *H.* 5. 10. And this Reſolution doth not oppoſe that Rule; for preſentation of
the grantee of the next avoidance being made in the title and right of the grantor ſhall ſerve as well for
him, as his own preſentment, and doth amount to as much. As if grantee for years of a Seigniory, or
Guardian get ſeiſin of the ſervices, it ſhall be a good ſeiſin for him in the reverſion, and therewith agreeth
F. N. B. 179. *f.* 45 *E.* 3. 26. 11 *E.* 3. *Aſſiſe* 86. Alſo it is holden in our Books, That if preſentment
be alledged in the leſſor or donor, and alſo in the leſſee and donee it is not double, for the preſentment of
the leſſor or donor is not traverſable. And ſee for both theſe Points 18 *E.* 3. 15. 24 *E.* 3. 37. 40 *E.* 3.
10. 42 *E.* 3. 4. 33 *H.* 6. 32, 33, 34. 7 *E.* 4. 20. 9 *H.* 7. 23. 1 *&* 2 *Phil. & Ma. Dier* 106. Note
a Caſe adjudged in which was diverſity of opinions in our Books, in which the Law is now well
reſolved.

Mich. 40 & 41 Eliz. *in the Common Pleas.*

Burie's Caſe.

[*b*] BEtween *Webber* and *Bury* in an *Ejectione firmæ*, a ſpecial verdict was given upon a divorce betwee
Bury and his wife, *cauſa frigiditatis*, and that the wife for three years after the marriage *remanſit vir*
intacta propter perpetuam impotentiam generationis in viro, & quod vir fuit inaptus ad generandum. And in thi
ſpecial Verdict all the examinations of the Witneſſes, upon which the Judge in the Spiritual Court wa
moved to give his ſentence, and which were depoſed in the ſame Caſe by which the perpetual infirmity
and diſability of *Bury ad generandum* was manifeſt (which were not entred in a former Verdict, upon
which Judgment was given) by which it was pretended, that by reaſon of his perpetual impotency
the iſſue which he had by the ſecond wife was illegitimate; and that was the doubt in this cauſe which
the Jury conceived: And it was adjudged, that the iſſue by the ſecond wife was legitimate; for it is
clear that by the divorce *cauſa frigiditatis* the marriage was diſſolved *a vinculo matrimonii*, and by conſe-
quence each of them might marry again. Then admitting that the ſecond marriage was voidable, yet it
remaineth a marriage until it be diſſolved; and by conſequence the iſſue had during the coverture, if no
divorce be in the life of the parties, is lawful. See 36 *Aſſ.* 10. 39 *E.* 3. 32. 28 *H.* 8. *Baſtardy* 44. *Bracton*,
lib. 2. *fol.* 92. 12 *H.* 7. 22. 22 *E.* 4. *Conſultation* 6. *Et ſemper præſumit' pro legitimatione puerorum, &*
filiatio non poteſt probari, and a man may be *habilis & inhabilis diverſis temporibus*. And for this caſe (not-
withſtanding the depoſitions by which a natural and perpetual inability before the firſt ſentence was
depoſed) Judgment was given that the iſſue was lawful according to the firſt Judgment given. And
upon this Judgment a Writ of Error was brought, and after many Arguments and great deliberation,
the ſaid Judgment was affirmed by *Popham* Chief Juſtice and the whole Court, for the reaſons and
cauſes aforeſaid.

Mich. 40 & 41 Eliz. *in the Kings Bench.*

Flower's Caſe.

[99] LAuncelot *Flower* was indicted upon the Statute of 5 *Eliz.* for perjury, in giving falſe evidence to the
Grand Inqueſt at the Seſſions holden at *Wisbich*, &c. upon an Indictment of Riot. And the ſaid
Flower was by Judgment of the Court diſcharged of this Indictment: for the Statute of 5 *Eliz. cap.* 14.
hath two Branches; The firſt is againſt procurors of perjury, and that in matter depending in ſuit by
Bill, Action, or Information. The ſecond Branch (upon which the ſaid *Flower* was indicted) is enacted
againſt them who commit perjury by his or their depoſition in any of the Courts above mentioned, or
being examined *in perpetuam rei memoriam*: And although that this clauſe be general, and not reſtrained
by any words to particular ſuits, *viz.* by Bill, Writ, Action, or Information, as the firſt was, yet in good
conſtruction this Branch ſhall have reference to the firſt, and ſhall be expounded by it, and ſo one part
of

of the Act ſhall expound the other. For otherwiſe the party who committeth the perjury upon Indictment ſhall be puniſhed upon this Branch; and he who ſuborneth and procureth him to commit the perjury ſhall paſs unpuniſhed, which ſhall be againſt reaſon, and the meaning of the makers of the Act. For ſome ſay, *Quod plus peccat author quam actor.* And ſo it was adjudged in *Monday's* Caſe in the *Kings Bench, Mich. 36 & 37 Eliz.* And the like Judgment wasgiven *Trin. 39 Eliz.* in the *Kings Bench* in Caſe of perjury ſuppoſed to be committed upon an Indictment of felony.

Hill. 40 Eliz. in the Common Pleas.

Rooke's Caſe.

IN a Replevin in the *Common Pleas* by *Rookes* againſt *Withers*; The Defendant juſtified the taking by authority of Commiſſion of Sewers directed to *B. S.* and others, to ſurvey all Walls (*prout* in the Commiſſion) in the River of *Thames* in the County of *Kent* and *Eſſex*, becauſe that one *Carter*, *&c.* was aſſeſſed to every acre for repairing of a Bank, &c. for the not payment of which he took the diſtreſs, To which the Plaintiff replied, Of his own wrong, without ſuch cauſe. And the Jurors found the Commiſſion and the Statutes of *6 H. 6. cap. 5. & 23 H. 8. cap. 5.* And that the Commiſſioners did impanel a Jury to enquire of defaults, who preſented that ſeven acres of meadow in which the diſtreſs was taken was next adjoyning to the River; and that the bank of the River was adjoyning to the ſaid ſeven acres, for which they taxed *Carter* to pay 8 *s.* for every acre: And the Jury further found, that the Occupiers of the ſaid ſeven acres have uſed always to repair the ſaid bank, ſometimes voluntarily, and ſometimes by preſentment. And further that divers other perſons had lands to the quantity of 800 acres within the ſame level, and ſubject to drowning, if the ſaid bank be not repaired: And if this aſſeſsment of the Owner of the land next adjoyning only without any aſſeſsment of the other who had lands ſubject to the like danger of drowning, were lawful or not was the Queſtion. And in this Caſe three Points were reſolved: [b]

1. That the finding of the reparing, &c. by the Occupiers of the ſaid ſeven acres was not material, becauſe the Occupiers might be Tenants at will, or other particular Tenants who by their Act cannot bind him who hath the Inheritance.

2. That the Commiſſioners ought to tax all who are in danger to be endamaged for the not repairing equally, and not he who hath the land next adjoyning to the River only; for the Statute of *6 H.6. cap. 6.* in which the Commiſſion of Sewers is formed and ſpecified, hath preciſe words in the ſame Commiſſion, That no perſon of any eſtate or condition ſhall be ſpared. *Ita quod aliquis tenentibus terrarum ſive tenementorum, &c. diviti vel pauperi, vel alteri cujuſcunque conditionis, ſtatus, vel dignitatis fuerit, qui defenſionem, commodum, & ſalvationem per præd. Wallias, foſſata, gutteras, pontes, calceta, & gurgites, &c. habent, vel habere poterint nullatenus partiatur in hac parte.* And if the Law ſhall be otherwiſe, inconvenience may follow, for it may be that the rage and force of the water ſhall be ſo great, that the value of the land adjoyning will not ſerve to make the banks; And therefore the Statutes will have all which are in danger, and are to take commodity by the making of the banks to be contributory; for *Qui ſentit commodum ſentire debet & onus:* and the ſaid Statutes require equality, which well agreeth with the rule of Equity: See the Caſe of Bankrupts in the Second Part of my *Reports. Vide* 35 *H.* 8. *Br. tit. Teſtam. 19.* 4 *E.* 3. *Aſſiſe* 178. 11 *H.* 7. 12. 29 *E.* 3. 39. and Sir *William Harbert's* Caſe in the third Part of my Reports; Caſes of equality grounded upon reaſon and equity, *Ipſe etenim leges cupiunt ut jure regantur*; And notwithſtanding the ſaid words of the ſaid Commiſſion give authority to the Commiſſioners to do according to their diſcretions, yet their proceedings ought to be limited and bound with the rule of reaſon and Law. For diſcretion is a ſcience or underſtanding to diſcern between falſity and truth, between right and wrong, between ſhadows and ſubſtance, between equity and colourable gloſſes and pretences, and not to do according to their wills and private affections; for as one ſaith, *Talis diſcretio diſcretionem confundit.* And *Walmeſley* Juſtice held, and it was not denied by any, That if the owner of the land were bound by preſcription to repair the River bank, that yet upon ſuch Commiſſion awarded, the Commiſſioners ought not to charge him only, but ought to tax all who had land in danger: And to this purpoſe the Statutes were made; for otherwiſe it might be that all the land ſhall be drowned before that one perſon only can repair the bank, and that appeareth by the words of the Statutes: for which cauſe Judgment was given for the Plaintiff. [100]

Trin. 40 Eliz. *in the Common Pleas.*

Penruddock's Caſe.

[b] IN a *quod permittat* between *Henry Clark* Plaintiff, and *Edward Penruddock* and *Mary* his wife Defendants, which was adjudged in the *Common Pleas*, and removed by a Writ of Error into the *Kings Bench*, *Hill.* 37 *Eliz. Rot.* 387. the Caſe was ſuch; *John Cocke* 2. *Octobr. anno* 1 *Mar.* builded upon his own Freehold a houſe in *S. Johns ſtreet* in the County of *Midd.* ſo near the Curtilage of the houſe of *Thomas Chichely*, that *domus illa ſuperpendet, Anglice*, doth hang over, *magnam partem, videlicet*, 3. *pedes Curtilagii prædicti, &c.* And afterwards *John Cock* conveyed the houſe which he had ſo built to *Penruddock* and his wife; And *Tho. Chicheley* to whom the nuſans was done, conveyed his houſe to *Clark* the Plaintiff. And the Plaintiff in his *Quod permittat* (which he brought) *proſternere domum prædict'*, declared that the ſame houſe *ſuperpendet tres pedes curtilagii prædict'*, *ſic quod aquæ pluviales de eadem domo deſcendentes, ſolum ejuſdem curtilagii conterunt, ac magnopere, ac indies magis magiſque conſumunt & devaſtant, ac ea ratione curtilagii præd' quolibet pluviali tempore humectat' & inundat' exiſt'*, *ita quod prædict'* Henric' *inhabit' in eodem meſſuagio, nullum profic' & eaſiament' de eodem curtilagio percipere poſſit, ad nocumentum liberi tent' prædicti in eiſdem.* And the firſt Queſtion was, if the Writ of *Quod permittat* lieth in this Caſe by the feoffee or not: And it was objected, that when wrong and injury is done by levying of a nuſans for which an Action lieth, that if he who hath the Freehold to whom the nuſans is done convey the ſame over, now this wrong is remedileſs: As if the Lord encroach rent of his tenant, the tenant cannot avoid [101] this wrong in an Avowry, but in an Aſſiſe, or a *Ceſſavit*, or a *Ne injuſte vexes* he may. But if the tenant to whom the wrong is done enfeoffeth another, his feoffee ſhall never avoid this wrong; for he ſhall take the land in the ſame plight it was given him, and that appeareth by 33 *E.* 3. *Avowry* 255. & 18 *E.* 2. *Avowry* 217. & 4 *E.* 2. *Avowry* 201. Alſo if a man be ſeiſed of land to which is Common appendant, and he is diſſeiſed of the Common, upon which he bringeth an Aſſiſe, and afterwards enfeoffeth another of the ſaid land, the Common is extinct for ever; and therewith agreeth 4 *E.* 3. for which they conceived that the feoffee ſhall not have a *Quod permittat* to avoid the wrong and nuſans made in the time of the feoffor. But it was anſwered and reſolved, That the diſtilling of the water in the time of the feoffee is a new wrong, ſo that the permiſſion of the wrong by the feoffor, or his feoffee to continue to the prejudice of another ſhall be puniſhed by the feoffee of the houſe to whom, &c. And if the ſame ſhall not be reformed after requeſt made, the *Quod permittat* lieth againſt the feoffee, and he ſhall recover damages if he do not reform it, but without requeſt made, it doth not lie againſt the feoffee, but againſt him who did the wrong it lieth without any requeſt made, for the Law doth not require any requeſt to be made to him who himſelf doth the wrong; And ſo this Caſe not like to any of the Caſes which have been put on the other ſide. *Vide* 4 *Aſſ.* 3. 4 *E.* 3. 36. 5 *E.* 3. 43. where it appeareth that the feoffee ſhall have a *Quod permittat* of a nuſans levied in the time of the feoffor: And with this Judgment agreeth Judgment given by Sir *Chriſtopher Wray* Chief Juſtice and the whole Court of *Kings Bench*, *Mich.* 24 & 25 *Eliz.* where the Caſe was; *John Rolfe* the father was ſeiſed of a houſe in *Hemelhamſtead* in fee; and *Richard Rolfe* the father was alſo ſeiſed of a piece on the South and Eaſt parts adjacent to the ſaid houſe, and *Richard Rolfe* built a houſe upon his piece of land aforeſaid, ſo near the houſe of the ſaid *John Rolfe*, that the Eaves of the ſaid houſe did hang over part of the houſe of the ſaid *John Rolfe*, ſo that the rain which deſcended from the houſe of the ſaid *Richard Rolfe*, fell upon part of the houſe of the ſaid *John Rolfe*, and afterwards *John Rolfe* died, and his land deſcended to his ſon, and afterwards the ſaid *Richard Rolfe* died, and his land deſcended to his ſon, who upon requeſt made by the ſaid *John* the ſon did not reform the ſaid wrong, but ſuffered the Eaves of his houſe to hang over the houſe of the ſaid *John* the ſon for a certain time; the wall of the houſe of the ſaid *John* the ſon became rotten, &c. upon which matter *John* the ſon brought an Action againſt *Richard* the ſon, upon which *Richard* the ſon did demur in Law; And it was adjudged that the Action was maintenable, becauſe the Defendant upon requeſt made, did not reform the nuſans which his father made, but ſuffered the ſame to continue to the prejudice and damage of the Plaintiff, ſon and heir to him to whom the wrong was done. *Vide* 2 *H.* 4. 13. 31 *E.* 3. *Voucher* 272. 20 *Aſſ. p.* 18. 19 *Aſſ. p.* 6. and with this Judgment in the principal Caſe agreeth [b] the *Regiſter* 199. *b.* & *F. N. B.* 124. And the Statute of *Weſt.* 2. *cap.* 24. by which it is enacted, *Quod ſi transferat' domus, murus, &c. in aliam perſonam, breve non denegat', ſed de cætero, cum in uno caſu conceſſit breve in conſimili caſu, ſimili remedio indigente, ſicut prius, fiat breve. Et ſi hujuſmodi levata ad nocumentum, transfirant' in aliam perſonam, de cætero fiat breve, &c.* By which it appeareth, That the Writ in our Caſe well lieth, and ſo it was adjudged in the *Common Pleas*, that the *Quod permittat* in the Caſe at Bar did well lie. *Vide* 14 *Eliz. Dier* 319. Madam *Browns* Caſe. And *Hill.* 35 *Eliz. Rot.* 493. between *Beſwicke* and *Camden* in the *Kings Bench*: Upon which Judgment in the Caſe at Bar *Penruddock* and his wife brought a Writ of Error in the *Kings Bench*, where *Popham* Chief Juſtice, and all the Juſtices of the *Kings Bench* did concur in opinion with the Juſtices of the *Common Pleas*, as to the Point there adjudged: And it was moved in the *Kings Bench*, If the feoffee might abate the nuſans as the feoffor himſelf, and as well in the hands of the feoffee who did not the nuſans, as in the hands of the feoffor who did the nuſans; And if the feoffee of the houſe to which the nuſans was made may do it, if he may do it before he have ſome ſpecial prejudice, as in diſtilling of the water, or if he ought to ſtay till he hath ſpecial prejudice. And *Popham* Chief Juſtice held in both Caſes, the feoffee might abate the nuſans, and that before any prejudice, for it is reaſon that he prevent his prejudice, and ſtay not till it be done, which was granted by the whole Court. And afterwards the Judgment was affirmed: And ſo this Caſe was adjudged by all the Judges of *England*.

Paſch.

Pasch. 41 Eliz. Rot. 513.

Windsor's Case.

IN a *Quare Impedit* by *Andrew Windsor* against the Archbishop of *Canterbury*, *Fletcher*, *&c.* for the Church of *Buscot* in the County of *Berks*: The Plaintiff counted that he had a Mannor to which the Advowson of two parts of the said Church was appendant, and that the Defendant had a Mannor to which the Advowson of the third part was appendant; and upon the Count, and at the Bar, the Case was such: The Plaintiff hath the Advowson of two parts, the Defendant of the third; the Plaintiff presents once, and the Incumbent dieth, and afterwards he presented in the time of *E. 6. Parry* who was admitted, instituted, and inducted; And afterwards in the time of Queen *Mary* he was deprived, because he was a married man and a favourer of the Religion in the time of *Ed. 6.* and the Church being void by his deprivation, the Defendant presented his Clerk, who was admitted, instituted, and inducted, *& remansit in Ecclesia præd. usque* 1 *Eliz.* and then deprived by *Jewel* and others of the High Commissioners, and the first sentence declared and adjudged to be void, and *Parry* the first Incumbent restored to the Church: And afterwards the Defendants Clerk so deprived died, and then *Parry* died, and the Defendant presented as in his turn, for as much as his Incumbent was deprived, and *Parry* the Incumbent of the Plaintiff restored, by whose death the Church now becometh void; upon which the Plaintiff did demur in Law: And it was adjudged against the Plaintiff. And in this Case it was agreed, That if two have title to present by turns; and one present who is admitted, instituted, &c. and afterwards is deprived for Crime or Heresie, or any other cause, yet he shall not present again, but it shall serve for his turn; So if he present a meer Lay-man, who was admitted, instituted, &c. although it be declared by sentence that he was uncapable, and therefore void *ab initio*; yet because that the Ghurch was full till the sentence declaratory came, it shall serve for his turn because it was but voidable, as in the Case of *Litt.* If the Lord marrieth his Ward within age of consent, and afterwards he disagreeth to it, now it is no marriage *ab initio*, yet he shall marry him again. *Vide* 27 *H. 6. Gard.* 118. [b] If the Guardian marrieth his Ward, and afterwards they are divorced *causa præcontractus*, yet he shall not have the marriage of him again: But when the admission and institution are meerly void, then without doubt it shall not serve for a turn, as if his presentee had been admitted, instituted, and inducted, but he hath not subscribed to the Articles according to the Statute of 13 *Eliz.* 23 *Eliz. Dier pl. ult.* But in the principal Case, although the Defendants Clerk was Parson for the time to all purposes, and during the first deprivation *Parry* was not Incumbent; yet when the second sentence came, then *Parry* was Incumbent again by force of his presentation, institution, and induction, and needed no new institution, &c. And by force of the second sentence the presentee of the Defendant was removed, and *Parry* restored; Then when *Parry* died, who was the last presentee of the Plaintiff, the Defendant shall present in his turn, for the presentation which he made, now upon the matter during the life of *Parry*, being the second presentee of the Plaintiff, cannot be in his turn, when *Parry* dieth Incumbent by force of the Plaintiffs presentation: But if *Parry* had died before the second sentence, or had not reversed the former sentence, then the Defendant had had his turn: And note, that the Writ was *ad Ecclesiam*, and the Count was *de advocatione duarum partium*, and well. *Vide Dier* 6 *E. 6.* 78. *b.* 8 *F. N. B.* 39. *b. vide Trin.* 14 *Eliz. Rot.* 1060. in the *Common Pleas*, and *Hill.* 38 *Eliz.* Sir *Thomas Stanhop's* Case in the *Common Pleas*: And I conceive that the Writ ought to be general, as *F. N. B.* and divers other Books are; but the Count ought to be according to his title. [102]

Trin. 43 Eliz. Rot. 1084. *in the Common Pleas.*

Hungate's Case.

Hungate brought an Action of Debt upon an Obligation against *Mese* and *Smith*, the Condition of which was to perform the arbitrement of two, between the Plaintiff of the one part, and the Defendant of the other part; *Ita quod arbitrium præd. fiat & deliberetur utrique partium prædictorum* before such a day: And the Defendants pleaded that before the day the arbitrement was made, but was delivered to the Plaintiff, and *Mese* one of the Defendants, and not to *Smith*; upon which the Plaintiff did demur. And Judgment was given against the Plaintiff. And it was resolved, that sometimes this word (*uterque*) is *discretive* and several, and sometimes *collective*, and conjoyned: As if two or three be bounden in an Obligation, *& utrumque eorum*, this word *utrumque* maketh the Obligation several, as it is holden in 28 *H.* 8. *Dier* 19. *b.* But in the Case at Bar it shall be taken *collective*. And the Rule to know in what sense it shall be taken, and when it shall be taken either severally or joyntly is to consider the subject matter, and to make construction according to congruity of reason, and *ut evitetur absurdum*, as in the Case of 39 *H.* 6. 7. the condition of an Obligation was, *si uterque eorum*, *scil.* the obligor and obligee, *steterit arbitrio* Robert Bozom, &c. and it was adjudged that each of [103]

them were bound *pro parte ſua*, and not one for the other; for that ſhall be abſurd and againſt reaſon: And in the Caſe at Bar, for as much as each of the parties is ſubject to penalty and damage, it is reaſon that the arbitrement ſhall be delivered to each of the parties, to the intent they may perform it, and avoid
[b] the danger of breaking of it. 2. It was reſolved, that if two be of one part, and two of the other part, and the words are (as above) *ita quod deliberetur utrique*, that the delivery of the arbitrement to one of the one part, and to another of the other part is not ſufficient; for the party is to be intended of the whole party, one is as well within the penalty and danger as the other. And for as much as the Arbitrement was not delivered to *Smith*, Judgment was given againſt the Plaintiff.

Trin. 42 Eliz. *in the Kings Bench.*

Baker's Caſe.

[104] UPon Evidence in an *Ejectione firmæ*, between *Middleton* and *Baker*, it was reſolved by the whole Court, That if the Plaintiff in evidence ſheweth any matter in writing, or of Record, or any ſentence in the Eccleſiaſtical Court, upon which a queſtion in Law doth ariſe, and the Defendant offereth to demur in Law upon it, the Plaintiff cannot refuſe to joyn in demurrer, but he ought to joyn in the demurrer, or wave his evidence. So if the Plaintiff produceth witneſſes to prove any matter in fact, upon which a queſtion in Law doth ariſe, if the Defendant admitteth their teſtimony to be true, there alſo the Defendant may demur in Law upon it, but then he ought to admit the evidence given by the Plaintiff to be true; and the reaſon thereof is, That matter in Law ſhall not be put to Lay-men. So may the Plaintiff demur upon the Defendants evidence, *mutatis mutandis*: But if evidence be given for the King in information, or other ſuit, and the Defendant offer to demur upon it, the Kings Council are not tied to joyn in demurrer, but in ſuch Caſe the Court ought to direct the Jury to find the ſpecial matter, and upon that they ſhall adjudge the Law, as it appeareth 34 *H.* 8. *Dier* 53. but that is by the Kings Prerogative, who alſo may wave a Demurrer, and take iſſue at his pleaſure. *Quæ Nota.*

Mich. 39 & 40 Eliz. *in the Common Pleas.*

Boulſton's Caſe.

[b] BEtween *Boulſton* and *Hardy* it was adjudged in the *Common Pleas*, That if a man have Cony-boroughs in his own land, which increaſe in ſo great number that they deſtroy his Neighbours land adjoyning, that his Neighbour cannot have an Action on the Caſe againſt him who maketh the Cony-boroughs; for ſo ſoon as the Conies come in his Neighbours land he may kill them, for they are *feræ naturæ*, and he who maketh the Cony-boroughs hath no property in them, and he ſhall not be puniſhed for the hurt which the Conies do wherein he hath no property, and which the other may lawfully kill. And it was reſolved in this Caſe, That none may new erect a Dove-cote but the Lord of the Mannor, and if any doth, he may be puniſhed in the Leet, but no Action upon the Caſe lieth by any particular man, for the infiniteneſs of Actions that may be brought: And of ſuch opinion, as to the new erection of a Dove-cote was Sir *Roger Manwood* Chief Baron, and the Barons of the Exechequer in the Exchequer Chamber.

Hill. 43 Eliz. Rot. 1807. *in the Common Pleas.*

Alden's Caſe.

[105] IN an *Ejectione firmæ* by *Smith* againſt *Alden*; The Defendant pleaded that the Tenements in which were parcel of the Mannor of *Odiham* in the County of *Southampton*, &c. *quod quidem manerium eſt de antiquo dominico*, &c. and demanded the conuſans of the Court; upon which the Plaintiff did demur in

in Law: And it was objected that this Action was but in the nature of Treſpaſs, and in old time, in it the term was not recovered, but only againſt him in the reverſion; And in Treſpaſs for breaking of a Cloſe and felling of trees, ancient demeſne is no plea, as it is adjudged in 46 *E.* 3. 1. Alſo lands in ancient demeſne ſhall be extended by *Elegit*, becauſe the Freehold doth remain as it was before, and yet the intereſt of the land is changed by this Execution, 7 *H.* 7. 1. But it was anſwered and reſolved that the plea was good.

1. Becauſe that the common Indictment is that the title and right of the land came in debate, as in a Replevin, in a Writ of Meſne, in a Writ of Ward, in Accompt againſt Guardian in Socage, ancient demeſne is a good plea, for the appearance and common intendment that the realty doth come in debate, 21 *E.* 3. 10. 4 *E.* 3. 4. 46 *E.* 3. 1. So in accompt againſt a Baily, for it is brought for the iſſues and profits of the land, which is ancient demeſne, which ought to be determined in the Court of ancient demeſne. *Vide* 21 *E.* 4. *Ancient demeſne* 6.

2. In this Action of *Ejectione firmæ*, the Plaintiff ſhall recover the poſſeſſion of the land, and ſhall have execution alſo *per habere facias poſſeſſionem*, and therefore not like to execution by *Elegit*; for there no Judgment is given to recover the poſſeſſion of the land in Court of Record, but only execution done by the Sheriff in the Country: But in an Aſſiſe brought by Tenant by *Elegit*, ancient demeſne is a good plea, as it is holden 22 *Aſſ.* 45. And there ſome ſay, That land in ancient demeſne is not ſubject to *Elegit*, but the Law is holden contrary at this day for the reaſon aforeſaid. And where any intereſt in the land ſhall be bound, or that the realty come in debate, it ſhall be reaſonable that thoſe in ancient demeſne, who beſt know to try it and determine it, have the conuſans of it. And if this Action proceedeth in this Court, the Sheriff cannot return any perſons within ancient demeſne; and if he return any, he may be challenged and withdrawn, and thereby the true inſtitution of the Law defeated, *ſcil.* That the intereſt of every man ſhall be tried *per probos & legales homines de vicinet', &c.* who beſt know the truth of the matter. And for as much as at this day all titles of lands are for the greateſt part tried in *Ejectione firmæ*, if in this ancient demeſne ſhould be no good plea, the ancient priviledges (which the Law for the repoſe and quiet of thoſe of ancient demeſne allowed to them, to the intent they may apply themſelves to their Tillage and Husbandry, and therefore are ſo greatly regarded and favoured in our Books) ſhall be utterly taken away and defeated. *Vide* 44 *E.* 3. 22. [b]

Paſch. 43 Eliz. *in the Kings Bench.*

Sir *Henry Conſtable's* Caſe.

SIR *Henry Conſtable* brought an Action of Treſpaſs againſt *Gamble*, and declared, That King *Philip* and Queen *Mary* were ſeiſed of the Mannor and fee of *Holderneſs* in the County of *York* in their demeſne as of fee; and by their Letters Patents granted the ſaid Mannor and fee with wreck of the Sea within the ſaid Mannor and fee, to *Henry* Earl of *Weſtmerland* in fee, who conveyed them to Sir *John Conſtable* father of the Plaintiff, whoſe heir he is in fee: And further declared, that certain goods, *ſcil.* twelve ſhirts and five cloaks were wreck and caſt upon the land within the Mannor of *Barneſton*, which is within the ſaid fee of *Holderneſs*, and that the Defendant took the ſaid goods, &c. The Defendant pleaded to iſſue, and thereupon a ſpecial Verdict was found to this effect; *ſcil.* That the conveyance to the Plaintiff of the Mannor and fee aforeſaid was true as he hath declared; and that the ſaid Mannor of *Barneſton* was within the ſaid fee: And further, that parcel of the ſaid goods were wreck, and caſt *ſuper arenas aqua ſalſa minime coopertas Manerii de* Baneſton, *infra fluxum & refluxum maris in Manerio de Barneſton*, and for other parcels of the goods, that they were floting *ſuper aquas maris refluentes ex arenis ejuſdem Manerii de* Barneſton *infra fluxum & refluxum maris, &c.* And that the Defendant took all the ſaid goods and ſeiſed them to the uſe of the Lord Admiral, &c. And damages aſſeſſed entirely for all: And *ſi ſuper totam materiam, &c.* And this Caſe was often well argued at Bar and Bench, and at the laſt Judgment was given againſt the Plaintiff. And in this Caſe five Points were reſolved: [106]

1. That nothing ſhall be ſaid *Wreccum maris*, but ſuch goods only which are caſt and left upon the land by the Sea; for *Wreccum maris ſignificat illa bona, quæ naufragio ad terram appelluntur: Flotſam* is when a Ship is ſunk, or otherwiſe periſhed, and the goods flote upon the Sea; *Jetſam*, is when the Ship is in danger to be ſunk, and for lightning of the Ship the goods are caſt into the Sea, and afterwards notwithſtanding the Ship periſheth. *Lagan*, or rather *Ligan*, is when the goods which are ſo caſt into the Sea, and afterwards the Ship periſheth, and ſuch goods ſo caſt are ſo heavy that they ſink to the bottom, and the Mariners to the intent to have them again, tie to them a boy, or cork, or ſuch other thing which will not ſink, ſo that they may find them again, and it is called *Ligan a ligando*; and none of theſe goods which are called *Jetſam*, *Flotſam*, and *Ligan* are called wreck ſo long as they remain in or upon the Sea, but if any of them by the Sea be put upon the land, then they ſhall be ſaid wreck. So *Flotſam*, *Jetſam*, and *Lagan*, being caſt upon the land ſhall paſs by the grant of wreck: And where it is provided by the Statute of 15 *R.* 2. *cap.* 3. that the Court of Admiralty ſhall not have Juriſdiction of wreck of the Sea, yet he ſhall have conuſans and juriſdiction of *Flotſam*, *Jetſam*, and *Lagan*; for wreck of Sea is, when the goods are by the Sea caſt upon the land, and ſo *infra Comitat'*, whereof the Common Law taketh conuſans, but the other three are all upon the Sea, and therefore of them the Admiral hath Juriſdiction. *Bracton, lib.* 3. *cap.* 3. *fol.* 120. *Item magis proprie dici poterit wreccum, ſi navis frangatur, & ex qua nullus vivus evaſerit, & maxime ſi domin' rerum ſubmerſus fuerit, & quicquid inde ad terram* (note theſe words) *venit, erit Domini Regis.* And that alſo appeareth by the Book of Entries, *fol.* 611, 612. [b]

Treſpaſs

Treſpaſs in Wreck. Always when wreck is claimed by preſcription (as by Law it may be the pleading is *bona wreccata ſuper mare, & ad terram projecti'*. And another preſcription is there, *habere omnimod' wreccum maris infra præcinctum Manerii, ſive Domini prædict' projecti', & flotſam maris infra eundem præcinct' deveniens'*: by which the difference between Wreck and *Flotſam* appeareth. See 9 E. 4. 22. wreck is when it is caſt upon the land, 11 H. 4. 16. 5 E. 3. 3. & 29. 21 H. 6. *Preſcription*, 14 E. 2. *in Treſpaſs* 236. 5 H. 7. 36. 39 H. 6. 37. & 9 H. 7. 20. *acc'*. *Vide Regiſter* 102. *b.* the Writ ſaith, *Oſtenſurus quare cum idem* Tho. *Dominus Manerii de Eſtombavent exiſtat & ibidem habere debeat, ipſeque & anteceſſores ſui Domini Manerii præd' a tempore quo, &c. non exiſtat memoria, hucuſque habere conſueverunt wreccum maris infra præcinct' Manerii præd'* Johannes & Robertus, *bona & catalla ad valenc' cent' ſolid' apud S. infra præcinct. ejuſdem Manerii ad terram projecti', & quæ ad ipſum* Tho. *tanquam wreccum pertinere deberent, vi & armis ceperunt & aſportaverunt.* Alſo the Statute of 15 R. 2. *cap.* 3. proveth it alſo. And it is enacted and declared, That wreck of the Sea ſhall be tried and determined by the Laws of the land, which cannot be extended to *Flotſam*, *Jetſam*, and *Lagan*, for they are in or upon the Sea, and therefore cannot [107] be tried and determined by the Common Law, for it wanteth trial, but are to be determined before the Admiral.

2. In this Caſe it was reſolved by the whole Court, that the ſoil upon which the Sea floweth and ebbeth; *ſcil.* between the high water mark and low water mark may be parcel of the Mannor of a Subject, 16 *Eliz. Dier* 316. *acc'*. And ſo it was adjudged in *Lacie's* Caſe, *Trin.* 25 *Eliz.* in this Court. And yet it was reſoved, That when the Sea floweth and hath *plenitudinem maris*, the Admiral ſhall have juriſdiction of every thing done upon the water, between the high water mark and low water mark, by the ordinary and natural courſe of the Sea: And ſo it was adjudged in the ſaid Caſe of *Lacy*, that the felony done upon the Sea *ad plenitudinem maris*, between the high water mark and the low water mark, by the ordinary and natural courſe of the Sea, the Admiral ſhall have juriſdiction; and yet when the Sea doth ebb, the land may belong to a Subject, and every thing done upon the land when the land is ebbed ſhall be tried at the Common Law, for the ſame is then parcel of the County, and *infra corpus Comitat'*, and therewith agreeth 8 E. 4. 19. So note, that below the low mark the Admiral hath the ſole and abſolute juriſdiction, and between the high water mark and low water mark, the Common Law and the Admiral have *diviſum Imperium*, iterchangeably as is aforeſaid, *ſcil.* one upon the water, and the other upon the land. And Sir *John Popham* Chief Juſtice ſaid, That in trial of a *Niſi prius* between the City of *Briſtow* and the Lord *Berkley*, it was holden by the Juſtices of Aſſiſe, That where the Lord *Berkley* had a Mannor adjoyning to the Severn, and preſcribed to have wreck within his Mannor, and certain goods floted between the high water and low water mark, and the City of *Briſtol* had *Flotſam* there; And it was holden that the ſaid goods were not wreck as long as they were floting upon the water between high water and low water mark. See the Book in 5 *E.* 3. 3. in a Replevin brought by *William de Newport* of *London* againſt Sir *Henry Nevil*, and counted that the Defendant took three laſt of Herrings, and a Ship; and the Defendant pleaded that he was Lord of the Mannor of *Warling*, and preſcribed to have wreck within his Mannor, and that the Herring and Ship were wreck within his Mannor: To which the Plaintiff ſaid, that they were our goods in the keeping of the Mariners which arrived by the Sea, and that he took them out of their cuſtody: Judgment if he can claim as wreck? To which the Defendant ſaid, we took them as wreck, *Hors de cheſcun gard*; upon which Book I obſerve three things, 1. That wreck may be claimed by preſcription; 2. That for as much as a Ship cannot be wreck, *ſcil.* caſt upon the land, but between the high and low water mark, that there it followeth that that was parcel of the mannor: 3. That if the Ship periſh, yet if any of the ſervants eſcape, the Law ſaith, that they have the cuſtody of the goods, and they are not wreck, 39 *E.* 3. 5. One preſcribed to have royal Fiſhes, as Porps, &c. found within his Mannor, that it ſeemeth to be between the high and low water mark.

3. It was reſolved, That the King ſhall have *Flotſam*, *Jetſam*, & *Lagan*, when the Ship periſheth, or [*b*] when the Owners of the goods are known, as in 46 E. 3. 15. appeareth, that goods caſt into the Sea for fear of tempeſt are not forfeit. *Vide F. N. B.* 112. *c.* 5 E. 3. 3. 9 E. 4. 22. that the Ship ought to periſh, which is called ſhipwrack: And that is alſo proved by the Act of *Weſt.* 1. *cap.* 4. where it is ſaid, If a man, dog, or cat eſcape alive, (which is to be intended when the Ship periſheth) and therewith agreeth *Bracton*, *lib.* 2. *cap.* 18. *fol.* 41. *Item ſine traditione res habita pro derelict', ubi Dominus ſtatim definit eſſe Dominus, ſi autem cauſa navis alleviandæ, non ſic, quia non ea voluntate ejecit quis, ut deſinat eſſe Dominus.* And a man may have *Flotſam* and *Jetſam* by the Kings Grant, and may have *Flotſam* within the high and low water marks by preſcription, as it appeareth before. And thoſe of the Weſt Country preſcribe to have wreck in the Sea ſo far as they may ſee a *Humber* barrel.

4. It was reſolved, that the Statute of *Weſt.* 2. *cap.* 4. by which it is enacted, That of wreck of the Sea it is agreed, that there where a man, dog, or cat, eſcape alive out of the Ship or Veſſel, not any thing within them ſhall be adjudged wreck, but the goods ſhall be ſaved and kept by the view of the Sheriff, Coroner, or Kings Bayliff, &c. ſo that if any ſue for thoſe goods, and can prove that they belonged to him, or that they periſhed in his keeping within a year and a day, they ſhall be reſtored to him without delay, &c. was but a declaration of the Common Law; and therefore all that which is provided as to wreck, extendeth alſo to *Flotſam*, *Jetſam*, and *Lagan*. *Bracton* who wrote in the time of *H.* 3. before the making of the ſaid Act, ſpeaking of Wreck, ſaith, *Et quod hujuſmodi dici debet wreccum, verum eſt, niſi ſit, quod verus Dominus aliunde veniens, & certa judicia & ſigna donaverit res eſſe ſuas, ut ſi canis vivus inveniat', & conſtare poterit, quod talis ſit Dominus illius canis præſumptive, ex hoc illum eſſe Dominum illius canis & illarum rerum: eodem modo ſi certa ſigna impoſita fuerint mercibus*: By which it appeareth, that the Statute of *Weſt.* 1. which is made 3 E. 1. was but a declaratory of the Common Law, againſt the opinion in *Doctor* and *Student* 118. that if the Owner dieth, his Executors or Adminiſtrators may make their proofs. And in many Caſes concerning time, the Common Law giveth

giveth a year and a day for convenient time; as in the Caſe of ſtray, if the Owner (Proclamations being made) dot claim the ſame within a year and a day, the ſame is forfeited. So a year and a day is given in Caſe of Appeal, and in Caſe of Deſcent after entry or claim; of Nonclaim upon fine, or Writ of right at the Common Law; of a Villain dwelling in Ancient demeſne; of the death of a man who hath blow or wound; of Protections, Eſſoins of the Kings ſervice, and in many other Caſes: And the year and day in Caſe of wreck, ſhall be accounted from the taking or ſeiſure of them as wreck; for although that the property is in Law veſted in the Lord before ſeiſure, yet until the Lord ſeiſeth, and taketh it into his actual poſſeſſion, it is not notorious who claimeth the wreck, nor to whom the owner ſhall repair to make his claim, and to ſhew to him his proofs. And if the wreck doth belong to the [108] King, the party may have a Commiſſion to hear and determine the truth of it, and that by verdict of twelve honeſt men, for no proof is allowable by Law, but the verdict of twelve men: And if it doth belong to another then to the King, then if the owner cannot ſatisfie him who claimeth the wreck by his mark or Cocket, or by the Book of Cuſtoms, or by teſtimony of honeſt men, then the owner may have ſuch Commiſſion, or may bring his Action at the Common Law, and prove the ſame by the verdict of a Jury; And if the Commiſſion be awarded, or the Action be brought within the year and day, although the verdict be given for him afterwards, it is ſufficient. See *Regiſter* and *F. N. B.* 12. For the Commiſſion, *vide Statutes Weſt.* 1. *cap.* 4. 4 *E.* 1. *de Offic. Coronat.* 15 *R.* 2. *cap.* 3. 27 *E.* 3. *cap.* 13. *Britton, cap.* 17. *&* 33 *Stamf. Prærogat. Regis.* And note, that the Act of *Prærogativa Regis* made in 17 *E.* 2. *cap.* 11. enacted, *Quod Rex habebit wreccum maris per totum regnum, &c.* is but a declaration and an affirmance of the Common Law. For notwithſtanding that the Statute being made within time of memory, a man may preſcribe to have wreck, as it appeareth in 11 *H.* 4. 16. *Stramf.* 38. *F. N. B.* 91. *a.* 5 *H.* 7. 36. 5 *E.* 3. 3. *&* 59. 9 *E.* 4. 12, *&c.*

5. It was reſolved in the Caſe at Bar, That part of the goods paſſed by the name of wreck, and part of the goods were *Flotſam*, and did not paſs by the grant of wreck, and damages were intirely aſſeſſed for all. And in Treſpaſs the Plaintiff ſhall recover damages only for the value of the goods, and for this cauſe Judgment was given againſt the Plaintiff. And the Book in 21 *H.* 7. 43. was cited, where the Caſe is, That in Treſpaſs the Defendant juſtifieth as to one thing, and pleadeth Not Guilty of another, and they are at iſſue, and the Jury enquired of one thing only, and taxed the damages for both entirely. *Fineux* held the verdict good for the thing found, and that he ſhould have a Writ of Enquiry of damages, *Quod fuit negatum per totam Curiam. Dier* 22 *Eliz.* 269. *in Ejectione cuſtodiæ* agreeth with this Judgment. And it was adjudged *M.* 14 *&* 15 *Eliz.* in this Court in Treſpaſs by *Pooly* againſt *Osburn* of breaking his Cloſe and beating his ſervant, and doth not ſay, *per quod ſervitium amiſit*, the Defendant pleaded Not Guilty, and the Jurors found him guilty and aſſeſſed damages intirely; and becauſe the Plaintiff had not cauſe of Action for beating of his ſervant, becauſe he hath not averred that he loſt his ſervice, for this cauſe the Plaintiff took nothing by his Bill. And *Catline* then Chief Juſtice cauſed the reaſon and cauſe of the Judgment to be at large ſet down in the margent of the Record, 9 *H.* 7. 3. in *Reſcous acc'*. And it was adjudged accordingly, *M.* 30 *&* 31 *Eliz.* between *More* and *Bedell*, in an Action upon the Caſe upon *Aſſumpſit*, which began in the *Kings Bench*, *M.* 28 *&* 29 *Eliz. Rot.* 476. where the Defendant promiſed to do divers things, and the Plaintiff alledged two breaches, whereof one was inſufficient, the Defendant pleaded *Non aſſumpſit*, the Jury gave damage generally. It was reſolved, 1. That it ſhall be intended that they gave damages for both: 2. That for as much as the Plaintiff had no cauſe of damages for the one, for this cauſe the Judgment given for the Plaintiff in the *Kings Bench* was reverſed by a Writ of Error brought in the Exchequer Chamber. [*b*]

Note Reader, at the firſt, the Common Law gave as well *Wreck*, *Jetſam*, *Flotſam*, and *Logan* upon the Sea, as Eſtray (which *Bracton* calleth *animalia vagantia*) or as other call them *animalia vacantia, quia Domino vacari debent*, treaſure trove, and the like to the King, becauſe that by the rule of the Common Law, when no man can claim property in any goods, the King ſhall have them by his Prerogative. And therefore *Bracton, lib.* 3. *cap.* 3. ſaith, *Sunt alia quædam quæ in nullius bonis eſſe dicunt', ſicut wreccum maris, groſſus piſcis, ſicut ſturgio, & balena, & aliæ res quæ Dominum non habent, ſicut animalia vagantia, quæ ſunt Domini Regis propter privilegium.* So that it appeareth by *Bracton* that the King ſhall have Wreck, as he ſhall have great fiſhes, &c. becauſe they are *nullius in bonis*, or as he ſhall have *animalia vagantia, ſive vacantia, ſcil.* Eſtrays, becauſe none claimeth the property. And note, that Wreck is Eſtray upon the Sea coming to land, as eſtray of beaſts is upon the land coming within any priviledged place; and the Law giveth in both Caſes a year and a day to claim them. And *Bracton* in the ſame Book, *lib.* 3. *cap.* 33. *fol.* 135. ſaith, *Navis, nec batellus, nec alia catalla de his qui ſubmerſi ſunt mari, nec in ſalſa nec in dulci aqua, wreccum erit, cum ſit qui catalla illa advocet, & hoc docere poterit*; and ſo he fitly before reſembleth it to an eſtray: And if the goods of an Infant, feme covert Executrix, a man in priſon, or beyond Sea, eſtray and be proclaimed according to the Law, if none claim them within the year and the day, they all ſhall be bounden. The ſame Law is of wreck of Sea, for the Law is ſtrict and binding in both Caſes; but it appeareth by the opinion of *Bracton* and *Britton* alſo, that *Flotſam*, *Jetſam*, and *Lagan*, ſo long as they are in or upon the Sea, do not appertain to the King, *ſed occupanti concedunt'*, *quia non eſt aliquis qui inde privilegium habere poſſit, Rex non magis quam privata perſona propter incertum rei eventum (& paulo ante reddit inde rationem) eo quod conſtare non poſſit ad quam regionem eſſent applicanda.* And *Britton, lib.* 1. *cap.* 17. Treaſure hid in the ground, we will that it be ours, and if it be found in the Sea, be it to the finder. But as it appeareth before by the Reſolution of the whole Court, the King ſhall have *Flotſam*, *Jetſam*, and *Lagan*, as is aforeſaid, by his Prerogative, although they be in or upon the Sea: And the Sea is of the Kings allegeance, and parcel of his Crown of *England*, as it is holden in 6 *R.* 2. *Protection* 46. *&* *Britton, cap.* 33. well agreeth with the opinion of *Bracton, ſcil.* that Wreck is a thing *in nullius bonis*; for there he ſaith, There is alſo purchaſe by Franchiſe granted, by name of a thing found in no mans goods, as a Wreck of Sea, and cattle eſtraying, Conies, Hares, Patridges, and other ſavage beaſts, by franchiſe to have Wreck found in his ſoil, and waif and ſtray found in fee, Warrens, and his demeſne lands.

Paſch.

Pasch. 43 Eliz. *in the Kings Bench.*

Foxley's Case.

[109] *Foxley* brought an Action of Trover and Conversion of 20 sheep; The Defendant pleaded, that the Queen was seised of the Mannor of *Newport-panel* in the County of *N.* and that certain persons unknown did steal the said sheep from the Plaintiff, and brought them within the said Mannor, and there left, and waved them; for which the Defendant as the Queens Bailiff of the said Mannor, did seise them to the Queens use, as goods waved, which is the same Trover and Conversion, and demanded Judgment, *si Regina inconsulta?* upon which the Plaintiff did demur: And he was ousted of the Aid by Judgment, for it doth not appear by the Defendants bar that these goods were forfeit to the King; for it was resolved, that if a Felon steal my goods, and bringeth them into a Mannor, and there leaveth them in his house, or in the house of any other, or in the custody of any other, or hideth them in the ground, or other secret place, and afterwards flieth, that these goods are not forfeited, nor shall be said waif in Law, where the Felon in pursuit waiveth the goods, or when the Felon for fear to be apprehended, thinking that pursuit was made, having them with him in his possession flieth, and waiveth the goods, in these Cases they shall be said waived in Law: But if he hath not the goods with him when he flieth being pursued, or for fear to be apprehended, they are not waived nor forfeited, but the owner may take them when he will without any fresh suit. But if the Thief in his flight waiveth them, there the goods are forfeited by the Common Law, if the Felon upon pursuit was not attainted at the suit of the Owner of the goods. And the reason that waif is given to the King, and that the party shall lose his property in such Case is, for default in the Owner that he doth not make fresh suit to apprehend the Felon; for *interest Reipublicæ ne maleficia remaneant impunita, & impunitas semper ad deteriora invitat*, and therefore the Law hath imposed this penalty upon the Owner, that if the Thief by his industry and fresh [b] suit be not attainted at his suit, (*scil.* in appeal of the same felony) he shall for his default lose all his goods which the Thief at the time of his flight doth waive. But if the Thief have not them with him when he flieth, having perhaps hid them (as it hath been said) there no default can be in the party.

So note Reader, *bona waviata seu derelicta*, are goods which are stollen and waived by the Thief in the flight. *Bona fugitivorum* are the proper goods of him who flieth for the felony. But it is to be observed, that if a man flie for felony, his proper goods are not forfeit until it be found by indictment before the Coroner, in Case of death or otherwise lawfully found of Record, upon acquittal, that he fled for the felony: For if the goods of any shall be forfeit only by the flight, without more, then a man may have such goods so forfeit by prescription, in the same manner as he may have other goods waived, estray, or treasure found, &c. But for as much as *bona fugitivorum* are not forfeited, until the flying be lawfully found of Record, and because that things forfeited by matter of Record cannot be claimed by prescription, which is but a matter in fact, for this cause they cannot be claimed by prescription, 46 *E.* 16. *b. & 9 H.* 7. 20. *a. acc'*. But waif, estray, treasure found, werck of the Sea, &c. which may be gained by usage without matter of Record, there a man may prescribe to have them, 21 *H.* 6. *Prescription*, 1 *H.* 7. 23. *9 H.* 7. 20. 46 *E.* 3. 16. 22 *E.* 3. *Corone* 241. Also he shall not forfeit the goods which he hath at the time of the flight (as he should do if they were absolutely forfeit by the flying) but those which he hath at the time of the indictment, or acquittal. *Vide* 3 *E.* 3. *Corone* 344. *&* 8 *E.* 2. *Corone* 296. 5 *H.* 4. *Forfeit* 52. 33 *E.* 3. *Forfeit* 30. 42 *Ass.* 5. *vide Stamford's Pleas of the Crown* 15. 184, 192. And the flying of a Felon, either ought to be found by verdict upon his acquittal (for although he be found Not Guilty, yet he shall forfeit his goods by the flying, *Quia fatetur facinus, qui judicium fugit*, and the Law will not admit any proof against this prescription) or upon indictment found *super visum corporis* before the Coroner, if it be in Case of the death of a man, *vide* 22 *Ass.* 76. 13 *H.* 4. 13. 3 *E.* 3. *Forfeit* 53. and it appeareth there, that although that the Jury which trieth him, find him Not Guilty, and further that he did not fly, yet the goods are forfeited by force of the finding of the flying before the Coroner: But upon no other Indictment the flying shall be found, if it be not in special Cases. As if a Felon be arrested of felony, and as he carrying to the Gaol, flying, those who follow him cannot apprehend him without killing him, for which they kill him, if all the matter and the flying be presented before the Coroner, or any other who hath authority to enquire of felonies, the party so killed shall not forfeit all his goods and chattels, and therewith agreeth 3 *E.* 3. *Corone* 287. 312. & 328. And there it appeareth, that in such Case it is not felony in them which follow him, 3 *E.* 3. *Forfeit* 25. If a true man killeth a Thief who would rob him, if the Thief do not withdraw himself, he [110] shall forfeit nothing. And the reason of the Book in 45 *E.* 3. *Corone* 100. that if a man stealeth divers goods, and the Owner in his Appeal omit some part, the King shall have all that which is omitted, because that by this omission the Thief may escape, and because the Owner cannot have them, the King shall have them: And as in these Cases the King shall punish the Owner for his negligence or connivence, so the Common Law doth abhor malice in seeking of blood without just cause. And therefore if *A.* hath the goods of *B.* by bailment or trover, and *B.* bringeth Appeal of robbery against *A.* for taking of them feloniously, and it is found that they are the Plaintiffs goods, and that the Defendant came to them lawfully; in this Case the Plaintiff shall forfeit his goods to the King for his false and malicious Appeal, as it was adjudged in 3 *E.* 3. *Corone* 367. Also *bona & catalla felonum* in some Cases shall be forfeited by conviction, and sometimes without conviction. But always when any forfeiture is of felons goods it ought to appear of Record, and that is the cause that such goods cannot be claimed by prescription, as appeareth by the said Books. At the Common Law the goods of a Clerk by verdict or confession were forfeited to the King, not only all those which he had at the time of the conviction, but all the goods which he got

got afterwards until he had made his purgation, or gotten his pardon; for at the Common Law every Clark convict, who had the benefit of his Clergy either might make his purgation, or he might not make it; if he might make his purgation, then the entry was, *Quod talis commissus est ordinario*, and if he could not purge himself, then the entry was, *Quod talis commissus fuit ordinario absque purgatione faciendâ.* And in case when he cannot make his purgation, or in case when he might make purgation, till purgation made, he remained a person disabled to take any goods to his own use: And therefore question hath been made upon the Statute of 18 *Eliz. cap.* 7. by which it is enacted, That after Clergy allowed, and burning in the hand, the Prisoner shall be presently enlarged and delivered out of Prison: If one after the Statute be convicted of felony, and hath his Clergy, and be burnt in the hand, and afterwards acquireth goods, if he shall forfeit his goods which he getteth after until he obtaineth his pardon? for now he cannot make purgation, and peradventure the cause or offence was such, that he could not make purgation. And *Pasch.* 41 *Eliz.* this doubt was resolved; for in Action upon the Case upon Trover, &c. brought of certain goods by *Hesdon*, as administrator of *Riddleson* against *Masterson*; The Defendant pleaded that before the Trover the Intestate was convicted of felony, and burnt in the hand: And it was adjudged for the Plaintiff, for as much as the Statute hath taken away the ordinary means and power from him who might make purgation, which was the ordinary means to make him capable of goods to his own use: And as to him who cannot make his purgation, for as much as by the said Act it was enacted, That he shall be presently enlarged and delivered, which is in lieu of a pardon by good construction, the same Act hath made him as capable in both Cases to purchase goods to all purposes, as if he had made his purgation in the one Case, or obtained his pardon in the other. But it is to know, that although the felon had made his purgation at the Common Law, the same was only to enable him to purchase goods or chattels; for notwithstanding the purgation he forfeited his goods which he had before his purgation, and the profits of his lands till his purgation made, against the Book in 3 *E.* 3. *Corone* 365. See 8 *E.* 2. *Forfeiture* 34. But now presently upon his delivery upon the Act of 18 *Eliz.* he is discharged against the King of the profits which shall come after: And if the King pardoneth the burning of the hand, the same is within the Act, although that the words are after Clergy allowed, and burning of the hand, for the pardon hath discharged the punishment. And there it was resolved, That if a man obtaineth a pardon before conviction, he shall not forfeit his goods, nor the profits of his lands. *Laughton's* Case, *Hill.* 37 *Eliz.* in the *Kings Bench* it was resolved by *Popham* Chief Justice, and the whole Court of *Kings Bench*, That if a man be *felo de se*, his goods are not forfeited until it be presented or found of Record, and that is the cause that such goods cannot be claimed by prescription. Then it was moved if one be *felo de se*, and cast in the Sea, or conveyed or buried in so secret manner that the Coroner cannot have the view of the body, and by consequence he cannot enquire of it: It was resolved, that the Justices of Peace, Justices of Oyer and Terminer, and all other who have power and authority to enquire of felonies, may take presentment of it, for it is felony, that shall serve to entitle the King to his goods and chattels. And *Deodanda* are goods which occasion the death of a man by misadventure, and are not forfeited until the matter be found of Record, and therefore they cannot be claimed by prescription. And the Jury who find or present the death by such misadventure, ought to find and appriſe the *Deodand* also: *Omnia quæ movent ad mortem sunt Deodanda. Vide* 3 *E.* 3. *Corone* 326. 341, 342. 8 *E.* 2. *Corone* 401. *Vide* 12 *R.* 2. *Forfeit* 20. There are also *bona & catalla in exigendo positorum*; and these are when any one is appealed or indicted of felony, and he withdraweth and absenteth himself for so long time that an *Exigent* is awarded against him, by this retreat (which is a flying in Law) he shall forfeit all his goods and chattels which he had at the time of the *Exigent* awarded, although he rendreth himself upon the *Exigent*, and that after he be found Not Guilty; and that appeareth by 22 *Ass.* where the Case was, That a man endicted of the death of a man did render himself, and was presently arraigned, and found Not Guilty, and because he came by *Exigent*, by which it was sufficiently proved that he withdrew himself, his goods and chattels were forfeited, and the Jury who did acquit him did enquire of the goods. And in 41 *Ass. pl.* 13. at the time of the *Exigent* awarded against divers in an appeal of death, the Writ was awarded to the Sheriff to enquire of their goods and chattels, and to seise them: But peradventure at the time of the *Exigent* awarded the Defendant was in prison, or beyond Sea, what remedy hath the party to have his goods again? For as *Knivet* in 43 *E.* 3. 17. saith, the party shall not have restitution of his goods (although the Writ of *Exigent erronice emanavit*) so long as the award of the *Exigent* (which is there called a Judgment) standeth in force not defeated. And in the same Book it is said, That if a man hath a Charter of pardon, of elder date then the *Exigent*, his goods are saved, for the cause of salvation appeareth of Record: But it doth not appear by the Book what remedy the party hath, if the cause of saving of them be by matter in fact, as by imprisonment, or that the party was beyond the Sea, &c. And *Mich.* 33 & 34 *Eliz.* in the *Kings Bench* in *Marshe's* Case it was resolved, That in such case the party or his Executors or Administrators should have a Writ of Error to reverse the said award of the *Exigent*: And a president in 18 *H.* 7. in this Court in the Case of one *Eaton*, against whom upon an Indictment of death, an *Exigent* was awarded in the County of *Lincoln*, and the said *Eaton* died, and was never convicted or attainted, and his Executors brought a Writ of Error to reverse the said award of the *Exigent*; For in as much as the King is intitled by matter of Record, of necessity it ought to be avoided by a matter of as high nature. And for as much as the words of a general Writ of Error are (*si judicium inde redditum sit*) which is not in this Case, he shall have a special Writ reciting the whole special matter, as by the president appeareth. *Vide* 30 *H.* 6. *Forfeiture* 31. 19 *E.* 3. *Forfeiture* 19. 8 *E.* 3. 11. 29 *E.* 3. 29 & 30. 37 *H.* 8. *Estray*, *Br.* 9. *Stamford's Pleas of the Crown* 186. And so it was resolved, that in the Case at Bar there was no cause of Aid, and therefore by the rule of the Court he was ousted of the Aid.

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2. It was agreed, That the demurrer was not peremptory, but to answer over. See now the Statute of 21 *H.* 8. *cap.* 11. concerning goods waived, and the restitution of them.

Pasch. 43 Eliz. *in the Kings Bench.*

Mallorie's Case.

[b] IN a Replevin between *Mallory* Plaintiff and *Payne* Defendant, the Case was such; The Abbot and Covent of *Sawtrey* by Deed indented, demised the place, where, &c. to *Anthony Mallory* for 12 years, rendring yearly during the term to the Abbot and Covent, or his successors, the rent of eight Mark, to be paid at the Feast of S. *Michael* and the Annunciation by equal portions, upon condition that if the rent be behind, and a distress taken by the lessor, &c. and not redeemed within six weeks, that it should be lawful to the lessor, &c. to reenter. The Abbot and Covent surrender their Monastery and all their possessions to King *H.* 8. The term by divers mean assignments was assigned to *Mallory* the Plaintiff, and the reversion by divers mean conveyances to one *S.* who levied a fine thereof to Doctor *Bellay*, who before any attornment granted the reversion by his Deed to *Thomas Bellay* his son and his heirs, to whom the tenant attorned: And for rent arrere, and distress taken according to the condition, &c. *Payne* by the commandment of *Thomas Bellay* the son, distrained the Plaintiffs cattel damage feasant: And the Question was, If the entry of *Thomas Bellay* the son be lawful or not. And after divers Arguments at Bar and Bench, it was resolved by the whole Court that the entry was lawful. And in this Case four Points were resolved:

1. That the said reservation in the disjunctive was good, for in the first part of the reservation the words are, Rendring yearly during the term; and the subsequent words ought to have such interpretation that they do not confound them which precede, but that all together may stand and satisfie the intent and meaning of the parties. And such construction the Judges made in *Hill* and *Graunges* Case, [112] *Plow. Comm.* 164. where a lease was made in *January* for years, rendring yearly during the term to the lessor rent, payable at the Feasts of S. *Michael* and the *Annunciation*, which last words shall be so marshalled and transposed, that the first words, *scil.* rendring yearly, shall not lose any of their force: and therefore the Law shall make construction, that the rents shall be paid at the Feasts of the *Annunciation* and S. *Michael*. And it was agreed, that rending rent yearly during the term to one and his successors, and rending rent during the term to him or his successors are all one; for if the rent be reserved to him and his successors, although the words are joynt and in the copulative, yet in construction of Law the lessor shall have it during his life; and his successor after his decease. So when rent is reserved yearly during the term to one or his successors, these words (to him or his successors) are words of explanation, *scil.* to direct the lessee to whom he shall pay the rent during the term, *viz.* to the lessor during his life, and after his death to his successors, for without these words, *scil.* to the lessor or his successors, the reservation had been good by force of these words (rendring yearly during the term) as it is agreed in 10 *E.* 4. 14. & 27 *H.* 8. 19. But if a feoffment be made to *A.* to have and to hold to him, or to his heirs, there he hath but an estate for life, for there want precedent words to direct the words in the disjunctive: And these words (his heirs) are of the essence of the estate, and without them no estate of Inheritance shall pass. So and for the same reason if a reservation be made upon a feoffment to one or his heirs, such reservation is not good but during the life of the feoffor. And so note the difference. *Vide Chapman's* Case, *Plow. Comm.* 284. where a copulative shall be taken for a disjunctive; but he in the disjunctive doth amount in construction to a copulative. See the Case in 21 *E.* 3. 29. *b.* where one was bound that when the obligor should come to his Aunt, he would enfeoff the obligee, or the heirs of his body of certain lands; and the obligee when the obligor came to his Aunt requested him to enfeoff him, which the obligor refused to do: And it was adjudged that he had forfeited his Obligation; for although the condition was in the disjunctive, and that the condition is always for the benefit of the obligor, yet for as much as the feoffment was to be made when he came to his Aunt, and when he came the obligee was alive, and because it was not possible then to enfeoff his heir, for this cause he ought to perform such part of the disjunctive, that then was possible to be performed. Note Reader, a good Case to prove the principal; for in as much as the rent was to be paid yearly during [b] the term at such Feasts in certain to the lessor, or his successors, the lessee at the same Feasts ought to pay the rent to that person which then might receive it, and that is the lessee himself, and the lessor cannot choose to pay it at the same Feasts to him or his successors as long as the lessor liveth, for it is not possible that he that is not then *in rerum natura* should receive it.

2. It was resolved, That although the words of the Statute of 32 *H.* 8. are general (As also other persons being grantees or assignees to or by any other person or persons, &c. shall and may have like advantage, as the lessors or grantors themselves, &c. ought, should, or might have had or enjoyed at any time or times, &c.) Yet the grantee or assignee by fine shall not take advantage of a Condition without attornment. For when a Statute speaketh of an assignee, &c. it is to be intended of such compleat assignee, who hath all the ceremonies and incidents requisite by the Law to such assignee, and not to take away any ceremony or circumstance, which the Law doth require not to make any thing contrary to the Common; as it is agreed in 28 *H.* 8. 28. That where the Statute of 21 *H.* 8. *cap.* 10. of uses, enacteth that the actual possession shall be according to the use, yet it ought to have circumstance which is requisite by the Common Law, *scil.* actual entry in fact. So it is agreed in 4 *E.* 4. 31. It was ordained by the Statute of 1 *E.* 4. that all Inquisitions taken before the Sheriff in his Turn, or County, shall be delivered to the Justices of Peace at the next Sessions; and that he make process upon them, as upon Inquisitions taken before themselves: A presentment was made in the Turn upon the Statute of Liveries, which was delivered according to the Statute to the Justices of Peace at the next Sessions who proceeded upon them. And it was holden that it was against Law, for the Statute of 1 *E.* 4. is

is intended of lawful and ſufficient preſentments in Law, and not of preſentments which the Sheriff cannot take by the Common Law. So it is holden in 22 *E.* 3. *Corone* 276. that the Statute of *Weſt.* 2. *cap.* 12. ſhall not make a Monk who was appealed and acquitted capable of damages, for he was diſabled by the Common Law. And it was ſaid, that upon the ſame reaſon it was adjudged in *Duke*'s Caſe, That the conuſee of a fine before attornment ſhould not take benefit of a Condition by the ſaid Statute of 32 *H.* 8.

3. It was reſolved, That although Doctor *Belay* himſelf could not have taken advantage of the Condition, becauſe he had not attornment; yet for as much as by the fine the reverſion and the rent was veſted in him, which he hath granted to his ſon, to whom the tenant hath attorned, for this cauſe he ſhall take advantage of the Condition, which his father could not, becauſe he wanted attornment, which his ſon hath. And the words of 32 *H.* 8. That the grantees or aſſignees, ſhall and may have [113] and enjoy like advantage, &c. as the ſaid leſſors or grantors themſelves, &c. if the reverſion had not come to the hands of our Soveraign Lord, &c. are well ſatisfied; for here in this Caſe is a compleat grantee and aſſignee; and therefore he ſhall take the ſame benefit as the Abbot himſelf who made the leaſe might. Alſo it was reſolved, that theſe words (as the ſaid leſſors or grantors) ſhall not be intended of immediate grantor of the reverſion, but to any grantor before, who might have taken benefit of the Condition.

4. This difference was taken and agreed for Law, that is to ſay, between an expreſs attornment of the party, and an act which doth amount in Law to an attornment: For if a leaſe for life, or for years be made rendring rent, &c. and afterwards the reverſion is granted to be *B.* by fine, and before attornment *B.* diſſeiſeth or ouſteth the leſſee, and enfeoffeth *C.* the leſſee reentreth, it ſhall not amount to an attornment in Law to make privity to *C.* that he may diſtrain for the rent, for he ſhall not be in better Caſe then his feoffor was, as it was adjudged in the *Common Pleas*, *M.* 36 & 37 *Eliz.* in *Owſey*'s Caſe. But otherwiſe it is if the leſſee had expreſly attorned to the feoffee. So *Popham* Chief Juſtice ſaid it was adjudged in *Knottisford*'s Caſe, with which he was of Council 30 years paſt; That where the conuſee of a fine of a reverſion before attornment, did bargain and ſell the reverſion to another by Deed indented and enrolled according to the Statute, that the bargainee ſhall not diſtrain for the rent reſerved upon the leaſe; for he ſhall not be in better condition then he who made the grant to him, & *nemo poteſt plus juris in alium transferre, quam ipſe habet*; but if the conuſee had had expreſs attornment, then the bargainee ſhould diſtrain without any attornment. But if the conuſee of a reverſion by fine dieth without heir before attornment, by which the eſtate which he hath eſcheateth to the Lord, the Lord in this Caſe ſhall diſtrain without attornment, as *Litt.* 131, 132. & 39 *H.* 6. 32. & 38. *Priſot* holdeth, yet the conuſee himſelf cannot; and the reaſon is, becauſe the Lord by Eſcheat hath loſt his Seigniory, and he doth not claim as heir or aſſignee of the conuſee, but by vertue of his Seigniory paramount.

Note Reader, otherwiſe it is, as it hath been ſaid, if the conuſee before attornment bargain and ſell the reverſion by Deed indented and enrolled; for the Statute of 27 *H.* 8. doth execute the poſſeſſion in the ſame quality, manner, form, and condition as he had the uſe; and when the conuſee before attornment bargaineth and ſelleth the reverſion, the uſe which is derived out of his eſtate which [b] wanted attornment, ought to be of the ſame nature and quality as that was out of which it was derived: But if the bargainee in ſuch Caſe hath obtained expreſs attornment, it ſufficeth: And ſo obſerve theſe differences. And in this Caſe it was ſaid by *Popham* Chief Juſtice, and not denied by any, That if the leſſor in the abſence of the leſſee entreth as it is aforeſaid, and maketh a feoffment in fee, and the leſſee reentreth, although the ſame amounteth to an attornment in Law, yet without notice given of this feoffment to the leſſee, the feoffee ſhall not make demand of the rent reſerved upon the leaſe for entry for condition broken: For true it is that the feoffee may diſtrain, or have an Action of debt for the rent, or have an Action of Waſt in ſuch Caſe, for in his Avowry, or Count, he ought to alledge the feoffment whereof the leſſee had notice: But if he may demand the rent upon condition without notice, it is not poſſible that the leſſee ſhould know to whom to pay the rent to ſave his term, nor to have notice of the feoffment in ſuch Caſe before that he hath forfeited his term: So if the leſſor bargain and ſell the reverſion by Deed indented and inrolled, the bargainee (although there needeth no attornment) ſhall never take benefit of a condition upon a demand of rent, without giving notice unto the leſſee of the bargain and ſale; for although the bargain and ſale by Deed indented and enrolled be on Record; yet for as much as it may be enrolled in ſo many Courts in ſecret manner, the Law will not compel the Farmers in *England*, who have conditional leaſes to make every ſix months ſuch infinite ſearch to ſave their terms; But the Law for the ſalvation of the intereſt and term of the leſſee, will compel the bargainee, who is to take benefit of the condition to give notice to the leſſee who is altogether a ſtranger to it.

Note Reader, The leſſee as *Littleton* ſaith ſhall not be by the Law miſconuſant of feoffments made upon the ſame lands, the ſame is to be intended as to diſtreſs, Action of Debt, and Action of Waſt, in which Caſes the Law doth compel the feoffee in his Avowry, and Count to give notice as hath been ſaid. But *Littleton* is not to be intended, as to demand of rent to have advantage of a condition without notice thereof given, as is aforeſaid. And *Littleton* there ſaith, that in ſuch Caſe the feoffee after regreſs made by the leſſee ſhall have an Action of Waſt: But neither *Littleton*, nor any of the Books in 18 *E.* 3. 47. *Robert Bowſer*'s Caſe, 46 *E.* 3. 30. *Pomeray*'s Caſe, 34 *H.* 6. 6. 5 *H.* 5. 12. nor any other Book ſpeaketh of demand and entry upon the Condition broken.

Trin. 43 Eliz. *in the Common Pleas.* Rot. 406.

Wade's Case.

[114] IN a Replevin between *Foxcroft* Plaintiff, and *Wade* Defendant, the Case was; *Foxcroft* Copiholder in fee, did surrender to the use of *William Wade* father of the Defendant, upon condition that if the Plaintiff should pay to the said *William Wade* 250 *l. legalis monetæ Angliæ* the 24*th* day of *Nov.* at his dwelling house, &c. that then the surrender should be void. And tender and refusal was alledged; and issue was taken upon the tender to *William Wade:* And the Jurors gave a special Verdict, *scil.* That *Foxcroft* the 24*th* day of *Novemb.* between the hours of seven and eight before Noon of the same day did deliver to one *M.* his son, and to one *A. S.* 250. *in monet' (Anglice* Money) *scil. quinque solid. in Hispanico argento (Anglice* Spanish silver) *& duo duplices Auri selopi (Anglice* two double Pistolets) *& resid. præd. summa* 250 *l. fuit in bona & legal' monet' Angliæ*; and also delivered *præfat' M. & A. S.* 34 s. *legalis monet' Angliæ*; and that the Plaintiff required them and every of them to pay the said 250 *l.* according to the form and effect of the Condition. And it was further found, that between nine and twelve before Noon of the same day, that they upon *quandam mensam ibidem obtulerunt* 250 *l.* And that *William Wade* did there tell out and number 244 *l.* but in respect of the said 5 *s.* in *Spanish* money, and the said two Pistolets, he refused to receive the monies; upon which *M.* and *A. S.* offered the said 34 *s.* in silver to the said *William Wade*, requiring him to take silver in place of the said Pistolets, and *Spanish* money, which also he refused; and afterwards *circa horam duodecimam*, they tendred to the said *William Wade* the residue in silver, *French* Crowns and Angels, currant money of *England*, which he in like manner refused to accept: And afterwards *ante occasum solis ad ostium domus*, they offered to him to pay the 250 *l.*
[*b*] all in silver being in baggs, but did not shew any part of it; and he said, that *recipere vellet, sed non recepit.* And at Sun set, the said *A.* entred into the said house, and *super quandam mensam deposuit prædict.* 250 l. being in baggs, *sed ill' extra baggas præd. non ostendit, quodque prædict. W.* Wade *differebat recipere prædict.* 250 l. *usque post occasum solis, & adtunc requisitus ad recipiend' recusavit, allegando*, that the Sun was set, *& ea occasione recipere noluit:* And if upon the whole matter there was any good tender or not was the Question. And in this Case four Points were resolved:

1. Although that the last time of payment of the monies by force of the Condition is convenient time, in which the money may be numbred before Sun set, yet if the tender be made to him who ought to receive it at the place specified in the Condition, at any time of the day, and he refuse it, the Condition is for ever saved, and the morgagor or obligor needeth not to make tender of it again before the last instant, for by the expres words of the Condition the monies are to be paid upon the day indefinitely, and convenient time before the last instant is the extreme time appointed by the Law, to the intent the one should not prevent the other, the one being sometimes there, and the other not, and the other being sometimes there, and not the other; and therefore the Law appointeth the extreme time of the day, to
[*a*] the intent that both parties may certainly meet together; for the Law which always requireth convenience, and is grounded upon the experience of the Sages, will not compel any of the parties to make Attorney, or to repose confidence and trust in any other to pay it for him when he will do it himself, (for *non temere credere est nervus sapientiæ.*) But if both the parties meet together any time of the same day, and the obligor or morgagor, &c. maketh a tender in the place, &c. to the morgagee, &c. and he refuseth it, the penalty is for ever saved, and he need not make a new tender by a convenient time before the last instant. And so upon these reasons you will better understand your Books in 19 *H.* 6. 76. 20 *H.* 6. 32. 22 *H.* 6. 46. 7 *H.* 7. 7. 6 *H.* 7. 2. 32 *H.* 8. *Br. Condition* 192. *Plow. Com. Kidwellie's* Case 70. and *Hill* and *Grange's* Case 173. 4 *E.* 6. *Br. Tender* 41. 19 *Eliz. Dier* 354.

2. Where the Condition was, that he should pay to him 250 *l. legalis monet' Angliæ*; It was resolved that the said *Spanish* silver so tendred was lawful money of *England*, for it was made currant by Proclamation in the times of the Reigns of *Philip* and *Mary:* Also the *French* Crowns were currant and lawful money of *England* by Proclamation also. And the King by his absolute Prerogative may make any for-
[115] reign Coin lawful money of *England* at his pleasure by his Proclamation, *quod nota.*

3. That if a man tender more then he ought to pay, it is good, for *omne majus continet in se minus*, and the other ought to accept so much of it as is due to him: *quando plus fit quam fieri debet, videtur etiam illud fieri quod faciendum est. Et in majore summa continetur minor.*

4. That where the Plaintiff did tender all the 250 *l.* in bags without shewing it, or numbring it; It was resolved that the tender was good, if the truth was that there was 250 *l.* in the bags: And so it hath been adjudged in the *Kings Bench* in *Winter's* Case; for when the Condition is, that he shall pay 250 *l.* the morgagor doth all that is requisite by the Law for him to do, if he provideth the money, and offereth the same to the morgagee in bags, which is the usual manner to carry money. And then it is the part of the morgagee to number it if he will, or if he will credit the morgagor he may accept of it without telling of it; for if the numbring of it doth belong to the morgagee, by consequence he ought to put it out of the bags, which is incident to it, for without so doing he cannot number it: And if the morgagor putteth the money out of the bags, yet it is at the peril of the morgagee to look upon, for perhaps they may be counterfeits, and have a great shew of good and lawful money, and also it is at his peril to number it: And if a man be bound to pay 4000 *l.* at such a day, if he tender it in bags it is sufficient, for it cannot be numbred in one day. And so hereby you will understand the better opinion of the Book in 22 *E.* 4. 21. And it was said it was adjudged between *Vane* and *Studley*, that where the lessor demanded rent of his lessee according to the condition of reentry, and the lessee payeth the rent to his lessor, and he received it and put it in his purse, and afterwards in

in looking it over again at the ſame time, he found amongſt the money that he had received ſome counterfeit piece, and thereupon refuſed to carry away the money, but reentred for the Condition broken, That it was adjudged that the entry was not lawful; for when the leſſor had accepted of the money, it was at his peril, and after that allowance he ſhall not take exception to any part of it.

Trin. 43 Eliz. *in the Common Pleas.*

Foliamb's Caſe.

IN an Action of Waſt by *Foliamb* againſt Sir *William Bowes* and his wife, the Plaintiff had an Eſtrepment directed to the Sheriff. And in this Caſe two Points were reſolved: [b]

1. That a Writ of Eſtrepment lieth in an Action of Waſt, as well at any time before Judgment, as after Judgment and before Execution: For without queſtion he cannot recover damages for more then he hath contained in his Count, and he cannot aſſign any Waſt after the Writ purchaſed, for the words of the Writ are *fecit vaſtum* in the preterperfect tenſe; and therefore he cannot aſſign Waſt after the Writ brought.

2. Where the words of the Writ are, *Tibi præcipimus, quod meſſuagium præd. perſonaliter acceden', totaliter ordinari facias, quod vaſtum ſeu eſtrepamentum de eodem meſſuagio, contra formam Statuti præd. non fiat, pendente placito prædict. indiſcuſſo*: It was reſolved, that the Sheriff by force of this Writ may reſiſt them who would do Waſt. And if he otherwiſe cannot it is lawful for him to impriſon them, and to make a Warrant to others ſo to do; and if it be needful he may take the *poſſe Comitatus* to help him. *Quia quando aliquid mandatur, mandatur & omne per quod pervenitur ad illud*; And ſo a doubt in divers Books, *ſcil.* 4 E. 3. 33. 21 E. 3. 22 E. 3. 2. 6 H. 4. 1. 33 H. 6. 6. 14 H. 7. 7, 8. F. N. B. 66. Y. & 61. C. K. L. well reſolved.

Hill. 44 Eliz. *in the Kings Bench.*

Oland's Caſe.

IN Treſpaſs by *Oland* againſt *Burdwick* which began in the *Kings Bench*, *Hill.* 37 *Eliz. Rot.* 924. upon a ſpecial Verdict, the Caſe was ſuch; A woman Copiholder of certain land, *durante Viduitate ſua*, according to the cuſtom of the Mannor ſowed the land, and before ſeverance of the corn ſowed, took husband. And whether the husband or the Lord of the Mannor ſhall have the Embleements was the Queſtion. And it was adjudged that the Lord ſhould have the Embleements; for although at the time of the ſowing, the eſtate of the wife was incertain, and although her eſtate be ended by limitation and not by condition, either in fact (as in Caſe of reentry) or in Law (as forfeiture) yet becauſe it determineth by the act of the leſſee her ſelf, for this cauſe the Lord ſhall have the corn ſowed, and not the husband: So if a woman ſeiſed of land during her Widowhood maketh a leaſe for years, and the leſſee ſoweth the land, and afterwards the woman who made the leaſe taketh husband, the leſſee ſhall not have the Embleements; for although that his eſtate is determined by the act of a ſtranger, yet he ſhall not be (as to the leſſor) in better condition then his leſſor was. It is commonly holden in our Books, That if a man leaſe lands at will, and afterwards the leſſee ſoweth the land, and afterwards the Will is determined, that the leſſee ſhall have the Embleements; But it was agreed that if the leſſee himſelf determine the Will before the ſeverance of the corn, he ſhall not have the Embleements, becauſe he hath determined his intereſt by his own act. [116]

If a man maketh a leaſe at will, and the leſſor is outlawed, by which the leaſe at will is determined, the King ſhall have the profits; yet the leſſee at will ſhall have the corn which was ſowed: But if the leſſee at will be outlawed, by which the leaſe at will is determined, yet the King ſhall have the corn which was ſowed. *Vide* 9 H. 6. 20, 21. But it was holden, That if a leaſe be made to husband and wife during the coverture, and the husband ſoweth the land, and afterwards they are divorced *cauſa præcontractus*, the husband ſhall have the corn which was ſowed, and not the leſſor; for although that the ſuit is the act of the party; yet the ſentence which diſſolveth the marriage is the Judgment of the Law, & *judicium redditur in invitum*; and therefore the husband in ſuch Caſe ſhall have the corn which was ſowed; But if a leaſe be made to one until he doth Waſt, and he ſoweth the land, and afterwards doth Waſt, he ſhall not have the corn which was ſowed, for the reaſon aboveſaid. [b]

Trin.

Trin. 44 Eliz. Rot. 501. *in the Common Pleas.*

Pinnel's Caſe.

[117] *Pinnel* brought an Action of Debt upon an Obligation againſt *Cole* of 16 *l.* for the payment of 8 *l.* 10 *s.* the 11*th* day of *Nov.* 1600. The Defendant pleaded, that at the inſtance of the Plaintiff, before the ſaid day, *ſcil.* 1. *Octob.* 44. *apud Weſt.* he paid to the Plaintiff 5 *l.* 2 *s.* 2 *d.* *quas quidem* 5 *l.* 2 *s.* 2 *d.* the Plaintiff accepted in full ſatisfaction of the 8 *l.* 10 *s.* And it was reſolved by the whole Court, That the payment of a leſſer ſum in ſatisfaction of a greater, cannot be any ſatisfaction for the whole, becauſe it appeareth to the Judges that by no poſſibility, a leſſer ſum can be a ſatisfaction to the Plaintiff for a greater ſum: But the gift of a Horſe, Hawk, &c. in ſatisfaction is good. For it ſhall be intended that a Horſe, Hawk, &c. ſhall be more beneficial to the Plaintiff then the money in reſpect of ſome circumſtance, or otherwiſe the Plaintiff would not have accepted of it in ſatisfaction. But when the whole ſum is due, by no intendment the acceptance of parcel can be ſatisfaction to the Plaintiff: But in the Caſe at Bar it was reſolved, that the payment and acceptance of parcel before the day in ſatisfaction of the whole, ſhall be a good ſatisfaction in regard of circumſtance of time; for peradventure parcel of it before the day, ſhall be more beneficial then the whole at the day, and the value of the ſatisfaction is not material: So if I be bounden in 20 *l.* to pay you 10 *l.* at *Weſtminſter*, and you requeſt me [*b*] to pay you 5 *l.* at the day at *York*, and you will accept of it in ſatisfaction of the whole 10 *l.* it is a good ſatisfaction for the whole: for the expences to pay it at *York*, is ſufficient ſatisfaction: But in this Caſe the Plaintiff had Judgment for the inſufficient pleading; for he doth not plead that he had payed the 5 *l.* 2 *s.* 2 *d.* in full ſatisfaction (as by the Law he ought) but pleaded the payment of part generally; and that the Plaintiff had accepted of it in full ſatisfaction. And always the manner of tender and of the payment, ſhall be directed by him who made the tender or payment, and not by him who accepteth of it. And for this cauſe the Judgment was given for the Plaintiff.

See Reader 36 *H.* 6. *Barre* 37. in debt upon an Obligation of 10 *l.* the Plaintiff pleaded, that one *F.* was bound by the ſaid Deed with him, and each in the whole, and that the Plaintiff had made an acquittance to *F.* bearing date before the Obligation, and delivered after, by which acquittance he did acknowledge himſelf to be paid 20 *s.* in full ſatisfaction of 10 *l.* And it was adjudged a good bar; for if a man acknowledge himſelf to be ſatisfied by Deed, it is a good bar, without any thing received. *Vide* 12 *R.* 2. *Barre* 243. 26 *H.* 6. *Barre* 37. 10 *H.* 7, *&c.*

Paſch. 1 Jacobi, *in the Common Pleas.*

Edriche's Caſe.

[118] BEtween *Edrich* and *Smith* in a Replevin, a Caſe was adjudged upon the laſt clauſe of the Statute of 32 *H.* 8. *cap.* 37. and the Caſe was ſuch; *A.* ſeiſed in fee of lands holden in Socage, by his Will in writing deviſed a rent with clauſe of diſtreſs to *B.* for the life of *C.* and died. The heir leaſed the land charged for life to *D.* the remainder to *E.* in fee, the rent is behind for divers years in the life of *D.* *D.* dieth, and afterwards *C.* dieth, *B.* diſtraineth him in the remainder for all the arrerages incurred in the life of *D.* And if he ſhould be charged in this Caſe for all the arrerages by the ſaid Act was the Queſtion. The Branch of which Act as to this purpoſe doth conſiſt upon two parts; By the firſt, Action of debt is given to the tenant for *auter vie*, after the death of *Ceſtuy que vie*, againſt the tenant in demeſne (who ought to have paid it when it was firſt due) his Executors or Adminiſtrators. The ſecond is And alſo ſhall diſtrain for the ſame arrerages upon ſuch lands and tenements out of which the ſaid Rents or fee Farms were iſſuing, in ſuch manner and form as he ought or might have done if *Ceſtuy que vie* had been alive. And it was objected, that by a former part of the Act, which gave diſtreſs to Executors of tenant for life, there the diſtreſs is given againſt him in whoſe time the arrerages incurred due, and all others claim the land only (by or from the ſaid tenant by purchaſe, gift, or deſcent,) in the ſame manner as the tenant for life might have done; ſo that by this Branch, he in the reverſion or remainder ſhall not be charged for the arrerages incurred in the life of the tenant for life, for he in the reverſion or remainder doth not claim by or from him: And in this Caſe at the Bar the Action of debt by [*b*] the firſt part of the ſaid Branch is given only againſt the tenant who ought to have paid it, his Executors or Adminiſtrators, and not againſt him in the remainder, &c. And in that it was ſaid, the Statute hath great reaſon, for otherwiſe he in the reverſion or remainder ſhall not only be charged by the Statute for the arrerages (if any ſhall be) which incur in their own time, but alſo for the arrerages incurred in the life of the tenant for life, where in the one Caſe or the other he in the reverſion or remainder was not charged by the Common Law, and the tenant for life may leave all the rent for his time unpaid, and by this may charge him in the reverſion or remainder for all; and the grantee in this Caſe may have his remedy againſt the Executors of the tenant for life: But it was reſolved and adjudged, That he in remainder in this Caſe, by the laſt part of the ſaid Branch ſhall be charged. And the Judges ſaid they ought not make any conſtruction againſt the expreſs letter of the Statute; for nothing can ſo expreſs the meaning of the makers of the Act, as their own direct words, for *Index animi ſermo.* And it ſhall be dangerous to give ſcope to make a conſtruction in any Caſe againſt the expreſs words, when the meaning

meaning of the makers appeareth to the contrary, and when no inconvenience will thereupon follow, and therefore in ſuch Caſes, *A verbis legis non eſt recedendum.* And the ſeveral inditing and penning of the former part concerning diſtreſs given to Executors, and of this Branch, doth argue that the makers did intend a difference of the purviews and remedies, or otherwiſe they would have followed the ſame words. And in the principal Caſe all the land was charged with the rent, and the heir held all his eſtate charged with it; and when he made the leaſe for life, the remainder in fee, he in the remainder was chargeable, and in this Caſe might have been diſtrained by the Common Law for the arrerages, but by the act of God by the death of *C. D.* was prevented, the which prevention, the ſaid laſt part of the ſaid Branch hath ſupplied and remedied in this Caſe, giving to the grantee power to diſtrain, as if *Ceſtuy que vie* had been alive. And according to this Reſolution Judgment was entred.

Trin. 2 Jacobi, *in the Kings Bench.*

Whelpdale's Caſe.

IN Debt by *Whelpdale* againſt *Whelpdale*, which began *Hill.* 45 *Eliz. Rot.* 1303. The Plaintiff declared upon a Bill obligatory made by the Defendant to the Plaintiff; The Defendant pleaded, *Non eſt factum*; and the Jury found that the Bill was a joynt Bill made by the Defendant and another to the Plaintiff; And if upon the matter the Bill mentioned in the Declaration be the Deed of the Defendant, the Jurors prayed the advice of the Court. And it was adjudged that the Plaintiff ſhould recover. And in this Caſe four Points were reſolved: [119]

1. When two men are joyntly bounden in an Obligation, although none of them be bound by himſelf, yet none of them can ſay, That the Obligation is not his deed, for he hath put his Seal to it and delivered it, and each of them is bounden in the whole. And therefore if they both be ſued and one appeareth, and the other maketh default, and by proceſs of Law he is outlawed, he who appeareth ſhall be charged with the whole, as appeareth in 40 E. 3. 36. 41 E. 3. 3. But in the Caſe at Bar, he might have pleaded in abatement of the Writ, but cannot plead, It is not his deed.

2. It was reſolved, that in all Caſes when the deed is avoidable, and ſo remaineth at the time of the pleading (as if an Infant ſeal and deliver a deed, a man of full age by dureſs) in theſe Caſes and the like the obligee cannot plead it is not his deed, for it is his deed at the time of the Action brought, and ought to be avoided by ſpecial pleading, with concluſion of Judgment, *ſi Actio.*

3. When an Obligation or other writing is by an Act of Parliament enacted to be void, the party who is bound cannot plead it is not his deed, but in conſtruction of Law the deed is to be avoided by the party who is bound in it, by pleading the ſpecial matter, taking advantage of the Act of Parliament; For although the Act maketh the Obligation or other writing void, yet thereto the Law doth *tacite* require order and manner, that the obligee ought to follow: As if an Obligation be made unto a Sheriff againſt the Statute of 23 *H.* 6. *cap.* 10. or to one againſt the Statute of 13 *Eliz. cap.* 8. of Uſury, in theſe and other like Caſes the obligee ought to plead the ſpecial matter, with concluſion of Judgment, if Action; and cannot plead that it is not his deed, and therewith agreeth 7 E. 4. 5. 7 E. 6. *Br. Non eſt factum* 14. againſt the opinion of *Mountague, Plow. Comm. in Dive & Manningham's* Caſe. In all Caſes when the Obligation was once a deed, and afterwards before the Action brought becometh no deed, either by raſure, addition, or other alteration of the deed, or the ſeal be broken and taken off, in this Caſe, although it was once a deed, yet the Defendant may ſafely plead, It is not his deed, for without queſtion at the time of the plea, which is in the preſent time, it was not his deed, 36 *H.* 8. *Dier* 59. In an Action of debt upon a Bond againſt *Hawood*, the Defendant pleaded that it was not his deed, and before the day of appearance of the Enqueſt, Rats did eat the Label by which the ſeal was faſtned, by negligence of the Clark who had the keeping of it, The Juſtices charged the Jury, that if they ſhould find that it was the deed of the Defendant at the time of the plea pleaded, that they ſhould give a ſpecial verdict, and ſo they did: But if one commit Waſt, and before any Action brought, the leſſee doth repair, &c. and afterwards the leſſor bringeth an Action of Waſt, there the Action is not maintenable, becauſe the Jurors ought to view the Waſt: But the Defendant in the ſame Caſe ought to plead the ſpecial matter, and cannot plead that he did no Waſt, for the entry is in the preter perfect tenſe, *ſcil. quod non fecit vaſtum*, and therewith agreeth 10 *Eliz. Dier* 276. and ſo a good diverſity; and the *Quere* 2 *Mar. Dier* 112. well reſolved. [b]

And if an Obligation be delivered to another, to the uſe of the obligee, and the ſame is tendred to him, and he refuſeth it, then the delivery hath loſt his force, and the obligee can never after agree to it; and therefore the obligee may ſay that it is not his deed, againſt the opinion in 1 *Eliz.* 167. So if an Obligation be made to a feme covert, and the husband diſagreeth to it, the obligor may plead that it is not his deed, for by the refuſal the Obligation hath loſt its force, and become no deed. And ſo the diſagreeing opinions in 14 *H.* 8. 28. *Dive* and *Manningham's* Caſe 66. 1 *H.* 7. 15. 1 *Eliz. Dier* 167. and other Books are well reconciled.

Mich.

Mich. 2 Jacobi, *in the Kings Bench.*

Long's Caſe.

[120] WIlts. ſcil. *Inquiſitio indentata capta apud* Coſſam *in Com. præd'*, 5. *die* Octobr', *anno Regni Dominæ* Eliz. *Dei gratia* Angliæ, Franciæ, & Hiberniæ, *fidei defenſor'*, &c. *triceſimo ſexto, coram* Willielmo Snelling *coronat. Dominæ Reginæ infra libertat. dict. Dominæ Regin. villæ ſuæ de* Coſſam *præd'*, *ſuper viſum corporis* H. Long *armig. ibid. exiſten. mortui per Sacrament.* 12. *Jurat. exiſt. præſentat'* ; *quod quidam* H. D. *nuper de* C. *in Com.* E. *miles*, C. D. *nuper de* C. *præd'*, *in dicto Com.* E. *miles*, G. L. *nuper de* Colkidge *in Com.* W. *Yeoman*, & R. P. *nuper de* L. *in dict. Com.* W. *Yeoman*, &c. *timorem Dei præ oculis ſuis non habentes, ſed inſtigatione diabolica ſeducti, quarto die* Octobr', *anno Regni dict. Dominæ Reginæ nunc triceſimo ſexto ſupradict'*, *inter horas undecimam & duodecimam ejuſdem diei, apud* Coſſam *præd'*, *in dict. Com.* Wilts. *vi & armis*, viz. *gladiis, pugionibus, armacudiis & torment', in dict.* Henricum Long, *in pace Dei & dict. Dominæ Reginæ adtunc eodem* 4. *die* Octobr', *anno triceſimo ſexto ſupradict'*, *apud* Coſſam *præd. exiſten', inſult. fecerunt, & prædictus* H. D. *quoddam tormentum (vocat.* a dagge) *ad valentiam* 6 s. 8 d. *cum pulvere & pellet. plumbe, Anglice dict'*, charged with powder and a bullet of lead, *quod idem* H. D. *tunc*, viz. *dict. quarto die* Octobr', *anno triceſimo ſexto ſupradict'*, *apud* Coſſam *præd'*, *in manu ſua dextra habuit & tenuit, in & ſuper ipſum* Henr' Long *adtunc eodem quarto die* Octobris, *anno triceſimo ſexto ſupradict'*, *apud* Coſſam *præd'*, *in dict. Com.* Wilts. *felonice, voluntar', & ex malicia ſua præcogitata exoneravit, Anglice* did diſcharge, *dans eidem* H. Long *ad tunc apud* Coſſam *prædict'*, *cum pellet. plumbeo præd'*, *ſic extra torment. præd'*, *per ipſum emiſſ., unum vulnus mortale, in & ſuper anteriorem partem corporis ipſius* Henr' Long, *ſubter ſiniſtram mamillam ipſius*

[b] Henr' Long, *totalit' penetrans in & per corpus dict.* Henr' Long : *De quo quidem vulnere mortali, idem* H. L. *ad tunc eodem quarto die* Octob. *anno* 36. *ſuprad'*, *apud* Coſſam *præd. inſtanter obiit. Et quod præd.* C. D. *miles*, G. L. &c. *dict. quarto die* Octob. *anno* 36. *ſupradict'*, *ac inter horas præd' ejuſdem quarti diei, apud* Coſſam *præd'*, *in dict. Comitat.* Wilts. *felonice, & ex malitiis ſuis præcogitat. fuerunt præſentes, abbettantes, procurantes, comfortantes, & manutenentes dict.* H. D, *ad feloniam & murdrum præd'*, *modo & form. præd. felonice faciend. & perpetrand'*, *contra pacem dict. Dominæ Reginæ nunc, coron. & dignitat. ſuas. Et ſic Juratores præd'*, *dicunt ſuper Sacrament. ſuum præd'*, *quod prædict.* H. D. C. D. G. L. &c. *dictum* H. L. *eodem* 4. *die* Octob. *anno* 36. *ſuprad'*, *apud* Coſſam *præd. in dict. Comitat.* Wilts. *felonice, voluntarie, & malitiis ſuis præcogitat. felonice interfecerunt & murdraverunt, contra pacem dict. Dominæ Reginæ, coron. & dignitat. ſuas : Et ulterius Juratores præd. dicunt ſuper Sacrament. ſuum præd'*, *quod immediate poſt felon. & murdrum præd. in forma præd. comiſſ. iidem* H. D. C. D. G. L. &c. *fuger'*, *& ſe retraxer. pro felonia & murdro præd. Ac quod ipſi, aut eorum aliquis, tempore feloniæ & murdr. præd. in forma præd. commiſſ. nulla habuerunt bona aut catalla, terr', aut tenementa, ad notitiam Jur' præd'. In cujus rei teſtimonium tam Jurator. præd'*, *quam præd. coronat'*, *die & anno prius ſuprad'*, *alternatim huic inquiſitioni ſigilla ſua appoſuer'*, *& quilibet eorum appoſuit.*

Upon which Indictment the ſaid *H. D.* was outlawed, and brought a Writ of Error, and divers Errors were aſſigned in the Indictment ; 1. becauſe in the beginning of the Indictment it is alledged, that the Indictment was taken before *W. S. Coron. Dominæ Reginæ infra libertat. dict. Dominæ Reginæ villa ſua de* Coſſam *præd'*, *ſuper viſum corporis* ; and it is not alledged to what places the ſaid Liberty doth extend, nor what part, or nothing of the Town of *Coſſam* be within the Liberty ; and ſo it doth not appear that the Coroner hath Juriſdiction in the place where the Inquiſition was taken, nor where the murder was committed, nor where the dead body lay, for all is alledged by the Indictment to be at *Coſſam* ; and Indictments of felony which are as Counts and Declarations for the King againſt the parties for their lives, ought to have certainty expreſſed in the Record of the Indictment, and ſhall not be ſupplied or maintained by intendment or argument, For if the counts between party and party for lands or chattels ought to have two things, *ſcil.* truth and certainty, as it is holden in *Plow. Comm.* 84. *a.* & 202. 5 *E.* 4. 21. in Debt, 3 *H.* 6. 1. in *Forcible Entry*, 38 *H.* 6. 35. 9 *H.* 6. 18. becauſe that the Counts are the foundation of the ſuits, to which the party is to anſwer, and upon which the Judges ſhall judge, *a fortiore* Indictments, principally thoſe which concern the life of a man, and which are the Kings Counts,

[121] to which the party is to anſwer, and upon which the Court ſhall adjudge for his life, ought to have full and preciſe certainty, and ſhall not be taken by argument, as appeareth 2 *E.* 3. 31. 18 *Aſſ. p.* 15. 29 *Aſſ.* 45. 2 *E.* 3. 28. *per Scrope*, 27 *Aſſ.* 73. 38 *Aſſ.* 11, 12. 47 *E.* 3. 17. 7 *H.* 6. 42. 8 *E.* 4. 3. 3 *H.* 7. 5. And becauſe it is not expreſſed in the Indictment that *Coſſam* was within the Liberty of *Coſſam*, for this cauſe the Indictment was incertain and inſufficient. To which it was anſwered and reſolved by the Court, that the Indictment notwithſtanding this Exception was ſufficient ; for true it is that the rule of Law is, that Indictments ought to be certain : But there are three manner of certainties ; 1. To a common intent ; 2. To a certain intent in general ; 3. To a certain intent to every particular : The firſt intent doth ſuffice in bars, which are to defend the party and excuſe himſelf : The ſecond is required in Indictments, Counts, Replications, &c. becauſe they are to excuſe or charge the party ; The third is rejected in Law, for *nimia ſubtilitas in jure reprobatur, & talis certitudo certitudinem confundit :* And in this Caſe at Bar there is enough certain intendment in general, that *Coſſam* is within the Liberty of *Coſſam*, but peradventure the Liberty may reach beyond the Town, which is a ſtrained and captious intendment, which the Law will not allow : And ſo Sir *John Popham* Chief Juſtice ſaid it was reſolved in the ſame Point in the Caſe of *Lewes* in the County of *Suſſex* ; and there the Indictment was, *Inquiſitio capta apud* Lewes *coram Coronatore raptæ ſuæ de* Lewes, and adjudged good in Law.

The ſecond Objection was, That the Indictment was, *Quod prædictus* H. D. *quoddam tormentum, vocatum* a dagge, *ad valentiam* 6 s. 8 d. *cum pulvere, & pelletto onerat'*, &c. *in & ſuper ipſum* Henr. Long *adtunc*, &c. *felonice, voluntarie, & ex malitia ſua præcogit. exoneravit, dans eidem* Henr. Long *adtunc*, &c. *cum*

cum pellet' plumbeo, &c. unum vulnus mortale ſuper anteriorem partem corporis ipſius H. L. *ſubter mamillam*. It was objected, that this word (*mamillam*) is a word inſenſible, being no *Latin* word, for the *Latin* word was (as it was ſaid) *mammillam*, with a double (*m:*) And it was ſaid that falſe *Latin* ſhall abate Writs, Counts, and quaſh Indictments, becauſe he who proſecuteth may purchaſe a new Writ, and frame a new Indictment. But otherwiſe is it of grants or deeds, for the party cannot have new when he will. And *Hill.* 28 *Eliz. Vauxe's* Caſe was cited, where the Count in appeal was holden inſufficient by reaſon of the word *burgalriter*, where it ſhould be *burglariter*; To which it was anſwered and reſolved by the Court: 1. That falſe *Latin* doth not quaſh an Indictment, nor abate any Count, for although the original Writ abate for falſe *Latin*, as it is holden in *9 H.* 7. *16.* 2 *H.* 4. 8. 44 *E.* 3. 18. 10 *E.* 3. 1. *&* 553. Yet Judicial Writs or fine ſhall not be impeached for falſe *Latin*, as it is holden in *9 E.* 4. *67.* The ſame Law of an Indictment; as if in an Indictment it be *præfato Reginæ*, where it ſhould be *præfatæ Reginæ*, or *præfatæ Regi* for *præfato Regi*, or the like, for as much as the word is *Latin* and ſignificant; and although it be not true *Latin*, the Indictment for ſuch incongruity ſhall not be quaſhed. But if the word be not *Latin*, nor allowed by the Law, as *vocabulum artis* (for every Art and Science have *propria vocabula artis*) but is inſenſible there, if it be in a Point material, it maketh the Indictment inſufficient, as *burglaria*, *burglariter*, *murdrum*, *felonice*, and the like are *vocabula artis*, known to the Law, and therefore if ſuch words, or the like, are miſtaken in an Indictment, ſo that in a material place a word inſenſible, which is not *Latin*, nor any word known in Law, it maketh the Indictment vicious and inſufficient, as *murdedrum* for *murdrum*, or *burgariter* for *burglariter*, *feloniter* for *felonice*. But in the Caſe at Bar it was reſolved, that *mamilla* with a ſingle (*m*) is as good *Latin* as *mammilla* with a double (*m*) as *defamo* and *diffamo*, *definitio* and *diffinitio*. Alſo *Popham* Chief Juſtice, *Gawdy*, *Yelverton*, and *Williams* held, that theſe words *ſuper mammillam* were abundant and more then needed, and therefore if *mammilla* were inſenſible, and no *Latin*, yet it doth not make the Indictment vicious: For it was holden by them, that *ſuper anteriorem partem corporis* was enough certain and ſufficient; for *corpus* in an Indictment (which is found by Lay-people) is to be intended of the trunk of the body, between the neck and the thighs, which is the uſual and vulgar acceptance of the body: So it was reſolved, *Quod ſuper caput*, or *ſuper faciem*, or *in dexteriori parte corporis*, or *in ſiniſtra parte corporis*, or *ſuper ſiniſtr' manum*, or *ſuper dextram manum*, or *ſiniſtrum brachium*, *&c.* or *in pectore*, or *ventre*, are enough certain and ſufficient. But *ſuper brachium*, or *ſuper manum*, or *ſuper latus*, *&c.* without ſaying *dextr'*, or *ſiniſtr'* is not ſufficient, becauſe in ſuch Caſe the part of a man in which the ſtroke is, is not certain. [b]

Another Exception was taken, becauſe that in the ſaid Indictment it was ſaid, *dans eidem* Henr' Long, &c. *unum vulnus mortale*, *&c.* where it ought to be *unam plagam*, which is the word uſed in all Indictments, and that *vulnus* ſhall not be uſed in Indictments no more then *ictus*, which alſo ſignifieth a ſtroak: But this Exception was diſallowed by the Court, for *plaga* and *vulnus* are *ſynonyma*, and ſignifie the ſame thing, although that *plaga* is the more uſual word in Indictments. Further Exception was taken, becauſe the length and depth of the wound was not ſhewed, which ought to be in every Indictment of death, for this cauſe the Indictment was inſufficient. But this Exception was diſallowed by the Court, for the length and depth of the ſtroak ought to be alledged, to the intent that it may appear to the Court that the wound was mortal, ſo that that may appear to be the occaſion of the death. But in this Caſe the wound was through the whole body, *ſcil. totaliter penetrans*, *& per totum corpus*, ſo that it was apparent to be mortal; and in ſome Caſes the dimenſions cannot be alledged, when a member, as the knee, or the hand, or the foot, or the head are cut off, there any of the ſaid dimenſions cannot be ſhewed. So in the Caſe at Bar. *Vide Trin.* 28 *Eliz. Heydon's* Caſe *acc'*. Another Exception was taken, becauſe the Indictment was, *dans eidem* Henrico Long, &c. *cum pelletto plumbeo præd', &c. vulnus mortale, &c. totaliter penetrans in & per corpus præd'* Henr' Long: And becauſe that *penetrans* ought to agree with *vulnus*, and not with *pelletto*, not only becauſe that *vulnus* is the laſt antecedent, but becauſe that otherwiſe will follow incongruity: For *penetrans* agreeth well with *vulnus*, and not with *pelletto*, for that is the ablative Caſe, and ſo cannot be *penetrans*, for then it ſhould be *penetrante*: And it was ſaid, that the wound did not penetrate or pierce the body, but the pellet pierced the body, and made the wound; But it was not allowed, for the ſenſe is ſignificant enough to ſay that the ſtroke did penetrate the body; for if it ſhall be asked of the depth of the wound, it may well be anſwered that it pierced the body. And *penetro derivatur a penitus & intra.* And ſo the words are ſignificant enough, without any abſurdity, or incongruity, to ſay *dans, &c. vulnus mortale totaliter penetrans, in & per corpus*, and ſo much the rather being the words of Lay-people. For the pellet gave the wound, which wound did pierce through the whole body. But the great Objection, and moſt difficult againſt the Indictment was, becauſe the Indictment wanted *percuſſit*; for the effect of it, as to the purpoſe is, *Præd.* H. D. *quoddam tormentum, &c. cum pulvere & pelletto plumbeo onerat', &c. in & ſuper ipſum* Henr' Long *exoneravit, dans eidem* Henrico Long *adtunc & ibidem cum pellet' plumbeo præd' extra torment' præd' per ipſum dimiſſo unum vulnus mortale, &c.* And it was ſaid, that although it wanted *percuſſit*, yet here is *tant amount*, and it is the Rule of Law and reaſon, *Non refert quid ex æquipollentibus fiat.* And when it appeareth that *H. D. torment' cum pulvere & pelletto, &c. in ipſum* Henr' Long *exoneravit, dans eidem* Henr' Long, &c. *cum pellet' plumbeo præd', &c. unum vulnus mortale, &c.* by that it appeareth to the Court, that *H. D.* was the occaſion of the wound, and upon the matter gave in this manner the wound. And further it was ſaid, that *percuſſit* is not properly ſaid, but when one with his hand, or any weapon which he holdeth in his hand, woundeth another, and not when he giveth a wound by a means, as out of a gun with a bullet, or out of a bow with an arrow. This word *percuſſio* is derived and compounded as it was ſaid, from *per* and *quatio:* But it was reſolved by the whole Court, that for this cauſe the Indictment was inſufficient. And this part of the Indictment concerning the ſaid Objection was divided into two parts; 1. The clauſe before *dans eidem*, *&c.* and the clauſe containing *dans eidem*, *&c.* [122] [b]

And it was reſolved that the firſt clauſe was not ſufficient in it ſelf, for although *H. D.* diſcharged the dagge upon him, yet it may be he was not ſtrucken with it; Then the ſecond clauſe, *ſcil. dans eidem, &c.* cannot make that good; for the clauſe of *dans, &c.* doth depend upon the firſt clauſe, and deſcribeth only the wound to manifeſt the ſame to be mortal; which ought to appear by the firſt ſentence to be given, becauſe *in hoc caſu participium determinat verbum:* But here it doth not appear by the firſt clauſe that there was ſtroke given; and then *dans, &c.* cannot ſupply it; for that is a participle depending upon the verb precedent, and the verb precedent is *exoneravit*, and *exoneravit* may be without percuſſion or ſtroke: As if one be indicted that he did aſſault one with an ax in his right hand, giving to him a mortal wound, it is inſufficient, becauſe this participle (giving) hath a verb before with which it might participate: And it was ſaid, that if the ſecond clauſe had been in the Caſe at Bar, *& dedit adtunc & ibidem unum vulnus mortale*, it had been inſufficient; for *dedit* doth not imply a willing and voluntary ſtroke, as *percuſſit*, and if *dedit* would have been ſufficient, yet *dans* by the whole Court, for the cauſe aforeſaid was inſufficient. And it was reſolved that the Indictment may ſay *percuſſit*, as well of a wound given out of a gun, or bow, as with the hand. And a preſident in 10 *E.* 4. in the *Kings Bench* was ſhewed, where the wound was out of a gun, and the Indictment had the word *percuſſit*, 1 *Ma. Dier* 99. That an Indictment with ſuch clauſe *ex malitia ſua præcogitata felonice murdravit, &c.* is not good without ſaying *percuſſit*, becauſe that Indictment of murder or manſlaughter ought to have expreſly a ſtroke to be ſuppoſed.
[123] And true it is, that in all Indictments of murder or manſlanghter a ſtroke ought to be alledged, if not in caſe of poiſoning. And for this laſt Error the outlawry was reverſed, and the ſaid *H. D.* diſcharged. And many preſidents of Indictments of death, where the wound was given with a bullet out of a gun, or by an arrow out of a bow, and all thoſe (which I ſaw) had this word *percuſſit*.

Paſch. 3 Jacobi, *in the Common Pleas.*

Saffyn's Caſe.

[*b*] IN a Replevin between *Saffyn* Plaintiff, and *Adams* Defendant, which began *Trin.* 44 *Eliz. Rot.* 1244. upon a ſpecial Verdict found, the Caſe was ſuch; A man made a leaſe for years of certain land to begin after the end or determination of a term for years then in being; The firſt years determine, the ſecond leſſee doth not enter, but he in the reverſion entreth and maketh a feoffment, and levieth a fine of the land with proclamations, according to the Statute of 4 *H.* 7. *cap.* 24. And five years paſs after the proclamations without entry or claim made by the ſecond leſſee: And if the leſſee for years were barred or not by the ſaid fine with proclamations, and the ſaid Act of 4 *H.* 7. was the Queſtion; And it was objected that the leſſee for years ſhould not be barred for two cauſes:

1. Although the word (intereſt) is in the Act, yet it is to be intended ſuch intereſt that the owner thereof, may thereof levy a fine; But he who hath a term or intereſt for years cannot levy a fine, but every one ſhall ſay againſt it, *quod partes finis nihil habuerunt*, becauſe a leaſe for years is but a chattel, and a fine is in the realty, and the Law doth require that one of the parties have a Freehold. And that this word (intereſt) in the Act ſhall be intended of an intereſt of Freehold whereof a fine may be levied. And it was ſaid that *Mich.* 21 *Eliz.* in the *Kings Bench*, it was adjudged in *Saunder's* Caſe, That a leaſe for years was not an intereſt within the ſaid Statute of 4 *H.* 7.

2. It was objected, That although that leſſee for years, when he is ouſted and ejected ſhall be within the ſaid Act; yet in this Caſe the leſſee ſhall not be bound, for no fine levied with proclamations ſhall bind any, but thoſe who are put out of poſſeſſion, and have but a right, for if their eſtate or intereſt be
[124] not deveſted out of them, but remain in them as it was *ab initio*, they need not enter or make claim to that which never was deveſted; and therefore it is agreed in *Plow. Comm.* in *Stowel's* Caſe, That a fine levied of land with proclamations, and five years paſt without claim made by him who hath Common of paſture, rent, or the like, ſhall not bind them, for their eſtate is not deveſted out of them, but always remaineth in them. So it was ſaid in the Caſe at Bar, until the ſecond leſſee entreth he hath but *intereſſe termini*, as he had before the firſt leaſe determined, the which (as it was ſaid) doth continue in him notwithſtanding the feoffment or fine. As if a man make a leaſe for years to begin at a day to come, and before the day the leſſor is diſſeiſed, yet the leſſee may grant over his intereſt, for ſuch intereſt of a term cannot be by diſſeiſin or feoffment deveſted, and put to a right more then a rent, or Common, or the like; and that was ſhortly the effect of what was ſaid on that ſide. But it was reſolved, That the fine and proclamations, and the Nonclaim of the leſſee had barred him of his term by the Act of 4 *H.* 7. And as to the firſt Objection it was anſwered and reſolved, That notwithſtanding leſſee for years hath not ſuch eſtate that he may levy a fine, it doth not follow, that his term or intereſt ſhall not be bound and barred by the ſaid Statute, and that for two cauſes: 1. It is within the letter of the Act, for the words of the Act are general (the ſaid fine with proclamation ſhall be a final end, and conclude as well privies as ſtrangers to the ſame) which words are general, and extend to all: And the words of the ſaving are (ſuch right, claim, and intereſt, &c.) and he who hath a term for years hath an intereſt, and therewith agreeth *Catlyne* in *Plow. Comm.* 373. 2. It is within the miſchief; for it appeareth by the preamble, (That fines ought to be of greater ſtrength to avoid ſtrifes and debates, and to the final end and concluſion, &c.) And great miſchiefs, trouble, and vexation will follow, if leaſes for years which now are made for a great number of years, ſometimes abſolute, ſometimes determinable upon lives, ſhall not be within the ſaid Act; and therefore it was reſolved, That the intereſts of tenant by Statute Merchant, Statute Staple, Elegit, Guardian by Knights ſervice, Executors who have lands till debts

debts levied and legacies paid, and every other such interest are within the said Act of 4 *H.* 7. for all these have interest in the lands, and he who hath a bare right or title to any Inheritance or Freehold, cannot levy a fine to any stranger, but it shall be said, *quod partes finis nihil habuerunt*; and yet he shall be bound by a fine levied by the Terre-tenant: So although that lessee for years cannot levy a fine to a stranger, but it shall be said, *quod partes finis nihil habuerunt*, yet it doth not follow but that he shall be bound by the fine with proclamations levied by tenant of the land. [b]

As to the second Objection it was answered and resolved by the Court, that in the Case at Bar by the said feoffment, the second lessee had but a right, for when his future interest had commencement, then he had such present estate in the land, which might be devested, and which he may revest by his entry. As if a man make a lease for years, in this Case before that the lessee entreth he hath estate for years in the land which he may grant. And the words of *Littleton* were well observed, *lib.* 1. *cap.* 7. *fol.* 13. *b.* If a man make a lease for years, and before the lessee entreth the lessor dieth, yet the lessee may enter, because the lessee by force of the lease hath present right to have the tenements according to the form of the lease: And *Lit. lib.* 3. *cap.* 8. *fol.* 107. If a man leaseth lands for years, if the lessor releaseth to his lessee all his right, before that the lessee hath entred into the land, such release is void, because the lessee had not possession in the land at the time of the release made, but only a right to have the same lands by force of the same lease: And *fol.* 127. if a man leaseth tenements for years, by force of which the lessee is seised, that is, possessed, and after the lessor by his Deed granteth the reversion to another for life, &c. it behoveth in such Case that the tenant for term of years attorn: By which it appeareth, that before the lessee entreth, he hath not actual possession, nor (as it seemeth) the lessor hath not such reversion that he may grant it over by the name of reversion, but yet such lessee hath more then he who hath a future interest, for that he may presently enter and take the profits, so that his interest accompanied with present entry and ability to take the profits which he may pass over, may be devested out of him, and put to a meer right not grantable: And so the difference appeareth between the Case at Bar, and *Saunder*'s Case which was adjudged in 21 *Eliz.* for there at the time of the fine levied the lessee had not power to enter and take the profit, but only a future interest, which (if it may be devested) he had not any means possible to revest in him again.

Pasch. 3 Jacobi, *in the Starr-Chamber.*

The Case *De Libellis famosis.*

IN the Case of *L. P.* in the *Star-Chamber* this Term, against whom the Attorney-General proceeded *ore tenus* upon his own confession, for composing and publishing of an infamous Libel in verse, by which *John* Archbishop of *Canterbury* (who was a Prelate of singular piety, gravity, and learning, now dead) by circumlocutions and descriptions, and not in express terms; and *Richard* Bishop of *Canterbury* who now is, were traduced and scandalized: In which these Points were resolved: [125]

1. That every Libel which is called *famosus Libellus, seu defamatoria scriptura*, is made either against a private man, or against a Magistrate and publick person, if it be against a private man it deserveth a severe punishment, for although the Libel be made against one, yet it inciteth all those of the same family, kindred, or society to revenge, and so may be the cause of shedding of blood, and of great inconvenience: If it be against a Magistrate, or another publick person it is a greater offence; for that it concerneth not only the breach of the peace, but also the scandal of government; for what greater scandal of government can there be then to have corrupt and wicked Magistrates to be appointed and constituted by the King to govern his Subjects under him? and greater imputation to the State it cannot be, then to suffer such corrupt men to sit in the sacred seat of Justice, and to have any medling in or concerning the administration of Justice.

2. Although the private man or Magistrate be dead at the time of the making of the Libel, yet it is punishable, for in the one Case it stirreth up others of the same family, blood, or society to revenge, and to breach of the peace, and in the other the Libeller doth traduce the State and Government, which dieth not.

3. A Libeller (who is called *famosus defamator*) shall be punished either by Indictment at the Common Law, or by Bill, if he deny it, or *ore tenus* upon his confession, in the *Star-Chamber*, and according to the quality of the offence he may be punished by fine or imprisonment, and if the Case be exorbitant, by Pillory and loss of his Ears. [b]

4. It is not material whether the Libel be true, or whether the party against whom the Libel is made, be of a good or ill fame; for in a setled state of government the party grieved ought to complain for every injury done to him in ordinary course of Law, and not by any means to revenge himself, either by odious course of libelling, or otherwise: He who killeth a man with his sword in fight is a great offender, but he is a greater offender who poisoneth another, for in the one case he who is the party assaulted may defend himself, and knoweth his adversary, and may endeavour to prevent it: But poisoning may be so secret that none can defend himself against it, for which cause the offence is more grievous, because the offender cannot be easily known; And of such nature is libelling, it is secret, and robbeth a man of his good name, which ought to be more precious to him then his life, *& difficillimum est invenire Authorem infamatoriæ scripturæ*, because that when the offender is known, he ought to be severely punished. Every infamous Libel, either is in writing, or without writing. In writing, when an Epigram, Rime, or other writing is composed or published to the scandal or contumely of another,

by which his fame or dignity may be prejudiced. And such libel may be published, 1. *Verbis aut cantilenis*: As where it is maliciously repeated or sung in the presence of others. 2. *Traditione*, when the Libel, or copy of it is delivered over to scandalize the party; A famous Libel without writing may be. 1. *Picturis*, as to paint the party in any shameful and ignominious manner. 2. *Signis*, as to fix a Gallows, or other ignominious signs at the parties door or elsewhere. And it was resolved *Mich.* 43 & 44 *Eliz.* in the *Star-Chamber* in *Hallywood's* Case, That if one find a Libel (and would keep himself out of danger) if it be composed against a private man, the finder either may burn it, or presently deliver it to a Magistrate: But if it concern a Magistrate, or other publick person, the finder of it ought presently to deliver it to a Magistrate, to the intent that by examination and industry, the Author may be found out and punished. And libelling and calumniation is an offence against the Law of God.

[126] For *Leviticus* 17. *Non facias calumniam proximo.* Exod. 22. ver. 28. *Principi populi tui non maledices.* Ecclesiastes 10. *In cogitatione tua ne detrahas Regi, nec in secreto cubiculi tui diviti maledices, quia volucres cœli portabunt vocem tuam, & qui habet punnas annuntiabit sententiam.* Psal. 61. 13. *Adversus me loquebantur qui sedebant in porta, & in me psallebant qui bibebant vinum.* Job 30. ver. 7. & 8. *Filii stultorum & ignobilium, & in terra penitus non parentes, nunc in eorum canticum sum versus, & factus sum eis in proverbium.* And it was observed, that *Job* who was the Mirrour of patience, as appeareth by his words, became in a manner impatient when Libels were made of him; And therefore it appeareth of what force it is to provoke impatience and contention. And there are certain marks by which a Libeller may be known: *Quia tria sequuntur defamatorem famosum:* 1. *Pravitatis incrementum*, increase of lewdness: 2. *Bursæ decrementum*, wasting of his money and beggery: 3. *Conscientiæ detrimentum*, shipwrack of conscience.

Pasch. 3 Jacobi, *in the Kings Bench.*

Palmer's Case.

[b] BEtween *Palmer* and *Wilder* for a Ward in the County of *Oxford*, the only Question in the Case was; If the Guardian in Knights service shall have the single value without any tender: And it was objected, that the Guardian should not have it without tender for four causes:

1. *Litt. lib.* 2. *cap.* 4. *fol.* 21. and all the Books agree, that Knights service draweth to it Ward, Marriage, and Relief. And the Statute of *Merton, cap.* 7. saith, *Quod maritagium ejus qui infra ætatem est de mero jure pertinet ad Dominum feodi*, so that the marriage of the heir within age doth belong by the Law in such Case to the Lord; Then if the heir will perform that which the Law requireth, *scil.* to be married by his Guardian, it is not reason that he render any value for it; for *Littleton* doth not say, that Knights service draweth to it the value of the marriage, but the marriage it self; and the Statute of *Merton* doth not say, *Quod valor maritagii ejus de mero jure pertinet ad Dominum feodi, sed maritagium ejus de mero jure pertinet, &c.* Put case then that *A.* covenant with *B.* that *B.* shall have the marriage of *A.* and that he shall be married to him to whom *B.* will nominate to him; In this Case if *A.* be ready to be married according to his covenant, and *B.* will not nominate any, he shall never render any value for it: So in the Case at Bar, for as much as the Law giveth to the Lord the marriage, if the heir be ready to perform it, he is excused, and shall not be charged with any value. So if the tenant be ready to do his homage, or any other corporal service, which by his tenure he ought to do, the Lord cannot refuse it, or wave it, and take amends for it.

[127] 2. In this Case of marriage which the Law giveth, the Lord is to have the benefit, and he ought to do the first act, for the heir cannot perform the duty which the Law in such Case requireth, without the first act done by the Lord, *scil.* Tender of a woman that the heir shall marry; and in all Cases when the default is in him who ought to do the first act, the other party is excused. As if a man be bound to levy a fine to the obligee before such a day; in this Case for as much as by the Law the obligee ought to do the first act, *scil.* to sue forth a Writ of Covenant before the day, if no Writ of Covenant be sued, the obligor is excused, as it is holden 4 *E.* 3. 39. *b.* 18 *E.* 3. 27. & 11 *H.* 4. 18. *Vide* 21 *E.* 4. 2. 2 *E.* 4. 3. 20 *E.* 4. 36. 1 *Ma. Dier*, *Windsor's* Case, and 22 *Eliz. Dier* 371.

3. And the words of the Writ *de valore maritagii* are, *Quare cum maritagium præd.* B. *ad ipsum* A. *pertineat, eo quod præd.* B. *terram suam de eo tenuit per servitium militare, & eid'* A. *prædict.* B. *dum fuit infra ætatem in custodia sua, competens maritagium absque disparagatione, &c. sæpius obtulit, idem* B. *maritagium illud tenuens, de eodem maritagio præfat'* A. *cum ad plenam ætatem pervenerit satisfacere recusavit, & adhuc recusat minus juste, &c. ad dampnum, &c.* By which Writ, and also by the Writ of Intrusion of Ward it appeareth, that the Lord shall not have the single value without tender of marriage, and default in the heir; and if the tender in such Case shall not be requisite, great and tedious surplusage shall be contained in the Writ, which of its nature, and according to its name, ought to be brief and substantial, *Dicitur enim breve, quia rem breviter enarrat.*

4. Upon the reasons aforesaid are divers express authorities in the Point, 21 *E.* 4. 43. *per Curiam*, that there ought to be tender, *F. N. B.* 141. 40 *E.* 3. 6. Issue taken upon the tender, 11 *H.* 4. 82. Tender alledged, 43 *E.* 3. 20. and the Statute of *Merton, cap.* 7. *Si quis hæres, &c. pro Domino suo noluerit maritare, non compellatur hoc facere, sed cum ad ætatem pervenerit det Domino suo & satisfaciat ei, &c.* all which prove there ought to be tender. As to the first and second Objections, it was resolved by the whole Court, That at the Common Law it was at the Lords election to have the marriage of the heir, or to suffer the heir to marry whom he pleased, and to have recompence, *scil.* the value of it, and that at the Common Law there lay not only the Writ *De valore maritagii*, but also the Writ *Quare intrusit*

si

ſe maritagio non ſatisfacto, and therewith agreeth 31 *Aſſ. p.* 26. And at the Common Law if the heir within age had been raviſhed and married, the Guardian ſhall recover in an Action of Treſpaſs the value of the marriage in damages, and therewith agreeth 29 *E.* 3. 37. *&* 29 *Aſſ.* which is a notable proof, that the value of the marriage doth belong to the Lord without tender; for if the value ſhall not be due without tender, then if the raviſher of a Ward marrieth him, the Lord ſhall not receive the value, or if the heir marrieth himſelf before the Lord can make a tender, or if he flie over Sea, or to places unknown, the act and wrong of the heir if tender were neceſſary might prevent the Guardian of the benefit of the marriage, which *de mero jure* doth belong unto him, which ſhall be inconvenient. As to the third Exception it was anſwered, That many times Writs are framed according to that which moſt uſually happeneth. And where the rule is, *ad ea quæ frequentius accidunt jura adaptant'*, it may be well ſaid, *ad ea quæ frequentius accidunt reſcripta ſive brevia adaptant'*; And a ſpecial Caſe ſhall have a ſpecial Writ and a ſpecial Count: As to the Authorities, *ſcil.* 40 *E.* 3. 6. there it appeareth the iſſue was taken upon the tender, and many times it is done by good advice, *ſcil.* firſt to try the matter in fact, if the Plaintiffs Council will admit it, and then to take advantage of the matter in Law, which joyning of iſſue by the Plaintiffs Council, is not any authority of proof that tender is requiſite. And as the Book of 21 *E.* 4. 43. which is but one opinion *obiter* without argument or deliberation, in the debating of another Caſe, is to be underſtood of forfeiture of marriage; And in the other Books, tender is only alledged, and no authority that is requiſite: But the Book of 31 *Aſſ. p.* 26. is adjudged, That for the ſingle value tender is not requiſite; and therewith agreeth 2 *H.* 7. 9. *Et hoc communi juris peritorum calculo comprobatur:* And ſo the doubt in 9 *Eliz. Dier* 255. well reſolved. [b]

THE

THE REPORTS OF Sir Edward Coke Kt. &c.

PART VI.

Where Services Intire ſhall be appointed.

Hill. 36 Eliz. *In the Court of Wards. Reſolutions by the two Chief Juſtices and the whole Court of Wards, Concerning apportionment of Intire Services.*

Bruerton's Caſe.

[1] LOrd and Tenant of three Acres of Land by Homage, Fealty, annual Service of a Hawk, and ſute of Court, the Tenant maketh a Feoffment in Fee of one Acre, The Feoffee ſhall hold by homage, fealty, a Hawk, and ſute of Court, by the Common Law, For *Quæ in partes dividi nequeunt ſolida, a ſingulis præſtantur*, and therewith agreeth the Books in 2 E. 2. *Avowry* 184. 5 E. 2. *ibid.* 206. 11 E. 3. *Avowry* 101. 24 E. 3. 73. *a.* 34 *Aſſ. p.* 15. 22 E. 4. 36, 37. 27 H. 8. *Tenures* 64. and *Avowry*. And no difference as to this purpoſe between intire ſervices annual, as ſute, a Hawk, &c. and not annual, as homage, fealty, heriot, &c. And as to Heriot, *v.* 34 E. 3. *Heriot* 3. And the Statute of *Weſt.* 3. of *Quia Emptores terrarum* cannot extend to intire ſervices to hold *pro particula*, becauſe that ſuch ſervices are not deviſable, and by conſequence each ſhall hold by the whole as he ſhall hold by the Common Law. But in the Caſe of ſute, the Statute of *Marlebridge*, *cap.* 9. hath altered the Law in two Caſes. 1. In Caſe of Coparceners and their vendees by Equity, as it appeareth by the Regiſter and *F. N. B.* 159. *a.* and *b.* where the Writ re-

[b] cites, *Cum de communi Conſilio Regni noſtr. proviſum ſit, ſi hæreditas aliqua, de qua unica ſecta debetur, ad plures hæredes vel ad alios per venditionem devolvatur, &c.* 2. The Statute doth provide, *Et ſi plures feoffati fuerunt de hæreditate aliqua, de qua unica ſecta debeatur, Dominus unicam ſectam habeat, &c.* But that is meant when the Tenant, who holdeth by ſute, doth enfeoff others ſeverally, one of one part, and another of another part, &c. in certain; there the Lord ſhall have but only one ſute; and he who doth the ſute ſhall have contribution for his charge againſt the others, and that appeareth by the Statute of *Marlebridge*, and *F. N. B.* 159. But if the Tenant who holdeth by ſute infeoffeth many joyntly, the ſame is out of the Statute as to Contribution, for without expreſs agreement he ſhall not have Contribution. But yet all the ſaid Feoffees ſhall do but one ſute, as they ſhall pay or deliver but one Hawk, or other yearly intire ſervice, and therewith agreeth *F. N. B.* 162. *c.* But if the Tenant maketh a feoffment of the moity or third part in common, and not in ſeveralty, it is out of the purview of the Statute of *Marlebridge*: For where the poſſeſſion is intire and indivied, there cannot be contribution, and therewith agreeth *F. N. B.* 162. *d.* (That Tenant in Common ſhall do ſeveral ſute and ſeveral ſervice.) As Feoffee of the moity or third part is out of the Statute of *Quia Emptores terrarum* to hold *pro particula*, as it is holden in 29 *H.* 8. *br.* Tenures. 2. Although the Tenancy, and every part of it is holden and charged with intire ſervices; Yet therein obſerve this difference, between the Act of the Tenant by the ſeverance and parcelling of the Tenancy to others (for that ſhall give benefit to the Lord, who is a ſtranger to it) *res inter alios actæ nemini nocere debent, ſed prodeſſe poſſunt*, and the Act of the Lord himſelf to take any parcel of the Tenancy, which ſhall turn to his prejudice: for by his acceptance of any part of the Tenancy, all the ſaid yearly intire ſervices are gone and extinct; and therefore if one holdeth his land of his Lord by his yearly ſervice, of a Hawk, Horſe, or the like; if in ſuch caſe the Lord purchaſeth part of the Tenancy, ſuch entire ſervices are gone, becauſe that ſuch

such service cannot be severed or apportioned. And forasmuch as he hath discharged part by his own act, the whole intire service is gone, in the same manner as if he had released his Seignory in part of the Tenancy, all the Seignory by his own act is gone. And therewith agreeth *Lit.* 49. 5 *E.* 2. *Avowry* 206. 3. Another difference was taken between the said intire services, and other the like, which are only for the sole benefit of the Lord, and are a charge to the Tenant, as the services to render a Hawk, a Horse, a pair of gilt spurs, &c. and intire services which are for the benefit of the Commonwealth, or for the defence of the Realm, or for the advancement of Religion, and the service of God, or for Works of Devotion, Piety, or Charity, or for the advancement of Justice: In such and the like cases, although that the Lord purchaseth parcel; yet the entire services remain. As if the Tenant hold by Knights service, which is an entire service to be done by the body of a man (for escuage is but a a penalty for not doing of it) in this case, because it is for the defence of the Realm, and *pro bono publico*, although the Lord purchaseth parcel of the Tenancy, yet the service shall continue; and therewith agreeth *Littleton*, *lib.* 2. *cap. Rents*, *fol.* 49. The same Law of Castlegard, Cornage, and the like, *vide* 11 *H.* 7. 12. because for the defence of the Realm; So if one holdeth of his Lord to make a Bridge, repair a High way, or to make a Beacon (which Tenures you may see in 11 H. 7. 12. *b.* and 24 *H.* 8. *br. Tenures* 53.) Although that the Lord in such Case purchaseth parcel, the whole service doth remain, because for the Commonwealth. So if one holdeth to marry a poor Virgin yearly, as the Tenure is 24 *H.* 8. *br. Tenures* 53. because a work of Charity; So if the Tenure be to find a Preacher in such a Church, or to provide the Ornaments of such a Church, as the like Tenure is 35 *H.* 6. 6. because a work of Devotion and Piety. So where the Tenure is to assist the Sheriff, or to be High Constable of *England*; for these are for the advance of Justice. For the determination of divers cases doth belong to the Court of the Constable and Marshal, and the Sheriff is the Minister of Justice, *vide* 11 *Eliz. Dier* 285. and 16 *E.* 3. *Avowry* 93. Or if the Tenure be to keep the Kings Records, as the Abbot of St. *Bartholomew* in *Smithfield* held, as it appeareth amongst the Records in the *Tower* of *London*, 7 *R.* 2. *membran.* 15. *dorso*, Because the same concerneth the Administration of Justice. But if the Tenure be to be Carver, or Butler, or Cook to the Lord, or to cover the Lords Hall, or to attend upon him at some principal Feast, &c. in all such Cases, by the purchase of parcel, all is extinct, for these are for the only benefit of the Lord himself. 4. Another difference was taken between intire services, when the doing of the service by one Tenant of part shall serve for all, and he who doth it shall have contribution; and when every several Tenant shall do the several intire services. As in the Case of suit in the Cases aforesaid, one only shall do, and the others shall make contribution. And therefore there if any parcel cometh to the Lord, although it be by descent, which is an act of the Law; yet all the suit is gone, for there wanteth Contribution as well when part cometh by Law, as where it cometh by the act of the party, and therewith agreeth 34 *Assize*, 15 & 35 *H.* 6. *Execution* 21. But if parcel descendeth to the Lord, where the Tenure is by a Hawk, a Horse, &c. there it is otherwise, because that every parcel is severally holden by a Hawk, a Horse, &c. and therefore no Contribution shall be in such Cases: But (as it hath been said) every several Feoffee shall hold by a Hawk, a Horse, &c. 5. Another difference was as unto intire services, where the Lord cometh to part by the meer Act of the Law, and in part by the Act of the party, and especially when the original act is the act of the party, As Recovery in a *Cessavit* of parcel of the Tenancy, all the intire services which are only for the benefit of the Lord, as sute, grain of Wheat, a Horse, &c. are gone, and extinct, and therewith agreeth 40 *E.* 3. 46. *F. N. B.* 209. *a.*

[2] [b]

Where the Pleading shall stay for the Nonage of the Demandant, and where the Tenant shall have his Age.

Pasch. 35 Eliz. *in the Common Pleas.*

Markal's Case.

IN the Case of one *Markal* it was moved, Whether in a *Formedon* in Remainder by an Enfant, of a Remainder limited to his Father, and his heirs (whose heir he is, The Tenant without any plea pleading may pray that the pleading may stay for the Nonage of the Demandant. And 3 *E.* 3. age 72. was cited; And it was Objected, That although 8 *E.* 3. 59. be to the contrary, yet the reason which *Herle* there giveth, upon which he groundeth his opinion, is against Law. For he saith, That when the Enfant hath recovered in his *Formedon* in Remainder, then he shall not be in Ward. And it is apparent in a *Formedon* in the Reverter brought by the heir of the Donor, the tenant may pray that the pleading stay, without pleading any plea. And therewith agreeth 18 *E.* 3. age 11. and 12 *E.* 2. *ibid.* 145. But at last the Record of a Judgment was shewed *Pasch.* 4 *Eliz.* where the Case was, that a *Scire facias* to execute a fine brought by the heir within age of him in the Remainder in Fee, which Remainder was limited to his Grandmother and her heirs, the Tenant prayed [3]

prayed that the pleading might ſtay for the Nonage of the demandant. And after many Arguments and great deliberation, it was adjudged, that the prayer of the Tenant ſhould not be allowed, but that he ſhould anſwer preſently. And for the better underſtanding of the true reaſon of this Judgment, The Rules of the Common Law as to this purpoſe are firſt to be obſerved. And firſt, it is to know, That every real Action, either is Poſſeſſory, that is to ſay, of his own poſſeſſion or ſeiſin, or Auncestrel, *ſcil.* of the ſeiſin or poſſeſſion of his Anceſtor. And generally in all Real actions, which an Enfant bringeth of his own poſſeſſion, although he hath the land by deſcent, and although [b] the Tenant pleadeth the deed of his Anceſtor with warranty, the pleading ſhall not ſtay for his Nonage, for by the preſumption of Law, the granting that the pleading may ſtay for the nonage of the demandant, is in favour, and for the benefit of the Enfant, not for want of good underſtanding of his eſtate, and of the truth of the matter he ſhall be prejudiced of his right which deſcendeth unto him from his Anceſtor, and therefore the Law in ſuch Caſe will rather ſuffer a delay, than hazard the right of the Land, whereof his Anceſtor had the poſſeſſion, by negligence or otherwiſe to be loſt. But when his Anceſtor dieth ſeiſed, and the Land deſcendeth to the Enfant, and he entreth and taketh the Explees and Profits, in this caſe it ſhall be a prejudice to the Enfant that he ſhall loſe his poſſeſſion which he had, and ſhall be thereof delayed till his full age: But when only a bare right deſcendeth to him he is not at any ſuch prejudice. And therewith agreeth 12 *E.* 4. 17. in a writ of Entre ſur diſſeiſin of a diſſeiſin done to the Infant himſelf; and 41 *Edw.* 3. age 39. and a Writ of Right of the deforcement to an Infant himſelf of Land which he hath by deſcent. So in Eſcheat and Ceſſavit, and Writ of Right Sur diſclaimer brought by an Infant, becauſe he hath the Seignory in poſſeſſion, which by Eſcheat, ceſſer, or diſclaimer he loſeth, and his Anceſtor had not any right to the Land, for this cauſe the pleading ſhall not ſtay for his nonage. So in a writ of Meſne brought by an Infant, becauſe that the cauſe of the action and wrong beginneth in the time of the Infant himſelf, 21 *Edw.* 3. age 85. 1 *Edw.* 2. age 119. 7 *Edw.* 2. age 140. And as to actions Anceſtrel, there are two ſorts of them; one called *Anceſtrel Rightful*, becauſe that nothing deſcendeth from the Anceſtors but a bare Right; the other called *Action Anceſtrel poſſeſſory*, becauſe the Anceſtor died in poſſeſſion, and the Land it ſelf deſcendeth. In all caſes when a bare Right in Fee-ſimple deſcendeth from any Anceſtor (who once was in poſſeſſion) to an Infant, then in any Action Anceſtrel brought by him, the Tenant without any plea pleaded, may pray that the pleading ſtay. As if an Infant bring a *Writ of Right*, as heir to his Anceſtor, and alledge the Explees in his Anceſtor, the Tenant without any plea pleading may pray that the Parol demur. So if an Infant bringeth a *Formedon* in the *Reverter*, as heir to the Donor, for there he demandeth the Fee-ſimple of the ſeiſin of his Anceſtor, and there he ought to alledge the Explees in the Donor; [4] and therewith agreed 18 *Edw.* 3. age 11. 12 *Ed.* 2. *ibid.* 145. But in *Formedon* in Remainder, although he demand Fee-ſimple, yet becauſe his Anceſtor, to whom he is heir, was never ſeiſed, nor took any profits (and therefore in this caſe he ſhall alledge Explees only in the particular Tenant who hath the Eſtate upon which the Remainder dependeth, for this cauſe the Tenant (without plea) cannot pray that the Parol demur, foraſmuch as the Remainder never was in the poſſeſſion of any of his Anceſtors, and the demandant himſelf ſhall be the firſt in whom it ſhall veſt, and that ſhall have ſeiſin of the Land in demand; and that was the true reaſon of the ſaid Judgment. And it is not called *Action Anceſtrel Righful*, becauſe the Action doth deſcend, but becauſe the Right doth deſcend from the Anceſtor, for which an Action of the ſeiſin of his Anceſtor is given to the heir. And therefore if an Infant alieneth within age, and dieth within age, and his heir bringeth a Writ of *Dum fuit infra ætatem*, the Tenant may pray that the pleading ſtay, and yet the Action doth not deſcend; for it doth not lie for him who alieneth, becauſe he died within age, and the Writ ſaith, *Dum fuit infra ætatem.* So if the heir within age bring a Writ of *Non compos mentis*, the Tenant may pray that the Parol demur, and yet a bare Right and no Action deſcendeth, *vide* 20 *Edw.* 3. 7. In all Actions Anceſtrel poſſeſſory, as in *Coſinage*, *Beſaiel*, *Aiel*, *&c.* where the Anceſtor died ſeiſed, there the Tenant may without plea pleading pray that the Parol demur for the nonage of the Demandant. But at the Common Law, in ſuch Actions, if the Tenant had pleaded a Feoffment, or other act of the Anceſtor in bar, by which it appeareth, that either nothing, or that a bare right at moſt deſcended, which maketh it equivalent to an Action Anceſtrel righful, There the Tenant upon ſuch plea pleaded, may pray that the pleading ſtay; and the demandant for the tenderneſs of his age, and in reſpect the Law preſumeth want of underſtanding in him, ſhall not be hazarded to try that which may perpetually bar him; and that the Common Law was ſuch, well appeareth by the Statute of *Glouceſter*, *cap.* 2. For there it appeareth, that in *Coſinage*, *Beſaiel*, *Aiel*, *&c.* brought by an Infant, the Tenant in anſwering, alledgeth a Feoffment, or pleadeth ſome other thing, or the Inqueſt was delayed till the age of the Infant, that now he ſhall anſwer as if he were of full age. But this Act extendeth only to Writs of *Coſinage*, *Beſaiel*, *Aiel*, 8 *Edw.* 3. 36. *&c.* againſt the opinion in 34 *Hen.* 6. 3. that it extendeth to other Actions, 54 *Edw.* 3. In a *Quid juris clamat* brought by an Infant, the Defendant ſaid, that his Anceſtor by Deed demiſed to him for life, without impeachment of waſt; and becauſe that the Plaintiff being within age cannot confeſs a Deed within age, it was adjudged, that he ſhould attend till his full age, [b] 6 *Edw.* 3. 48. The like plea pleaded in waſt by an Infant; for during his nonage he ſhall not be party to try the Deed of his Anceſtors in ſuch caſes. In a *Formedon* in the deſcender in which the demandant ſhall not recover the meer Right, but a limited eſtate *per formam doni* of the ſeiſin of the Donee, the Parol ſhall not demur by the prayer of the Tenant, but he ſhall be anſwered within age, if not that ſomething be pleaded againſt him, to which he cannot be party to try within age; and therewith agreeth 8 *Edw.* 3. 9. 12 *Ed.* 4. 17. 34 *Hen.* 6. 3. 40 *Ed.* 3. 42 *Edw.* 3. 13 *Ed.* 3. *Formedon* 96. 3 *Edw.* 3. *ibid.* 133. But in Aſſiſe, and Aſſiſe of *Mordanceſter* brought by an Infant, becauſe here is a Jury the firſt day, and the Jury is to enquire of the circumſtances, the pleading upon plea pleaded ſhall not demur, 8 *Edw.* 3. 36. And it is to know, that the Statute of *Weſtm.* 1. *cap.* 46. taketh away the

the age as well on the part of the Tenant as on the Demandant in a Writ of *Entrie ſur diſſeiſin* to the Anceſtor, if freſh ſuit were made, as it is adjudged in 24 *Ed.* 3. 46. For in ſuch caſe becauſe that a bare right deſcended to the heir at the Common Law, the plea did ſtay for his Infancy. But the ſaid Act is taken ſtrictly, and doth not extend to any other action than a Writ of *Entrie ſur diſſeiſin*, 46 *Ed.* 3. age 76. But at the Common Law, if the Grandfather was diſſeiſed, and brought an Aſſiſe, and die, depending the Writ; and afterwards the Father bringeth a Writ of *Entrie ſur diſſeiſin*, and pendant the Writ the Father alſo dieth, In caſe in a Writ of *Entrie* brought by the Son of a diſſeiſin done to his Grandfather, the Parol ſhall not demur for the nonage of the Son, for the ſpeedy and freſh perſuit which hath been made, and therewith agreeth 10 *Ed.* 3. 58. And it is to be obſerved that in all real actions at the Common Law, if the Tenant was within age, and in by deſcent, that he ſhall have his age, 21 *Edw.* 4. 78. in a *Scire facias* upon a Fine, 47 *Edw.* 3. 7. in Error, if he be Tenant; *vide* 8 *Edw.* 4. 19. 13 *Edw.* 3. age 7. in *Formedon* in deſcender, 45 *Edw.* 3. age 40. in *Aiel*, if the action be not grounded upon his own wrong, as in *Ceſſavit* of his own ceſſer, 2 *Ed.* 2. age 132. 9 *Ed.* 3. 50. 14 *Ed.* 3. age 88. *vide* 28 *Ed.* 3. 99. 31 *Ed.* 3. age 54. adjudged. And if it be not in a *Nuper obiit*, when he claimeth as heir from the ſame Anceſtor, *vide* 7 *Ed.* 3. 13. 4 *Ed.* 3. age 137. 9 *Ed.* 2. *ibid.* 142. 13 *Ed.* 2. *ibid.* 146. *vide* 5 *Ma.* 136. in *Baſſet's* Caſe; for a *Nuper obiit* is principally brought to try the privity of the blood, and if it be not in a *Partitione facienda*, becauſe that both are in poſſeſſion, *vide* 9 *Hen.* 6. 6. 10 *Hen.* 4. 5. and 8 *Edw.* 3. and if it be not in attaint, 9 *Hen.* 6. 46. for the miſchief of the death of the Petty Jury. So that the Law doth favour the Tenant within age, who hath the poſſeſſion by deſcent more than the Demandant, who hath but a bare right by deſcent. But the ſaid Act of *Weſtm.* 1. taketh away the age of the Tenant in a Writ of *Entrie ſur diſſeiſin* in the *per*, as is aforeſaid. And the Statute of *Weſtm.* 3. *cap.* 40. ouſteth the age of the vouchee, being the Husbands heir, in a *Cui in vita*, and in *Sur cui in vita*. But both theſe Statutes are taken ſtrictly, as appeareth by many Books; and by theſe differences, and the cauſes, and reaſons of them you will better underſtand your Books, which are almoſt infinite, and *prima facie*, ſeem to diſagree, and by theſe differences may be well reconciled. *Vide* 8 *Edw.* 3. 10. if the plea ought to be delayed for the nonage of the Infant, although the Tenant would anſwer, yet the Court ought to award that the plea be ſtayed. So when the Tenant voucheth one as heir within age, he may pray that the pleading may ſtay. But in ſuch caſe he ought to plead more certain; for he ought to ſhew how choſen, *vide* 7 *Edw.* 6. *Dier* 79. 16 *Ed.* 3. age, and 15 *Edw.* 4. 46 *Edw.* 3. 25. & 31 *Edw.* 3. *Voucher* 54. In Dower, if the Tenant vouche the heir within age in favour of Dower, he ought to ſhew a Deed, *vide* 11 *Edw.* 3. *Voucher* 13. 40 *Ed.* 3. 5. 50 *Edw.* 3. 25. 10 *Edw.* 3. 31.

[5]

Caſes of Tenures.

Hill. 40 Eliz. *in the Exchequer.*

Sir *John Molyn's* Caſe.

[b]

King *Edw.* 3. Lord, the Abbot of *Weſtminſter* Meſne, and C. Tenant of the Mannor of *Chippenham* in the County of *Buck.* The Tenant was attainted of Treaſon, and after office found thereof, King *Edw.* 3. granted over the ſaid Mannor to Sir *John Molyns*, and his heirs, To hold of us, our Heirs, and Succeſſors, and other the chief Lords of the ſaid Fee, by the ſervices *inde debita, & de jure conſueta*: Of whom, and how this Land ſhall be holden, was the queſtion. And it was objected that in this caſe the tenure ſhall be of the King, for three cauſes; 1. Becauſe the words of the *Tenendum* are, *per ſervitia inde debita, & de jure conſueta*; which words could not either revive, or create a Tenure to the Meſne; for by the Attainder the Meſnalty was extinct, and therefore at the time of the grant, no ſervices were due, and of right accuſtomed; for all ſervices were extinct: and therefore as in 27 *H.* 8. *Br. Parl.* 74. it is ſaid, That if the King hath Land by forfeiture of Treaſon, thereby all Tenures are extinguiſhed and determined, as well of the King as other perſons; and there, if this Land be given to another by Parliament, ſaving to all other their Rights, Rents, Services, &c. there the Seignories of common perſons are not revived; for no Seignory was in being *tempore ſecundi actus fatii*. So in the caſe at Bar, at the time of the making of the Letters Patents, there was no Seignory, or Service in being, and therefore of neceſſity the ſaid Mannor ought to be holden of the King; but the words ought to have been, by the ſervices before the Treaſon, or before the Attainder, *inde prius debita*. 2. In this caſe an expreſs Tenure is reſerved to the King; for the *Tenendum* is, To hold of us, &c. and therefore it ought to be holden of the King; and foraſmuch as the ſame Land cannot be immediately holden of many, for this cauſe theſe words *(and other the chief Lords)* &c. are void, and the firſt words, *viz. To hold of us, &c.* ſhall ſtand. 3. Divers Offices and Licences of Alienation, and other Records were ſhewed to the Court, by which it did appear, that the Law had been alwaies ſo taken, that the ſaid Mannor was holden of the King *in Capite*; *& conſuetudo eſt optima Legum interpres*. As to the firſt, it was anſwered and reſolved by the Barons of the Exchequer, that the words are ſufficient to create a Tenure in the Meſne, as it was before the Treaſon; for ſo is the Kings meaning, and it is conſonant

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to Equity, *viz.* that the Meſne who did not offend, ſhould not loſe his ſervices; and therefore the grant ſhall be taken beneficially for the honour of the King, and for the relief of the Meſne; and the words of the *Tenendum* cannot have any other reaſonable conſtruction; and as to this point they ſtrongly relied upon the Book in 33 *Hen.* 6. 7. where *Priſvil* ſaith, That if the King ſeiſed of any Lands by forfeiture of Treaſon, granteth the ſame Lands to another by theſe words, *Tenendum de capitali Domino per ſervitia debita & conſueta*, That the ſame Lands were holden of the chief Lord, as it hath been adjudged; and therewith agreeth 8 *Edw.* 3. 283. *vide* 46 *Edw.* 3. *Petition* 19. & 17 *Edw.* 3. 59. And as to the caſe of 27 *Hen.* 8. it was anſwered and reſolved, that that was not like to this caſe; for a ſaving cannot ſave that which is not *in eſſe*. But in the ſaid Book it is further ſaid, *viz.* Here are not words of Gift, or Reviving: But in the caſe at Bar, the Kings grant doth in judgment of Law amount to the reviving of the ancient Seignory. Note the gravity of the ancient Sages of the Law, to conſtrue the Kings grant beneficially for his honour, and the relief of the Subject, and not to make any ſtrict, or literal conſtruction in ſubverſion of ſuch grants. As to the ſecond point, it was reſolved, That all the words of the *Tenendum* in the caſe at Bar may well ſtand; for the ſaid Mannor ſhall be holden of the King as Lord Paramount, and of the Abbot as Meſne, *viz.* of the Meſne immediately, and of the King by Meſne, as it was before the attainder, and that was the honourable intention of the King, and ſtandeth well with the words: For as the Barons ſaid, divide the words of the *Tenendum* in two ſeveral Caſes, and then joyn them together, and the Caſe would be without any difficulty; Firſt, if the *Tenendum* had been, *de nobis hæred. & ſucc. noſtris per ſervitia inde debita, & de jure conſueta*, the tenure ſhall be of the King immediately. 2. If the words had been, *de Capitalibus Dominis feodi illius per ſervitia inde debita, & de jure conſueta*, the immediate Tenure ſhall be of the Abbot, as it was before, then joyn them together, as in the Caſe at Bar, and the Tenure ſhall be of the Abbot immediately, and of
[b] the King as Lord *Paramount*. As to the ſaid Offices, Licenſe, and other Records, the Barons ſaid, That foraſmuch as by conſtruction of Law upon the ſaid Letters Patents, it appeareth that there is no immediate Tenure of the King, although it had been otherwiſe found in Offices, or admitted in Licenſes, or other Records, the ſame cannot alter the true Tenure, which originally appeareth to them as Judges of Record. And it was ſaid, *Quod licet conſuetudo eſt magnæ authoritatis nunquam tamen præjudicat veritati.*

Paſch. 43 Eliz. *in the Exchequer.*

Wheeler's Caſe.

KIng *H.* 8. by his Letters Patents *ex certa ſcientia & mero motu* granted Lands in Fee, To hold of us and our heirs, by the ſervice of a Red Roſe yearly, at the Feaſt of the Nativity of St. *John the Baptiſt*, only for all and all manner of other ſervices. And it was adjudged in the Exchequer, that the ſame was a Tenure in Socage in chief. But it was objected, 1. That if the King granteth lands in Fee, and reſerveth nothing, the Patentee ſhall hold by Knights ſervice *in Capite*. The ſame Law if the King grant Lands by expreſs words, *abſque aliquo inde reddendo*, Or if he grant lands without any reſervation, the Tenure ſhall be of the King by Knights ſervice *in Capite* for the incertainty, and ſo it is holden in 33 *H.* 6. 7. 2. It was objected, That in the Caſe at Bar the Tenure cannot be by the ſervice of a Roſe only for all other ſervices, according to the words of the *Tenendum*, for to every Tenure there ought to be Homage, &c. Fealty at leaſt; then foraſmuch as the Tenure cannot be by a Roſe only, the King is deceived in his grant. 3. Foraſmuch as a ſervice above the Roſe, ought of neceſſity, by Con-
[7] ſtruction of Law be added to the Tenure; the beſt and higheſt ſervice ſhall be taken for the King, and that is Knights ſervice, for the uncertainty: yet it was reſolved, that foraſmuch as Fealty is incident to every Rent ſervice, the Law annexeth Fealty to the ſaid Rent, and then theſe words, *ſcil.* (For all other ſervices) is to be intended all other ſervices which the Law doth not imply or add to it, ſo that the Tenure ſhall be by a Roſe and Fealty, and that is the favourable Conſtruction of the Law, as near the Kings intent as may be. And by this conſtruction the ſaid words (for all other ſervices) have ſome effect, and ſhall not be rejected as idle, and of no force. And *Priſot* ſaid 33 *H.* 6, 7. That if the King granteth land, and reſerveth any ſpecial Rent, the Tenure ſhall be as he reſerveth it, be it Socage, or other.

Reſolutions

Reſolutions and differences when Bar in one Action ſhall be a Bar in another.

Mich. 40 & 41 Eliz. *in the Common Pleas.*

Ferrer's Caſe.

BEtween *Ferrers* and *Ardon* theſe points were reſolved: 1. When one is barred in any real or perſonal Act, or by Judgment upon demurrer, confeſſion, or verdict, &c. he is barred to that or the like action of the like nature for the ſame thing for ever. For *Expedit reipub. ut ſit finis Litium.* But there is a difference between real and perſonal actions. For in a perſonal action, as debt, accompt, &c. the bar is perpetual, for he cannot have an action of higher nature, and therefore in ſuch caſe he hath not any remedy but by Error, or attaint. But if the demandant be barred in a real action by Judgment upon verdict, demurrer, confeſſion, &c. yet he may have an action of higher nature, and try the ſame right again, becauſe it concerneth his Freehold and Inheritance. As if a man be barred in an aſſize of *Novel diſſeiſin*, yet upon ſhewing a deſcent, or other ſpecial matter, he may have an Aſſiſe of *Mortdanceſter*, *Aiel*, or *Beſaiel*, *Entrie ſur diſſeiſin* of his anceſtor. So if a man be barred in a *Formedon* in the Diſcender, he may have a *Formedon* in the Reverter, or Remainder; for that is an action of an higher nature; for therein the Fee-ſimple is to be recovered, according to the opinion in *Robinſon's* caſe, in the fifth part of my Reports. And if any one be barred by Judgment in any real action of the ſeiſin of his anceſtor, or of his own poſſeſſion, he may have a Writ of Right, in which the matter ſhall be tried and determined again. But recovery or bar in one Aſſiſe, is a bar in another Aſſiſe, and in a Writ of Entry in the nature of an Aſſiſe; for both are of his own poſſeſſion and of one nature between the ſame parties. So a bar in a Writ of *Aiel* is a bar in a Writ of *Beſaiel*, or *Coſinage*, &c. for theſe are Anceſtrel, and of one nature, and ſo of the reſt. So that the Law hath provided greater ſafety and remedy for matters of Freehold and Inheritance than for Debts and Chattels; for theſe once barred, are barred for ever (as it hath been ſaid) if it be not in a ſpecial caſe, as it appeareth in the ſaid *Robinſon's* Caſe; *vide Fitz. Nat. Brev.* 5. 30 *Aſſ. p.* 5. 4 *Ed.* 3. *Eſtoppel* 133. 5 *Aſſ. p.* 1. 11 *Edw.* 3. *Entre* 56. 12 *Edw.* 4. 13. 2 *Hen.* 3. 14. 33 *Hen.* 8. *br. action ſur le caſe* 105. 29 *Hen.* 8. *br. Dett.* 174. But in a *Formedon* in the Diſcender, if the demandant be barred by verdict or demurrer, yet the Iſſue in tail ſhall have a new *Formedon* in the Diſcender upon the conſtruction of the Statute of *Weſtm.* 2. *cap.* 2. So if he be barred in a Writ of Error upon the releaſe of his anceſtor, his iſſue ſhall have a new Writ of Error, for he claimeth in not only as heir, but *per formam doni*; and by the Statute ſhall not be barred by fraudulent pleading, or falſe pleading of his anceſtor, ſo long as the right of the Intail remaineth; and therewith agreeth, 10 *Hen.* 6. 5. 3 *Eliz. Dier* 188. Sir *Ralph Rowlet's* Caſe. Another difference is in real actions and perſonal, between a plea to the action of the Writ, and a plea to the Writ, for if the Demandant or Plaintiff hath miſtaken his action, ſo as the plea of the Tenant goeth to the action of the Writ, as *Formedon* in the Remainder, where it ſhould be *Formedon* in the Reverter, ſuch action without judgment upon verdict or demurrer, &c. doth not bar the Defendant of his rightful action; and therefore if the Defendant in ſuch caſe be Non-ſuit, or the plea be diſcontinued, he may bring his righful action; and therewith agreeth 27 *Edw.* 3. 84. 6 *Hen.* 4. 2. 2 *Rich.* 2. *Eſtoppel* 210. 4 *Edw.* 3. 54. But if the plea be but to the Writ, ſo that the ſame nature of Writ remaineth, in ſuch caſe although the plea to the Writ be adjudged againſt the demandant upon demurrer or verdict, &c. yet he ſhall maintain the ſame Writ again; for the judgment doth extend but to the Writ, and therewith agreeth 3 *Edw.* 3. *Eſtoppel* 134. 30 *Aſſ. p.* 8. Another difference in real actions, between ſuch perſons as have not the meer right in them, but a qualified right, although they be barred in real actions (without making them parties who have intereſt) ſhall not bind the Succeſſor, as Parſon, Prebendary, &c. For in ſuch caſe in a new action of the ſame nature by the Succeſſor, he ſhall falſifie; and the Recovery was not any diſcontinuance but the Succeſſor may enter. Otherwiſe of an Abbot, Biſhop, or the like, who have the whole Fee-ſimple in them, in ſuch caſes the Succeſſor at the Common Law ſhall not falſifie in a *Scire facias*, or new action of the ſame nature. The ſame Law when recovery is had againſt them, for it hath been adjudged that in a Writ of Right againſt a Parſon, who after the miſe joyned made default, and Judgment was given againſt him; yet the Succeſſor had a *Juris utrum*, becauſe he had not the meer Right, nor had prayed in aid of the Patron and Ordinary. The ſame Law of Tenant in Tail; *vide* 8 *Edw.* 3. 28, 29. 19 *Hen.* 6. 39. 7 *Hen.* 4. 20. 4 *Hen.* 7. 2. 12 *Hen.* 8. 8. 10 *Hen.* 6. 5. *b.* 15 *Edw.* 3. *Fauxer de recovery* 43. *Fitz. Nat. Brev.* 49. And if a Parſon, Vicar, or Prebend, &c. loſe by default in real action, he himſelf may have a *Juris utrum*; for that is his Writ of Right, as it is ſaid in the Regiſter, 32. *b.* And it ſhall be againſt reaſon that he ſhall not have any remedy, and principally the ſame being the right of the Church, which is favoured in Law. And it is to be obſerved, that when any one bringeth an Aſſiſe of *Novel diſſeiſin*, *Mortdanceſter*, Writ of *Entry ſur diſſeiſin*, or other real action, and he be barred by Judgment upon demurrer, or verdict, &c. the demandant and his heirs are not only barred of the ſame action, but alſo as long as the Record of the Judgment ſtandeth in force, he and his heirs are barred of their Entry, and are put to their action of higher nature; *vide* 25 *Hen.* 8. *Dier* 5. And whereas it is ſaid in Book, that

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Privies ſhall not falſifie in the point tried, the ſame is as much as to ſay, that they ſhall not falſifie in a *Scire facias* upon the ſame Judgment, or in another Writ of the ſame nature. But he may bring an action of an higher nature, and therein try the matter again, as it hath been ſaid before. But in *Robinſon's* caſe, foraſmuch as the Defendants in the firſt action gave to the Plaintiff, &c. action as Executor, and peradventure the Plaintiff at the time he brought his action as Adminiſtrator, did not certainly know of the
[b] Will, foraſmuch as (as it is ſaid in 27 *H. 6. Eſtoppel* 273.) he may be made Executor unknown to him; for this cauſe there in the ſaid *Robinſon's* caſe it was adjudged for the Plaintiff. Note Reader, at the Common Law, that if one had ſuffered a Recovery againſt him in any real action by default (if he were lawfully ſummoned, and no Error was in the proceeding) he had not (the caſe of an Infant only excepted for the tenderneſs of his years, and defect of underſtanding) any remedy but by Writ of Right: and that was the cauſe that Tenant in tail, Tenant by the curteſie, Tenant in dower, or Tenant for life after recovery by default, had not any remedy until the Statute of *Weſtm. 2. cap.* 4. gave to them a Writ of *Quod ei deforceat*, the words of which Act are; Whereas before time a man had loſt his Land by default, he had none other Recovery than by a Wright of Right, which was not maintainable by any that could claim of meer Right, neither of demandants for life, &c. It is provided that from henceforth their default ſhall not be prejudicial, but that they may recover their eſtate by another Writ, than by a Writ of Right, &c. Note, if a man loſe in the Aſſiſe, the Tenant is not put to his Writ of Right, but may have an Aſſiſe of *Mordancеſter*, 5 *Aſſ.* 1. No Recovery in Aſſiſe is a bar in a *Formedon* in the Reverter, as it is holden in 6 *H.* 4. 2. Note the Statute ſaith (by default) and that cannot be in Aſſiſe; for the Aſſiſe ſhall be adjudged. If a Recovery be againſt one by default, or upon a plea of the Bayley in Aſſiſe, the Defendant upon releaſe, &c. *vide Weſt.* 2. *cap.* 25. may have certificate, and ſo relieve himſelf, *Fitz. Nat. Br.* 181. 26 *Aſſ.* 5. Regiſter Judicial 11. 6. If the Husband had ſuffered a Recovery by default againſt him and his Wife, the Wife had not any remedy but a Writ of Right, and that appeareth by the Statute of *Weſtm.* 2. *cap.* 3. In caſe where the Husband loſt by default that was the right of the Wife, it was a hard thing that the Wife after the death of her Husband had none other Recovery but by a Writ of Right. The ſame Act gave a *Cui in vita* to the Wife in ſuch caſe, and a Writ of Entry to him in the Reverſion upon a Recovery had by default, or Reddition againſt the Tenant for life, *Fitz. Nat. Br.* 86. If ſuch particular Tenant loſe by action tried in a real action; at this day it ſeemeth they are without remedy, and therewith agreeth 50 *Edw.* 3. 7. *vide Temps Edw.* 1. *Eſtoppel* 171. & 235. and *Litt.* Chapter *Releaſes* 112. *b.* That if the Tenant, where the Remainder was over in Fee, had ſuffered a Recovery, that he in the Remainder before the ſaid Statute was without remedy; and the reaſon of the ſtrictneſs of the Common Law in ſuch caſe was
[9] to take away the multiplicity and infiniteneſs of Real ſuits, Recoveries, and Judgments in the ſame caſe; and therefore in the judgment and policy of the Law it was thought more profitable to the Commonwealth, and to the honour of the Law, to leave them without any remedy (as is aforeſaid) and to put others to their Writ of Right, without any reſpect of coverture, &c. than that there ſhould not be an end of actions and ſuits, *vide* the Judgment in *Rediſſ. & poſt diſſeiſ.* F.N.B. 188. & 190. And the puniſhment inflicted by the Law againſt him who ſhould diſſeiſe him who is in by Judgment of the Law in ſuch caſe; and the *Regiſter* 206, 208. For as it hath been well ſaid, *Intereſt reipub. ut ſit finis litium*; otherwiſe great oppreſſion may be done under colour and pretence of Law; for if there ſhall not be an end of ſuits, then a rich and malicious man would infinitely vex him who hath right by ſuits, and actions; and in the end (becauſe he cannot come to an end) compel him to yield to his charge and vexation, and to leave and relinquiſh his right; all which was remedied by the rule and reaſon of the Common Law, the neglect of which rule (by introducing of Trials of Rights, and Titles of Inheritance and Freehold in perſonal actions, in which there is not any end or limitation of ſuits) hath with it brought in four great inconveniencies. 1. Infiniteneſs of Verdicts, Recoveries, and Judgments in one and the ſame caſe. 2. Sometimes contrarieties of Verdicts and Judgments one againſt the other. 3. The continuance of ſuits for twenty, thirty, and forty years, to the utter impoveriſhing of the parties. 4. All the ſame tendeth to the diſhonour of the Common Law, which utterly abhorreth infiniteneſs, and delaying of ſuits, wherein is to be obſerved the excellency of the Common Law, for the rejecting the true inſtitution of it doth introduce many inconveniencies, and the obſervation thereof is always accompanied with reſt and quietneſs, which is the end of all humane Laws. And by all theſe differences and reaſons you will better underſtand your Books, in 8 *Ed.* 3. *droit* 35. 4 *Ed.* 3. *droit* 31. 3 *E.* 3. 16. 7 *Ed.* 3. 19. 8 *Ed.* 3. 54. 9 *Ed.* 3. 13. 18 *Ed.* 3. 31, 35. 18 *Ed.* 3. *Eſtoppel* 221. 30 *Ed.* 3. 19. 13 *Aſſ. p.* 1. 17 *Aſſ. p* 27. 27 *Aſſ. p.* 21. 24 *Aſſ. p.* 14. 30 *Aſſ. p.* 8. 30 *Aſſ.* 51. 31 *Aſſ.* 28. 32 *Aſſ.* 13. 31 *Aſſ.* 14. 33 *Aſſ.* 5. 19 *Ed.* 3. *Eſtoppel* 227. 40 *Ed.* 3. 21. 44 *Ed.* 3. 44 *Ed.* 3. 45. 45 *Ed.* 4. *Br.* 589. 7 *Hen.* 4. 15. 3 *Hen.* 6. 15. 22 *Hen.* 6. 27. 7 *Ed.* 4. 19. 2 *Rich.* 3. 14. 10 *Hen.* 6. 5. 37 *Hen.* 6. 31, 32. 12 *Ed.* 4. 13. 9 *H.* 7. 23. 21 *H.* 7. 24. 29 *H.* 8.
[b] *br. Det.* 174. 33 *H.* 8. *br.* action ſur le caſe 105. 7 *Ed.* 6. *br. Eſtoppel* 162. 23 *Eliz. Dier* 371. *Bracton, lib.* 4. *fol.* 262. Note, Reader, at the Common Law, if Land had been conveyed out of the degrees, ſo that the demandant could not have a Writ of Entre in the *per*, or *per & cui*, the demandant was put to his Writ of Right; for no Writ of Entre in the *poſt* was at the Common Law, and the reaſon thereof was as hath been ſaid, *quod ſit finis litium*, and that he who hath right ſhould take his remedy by Writ of Entre, before there ſhould be more than two alterations, and that appeareth by the Statute of *Marlebridge cap.* 29. *Vide F.N.B.* 192. 7 *Ed.* 3. 25. & 325. 17 *Ed.* 3. 69. 22 *Ed.* 3. 1. 7 *Hen.* 4. 17. *&c.*

Where

Where a Writ ſhall be brought by Journeys accompts.

Hill. 45 Eliz. Rot. 36. *in the Common Pleas.*

Spencer's Caſe.

WIlliam *Spencer*, and *Mary* his Wife brought a *Formedon* in the Deſcender againſt *John Dalby*, who voucheth *R. S.* the Demandant did counterplea the voucher ſpecially, and ſhewed, that the ſame Demandant at another time did proſecute a *Formedon* in the Deſcender againſt the ſame Tenant for the ſame Land, and had Judgment againſt him by default upon *Grand cape*, which Judgment was reverſed by a Writ of *Diſceit* brought by the Tenant, becauſe he was not duly ſummoned; and that this Writ was brought by Journeys Accomps, *viz. per dietas computat.* And the Demandants *ulterius dicunt*, that *præd* R. S. *quem, &c. nec aliquis anteceſſorum ſuorum cujus hæres ipſe eſt unquam aliquid habuerunt in tenementis prædictis cum pertinen. in Dominico, reverſione, nec in ſervitiis poſt donum prædict. uſque diem impetrationis prædicti primi brevis, ita quod prædictum* J. Dalby *aut aliquem anteceſſorum ſuorum inde feoffaſſe potuit, & hoc petit quod inquiratur per patriam*, and demurred upon the Counter-plea. And in this caſe two points were reſolved by the Court. 1. A difference was taken when the firſt Writ doth abate by default of the Demandant himſelf, as by his miſ-information of the Tenants name, or of the Town, &c. for there the demandant ſhall never have a Writ by Journeys Accompts, as the Books are in 48 *Ed.* 3. 21. 14 *Hen.* 4. 23. 32 *Hen.* 6. 28. *vide* 9 *Ed.* 3. *br.* 244. But where the Writ abateth for default of the Clerk, as where it abateth for falſe *Latin*, or variance, or want of form, there the demandant ſhall have the benefit of a new Writ by Journeys Accompts, becauſe it was the fault of the Clerk of the *Chancery*, and not the fault of the demandant himſelf, as the Books are agreed in 26 *Ed.* 3. *Quare Imped.* 163. 25 *Ed.* 3. 54. 38 *Ed.* 3. 5. 14 *H.* 4. 23. 22 *Hen.* 6. 62. 13 *Hen.* 4. *Executors* 118. By the ſame reaſon when the Writ abateth for want of good ſummons, for that is the fault of the Sheriff, and not of the demandant himſelf, and therefore it was reſolved that in ſuch caſe the demandant ſhall have a new Writ by Journeys Accompts. See 4 *Ed.* 3. 130. 8 *Ed.* 3. 377. 42 *Ed.* 3. 16. 22 *Ed.* 3. 15. 14 *Hen.* 6. 4. 46 *Ed.* 3. 14. 21 *Hen.* 6. 8. 22 *Hen.* 6. 62. 11 *Hen.* 6. 42. But 41 *Ed.* 3. 2. 7 *Hen.* 4. 8. *&* 22 *Hen.* 6. 46. *&c.* are contrary. And ſo an old queſtion in our Books well reſolved. If a Writ abate for nontenure of the whole, the demandant ſhall not have a new Writ by Journeys Accompts, becauſe the firſt Writ was begun without cauſe, and without any probable colour of cauſe; and therewith agreeth 33 *Hen.* 6. But a *Præcipe* of a Mannor being abated by nontenure of the party, the demandant ſhall have a Writ by Journeys Accompts, becauſe the Tenant was Tenant to the reſidue for which the new Writ is brought; and it is hard to drive the Tenant to know in whom every part of the Mannor is, and therewith agreeth 4 *Ed.* 3. 159. So if the *Præcipe* abate by Joyntenancy of part of the Tenancy, becauſe that every Joynteriant is ſeiſed of the whole, and may occupy in the whole, he ſhall have a new Writ by Journeys Accompts 17 *E.* 3. 39. 38 *E.* 3. 16. 33 *H.* 6. 2. 41 *E.* 3. 4. 33 *H.* 6. 2. A Judicial Writ ſhall never be purchaſed by Journeys Accompts, as it is holden in 22 *H.* 6. 62. 27 *E.* 3. 84. *&* 45 *E.* 3. *tit. Journey Accompts* 10. and the reaſon is, becauſe that a Judicial Writ ſhall never abate for want of Form, 4 *Hen.* 6. 3, 4. [b] Alſo a man ſhall never have a Writ by Journeys Accompts in other Court than the firſt Writ was, as it is holden in 8 *Ed.* 3. 386. 8 *Aſſ. p.* 8. 18 *Ed.* 2. *Eſtoppel* 263. A Writ of Journeys Accompts ought to be brought of the ſame quantity that the firſt Writ containeth, as it is adjudged in 13 *H.* 4. 12. *a.* And regularly a Writ of Journeys Accompts doth not lie but between thoſe who are parties to the firſt Wrt, as where one of the Plaintiffs dieth, or one of the Defendants. *Vide* 8 *E.* 3. 428. 10 *E.* 3. 498. 8 *H.* 5. 6. 7 *Hen.* 6. 17. 24, 25. 15 *E.* 3. *Journeys Accompts* 14. 43 *E.* 3. 16. 48 *E.* 3. 22. 33 *H.* 6. 3. 21 *H.* 6. 46. And no Writ ſhall be brought by Journeys Accompts but where the firſt Writ is ſerved, and returned of record, 14 *H.* 6. 7. But in no caſe where there is a ſole Plaintiff or Demandant, and he dieth, there his Heirs or Executors ſhall never have a Writ by Journeys Accompts, although it be in a *Quare Imped.* where the death after the ſix months is peremptory, as it appeareth in 19 *E.* 2. *Darreine preſentment* 21. *F. N. B.* 32. *c.* 10 *E.* 3. 17. Dutcheſs *de la Rivers* caſe. 2. It was reſolved, that in the caſe at Bar a new Writ by Journeys Accompts is *quodammodo* a continuance of the firſt Writ; and therefore if it be againſt Executors, they ought to plead fully adminiſtred the day of the firſt Writ brought, 21 *H.* 6. 9. 13 *H.* 4. *Execution* 118. 9 *E.* 4. 6. Coſts of the firſt Writ ſhall be recovered. See the *Book of Entries* 328. *b.* And therefore it was reſolved in the principal caſe, that the Tenant cannot vouch upon cauſe after the firſt Writ, and after by aſſent of the Tenant plead in bar. See *Dier* 36 *H.* 8. 55. If the Plaintiff be Knight, the writ ſhall abate, and it ſeemeth he ſhall not have a writ by Journeys Accompts, becauſe it is his own act. Note Reader, I conceive it is requiſite to expound to you theſe words, Journeys Accompts. 1. When a writ is purchaſed by Journeys Accompts it is ſaid in the Replication (reciting the former writ, that the ſame abated, and ſhew all in certainty) *ſuper quo*, the demandant *per dietas computat. recenter tulit quoddam breve, &c.* For the alledging of Journeys Accompts is always either by way of Counter-plea to ouſte the Tenant of voucher, as in the caſe at Bar; or by way of Replication, as it is commonly to ouſt the Tenant to plead Nontenure, or Joyntenancy, or any other plea which ariſeth upon matter after the date of [10] the

the firſt writ. See the *Book of Entries*, tit. *Journeys Accompt* 382. *b.* And Journeys Accompts, or by accompt of daies, *i. e. recenter*, and with diligence. *Vide Bracton, lib.* 4. *fol.* 176. where he ſaith, *Eſto*
[11] *quod propter aliquem defectum cadit primum breve cum forte inepte ſit conceptum, vel alio modo vitioſum quod non ſtare poſſit, & diſſeiſitus incontinenti impetrare incipiat aliud breve, &c.* By which it appeareth, that the ſecond Writ ought to be brought in reaſonable and convenient time to be diſcuſſed by the Juſtices; for which cauſe the Demandant ought always put certain the abatement of the firſt writ, ſo that it may appear to the Court, if the latter writ was purchaſed by Journeys Accompts, 7 *Ed.* 3. 203. *acc'*, *vide* 18 *Ed.* 3. 24. & 32 *Ed.* 3. *Journeys Accompts* 16. that fifteen daies were allowed.

Paſch. 25 Eliz. *between* Crosby *and* Jentleman *in the Kings Bench, divers Points were reſolved concerning Judges of Courts.*

Jentleman's Caſe.

IT is to be obſerved, that the words of a Writ of Right directed to the Lord of a Mannor are, *Præcipimus tibi, quod plenum rectum teneas* A. *de* B. *de uno meſſuagio, &c.* And the words of a Writ of *Juſticies* are, *Rex vic. S. Salutem. Præc. tibi quod Juſticies* A. *quod juſte & ſine dilatione reddat* B, 20 *l. &c.* And ſo of other Writs which are Vicountil. So the writ of *Droit cloſe* is directed to the Lord of the Mannor; *Præcipimus tibi quod ſecundum conſuetudinem Manerii, &c. plenum rectum teneas, &c. de uno meſſuagio.* And the Writs are in the ſame words when they are directed to the Bailiffs of a Mannor. And upon the words aforeſaid it was objected, that in ſuch caſes that the Lord, or the Bailiffs, or the Sheriff, are
[b] Judges, for they have authority by the Kings Writ, and the Writs are directed to them, and not to the Suters; and therefore it was ſaid, That the difference is, when the plea is in ancient Demeſne, Court Baron, or County Court without writ, there the Suters are Judges; but when the writ is directed to the Lord, or Bayliffs, or Sheriff, by which they are commanded to do Right and Juſtice to the parties there they are Judges. Alſo it was ſaid, that by force of *Juſticies* a plea may be holden in the County above forty ſhillings, and therefore it is reaſon that another Judge ſhould be appointed than the Suters, who of common right are Judges of ſmall things under forty ſhillings. And to this purpoſe are ſome opinions in *temp. Edw.* 1. *tit. Det.* 177. 21 *Edw.* 4. 66. & 21 *Hen.* 6. *tit. Retorne* 17. 21 *Hen.* 6. 34. 44 *Ed.* 3. 10. where *Finchden* holdeth, where the admeaſurement of power is made before the Sheriff, the Sheriff is Judge. But upon conſideration of all the Books it was reſolved, that in none of the ſaid Caſes, the Lord of a Mannor, or the Bayliffs, or Sheriff are Judges; but be the plea holden by writ, or without writ the ſuters are Judges. And the reaſon why the writ ſhall be directed to the Lord, or Sheriff, &c. is, becauſe the Court Baron is the Lords Court, and the County Court is the Sheriffs Court; and therefore it is great reaſon the writ be directed to him to whom the Court doth belong, to the end he ſee two things performed: 1. To hold his Courts that Juſtice and Right be therein done to the parties. 2. That he be anſwered the profits of his Court which belong to him. But in caſe where they hold plea by force of the Kings writ, it doth not change the nature and juriſdiction of the Court: For as theſe without writs are not Courts of Record, ſo when the plea is holden by writ, the Courts are of the ſame nature; for upon a judgment given in both caſes, a writ of falſe judgment lieth, and not a writ of Error: But if the writ which of Record ſhould conſtitute a new Judge, *viz.* the Lord in the one caſe, and the Sheriff, &c. in the other, then the authority of the Judge being by the Kings Writ, which is of Record, the Court as to this purpoſe ſhall be alſo of Record, which is very falſe. For without queſtion, as it appeareth by *F. N. B.* and all the Books, a writ of falſe judgment lieth in ſuch Caſe, although the plea be holden by writ: Alſo the Kings writ cannot alter the juriſdiction of the Court Baron, County, Hundred, &c. which are all Courts at the Common Law, and have Judges authorized and appointed in them by the Law; and therefore all things determinable in thoſe Courts ought to be determined by the Judges of the ſame Courts; but it is true, the King may create a new Court, and appoint new Judges in it; but after the Court is eſtabliſhed and created, the Judges of the Court ought to determine the matters in the Court. And therefore neither the Lord of ancient Demeſne, nor of a Court Baron, nor the Sheriff in the County Court, when the plea is
[12] holden by writ of Right, Juſticies, Admeaſurement, &c. are Judges, but the Suters, who are by the Common Law, are the Judges of the Court. And therewith agree the Books in 34 *H.* 6. 35. 39 *H.* 6. 5. 7 *E.* 4. 23. 6 *E.* 4. 3. 12 *H.* 7. 16, *&c.* And obſerve well the words of the writ in the *Regiſter*, 10. *b. Rex ſectatoribus, Cur. J. Manerii de* G. *quæ eſt de antiquo Dominico Coronæ* Angliæ, *ut dicitur, Salutem. Cum ſecundum legem & conſuetudinem infra maneria, quæ hujuſmodi antiquo Dominico Coronæ* Angliæ *hactenus exiſtunt, ut dicitur, uſitatis in placitis in Curia eorundem Maneriorum pendentibus, cum ad judicium inde reddendum ſit placitatum, ſectatores hujuſmodi curiæ ad judicia in placitis inde reddend. licite proceder debeant & conſueverunt totis temporibus retroactis.* And there it appeareth, that the plea did there depend by a writ of *Droit cloſe, &c. Vobis mandamus, &c. ad judicium inde reddendum cum omni celeritate procedatis, &c.* by which it appeareth that although the plea is holden by writ, yet the Suters are the only Judges. It appeareth alſo by the ſaid Books, That in a Hundred Court, the Suters are Judges, and ſo the Law well reſolved in a Caſe, wherein there was variance in opinions in our Books. But in ſome

Caſe,

Case, the Sheriff is made Judge by Parliament, as in Rediſſeiſin, by the Statute of *Merton*, *cap.* 3. And all his proceeding, by force of that Act, is of Record; and a writ of Error lieth of a judgment given againſt him, &c. *vide* 44 *E.* 3. 10. In a Court of Pipowers the Steward is Judge, 6 *H.* 4. 3. *acc.* 7 E 4 23. In the Leet the Steward, and in the Torne the Sheriff to judge, 10 *H.* 6. 7. 7 *H.* 6. 12. 12 *H.* 7. 15. In the Court of Marſhalſea, The Steward and Marſhal of the Kings Houſe are Judges, 19 *E.* 4. 8. *F. N. B.* 241. 20 *E.* 4. 16. 7 *H.* 6. 3. 4 *H.* 6. 8. *Artic. ſuper Chartas*, *cap.* 3.

Paſch. 27 Eliz. *in the Common Pleas.*

Morrice's Caſe.

BEtween *Smith* and *Morrice*, the caſe was ſuch, Two Joyntenants are with warranty, and partition was made between them by judgment in a writ of *partitione facienda*, by force of the Statute of 31 H. 8. *cap.* 1. And it was adjudged that the warranty doth remain, becauſe by writ they are compellable by the Statute (to which every one is party) to make partition, and the party hath purſued his remedy according to the Act, and therefore none can have wrong by the operation of the ſaid Statute, to which every one is a party: But if they had made partition by Deed, by conſent, after the ſaid act, although they were compellable by writ to make partition, yet foraſmuch as they have not purſued the Statute to make partition by writ, for ſuch cauſe ſuch partition doth remain at the Common Law, and by conſequence the warranty is gone, as it is agreed in 29 *E.* 3. *tit. Warranty*. And it was reſolved, that after the ſaid Statute, although that now Joyntenants are compellable to make partition by Writ as Coparceners are, yet they may not make partition by word as Coparceners may by the Common Law; and the reaſon was, becauſe the Statute doth not extend to any partition but by Writ *de partitione facienda* only, but leaveth all other partitions as they were before. And it was ſaid, If there be two Joyntenants with warranty, and the one doth diſſeiſe the other, and the diſſeiſee bringeth an Aſſize, and upon his prayer hath judgment to recover in ſeveralty, in this caſe the warranty is gone: for although he hath partition by judgment, yet he who is bound by the warranty, is not party, or privy, or conſenting to it, as he is when partition is made by force of the Act of Parliament. Note, Reader, that although ſome Books are, that Judgment ſhall be given to hold in ſeveralty in the caſe of Joyntenants, as 10 *Edw.* 3. 40. & 10 *Aſſ. p.* 17. yet I conceive it ſhall be hard in Law to maintain the judgment: For 1. the Plaintiff in the Aſſiſe ought for to recover according to his plaint, and that is of nothing in ſeveral. 2. He ought in the Aſſiſe to recover by view of the Recognitors, and they have not the view of any thing in ſeveralty. 3. It ſhall be to the Plaintiffs prejudice as well for the ſurvivor, as for warranty, and the like: And therewith agreeth 28 *Aſſ. p.* 35, where the caſe was not upon any opinion at the Aſſiſes but upon adjornment into the *Common Pleas*, and there adjudged that the Plaintiff ſhould recover generally, although the Plaintiff himſelf prayeth, that the Judgment might be, that he hold in ſeveralty; for the prayer of the party ſhall not alter the Judgment of the Law in ſuch caſe. [b] [13]

Caſes of Pardon.

Hill. 29 Eliz.

THe General Pardon of 28 *Eliz.* doth pardon all Felonies, &c. In which Burglary was excepted. And this Term it was asked all the Judges of *England*, If the attainder of one for Burglary be excepted? And it was objected, that by the Attainder and Judgment the offence of Burglary, which was but matter in fact, is now altered by the Judgment, and become of Record, and thereby the offence utterly extinct; and then it is not (by name of Burglary) excepted, and by conſequence he who is ſo attainted of Burglary ſhall be pardoned. But it was reſolved, That the attainder was excepted; for if the Burglary be excepted, although it doth not appear to the Eye of the Law, but it ſtandeth in doubt, and is left to trial, if it be Burglary or not, *a fortiori*, when the Burglary appeareth on Record by Judgment of Law, it ſhall be excepted. And it was ſaid, That the Burglary was not extinct, but had received ſuch Judgment (by which it is manifeſt) as the Law requireth, which Judgment ſo long as it remained in force, the offender cannot be called in queſtion for the Burglary, becauſe the Law hath had its end; but that proveth not but that the offence of Burglary remaineth, as in 20 *Aſſ. p.* 7. *A.* was bound in a Statute of twenty pound to *B*, *B.* ſued Execution, and the Land of *A.* was delivered to *B.* in Execution until he had levied the twenty pound, and afterwards *B.* made a defeaſance to *A.* by Indenture, that if *A.* paid to him eight pound at a certain day, that then the Recognizance, *viz.* the Statute of twenty pound ſhould be void: And it was adjudged that although the Statute was executed, yet the defeaſance of the Statute is ſufficient in Law to defeat as well the Statute as the Execution upon it; for the Statute is the Foundation, and therefore if that be deſtroyed, all which is built upon it ſhall be deſtroyed alſo. [b]

alſo. So in the principal caſe, although the Jury have found the Priſoner guilty of Burglary, and thereupon he hath Judgment: Yet the offence of Burglary is the Foundation, and therefore if the ſame be excepted, all which is builded upon it is excepted. Alſo ſee in my laſt Reports, where by the exception of the offence in the General Pardon, all dependants upon it are alſo excepted. And yet if a man be attainted of felony by Judgment, Outlawry, or Abjuration, and afterwards the King pardoneth generally the felony, it is nought worth, but the reaſon thereof is not becauſe that by the Attainder the felony is extinct, but that the King is not truly informed (as he ought to be) of the true eſtate of the cauſe, for peradventure if it had been informed of the truth of all the proceedings, he would not have pardoned it, *vide* 9 E. 4. 28. and 19 E. 3. *Corone* 124. 11 H. 4. 16. 48. *Stamford* 102. *b.* But if a man be attainted of felony, and the King pardoneth the Attainder, and execution of it alſo, this pardon ſhall be diſallowed, becauſe the King cannot pardon the felony by expreſs words, as it is adjuded in 8 H. 4. 22. *b.* which proveth that the felony doth remain. But 33 H. 8. 50. If murder or petit Treaſon be made High Treaſon, thereby the Murder or petit Treaſon is extinct, for High Treaſon doth drown every leſs offence, *vide M.* 6. and 7 *Eliz. Dier* 235. If a man killeth his Maſter, and petit Treaſon is pardoned by the general pardon, and Murder is excepted, he ſhall be diſcharged, for petit Treaſon is Murder, and more, *vide* 20 *Eliz. Dier.* One *Burton* Parſon of *Isbock* in *Leiceſterſhire* was deprived, *anno* 12 *Eliz.* for Adultery committed *anno* 11 *Eliz.* And afterwards by the general pardon 2. *April* 13 *Eliz.* the offences of Adultery amongſt others were pardoned before the 14*th* day of *Feb.* then laſt paſt, and it was ſaid that before the pardon, *Crimen adulterii prædicti tranſivit in rem judicatam*, and therefore the ſentence remained in
[14] force; And it was ſtrongly urged that the ſentence ſhould not by the relation of the ſaid pardon be made void, but at the moſt voidable, and therefore until it be reverſed by another ſentence the deprivation ſtood in force, and he who was after his deprivation admitted, inſtituted, and inducted, remaineth Parſon till the firſt ſentence by another be annulled; But it was anſwered and reſolved, that the ſaid *Burton* who was deprived, by force of the ſaid pardon, is now become Parſon again without any ſentence declaring the ſaid deprivation to be void; For by the Pardon, the Adultery, which was the cauſe and foundation of the ſentence, is diſcharged, and by conſequence all that dependeth upon it is alſo diſcharged. And no Laches was in the Parſon, or fault in pleading; for at the time of the ſentence he had not any matter of diſcharge, but it came *ex poſt facto*, by relation of the general pardon, and by Judgment in Law, the party deprived ſhall not be driven to a ſuit in the Eccleſiaſtical Court to have it redreſſed there: And ſo it ſeemeth if one be attainted of felony, and afterwards by relation of a general pardon the felony is pardoned, that he ſhall be diſcharged, for he hath not any remedy by Error, or otherwiſe to reverſe the Attainder.

Trin. 36 Eliz. *in the Kings Bench.*

Arundel's Caſe.

John Arundel Eſquire was indicted of the murder of one *William Parker*, and the Murder was alledged to be done at the City of *Weſtminſter*, *&c.* in a certain ſtreet there, called *Kings ſtreet*, in the Pariſh of St. *Margaret*, in the ſaid County of *Middleſex*: And to this Indictment *Arundel* pleaded Not Guilty, for the trial of this iſſue a Jury was returned *de Viceneto civitatis Weſtm.* And the Jury found the Defendant guilty. And it was ſhewed in arreſt of Judgment, that the viſne ought to have been out of the Pariſh, and not of the City. And upon that doubt the Juſtices did meet at *Serjeants Inn*, and after many
[*b*] Arguments, 1. They reſolved, That every trial ſhall be out of ſuch place, which by preſcription of Law can have beſt knowledge and notice of the fact, as in 23 E. 4. viſne 27. If Treſpaſs be brought in a Town, and no ſuch Town be pleaded, the viſne ſhall come out of the body of the County, but if Treſpaſs be brought in two Towns, and no ſuch Town be pleaded as to one, the viſne ſhall be out of the other Town; for that is the moſt certain. And if Treſpaſs or other Action be brought in a Manor, &c. the viſne ſhall come out of the Mannor: But if the Mannor be alledged to be in a Town, there becauſe the Town is more certain than the Mannor (for that may extend into many Towns) the viſne ſhall come out of the Town, as it is holden in 6 *Hen.* 7. 3. *b.* 11 *Hen.* 7. 22. *b.* 9 *Ed.* 4. 3. *a.* 3 *Ed.* 4. 26. 39 *Hen.* 6. *tr.* 63, *&c.* So in the principal caſe becauſe the Pariſh ſhall be intended more certain than the City, for this cauſe the viſne ſhall be rather of the Pariſh than of the City. And although that a Pariſh is a place uncertain, and may comprehend divers Towns, as it is holden in 4 *Ed.* 4. 41. 5 *Ed.* 4. 20. 125. 22 *Ed.* 4. 2. 35 *Hen.* 6. 30. 22 *Hen.* 6. Yet when a Pariſh is alledged to be in a City, there the viſne ſhall come from the Pariſh, 1 *Ed.* 3. 8. 7 *Hen.* 6. 38. and it ſhall be intended that the Pariſh is leſſer than the City. And afterwards it was awarded that the Trial was inſufficient, and a new *Venire facias* awarded to try the Iſſue again, becauſe his life was never in jeopardy.

Mich.

Mich. 36 & 37 Eliz. *In the Kings Bench.*

Treport's Case.

IN an *Ejectione firmæ* the Plaintiff declared upon a Leaſe made by *A.* and *B.* and upon Not Guilty pleaded, the Jurors gave a ſpecial verdict, *viz.* That *A.* was Tenant for life, the Remainder to *B.* in fee, and they both by Indenture did joyn in a Leaſe to the Plaintiff, and that *A.* the Tenant for life was alive; and if it ſhall be adjudged the Leaſe of both or not, the Jury doubted; and it was reſolved, That preſently by the delivery of the Deed it is the Leaſe of *A.* during his life, and the confirmation of *B.* and after the death of *A.* it is the Leaſe of *B.* and the confirmation of *A.* according to the opinion of *Dyer* and *Brown*, *Mich.* 6 & 7 *Eliz.* 234, 235. And becauſe the Plaintiff hath declared upon a joynt demiſe of *A.* and *B.* it was adjudged againſt the Plaintiff. Alſo it was holden by the Court, That if Leſſee for life, and he in the Remainder or Reverſion in fee make a Feoffment by Deed, each giveth his eſtate, *viz.* Leſſee for life his eſtate by Livery, and the Fee-ſimple doth move and paſs from him in the Remainder or Reverſion. But it it were by word, then it ſhall be the Feoffment of him in the Remainder or Reverſion, and the ſurrender of Leſſee for life, for otherwiſe nothing ſhall paſs by word. And it was holden by them, That in the Caſe at Bar, although that the Leaſe was by Deed indented, it ſhall be no concluſion; for when the Deed doth enure by paſſing of an Intereſt (as in the caſe it doth) it ſhall not be taken by any concluſion, no more than the Leaſe for years of Leſſee for life by Deed indented ſhall be an Eſtoppel after his death, becauſe the commencement of it took effect by way of paſſing of an Intereſt. And *Popham* Chief Juſtice ſaid, That if Tenant for life, and he in the Reverſion make a gift in tail rendring Rent, the Leſſee ſhall have the Rent during his life; for the making of a greater eſtate is not any forfeiture, becauſe he joyneth with him in the Reverſion. And if Tenant for life, and he in the Reverſion had made a Feoffment by Deed at the Common Law, the Feoffee ſhould hold of the Leſſee during life. *Nota bene.* [15]

Mich. 36, 37 Eliz. *in the Kings Bench.*

Eden's Caſe.

NOte, *Mich.* 31 & 32 *Eliz. Rot.* 365. In the *Kings Bench* in Treſpaſs for breaking of his Cloſe at *Martham* in the County of *Norfolk*, by *Thomas Eden*, and *William Franklyn* againſt *Edward Brown*, the Defendant pleaded that the Queen was ſeiſed in Fee in the Right of the Crown, and by her Letters Patents under the Great Seal, bearing date at *Weldhall* in the County of *Eſſex*, &c. *conceſſit tenement. prædict. in quibus*, &c. *cuidam A. B.* &c. The Plaintiff took Iſſue, *quod non conceſſit tenementa prædict. per prædictas literas patentes.* And this Iſſue was tried in the County of *Norfolk* where this Land lay, and not where the Letters Patents bore date, and the Jury found for the Plaintiff. And it was moved in arreſt of Judgment, That it ought to have been tried where the Letters Patents bore date; and *non allocatur per curiam*; for the Letters Patents being matter of Record, and ſhewed to the Court under the Great Seal, cannot be denied, nor the party cannot plead *Nul tiel record*, againſt them being ſhewed under the Great Seal, and therefore the effect of the Iſſue of *Non conceſſit* is, That the Queen had nothing in the Land, or that the Tenements did not paſs by her Letters Patents, in which caſes it ſhall be tried where the Land lieth; and ſo it was adjudged. *Vide* 8 *Eliz. Dier* 253. 3 *Mar. Dier* 127. 17 *Eliz. Dier* 342. [b]

Caſes of Deviſes.

Hill. 39 Eliz. *in the Common Pleas.*

Colyer's Caſe.

BEtween *Colyer* and *Walker*, the Caſe was ſuch; A man hath Iſſue a Daughter, and by his Will in writing deviſeth part of his Land to his Daughter, and the other part to his Wife for life, with the profits whereof ſhe ſhould bring up his Daughter, and that after his death it ſhould remain to his Brother, paying to one twenty ſhillings, and to others ſmall ſums, amounting to forty ſhillings in all, [16]

and that the Land was of the value of three pound *per annum*. And it was adjudged, that the Brother had the Fee-ſimple. And this difference was taken and reſolved in this caſe, That if the Deviſe had been to the Brother of the Land, to the intent that with the profits he ſhould educate his Daughter, or of the profits of the Land pay to one ſo much, and to another ſo much, it is but an eſtate for life; for he is ſure to have no loſs. So if Land be of the value of three pound *per annum*, and he deviſe that he ſhall pay for it twenty ſhillings, or thirty ſhillings, or forty ſhillings, or fifty ſhillings *per annum* to another, it is but an Eſtate for life; for he may pay it out of the profits, and is ſure to have no loſs. But in this Caſe at Bar, after the payment he may die before ſatisfaction; and therefore it is a Fee-ſimple; and the Law doth intend that the Deviſe was for his benefit, and not for his prejudice. And by this difference you will better underſtand the Books of 4 *Ed.* 6. *Eſtates* 78. 29 *Hen.* 8. *Teſtament* 18.

Hill. 41 Eliz. *in the Kings Bench.*

Wylde's Caſe.

HIll. 37 *Eliz. in Ejectione firmæ* between *Richardſon* and *Yardley* in the *Kings Bench*, upon Not Guilty pleaded, the Jury gave a ſpecial Verdict to this effect. Land was deviſed to *A.* for life, the Remainder to *B.* and the heirs of his body, the Remainder to *Rowland Wylde* and his Wife, and after their deceaſe to their Children, *Rowland* and his Wife then having a Son and a Daughter; and afterwards the Deviſor died, and after his deceaſe *A.* died, *B.* died without Iſſue, *Rowland* and his Wife died, and the Son had Iſſue a Daughter, and died; if this Daughter ſhould have the Land or not, was the Queſtion; and the ſame conſiſteth upon the conſideration what eſtate *Rowland* and his Wife had, *viz.* If they had an Eſtate tail, or an Eſtate for life with Remainder to their children for life; and the caſe for difficulty was argued before all the Judges of *England*; and it was reſolved by all the Judges of *England*, That *Rowland* and his Wife had but an Eſtate for life with Remainder to their children for life, and no Eſtate Tail. And in the conſtruction of this Will the Judges did firſt conſider the Judgment of the Common Law, If the Conveyance had been made by the Deviſor in his life. And, 2. The reaſon and cauſe that the Judgment ſhall not be according to the Rule of Law: And it was reſolved, that without queſtion that at the Common Law they had but an Eſtate for life, the Remainder to their children for life. Then what ſhall be the reaſon and cauſe to give them Eſtate Tail by conſtruction in this caſe? It will be anſwered, the intent of the Teſtator. But it was reſolved, that ſuch intent ought to be manifeſt and certain, and not, obſcure or doubtful: For at the Common Law Lands were not deviſable (but only by cuſtom, and that in ancient Cities and Boroughs, houſes and ſmall things) but by the Statute of 32 & 34 *H.* 8. all Lands according to the purview of that Act are deviſable; which Statutes were made to the great diſadvantage of Heirs at the Common Law by Wills for the moſt part made in extremity of ſickneſs, and that utterly againſt the rule and reaſon of the Common Law; for the ancient Common Law did favour him who by the Common Law was heir, becauſe he was to ſit in the ſeat of his Anceſtor, and to ſerve the King and Commonwealth in as good eſtate as his Anceſtor did. And therefore it appeareth by *Glanvile*, who was Chief Juſtice in the time of *Hen.* 2. *lib.* 7. *cap.* 1. *fol.* 44. Every Freeman without the aſſent of his Heir might diſpoſe of a reaſonable part of his Lands with his Daughter in Frankmarriage, for the
[15] advancement of his blood, or to any ſervant in recompence of his ſervice, or in Frankalmoigne to ſome Religious houſe to have divine prayers made for him. But all that was done in time of health, and not in extremity of ſickneſs, to the end that ſuch gifts be not more of rage and fury than of good diſcretion, and ſo his gift might exceed meaſure. But if any ſuch gift which was made in time of ſickneſs ſhall be good and firm in Law, the conſent and confirmation of his next Heir was requiſite to it. If a man who had Lands by deſcent, and who had Iſſue many Sons, he could not have given any of this Land to any of his younger Sons without the conſent of the eldeſt, to the end the Father, who for the moſt part bore moſt affection to the youngeſt Son ſhould not diſinherit the eldeſt. But of Land which he had gotten by his own purchaſe, he might have given a part of it to his younger ſons: and if he had not any Iſſue, he might have given all of it to whom he pleaſed. And all this appeareth in *Glanvile*, by which it appeareth, that the ancient Common Law did reſpect the heir at Common Law. Then in the caſe at Bar, foraſmuch as by the judgment of the Common Law upon the like words in a Conveyance, it ſhould be but an eſtate for life, the Remainder to their children for life, thereof it followeth, the intent and not only the words only of the Deviſor ought to make it an Eſtate tail in this caſe. Then this intent ought to be manifeſt and certain, and ſo expreſſed in the Will: And in this caſe no ſuch intent appeareth; for peradventure his meaning was to agree with the Common Law: And therefore this difference was reſolved for good Law, That if *A.* deviſeth lands to *B.* and to his Children or Iſſues, and he hath not any Iſſue at the time of the deviſe, that the ſame is an eſtate tail; for the intent of the deviſor is manifeſt and certain that his Children or Iſſues ſhould take, and as immediate deviſees they cannot take, becauſe they are not *in rerum natura*, and by way of Remainder they cannot take, for it was not his intent, for the gift is immediate, and becauſe then ſuch words ſhall be taken as words of limitation, *ſcil.*
[b] as much as children or iſſues of his body; for every child or iſſue ought to be of the body, and therewith agreeth a Caſe, *Trinit.* 4 *Eliz.* reported by Serjeant *Bendloes*, where the caſe was, that a deviſe was to the Husband and Wife, and to the Men. Children of their bodies begotten, and it did not appear in the caſe that they had any iſſue male at the time of the deviſe: And therefore it was adjudged that they had any eſtate tail, to them and the heirs males of their bodies; But if a man deviſeth lands to *A.* and

and to his children or issues, and they then have issue of their bodies, there his express intent may take effect, according to the rate of the Common, and no manifest and certain intent appeareth in the Will to the contrary. And therefore in such Case, they shall not have but a joynt estate for their lives. But it was resolved, that if a man, as in the case at Bar, deviseth Land to the Husband and Wife, and after their decease to their Children, or the remainder to their Children, in this case although he hath not any child at the time, yet every child which they have after may take by way of remainder, according to the rule of the Common Law; for his intent doth appear that their Children should not take immediately, but after the devise of *Rowland* and his wife.

Mich. 41 & 42 Eliz.

Sir *Edward Clere's* Case.

IN an Assize by *Parker* against Sir *Edward Clere* Knight, of lands in the County of *Norfolk*, the Case was such, *Clement Harwood* seised of three acres of land, and every one of equal value, holden *in Capite*, made a Feoffment in Fee of two of them to the use of his wife for life, for her Joynture, and afterwards made a Feoffment by Deed of the third acre, to the use of such person and persons, and of such estate and estates as he should limit and appoint by his last Will in writing; and afterwards by his last Will in writing, he devised the said third acre to one in Fee (under whom the Plaintiff claimed. And if this devise were good for all the said third acre, or not, or for two parts of it, or void for all, was the question. [18] And in this case four points were resolved by *Popham* Chief Justice, and Baron *Clark* Justice of Assize of the said County, upon conference had with the other Justices. 1. If a man be seised of lands in fee, maketh a feoffment to the use of such person and persons, and of such estate and estates as he shall appoint by his Will, that by operation of Law the use doth vest in the Feoffor, and he is seised of a qualified Fee, that is to say, till declaration and limitation be made according to his power, *vide Litt.* 109. When a man maketh a Feoffment to the use of his last Will, he hath the use in the mean time. 2. If in such case the Feoffor by his Will limit estates according to his power reserved to him upon the Feoffment, there the estates take effect by force of the Feoffment, and the use is directed by the Will; so that in such case the Will is but declaratory: But if in such case the Feoffor by his Will in writing deviseth the land it self, as owner of the land, without any reference to his authority, there it shall pass by the Will, for the Testator had an estate devisable in him, and power also to limit an use, and he had election to pursue which of them he would, and when he devised the land without any reference to his authority or power, he declared his intent, to devise an estate as owner of the land by his Will, and not to limit an use according to his authority; and in such case, the land being holden *in Capite*, the devise is good for two parts, and void for the third part. For as the Owner of the land he cannot dispose of more: And in such case the devise cannot take effect by the Will for two parts, and by the Feoffment for the third part; For he made his devise as Owner, and not according to his authority, and his devise shall be of as much validity as the Will of every other Owner having any land *in Capite*. 3. If a man maketh a Feoffment in Fee of lands holden *in Capite*, to the use of his last Will, although he deviseth the land with reference to the Feoffment, yet the Will is void for a third part: For a Feoffment to the use of his Will, and to the use of him and his heirs is all one. 4. In the case at Bar, when *Clement Harwood* had conveyed two parts to the use of his wife by act executed, he could not as owner of the land demise any part of the residue by his Will, so that he had not power to demise any part thereof as owner of the land, and therefore he had not election as in the case put before, either to limit it according to his power, or to devise it as owner of the land, for in the case at Bar as owner of the land (having conveyed two parts to the use of his wife as above) he [b] could not make any devise, and for this cause, the devise ought of necessity to enure to a limitation of an use, or otherwise the devise shall be utterly void: And judgment was given accordingly for the Plaintiff for the whole land so devised. And after the Judgment Sir *Edward Clere* brought a writ of Error in the *Kings Bench*, but did not prevail, but the Judgment was affirmed.

Hill. 37 Eliz. Rot. 416. *in the Common Pleas.*

Packman's Case.

WIlson brought an Action upon the Case upon Trover against *Packman*, and the case was such, A man died intestate, and the Ordinary committed Administration to a stranger, and afterwards the next of Kin of the Intestate sued a Citation in the Spiritual Court, to have it repealed; depending which suit, the Administrator to defeat the Plaintiff in the Spiritual Court of the effect of his suit, sold the goods of the Intestate to the Defendant: And afterwards the Letters of Administration are revoked by sentence, and the first sentence annulled and made void, and afterwards administration was committed to the Plaintiff. And it was resolved that the action did not lie: And thereupon the Plaintiff did discontinue his action: And in this case difference was taken between this suit by Citation, which is to countermand [19] or revoke the former letters of Administration, and Appeal, which always is to reverse a former sentence, for the Appeal doth suspend the former sentence; otherwise is it of a Citation: And in this case forasmuch

as the firſt Adminiſtrator hath the abſolute property of the goods in him without queſtion, he may give them to whom will. And although the Letters of Adminiſtration be afterwards countermanded, and revoked, yet the ſame cannot make void the gift. But if the gift be by Covin, it ſhall be awarded by the Statute of 13 *Eliz.* againſt a Creditor, but it remains good againſt the ſecond Adminiſtrator; And if an Adminiſtrator doth waſt the goods, and afterwards Adminiſtration is committed to another, yet any Debtor ſhall charge him in debt; and if he plead the laſt Adminiſtration committed to another, the other may reply that before the ſecond Adminiſtration committed, he hath waſted the goods, *vide* 17 *Eliz. Dier* 339. the like caſe, and 34 *H.* 6. 14. Adminiſtration may be granted upon condition; And it was holden in caſe, if ſuch Adminiſtrator before the Condition broken, giveth away the Inteſtates goods, and afterwards the condition is broken, yet the gift ſtandeth good. And obſerve Reader, a manifeſt difference between this caſe, and the caſe of 17 *Eliz.* For in our caſe the Adminiſtration granted was lawful, and the gift alſo lawful, and the donee claimeth in under the firſt Adminiſtration, which the ſecond Adminiſtrator doth intend to countermand and revoke; But in the caſe of 17 *Eliz.* the ſecond Adminiſtrator who obtained the ſecond Adminiſtration by Covin, had with the Defendant in the Action, without any recital of the firſt Adminiſtration, did releaſe to the Defendant by Covin to bar the Plaintiff of his Execution: It is there adjudged, that the ſaid ſecond Letters of Adminiſtration being revoked by ſentence, and declared to be void, the Defendant who was party to the Covin being in Execution ſhould not have an *Audita Querela.* But the ſame is not to be likened to our caſe, for there the Defendant claimed by the ſecond Adminiſtration, which is declared to be void, and the firſt always in force, ſo that the ſecond Adminiſtration was never lawful; But in our caſe the firſt Adminiſtration was lawful, until it was countermanded, and ſo a difference, *quod nota.*

Hill. 38 Eliz. *in the Kings Bench.*

Gregorie's Caſe.

[*b*] GRegorie brought a Writ of Error againſt *Blaſhfield*, and the Caſe was, that *B.* brought a Replevin in the Court of *Ludlow* (which is a Court of Record) againſt *C. tam pro Domina Regina, quam pro ſe ipſo*, upon the Statute of 4 & 5 *Ph. & Ma.* (which ſee in *Raſtal, Drapery* 135.) which forbiddeth that none ſhall weave any woollen Cloth, or Kerſies, if he hath not been Apprentice, or exerciſed the Trade, &c. by ſeven years, upon pain of forfeiture of ſuch Cloth, or the value of it, the penalty to be recovered by Action, Bill, Plaint, or Information in any Court of Record, in which no eſſoign, protection, &c. And three Errors were aſſigned. 1. That the ſaid branch of the Act was abrogated and taken away by the Statute of 5 *Eliz. cap.* 4. *Sed non allocatur.* For looking into the Statute, they both ſtand together. And it was ſaid that a latter Statute in the affirmative ſhall not take away a former Act; and the rather if the former be particular, and the latter general. The ſecond Error aſſigned was, that the Plaintiff by the Statute of 18 *Eliz. cap.* 5. ought to have ſued by original, or by information, and ſo was it adjudged, *Hill.* 30 *Eliz.* in this Court between *Woodeſden* and *Clark*, where the Defendant was ſued by Bill upon the Statute of 23 *H.* 6. of Sheriffs, and adjudged the action did not lie. The Error was, that although that *Ludlow* be a Court of Record, yet it is not ſuch a Court as is intended by the Statute, for two cauſes: 1. The Courts intended by the Statute, *propter excellentiam*, are the four Courts of Record at *Weſtminſter*, which are general Courts of Record, and therefore it ſhall be in general ſpeech ſo intended; as Eſcuage, which is either incertain or certain, incertain, as *ſervitium militare*; and certain is *ſervitium ſocæ, quia quemadmodum certitudo ſcutagii ſocagium, ita incertitudo facit ſervitium militare:* And *Littleton* ſaith, That if a man ſpeaketh general of Eſcuage, it ſhall be intended *(ſecundum Excellentiam)* in Common ſpeech, of the moſt excellent ſervice, and that is Knights ſervice for the defence of the Realm, and
[20] not of Socage. And 10 *E.* 4. 10. *b.* If it be generally ſpoken of proof, although there are many proofs in Law, yet it ſhall be of the beſt proof, and that is by Jury. And 20 *H.* 6. 17. If it be generally ſpoken of the Feaſt of St. *Michael*, where there are two Feaſts, it ſhall be intended of the moſt worthy and notorious Feaſt. And 37 *H.* 6. 29. 21 *H.* 6. 8. and 13 *H.* 4. 4. If ſpeech be of *J. S.* generally, it ſhall be intended the father, or of the eldeſt ſon, for they are the moſt worthy. And with the Caſe at Bar in effect agreeth *Mich.* 6 & 7 *Eliz. Dier* 236. where any Court of the Queen of Record, ſhall be intended one of the four eminent and moſt excellent Courts at *Weſtminſter.* 2. If the Act ſhall be intended according to the Letter, *ſcil.* (in any Court of Record) the Court of Oyer and Terminer, Gaol-Delivery, Sewers, Sheriffs Turn, Leet, Pipowders, and other Courts ſhall be within the Act; for theſe and many others are Courts of Record. Then the ſame being left to the conſtruction of the Law, the Rule is, *quod verba æquivoca & in dubio poſita, intelliguntur in digniori & potentiori ſenſu.* 3. The ancient uſage in all ſuch popular Actions or Informations hath been, that although that the Informer *tam pro Domina Regina quam pro ſeipſo* exhibit the Information, yet if the Defendant pleadeth a ſpecial plea, the Queens Attorney ſhall only reply. And it was meant by the makers of the Act, that the Suit ſhall be in ſuch Court where the Queens Attorney may attend, for the benefit the Queen ſhall have by ſuch ſuit, and that is in the four Courts of Record at *Weſtminſter.* And for theſe two laſt Errors the Judgment was reverſed.

Paſch.

Pasch. 38 Eliz. *in the Kings Bench.*

Michelborn's Case.

IN a Writ of Error between *Baptist* and *Michelborn*, the Case was, That an Action of Trespass upon the case of Trover and Conversion, within the Verge, was brought in the Court of *Marshalsea*, where none of the parties was of the Houshold, and upon Judgment given, a Writ of Error was brought in the *Kings Bench*. It appeareth by *Britton* (who wrote in 5 *E.* 1.) *fol.* 1. and by *Fleta*, *lib.* 2. *cap.* 3, 4 5, *&c.* that the Jurisdiction of the *Marshalsea* at the Common Law was doubtful; and therefore the Statute of 28 *Edw.* 1. *Articuli super Chartas*, *cap.* 3. set it certain; for the Preamble is of what Pleas they ought to hold; And therefore it is Enacted, That they shall not hold plea of any Freehold, *viz.* where the Free hold cometh in debate, nor of Debt, nor of Covenant, nor of Contract made between the Kings people, but only (which are words exclusory, and exclude all other Pleas but only these which follow) *viz.* of Trespass as done within the Kings house (*viz.* where both of the parties are of the Houshold) or of other Trespass done within the Verge (*viz.* when one of the parties is of the Houshold) and so it hath been always expounded. And therefore in the *Kings Bench*, *Mich.* 32 *Hen.* 6. *Rot.* 47. In Error between *Reade* and *Purchase* in Trespass in the *Marshalsea*, no other Error was assigned, but only that none of the parties were of the Kings House, and the Judgment for this Error was reversed, and therewith agreeth 10 *Hen.* 6. 13. 3 *Hen.* 6. 30. 19 *Edw.* 4. 8. *b.* 20 *Edw.* 4. 6. 22 *Edw.* 4. 31. *vide* 4 *H.* 6. 8. *Fitz. Nat. Brev.* 241. *Vide* The diversite of Courts in his Chapter of *Marshalsea*. And the words of the said Act are further; And of Contracts, and of Covenants that one of the Kings House maketh with another of the same House, and in the same House, and no other where. So that for the nature of the Actions, they only hold plea in three, *viz.* Trespass, Contract, and Covenant, and of no action which concerneth the Realty. And for persons in Trespass within the Verge, It is sufficient if one be of the Kings House, but in Contract and Covenants, both the Plaintiff and Defendant ought to be of the Houshold. And *vide* a Bill [21] which passed both Houses of Parliament, *viz.* the Lords and of the Commons, *anno* 1 *Rich.* 2. By which it is declared, That of ancient times their Jurisdiction was no other, nor had been but of Felony, Trespass within the Verge, and after their Retorn, and of Covenant and Debt, due and made between the Kings Servants and those who followed the Court; and that Lords and others who have Franchises may have their Franchises as well within the Verge as out of it, &c. To which the King answered, Let the Marshal have such Jurisdiction as before this time hath been reasonably used; and if any will plead in special, let him complain to the Steward of the Kings House, and right shall be done. So that although it be not an Act of Parliament, it is it a good Declaration of the Law by both Houses of Parliament. *Vide* a private Act for the City of *London* 30 *Edw.* 1. remaining in the Treasury, by which it is Enacted, That where before the Steward and Marshal (the Court being often near the City of *London*, some Enquests are taken of Trespass and other things done within the said City, betwixt some of the City only, and between them and Forreigners joyntly, or betwixt Forreigners, and of which Trespass and other things to the Steward and Marshal by reason of the Verge the conusance doth belong, That all such Enquests shall be taken within the City of *London*, and not elsewhere, &c. By which it appeareth, that this Act (made within two years of the Act of *Articuli super chartas*) doth not take away the said Act, nor giveth them more authority than they had before: But the purview of the Act only is; That of such things done in *London*, whereof the conusans doth appertain to them, shall be tried within the City, and not elsewhere. Observe the said Declaration 1 *Rich.* 2. doth agree in effect with the act of *Articuli super chartas*; and afterwards in the principal Case the Judgement was reversed.

Pasch. 40 Eliz. *in the Kings Bench.*

Butler and *Goodale*'s Case.

BEtween *Goodale* Informer, *tam pro se*, *&c.* upon the Statute of 21 *Hen.* 8. of Non-residency, and [*b*] *Butler*, Parson of *Downham* in *Norfolk*; upon a special Verdict it was resolved by the Court, that the Parson ought to abide upon his Rectory, *viz.* the Parsonage-house, and not in any other house, although it be within the same Parish; for the Statute is intended, not only for serving the Cure, and for Hospitality, but also for the maintaining of the houses, not only for himself, but also for his successors, that they also may keep Hospitality there. And there it was agreed, that lawful Imprisonment without covin, is a good excuse of Non-residency, so if there be not any Parsonage-house there; for, *Impotentia excusat Legem*; and these cases are excepted out of the Act by construction of Law. And note, that it was holden in the Exchequer, *Trin.* 39 *Eliz.* That sickness without fraud, was also a good excuse, *viz.* If the Patient remove by advice of his Physitian, *bona fide*, and for better air, and for recovery of his health.

Mich.

Mich. 40 & 41 Eliz. *in the Court of Wards.*

Ambrosia Gorge's Case.

[22] THe case of *Ambrosia*, Daughter and Heir of *Dowglas*, Wife of Sir *Arthur Gorge* Daughter and Heir of Viscount *Bindon*, was such; Viscount *Bindon* was seised of divers Mannors in Tail, sundry of them holden by Knights service *in Capite*, and had Issue the said *Dowglas*, who married Sir *Arthur Gorge*, and by him had Issue the said *Ambrosia*; *Dowglas* died in the life of her Father, and afterwards the Viscount died, all which was found by Office, and that *Ambrosia* was heir apparent to her Father, and of the age of seven years; and afterwards *Ambrosia* of tender years, and, *infra annos nubiles*, was married by her Father to *Francis Gorge*, son of Sir *Thomas Gorge*; and afterwards Sir *Arthur* took another Wife, and had Issue a son; and afterwards the Husband of *Ambrosia* died, the said *Ambrosia* being *infra annos nubiles*, *viz.* of the age of ten years; and in this Case two Questions were moved: 1. If a Daughter be such an Heir apparent to her Father, that during his life she shall not be in Ward to the King? And it was objected, That the Daughter is not such an Heir apparent that the Father shall have the Wardship of her; but ought to be such Heir apparent, that during the life of the Father, shall continue Heir apparent; but a Daughter is not such Heir; for a Son may be born, or another Daughter may be born. And it was said, That of Land in Borough-*English*, or Gavelkind, the Son cannot endow his Wife *ex assensu patris*, because by possibility he shall not continue Heir. So it was said, That the Father shall not have the Wardship of the Son and Heir apparent of Land in Borough-*English* holden by Knights service, because that by possibility he may not continue Heir apparent. But at length, after great deliberation, it was resolved [b] by the two Chief Justices, *Popham*, and *Anderson*, and *Periam*, Chief Baron, That the Father shall have the Wardship of his Daughter and Heir apparent so long as she continueth his Heir apparent; and therewith agreeth the Books in 31 *Edw.* 3. *Gard.* 144. 8 *Ed.* 2. *tres.* 235. *Fitz. Nat. Br.* 143. 2. It was resolved, that when the Father hath Issue a Son, that then the Daughter shall be in Ward to the King; for then the Son was Heir apparent and not the Daughter. 3. It was resolved, That the Queen should, notwithstanding the said Marriage, have the Marriage of the said *Ambrosia*; for it was no compleat Marriage, because to every Marriage there ought to be consent: for, *consensus, non concubitus facit matrimonium, & consentire non possunt infra annos nubiles.* And upon conference had with the Civilians, it was agreed, That after such Marriage if the Husband dieth, and the Wife marry again, it shall not be said Bigamy. And the Book in the 30 *Edw.* 1. *Gard.* 156. That if the Ancestor marrieth his Heir *infra annos nubiles*, and dieth, the Lord shall recover the body of the Infant, because the Heir may disagree. *Temp. Ed.* 1. *ibid.* 128. and 12 *Edw.* 1. *ibid.* 138. (which is mis-printed, *viz.* seven years for fourteen years) *acc.* And no difference as to this purpose between disagreement to the Marriage at the age of consent, and death before the said age; for when the Heir is married by the Father *infra annos nubiles*, and disagreement is, there clearly the Lord shall have the Ward. *Pari ratione* it was holden by all, when such imperfect marriage is dissolved by death, *infra annos nubiles*, the Lord shall have the Wardship, 7 *Hen.* 6. 11. *b.* by *Babthrope* accorded in the case of death. And it was agreed in this case, That the Grandfather shall not have the Wardship of the Son within age, the Father living; and that the Statute of *Prærogativa Regis*, *cap.* 6. is but an affirmance of the Common Law; for the Law is such in the case of a common person, as it appeareth by the Books aforesaid.

Trin. 41 Eliz. *in the Kings Bench.*

Pawlet Marquess of *Winchesters* Case.

[23] THe late Marq. of *Winchester*, as it was supposed, made his last Will and Testament in writing, and thereby did devise divers Mannors, Lands, Tenements of great value to his reputed Sons, and made them Executors. And further devised, that divers Mannors, Lands, and Tenements of great value should be sold by them; and bequeathed also divers Legacies of Plate, Monies, &c. And this Will was endeavoured to be proved in the Prerogative Court by the reputed Sons. And because it doth appear by divers witnesses, and by many notorious circumstances, that the said Marquess being sick, *& multa provectus senectute*, was not of sane and perfect memory, such as the Law requireth at the time of the making of the said supposed Will (for by the Law it is not sufficient that the Testator be of memory, but he ought to have a disposing memory, so that he is able to make a disposition of his Lands with understanding and reason; and that is such a memory which the Law calleth sane and perfect memory) upon this matter a suggestion was framed in the name of the now Marquess, as Son and Heir, to have a Prohibition out of the *Kings Bench*, supposing that he was not of sane memory at the time of the making of his Will, which matters the said Judges had pleaded in the Spiritual Court, in stay of the Probate of the said Will. And it was moved by the Attorney-General, of Council with the Marquess, to have a Prohibition generally to stay all the proceedings in the Ecclesiastical Court, as well for the Legacies and Bequests in the personalty, as for the Lands, and the reason and ground of his motion was, That forasmuch as the Will concerning the Land, and the Testament concerning the Goods are mixed together in one Will, if

if the Eccleſiaſtical Court ſhall proceed concerning the Teſtament of the Goods, it ſhould prevent and prejudice the Trial in this Court: For if he were of ſame memory at the time of making of the Teſtament of the Goods, he cannot be of the ſame memory at the time of the making of the Will of the Land, both being made at one inſtant; and the Common Law ought to determine what ſhall be ſaid perfect memory at the time of the making of the Will concerning the Land; and therefore the Prohibition ſhall be general, *quod fuit conceſſum per totam curiam.* And the Attorney-General cited a Caſe between *Lloyd* and *Lloyd*, *Mich.* 38 & 39 *Eliz.* in this Court, where it was ruled accordingly *in terminis terminantibus*, and that no Conſultation ſhould be granted for any party, till the matter be tried in this Court, *quod nota.* And thereupon the Prohibition was general by the Rule of the Court. And afterwards the parties agreed.

Mich. 41 & 42 Eliz. *in the Kings Bench.*

Reade's Caſe.

IN Treſpaſs *Quare clauſum fregit* by *William Read* Eſq; againſt *William Armiger* Gent. The Defendant did juſtifie, That *A. Wheatley* Eſquire was ſeiſed in Fee, and leaſed to him for years, and juſtified; the Plaintiff replied, That the Lady *Greſham* was ſeiſed in fee, and died ſeiſed, and the land diſcended to the Plaintiff, and maintained his Count, without that that *Wheatly* leaſed to the Defendant, upon which it was demurred. And it was objected that the ſeiſin in fee was traverſable and not the leaſe, if he alledgeth a Freehold in a Stranger: And if in Treſpaſs, the Defendant ſaith, that the place is the Freehold of *A.* and that he by his Commandment, &c. the Commandment is not traverſable: If the Plaintiff claimeth by a ſtranger, for the Freehold being alledged in a Stranger, the ſame ought to be anſwered. But it was adjudged that the Traverſe was good: And there is a great difference between the ſaid Caſes, for in the one Caſe the pleading is, that at the time of the Treſpaſs, ſuppoſed it was the Freehold of *A.* But in the Caſe at Bar the Defendant pleadeth, that long time before the Treſpaſs *Wheatly* was ſeiſed, &c. and ſo ſeiſed demiſed, &c. And that may be true, and that the Lady *Greſham* did diſſeiſe him, and a diſcent was caſt: So that it is not alledged, That *Wheatly* was ſeiſed in Fee at the time of the Treſpaſs (as in the other caſe) and then the moſt material thing to be traverſed is the leaſe, *vide* 4 *E.* 6. *Trav. br.* 372. That in the ſame caſe the ſeiſin in fee is traverſable, *vide Br. Trav.* 217. 21 *H.* 7. 23. & 26. 7 *E.* 4. 2. *b.* 8 *H.* 6. 34. 38 *H.* 8. *Trav.* 26. 21 *Eliz. Dyer* 365. 14 *Eliz. Dyer* 312. 26 *H.* 8. 4. 22 *E.* 4. *Replic.* 59. 7 *E.* 3. 11. 2 *E.* 4. 11. and it ſeemeth upon all the ſaid Books, that the one or the other in either caſe is traverſable at the pleaſure of the Plaintiff, *vide* 4 *E.* 4. 17. 15 *H.* 7. 3. 16 *H.* 6. *Double plea* 83. In Treſpaſs the Defendant pleaded, That *A.* was ſeiſed, and enfeoffed *B.* who enfeoffed *C.* who enfeoffed *D.* whoſe eſtate the Defendant hath, the Plaintiff may traverſe which of them he will, 18 *E.* 4. 26. In Treſpaſs the Defendant pleadeth, that *J.* was ſeiſed, and enfeoffed *B.* who enfeoffed the Defendant: The Plaintiff ſaid that *R.* was ſeiſed, and died ſeiſed, and that the land deſcended to him, and traverſed, *abſque hoc*, that *J.* enfeoffed *B.* and it was adjudged a good traverſe, and ſo is 21 *H.* 7. 33. And that is true in all caſes where the Defendant doth not claim by any mean conveyances from the Plaintiff himſelf, for that is traverſable. [24] [b]

Hill. 41 Eliz. *in the Kings Bench.*

Helyar's Caſe.

Helyar was Plaintiff in a Replevin againſt *Whitier*, the Defendant made conuſans as Bayliff to Sir *John Harbert* Maſter of the Requeſts, becauſe that *Richard Arch* was Prebendary of *T.* and 1 *Edw.* 6. leaſed the Land, who, &c. to *John Arch* for ninety years, who 2 *Eliz.* granted the term to *Johanne Arch*, who 35 *Eliz.* granted the ſame to *Sadlier*, who granted the ſame to Sir *John Harbert*, and made conuſance for damage feazance. The Plaintiff confeſſed the aſſignment to *John Arch*, &c. But further ſaid, that *Johanne* took to Huſband one *Tarre*, who 9 *Eliz.* granted the term to the Plaintiff, and traverſed the grant to *Sadlier*, upon which the Avowant did demur: And it was adjudged, that the Traverſe made the Bar to the Avowry inſufficient. And *Popham* Chief Juſtice delivered the reaſon thereof, becauſe that a leaſe for years cannot be gained but by lawful grant; and therefore when one claimeth a Leaſe for years, and the other claimeth by an elder grant, there he ſhall not traverſe the latter grant, but the other party ſhall traverſe the elder grant, and ſhew how he came to it again to enable the ſecond grant. But it is otherwiſe in caſe of Feoffment; for there if the party claimeth by a former Feoffment, he ought to confeſs and avoid the latter Feoff- [25]

Feoffment as by disseisin, &c. For a Disseisor may gain an Estate in Fee, but none can gain an Estate for years, but by lawful conveyance, and so is the difference. And when he claimeth by a former assignment of a term, it shall be impertinent to traverse, *absque hoc*, that he after that assigned his interest; for peradventure he assigned all his interest, and yet had nothing. *Vide* 2 *Edw.* 6. *Br.* Confess and Avoid 66.

Trinit. 41 Eliz. *in the Kings Bench.*

Ruddock's Case.

IN this Term between *Rasing* and *Ruddock* in a Writ of Error, the Case was; In a Replevin against six one doth avow, and the other make conusance as Bayliffs to the first, for an amercement for breaking a By-law in a Leet, and there Judgment was given against them, and the Plaintiff recovered his damages and costs, upon which the six brought a Writ of Error in this Court. In bar of which the Defendant pleaded the release of one of the five, upon which the Plaintiff did demur in Law. And it was objected, That forasmuch as it foundeth only in the personalty, and that no summons and severance lieth, for this cause the release of the one shall bar all other. And the Writ of Error and Attaint shall follow the nature of the action upon which they are grounded; *viz.* If summons and severance lieth in the first action, it shall be also in the Writ of Error or Attaint, as it is agreed in 34 *Hen.* 6. 42. So is it in a Writ of Champerty, it shall follow the nature of the first action, as it is agreed in 47 *Ed.* 3. 6. *Vide* 26 *Hen.* 8. 3. in Attaint, and 35 *Hen.* 6 19. by *Fortescue.* But it was answered and resolved, That it is true, when in the Writ of Error the Plaintiff shall recover any personal thing, as if they were barred in an action of Debt, or Trespass, &c. for the Release of the one shall not bar the other, but
[*b*] when the the ground of the action is a joynt interest which may be released. But when divers are charged in a joynt action and condemned, there they have not any interest, but they are charged joyntly, then when they bring a Writ of Error to discharge them, the release of one cannot bar the other; for they have not any joint interest or benefit, but a joynt charge and burthen, which cannot be released or discharged if not by the party who hath the interest and benefit of it. And this difference is taken and agreed in 2 *Hen.* 4. 16. *viz.* when Two are to recover a personal thing, there the default of the one is the default of both; but when they are to discharge themselves of a personalty, there the default of one is not the default of both. And 15 *Ed.* 3. *Severance* 23. in *Audita querela*, the Nonsuit of one shall not grieve the other; for he is but to discharge himself of a burthen and charge. But it may be Objected, That in the case at Bar they shall be discharged of the damages and costs which they have lost in the first action, and therefore they have a personal interest which may be released; which Objection might be made in the *Audita querela*, for there they shall be restored to the value of the goods taken in Execution. But forasmuch as by common intendment the Execution is done of goods which the Defendants have in severalty, therefore it is reason that the release of one shall not bar the others. And none will deny but that when six are condemned in damages and costs, and they before Execution bring a Writ of Error, there the release of one shall not bar the other; for they sue only to discharge themselves; and by consequence the suing of Execution afterwards will not alter the case, if the Execution be not of the goods they had in joynture or common; and that will afford a question. And as to the Book in 7 *Hen.* 4. 46. where in Appeal four men were outlawed, and they four did joyn in a Writ of Error, and two made default, and it was agreed that that should be the default of all; for it was their folly that they did joyn themselves in one Writ, who might have had several Writs. But in the case at Bar they were compelled to joyn in one Writ, and so no folly in them. And *Popham* Chief Justice said, That it was the Plaintiffs folly in a personal Action to joyn with one who would release. But in the case at Bar no folly can be alleged in the Defendants, for the Plaintiff might name which of them he would, and omit which of them he pleaseth; and he said, that by this way he might by confederacy joyn one with them who would release all Errors to him. *Vide* 31 *Hen.* 6. 19. *a.*
[26] If damages be recovered against divers in a Writ of Conspiracy, and one of them bringeth an Attaint, it is much debated if the Writ be well brought, or if all ought to joyn. And there it is objected, that if all ought to joyn, then by the Nonsuit or release of one of them the others should be barred. And there *Fortescue* Chief Justice said, That the Nonsuit or release of the one should not hurt the other, no more than in *Audita querela*, or *Scire facias* upon release. And by the Rule of the Book they ought to joyn in the Attaint; so in the case at Bar, the Law doth compel the Defendants to joyn in the Writ of Error, not to reap any benefit, but to discharge themselves of a charge imposed upon them. And forasmuch as the Law will do no wrong, for this case the release of one who could not be left out in the Writ of Error, shall not in this case hurt the others. And so it was adjudged. *Vide* 29 *Ass. p.* 35.

Pasch.

Paſch. 42 Eliz. *in the Common Pleas.*

Sharp's Caſe.

IN a Replevin between *Sharp* and *Swan* the Caſe was ſuch; *Michael Sharp* being Tenant in tail of certain lands within the County of *Suſſex*, with the Remainder over, came upon the land with the Plaintiff, and entred the houſe built upon it, and ſaid to him, *Brother, I here demiſe unto you my houſe as long as I live, paying twenty pound by year to me, and finding me my board and waſhing, and keeping of a horſe*: And if the ſame doth amount to a leaſe of the houſe and land was the queſtion. And it was agreed by the whole Court, that it was no leaſe, for that it wanted Livery; for to every Livery is requiſite, either an act which the Law ſhall adjudge Livery, or apt words which ſhall amount to it; for the delivery of the deed of Feoffment is an act; but the Law will not adjudge the ſame a Livery, becauſe it hath another effect, *viz.* to make the Charter his deed. But if he deliver a Turf or Twig, or other thing which cometh off the Land, or the Ring of the door, &c. in the name of ſeiſin, it is a good Livery. So if one ſaith, *Enter into this Land, and enjoy it during your life*, it is a good Livery; for the ſame is a delivery of the land it ſelf; and ſuch Livery is good when he doth it off the land, if the land be within view; *a fortiori* when it is upon the land. So in the caſe at Bar, when he ſaith, *I do here demiſe unto you my houſe for the term of your life*, this is a good beginning, if he make an actual Livery accordingly, or if he uſe apt words which may amount to as much, but without Livery it amounteth but to a leaſe at will, no more than when one delivereth a Charter of Feoffment upon the land; the deed importeth that he granteth the land to the Feoffee and his heirs, but it doth not amount to a Livery, but it is the beginning, *viz.* the delivery of the Deed which comprehendeth the land and the Eſtate, &c. but it doth not amount but to an eſtate at will without Livery; *a fortiori* in the caſe of a leaſe, or other Eſtate of Freehold or Inheritance by word. And it was agreed, that the caſe of the delivery of the Charter upon the land, hath been adjudged to amount to no Livery. *Vide* 38 *Aſſ. p.* 2. 39 *Aſſ. p.* 12. where ſuch words were intended were uſed as were apt, 27 *Aſſ. p.* 61. By which Books it appeareth, that after the Feoffor hath delivered the Charter of Feoffment upon the land, if he ſaith to the Feoffee, Hold and enjoy this land, or houſe, according to the deed, this is a good livery, So 41 E. 3. 17. *b.* After that the Feoffor had delivered the Charter of Feoffment upon the land, if he ſaith, Enter into this land, God give you joy thereof, the ſame amounteth to a livery. *Vide* 43 E. 3. Feoffments 51. 35 *H.* 8 *Br. tit.* Feoffments. [b]

Trin. 43 Eliz.

The Caſe of Soldiers.

THis Term all the Judges of *England* met together to conſider upon the Statute of Captains and Soldiers; for divers Soldiers after they were Preſſed, and gone towards *Ireland* to ſerve againſt the Rebels there, and before they did ſerve in the War, did depart and withdraw themſelves. And it was reſolved by them, that the Statute of 18 *H.* 6. *cap.* 19. was now of little force; for the ancient manner of retaining Soldiers, to which the ſaid Act doth refer is utterly changed; for then Knights or Gentlemen did covenant with the King to ſerve him in his War for ſo long time, with ſuch a number of men; and the Soldiers made their covenants with the Captains, as it appeareth by many preſidents in the Exchequer, and alſo as it appeareth by the Preamble of the body of the ſaid Act. And the Statute of 2 E. 6. *cap.* 2. doth extend only when a Soldier departeth after he hath ſerved the King in his War. But it was reſolved, That the Statutes of 7 *H.* 7. *cap.* 1. *&* 3 *H.* 8. *cap.* 5. which are all in one effect, and penned in the ſame words, were perpetual Acts, and were not made only for the Reigns of the ſaid ſeveral Kings, as it ſeemeth by *Raſtal* in his Abridgments of the Statutes: For this word (King) doth include all his ſucceſſion; for the King dieth not in reſpect of his politick capacity; and a gift of the King ſhall enure to his Succeſſors. And according to this Reſolution divers Soldiers were attainted and executed. *Vide* 4 Eliz. *Dier* 211. *Cheſter's* Caſe, the opinion of all the Juſtices of both Benches, that the Statute of 11 *H.* 7. *cap.* 8. hath continuance, againſt the opinion of *Raſtal.* [27]

Paſch. 43 Eliz. *in the Exchequer.*

The Viſcount *Mountague*'s Caſe.

[b] *Anthony* Viſcount *Mountague*, ſeiſed of divers Mannors in Fee, holden *in Capite*, by Indenture, 4 Eliz. did covenant with *William Brown*, and *William Denton* to ſuffer them before the Feaſt of Eaſter next following, to recover againſt him the ſaid Mannors by a Common Recovery, which Recovery ſhall be to the uſe of himſelf for life, and after to the uſe of *B.* in tail, and after to the uſe of *C.* in tail, and after to the uſe of *B.* in fee, with power of Revocation and Declaration of new uſes by any writing in his life. *&c.* or by his laſt Will, and that the Recoverers ſhall ſtand ſeiſed to the new uſes ſo declared; the Queen licenſeth the ſaid Viſcount to alien the ſaid Lands to the ſaid *William* and *William*, and their heirs (without any mention of declaration of any uſe in the Licenſe) and after the Recovery was had accordingly. And afterwards 34 *Eliz.* the Viſcount by his laſt Will did revoke the former uſes and eſtates, and declared, that preſently after his death *C.* ſhould have the ſaid Mannors in tail, with divers Remainders over, and died. And if by reaſon of this Revocation and new Declaration the Queen ſhall have in this caſe a fine for alienation was the queſtion in the Exchequer. And upon conference had with *Popham* and *Anderſon*, Chief Juſtices, and divers other Juſtices, it was adjudged in the Exchequer, That the Queen ſhould not have a fine for alienation in this caſe. And in this caſe two points were reſolved. 1. Although that no uſe was mentioned in the Licence. and the Licence was only to alien to *Brown* and *Denton*, and although the eſtate of the Land was transferred to others, ſo as the Queen could not be aſcertained of her very Tenant, yet for as much as it was executed by an Act of Parliament, viz. 27 *Hen.* 8. of Uſes; and an Act of Parliament to which every one is party can do no wrong, and every alienation without licence is a wrong to the King; for this cauſe when the King gave licence to alien to [28] *Brown* and *Denton*, and the Statute executeth the poſſeſſion in others, there ſhall not be any fine due to the King for this execution of the Eſtates by force of the ſaid Act of Parliament. And the Proviſo of the ſaid Act of 27 *H.* 8. was well explained, by which it was Enacted, *That the Kings Highneſs ſhall not have, demand, or take advantage or profit, for or by occaſion of the executing of any eſtate, only by authority of this Act to any perſon*, &c. *which now have, or on this ſide the firſt of* May, 1536. *ſhall have, any uſe or uſes, truſts or confidences in any Mannors*, &c. *holden of the Kings highneſs by reaſon of any* Primer ſeiſin, Ouſter le maine, Fine for alienation, Relief, *and* Heriot, *But that Fines for Alienation*, &c. *ſhall be paid to the Kings highneſs*, &c. *for uſes, truſts and confidences to be made and executed in poſſeſſion, by authority of this Act, after and from the ſaid firſt of* May, *of Lands*, &c. *holden of the King, in ſuch like manner and form and to all intents and purpoſes, as hath heretofore been uſed and accuſtomed by the order of the Laws of this Realm.* And foraſmuch as every uſe ought to be raiſed, either by Covenant out of the eſtate of the Covenantor, or by Feoffment, Fine, *&c.* (by tranſmutation of poſſeſſion) out of the eſtate of the Feoffees, Conuſees, *&c.* in the one Caſe or in the other, but one fine for alienation ſhall be paid to the King: For if the Kings Tenant who holdeth *in Capite*, intendeth to alien to *J. N.* to the uſe of *I. D.* and thereupon he purchaſeth a licenſe to alien to *I. N.* and accordingly he alieneth to *I N.* to the uſe of *I D.* in this caſe he ſhall pay but one fine, for it is but an alienation. And the ſaid latter part of the Proviſo concerning fines to be paid for execution of uſes in poſſeſſion after the firſt day of *May* 1536, is to be intended by uſes raiſed by covenant, or of uſes declared upon fine, feoffment, *&c.* and when no licence to alien to the feoffee, or conuſee is obtained. And it was ſaid, that if the ſaid Proviſo had not been, that no fine of execution for a uſe upon a Covenant ſhall be paid to the King; becauſe he was in by force of an Act of Parliament, which cannot (as hath been ſaid) do wrong, for remedy of which the ſaid Proviſo was made. 2. It was reſolved in the Caſe at Bar, when the Viſcount had licence to alien to *Brown* and *Denton*, and accordingly he ſuffered a Recovery, which Recovery was to the ſaid uſes, with power of revocation and alteration. In this caſe, although he alter the former uſes, and declare more, yet for as [b] much as the Queen hath given licence to alien to *Brown* and *Denton*, out of which alienation all the uſes, as well future as preſent, as out of one Fountain do ariſe, and they all grow from the Recovery as out of one root; for this cauſe there needeth no new licence of alienation for limitation of any new uſe riſing out of the ſaid Recovery. *Vide Cole's caſe, Plow. Com.* 401. And in this Term another Caſe was adjudged in the Exchequer, and was ſuch: *Richard Smith* being ſeiſed of Lands holden *in Capite, anno* 6 *Eliz.* levied a fine thereof without licence, which fine was to certain uſes contained in certain Indentures; that is to ſay, To the uſe of himſelf for life, and after to the uſe of his firſt ſon in tail, and then to the uſe of his ſecond ſon in tail, with divers remainders over, with a Proviſo, that it ſhall be lawful for him to limit by writing the ſame Lands to the uſe of any Wife he ſhall after marry, for her life in name of her Joynture; and that the ſaid fine ſhall be to the ſaid uſe, &c. The ſaid alienation is pardoned by the Act 13 *Eliz.* Then he marrieth *Dorothy*, and afterwards, *anno* 31 *Eliz.* by writing limiteth the ſame Lands, according to the ſame Proviſo to the ſaid *Dorothy* for her life, and dieth; after whoſe death ſhe took to Husband Sir *William Mounſon*, and it was adjudged that for the ſaid limitation to *Dorothy* no fine ſhould be paid to the Queen, *cauſa qua ſupra.* Which Caſe being openly adjudged, I have Reported, to the intent the Kings Officers in theſe Caſes ſhould take heed that the King be not deceived of an ancient Flower of his Crown by any device or invention more than duly by Law ought to be.

Trin.

Trin. 44 *Eliz. in the Kings Bench.*

Green's Case.

John Green brought an Action of Treſpaſs againſt *William Baker*, for breaking of his Cloſe and carrying away his Hay and Corn at *Coſington* in the County of *Somerſet*. The Defendant pleaded Not guilty; and the Jurors found a ſpecial Verdict to this effect. *Thomas* Lord *Pawlet* was Tenant for life of the Mannor of *Coſington*, to which the Advowſon of the Church of *Coſington* was appendant, the Remainder to *John Brent* Eſq. in Fee, which Rectory was a Benefice with cure. The Lord *Pawlet* 6 *Aprilis* 1574. preſented to the ſaid Church one *John Durſton*, who was admitted, inſtituted and inducted, and did not read the Articles according to the Statute of 13 *Eliz. cap.* 12. For which cauſe, 10 *Martii* 1583, at the ſuit of the ſaid *Thomas* Lord *Pawlet*, he was deprived by ſentence declaratory before the Biſhop; from which ſentence he did appeal to the Arches; and it was further found, That no notice was given by the Ordinary to the Patron of the ſaid deprivation. The ſaid Lord *Pawlet*, 7 *Martii* 28 *Eliz.* died. The Queen, *jure Prærogativæ ſuæ Regiæ*, by her Letters Patents, 30 *Junii* 28 *Eliz.* by title of Lapſe (and ſo expreſſed in the Patent) preſented *William Baker*, one of the Defendants, who was admitted, inſtituted and inducted. *Durſton* 5. *Octob.* 34 *Eliz.* died; after whoſe death, 8 *Maii* 1597, the ſaid *John Brent* preſented *John Green* now Plaintiff, who was admitted, inſtituted and inducted, and entred into the ſaid Rectory, and *Baker* and the other Defendants in his right, and by his commandment did enter upon the Plaintiff into the ſaid Cloſe, being parcel of the Glebe of the Rectory, and took the Hay and Corn, &c. And if the entry of *Baker* were lawful or not was the queſtion; and after many arguments it was adjudged for the Plaintiff. And in this caſe five points were reſolved. 1. Although the Patron were party to the ſute in which the declaratory ſentence was, and thereby took notice that *Durſton* did not read the Articles according to the ſaid Statute of 13 *Eliz.* yet after ſuch notice Lapſe ſhall not incurr; but notice of not reading of the Articles ought to be given him by the Ordinary, and after ſuch notice the Lapſe ſhall be accounted; For the Statute ſaith, Notice given by the Ordinary; and ſuch Notice ought to have two qualities, 1. It ought be given by a perſon certain, and that is the Ordinary; for if any other of his own head giveth notice to the Patron, it is not material. 2. The Notice ought to be certain and particular; and therefore it is not ſufficient for the Ordinary in ſuch caſe to give notice that the preſentee hath not read the Articles and ſubſcribed generally, but he ought particularly to inform the Patron that he hath not read the Articles, *&c.* for which default he is deprived, and that thereupon it belongeth to the Patron to preſent; for *notitia dicitur a noſcendo, & ex vi termini* it ought to be ſpecial, *& notitia non debet claudicare*; and therewith agreeth 22 *Eliz. Dier* 369. 2. That the Church is void preſently by the Statute of 13 *Eliz.* without any declaratory ſentence; for it is ſo Enacted by the Statute, that he ſhall be *ipſo facto* deprived, and that the admiſſion, inſtitution and induction are mere void in Law; and avoidance by Act of Parliament needeth not any ſentence declaratory. But it is enacted by the ſame Statute that no Lapſe ſhall incurr without notice given, and yet the Church is void: For if ſuch Parſon libelleth againſt any of his Pariſhioners for Tythes, they may plead againſt him the not Reading of the Articles, as it was adjudged in a Prohibition, *Trin.* 30 *Eliz* between *Maurice* and *Eaton*. 3. If the Queen by her Letters Patents of Preſentation miſtaketh her title, as if ſhe hath title to preſent in reſpect ſhe is very Patron, and ſhe preſent by reaſon of Lapſe, ſuch preſentation is void; for the Queen is deceived in her preſentation. So 17 *Eliz. Dier* 339. a preſentation obtained from the Queen (pendant a *Quare Impedit*) *in diſceit* of the Queen is void; *a fortiori*, when the Queen hath not title to preſent by any means, and ſhe preſent (as in the Caſe at Bar) (*ratione Lapſus*) it is utterly void; in the ſame manner as if the Queen preſent, and afterwards repealeth her preſentment, and yet the Ordinary doth inſtitute and induct the party. 4. In ſuch caſes although that the Biſhop doth admit, inſtitute and induct the Incumbent, yet the Church doth remain void, and the rightful Patron is not put to a *Quare Impedit* to remove ſuch Incumbent. And ſo it was holden, If the Ordinary collate within the ſix months, and his Clerk is inducted, yet the rightful Patron is not put out of poſſeſſion, nor put to his *Quare Impedit*, but may preſent as it was adjudged in *Jurden's* Caſe in a Writ of Error in the Kings Bench *Mich.* 29 & 30 *Eliz.* for the Church of *Ayleſham*, where the pleading was, that the Ordinary *uſurpando contulit*: for no Church can be full but by preſentation, or rightful collation. 5. It was reſolved, That if a common perſon uſurpeth upon the King, and his Clerk is admitted, and inducted, the King is put to a *Quare Impedit*, and cannot preſent untill the Incumbent be removed by Judgment. But in ſuch caſe the common perſon by double or treble uſurpation by ſeveral perſons doth not gain the Inheritance of the Advowſon out of the King, for the ſame is permanent, and is not in ſuch caſe deveſted out of the King. And ſo was it adjudged, *Paſch.* 25 *Eliz.* Between *Peſcod* and *Yardly* in the Common Pleas for the Vicaridge of *Newton Valence*, but the Plea begun, *Mich.* 21 & 22 *Eliz.* Rot. 2218. But as to the preſentation he is put out of poſſeſſion, for the ſame is tranſitory, and he cannot remove the Incumbent but by *Quare Impedit*, and ſo are all the Books to be intended, 4 E. 3. *Quare Impedit* 33. 18 E. 3. 16. 43 E. 3. 14. 47 E. 3. 4. Br. *Quare Impedit* 39. *Fitzh. Nat. Brev.* 36. 1 H. 7. 19. 18 *Eliz. Dyer* 351. 14 E. 3. *Quare Impedit* 151. And with that diſtinction they are well reconciled. And it is to be obſerved, that the Statute of *Weſtm.* 2 cap. 5. ſaith, *Cum aliquis jus præſentandi non habens, præſentaverit ad aliquam Eccleſiam (cujus præſentatus ſit admiſſus) ipſe qui eſt verus patronus per nullum aliud breve recuperare potuit advocationem ſuam, quam per breve de Recto.* By which it appeareth, that without a preſentation the very Patron cannot be

[29] [b] [30]

put out of poſſeſſion. And *vide 6 Ed.* 3. Although that the admiſſion, inſtitution and induction be in time of peace, yet if the preſentation be in time of war, all ſhall be avoided. But (ſee Reader) the caſe in 17 *E.* 3. 64. That although the penalty by collation doth not put him who hath title to preſent out of poſſeſſion, as it hath been twice adjudged, yet the plenarty by collation ſhall put him who hath title to collate out of poſſeſſion, as it appeareth by the ſaid book, which is ruled in the point. And *vide* 11 *H.* 4.

Mich. 3 Jacobi, *in the Common Pleas.*

Bothy's Caſe.

[b] IN Debt upon an Obligation by *Bothy* againſt *Smith*, which begun *Hill.* 1 *Jacobi*, Rot. 725. The Condition was, *That if the Defendant deliver to the Plaintiff one Obligation of the ſumm of ten pound, wherein the Plaintiff ſtood bound with one* T. *to the Defendant, for the payment of five pound, and alſo if the Defendant do acknowledge ſatisfaction of a Judgment upon the ſaid Bond, and alſo deliver true notes of all Bills of charges, as do concern the ſame, that then, &c.* The Defendant pleaded in Bar, That there were not any Bills of Coſts for, or concerning the ſaid Sute, and did not anſwer to the reſidue of the Condition, pretending that he needed not, in as much as they were collateral acts, and no time is limited when they ſhall be performed. And it was adjudged againſt the Defendant; for he ought to have performed the reſidue of the Condition in convenient time, and that without requeſt. And the difference was taken and agreed, when the Act by the Condition of a Bond, to be performed to the Obligee is of its nature a tranſitory act (as payment of mony, delivery of Charters, and the like) and no time is limited, although that a place be expreſſed there, the act ought to be performed in convenient time. And when the Act to be performed is in its own nature local, without expreſſion of limitation of any place. But in ſuch local Acts there is a difference; for when the concurrence of the Obligor and Obligee is requiſite, then the Obligor ſhall have time to do it during his life, if the obligee doth not haſten it by requeſt. But when the Act is local, and the Obligor may perform it for the benefit of the Obligee in his abſence, there the Obligor ought to do it in convenient time. And in this Caſe at Bar there are examples of both; for firſt, the delivery of the Bond is tranſitory, and therefore the Obligor ought to have delivered it within convenient time. 2. Although that the acknowledgment of ſatisfaction be local, yet it may be
[31] performed in the abſence of the other party; and therefore in both Caſes the obligor ought to perform the acts in convenient time without any requeſt. But when the act is of its own nature local, and to be done to the Obligee, and to the performance thereof the concurrence of the Obligor and Obligee is requiſite, then the Obligor ſhall have time to perform it during his life, if he be not haſtned by requeſt, as before is ſaid. As if a man be bound in an Obligation to enfeoff the Obligee of the Mannor of *D*, without limitation of any time, there becauſe the eſtate ought to paſs by Livery and Seiſin, ſo that there ought to be a concurrence of both parties, and the Obligor cannot do it without the Obligee, and it cannot be done but upon the Land, the Obligor hath time during his life, if the Obligee doth not haſten it by requeſt made to the Obligor: For it is not reaſonable, that the Obligee make requeſt upon the Land when he will; for then the Obligor ſhall be forced to ſtay always upon the Land, which ſhall be inconvenient; but in ſuch caſe the obligee ought to requeſt the Obligor, and appoint a certain time when the Feoffment ſhall be made unto him. But there is a difference in ſuch caſe between the concurrence of the Obligor and a Stranger, and of the Obligor and the Obligee; for if I be bound unto you to enfeoff a Stranger, and no time is appointed, although that the concurrence of the Obligor and Feoffee is requiſite, yet the Obligor ſhall not have time to perform it during his life, but he ought to do it within convenient time; for in ſuch caſe the Obligor hath taken upon him to do it to a Stranger, and may do it without the concurrence of the Obligee. But when the Obligee himſelf is party, and the act cannot be done without his concurrence, there its reaſon that the Obligor have time during his life, if the Obligee haſten it not by requeſt: For in ſuch caſe the Obligor doth not take upon him for the Obligee, who is party to the deed, as he doth in the other caſe for the Stranger. But it was ſaid, that if the concurrence of a Stranger, and of the Obligee be requiſite, in ſuch caſe, the Obligee being a party he ought to haſten it by requeſt. As if I be bound to you that *J. S.* ſhall enfeoff you without limitation of any time, *J. S.* ſhall have time during his life, if you haſten it not by requeſt. Alſo it was reſolved, That when the act which the Obligor by condition ought to do, doth not in any manner concern the Obligee, nor his benefit, but is to be done by the ſole act or labour of the Obligor himſelf, and no time is appointed in the Condition in which it ſhall be performed; there the Obligor hath time during his life; and the performance thereof cannot be haſtned by requeſt. As if I be bound to you that I will go to *Rome*, or *Jeruſalem*, *&c.* In that caſe, and the like caſes, the Obligor hath time during his life to do it. So when the act to be done by the condition is to be done by the ſole act and labour, or induſtry of a Stranger; which in no manner concerneth the Obligor, Obligee, or any other perſon, and no time is appointed when it ſhall be done, it is ſufficient if the thing be done in his life time who ought to do it. As if I be bounden to you upon condition that *J. S.* ſhall go to *Rome*, or *Jeruſalem*, *&c.* or that ſuch a Student in Divinity in the Univerſity of *Cambridge*, ſhall preach at *Paul's* Croſs, or ſuch a Student of the Law in the Inner Temple, ſhall argue a matter in Law in *Weſtminſter* Hall; in theſe, and the like caſes, no time being appointed,

pointed, they have time to do it during their lives, and the performance of them cannot be haſtned by requeſt. And by theſe differences and reaſons you will better underſtand your Books, which *prima facie* ſeem to diſagree, *viz.* 33 *H.* 6. 48. *Hillary*'s Caſe, 21 *E.* 4. 59. 42. 22 *E.* 4. 25. Sir *James Harrington*'s Caſe, 9 *E.* 4. 22. 15 *E.* 4. 30. *Litt.* 77, 79. 9 *H.* 7. 16. 3 *Mar. Dyer* 139. 14 *Eliz. Andrews*'s Caſe, & 18 *Eliz.* 354. 45 *E.* 3. 9. 27 *H.* 8. 1.

Trin. 2 Jacobi, *in the Kings Bench.*

Fitz William's Caſe.

IN Treſpaſs for breaking his Cloſe at *Gamſparke* by *John Fitz William*, againſt *William Fitz William*, Eſquire, now Knight: upon Not guilty pleaded, the Jurors gave a ſpecial Verdict, which was of great prolixity. In which Caſe theſe points were reſolved. 1. That whereas Sir *William Fitz William*, Father of the Plaintiff, and the Defendant was ſeiſed of the Mannor of *Gamſpark* amongſt others, *viz.* to him, and *Anne* his Wife, and to the Heirs Males of the body of the Father; and afterwards the Father, by Deed indented and inrolled did bargain and ſell the ſaid Mannor to one in fee, who ſuffered a common Recovery, in which Sir *William* the Father was only vouched, and he vouched over the common vouchee: Sir *William* the Father, and *Anne* having Iſſue, the Defendant the eldeſt Son, and *John* the Plaintiff the youngeſt, died. It was adjudged, that although Sir *William* the Father was only vouched, and not *Anne*, yet the eſtate tail was barred, for the cauſes and reaſons alledged in *Cuppledick*'s Caſe, *Paſch.* 44 *Eliz.* in the third part of my Reports, *fol.* 6. 2. Where the ſaid Recovery was unto divers uſes declared by certain Indentures, *viz.* to the uſe of the ſaid Sir *William* the Father for life, and afterwards to the uſe of the ſaid *Anne* for life, and ſix months after her deceaſe to the uſe of *William Fitz William* the defendant in tail, and afterwards to the uſe of the ſaid *Anne* and her heirs in Fee, with this Proviſo following; *Provided always, That it ſhall be lawful to, and for the ſaid Sir* William *and Dame* Anne, [32] [b] *at any time or times hereafter, and from time to time, during their joynt lives, at their free will and pleaſure, by any their deed or writing by the ſaid Sir* William *and Dame* Anne, *ſealed and publiſhed in the preſence of three credible witneſſes, at the leaſt, to alter, change, determine, revoke, or make void, all, or any of the uſe or uſes, eſtate or eſtates, in theſe premiſes before declared or mentioned, or limited of the premiſes, or any part of them; And that at all times, from and after ſuch time as the ſaid Sir* William *and Dame* Anne *ſhall by any ſuch deed or writing ſo expreſs and declare their pleaſure and mind to be to alter, &c. That then, and from thenceforth, ſuch of the ſaid eſtate and eſtates, uſe and uſes herein declared, as ſhall be ſo declared to be altered, &c. ſhall ceaſe, determine and be void. And that then, and from thence forth, the ſaid Recovery and Recoveries ſhall be, &c. and all and every perſon and perſons, &c. ſhall thereof ſtand and be ſeiſed to the uſe of ſuch, and thoſe perſons, to and for ſuch and thoſe uſe and uſes, and in ſuch manner and form, as by ſuch deed or writing, &c. as is aforeſaid, ſhall be declared or limited, only, and not to any other perſon or perſons, uſe and uſes.* And afterwards the ſaid Sir *William* and Dame *Anne* by their writing indented, ſealed by them, ſubſcribed and publiſhed in the preſence of three credible witneſſes, reciting the ſaid Indenture of uſes, and the ſaid power, did revoke the ſaid uſe and eſtate in tail, limited to *William Fitz William* now defendant, and the remainder limited to Dame *Anne* in Fee, ſaving the uſe and eſtate limited to himſelf for his life, the remainder to the Wife for life; and by the ſame writing declared, That the ſaid Recovery ſhall be to the uſe of the ſaid Sir *William Fitz William* for life, the remainder to the Lady *Anne* for life, and ſix Months after, and afterwards to the uſe of *John Fitz William* the Plaintiff in tail, and afterwards to the uſe of Sir *William Fitz William* the Father in fee, with the like power of revocation, as before; and afterwards Sir *William* and *Anne* die; and if the revocation, and new declaration, and limitation of the ſaid new uſes were good, and effectual in Law, was the queſtion; And it was ſtrongly urged that the new declaration of uſes was not ſufficient in Law for two cauſes. 1. Becauſe the revocation and new declaration and limitation (as this Proviſo is penned) cannot be in one and the ſame deed; for in that three times are to be obſerved, *tempus revocandi, tempus ceſſandi veteres uſus, & tempus declarandi novos uſus.* The act of revocation ought to be by writing, and ſealed and publiſhed in the preſence of three witneſſes; and then comes the ſecond time, *viz. And that at all times, and from and after ſuch time as Sir* William *and* Anne *by ſuch writing ſo expreſs and declare, &c.* So that there is a diſtinction of times, *viz. from and after ſuch time, &c.* the former uſes ſhall ceaſe; and after that they are ceaſed, then followeth the third time, *And that then, and from thenceforth, &c. viz.* after the time of the ceſſer, the recovery ſhall be, &c. to ſuch uſes *as by any ſuch deed or writing, &c. ſhall be declared and limited.* In which caſe [33] *(by ſuch deed)* which is as much as to ſay, by *hujuſmodi*, or *conſimile ſcriptum*, ought to be like in all circumſtances, as to be their joynt writing, to be ſealed and publiſhed as the other; but cannot be in the ſame deed; for the firſt deed is ended when that is ſealed and publiſhed, and after that nothing can be added to it; for that by the publiſhing is compleat, and his time paſt: Then after that time, the time of the ceſſer ought to paſs, and then cometh the time to declare new uſes: ſo that it is not poſſible that the declaration of the new uſes can be in the deed of declaration, but ought to be in another deed. And it was much inforced by this word *(ſhall be)* which is in the Future tenſe; and by that it appeareth, that the revocation ought to paſs before the new declaration ſhall be made; for the words are, *ſhall be declared or limited.* And it was ſaid, That theſe and the like powers by which the eſtate or intereſt of Strangers

ſhall

ſhall be changed or charged, ſhall be taken ſtrictly, becauſe they extend to the defeating or change of the eſtate of a third perſon; and to that purpoſe a Judgment was cited, *Trin.* 30 *Eliz.* in a Replevin between *Leaper* Plaintiff, and *Richard Wroth* Defendant, where the caſe was; *Henry* Earl of *Suſſex* conveyed the Mannor of *Burnham* in *Eſſex* to the uſe of himſelf for life, and afterwards to the uſe of the Counteſs of *Suſſex* for life, with divers Remainders over, with Proviſo, that it ſhould be lawful for the Earl to make Leaſes for one and twenty years, rendring, &c. And afterwards the Earl, *viz.* 3. *Aprilis*, *&c.* made a Leaſe of the ſaid Mannor for one and twenty years, to begin at the Feaſt of S. *Michael* the Archangel then following; and although that the power was general to make Leaſes for one and twenty years, without being reſtrained to make them in poſſeſſion, or any number of them, but indefinite to make Leaſes for one and twenty years, yet it was adjudged that the ſaid Leaſe was void for two cauſes. 1. If by the ſaid power he may make any future Leaſe, or Leaſe in Reverſion, then he may make a Leaſe for one and twenty years in poſſeſſion, and afterwards infinite Leaſes in reverſion for one and twenty years, which ſhall be contrary to the meaning of the parties, and then the expreſſing of the one and twenty years was in vain, and by ſuch conſtruction the text and letter of the Proviſo ſhould be idle and vain. The ſecond reaſon was, becauſe that for as much as this proviſo gave power to charge the eſtate of three perſons with terms of one and twenty years, ſuch Proviſo ſhall be taken ſtrict, and ſhall not extend beyond the Letter and the meaning of the parties. And if I be bound, or contract with you to make a Leaſe to you for one and twenty years indefinitely, the Leaſe ought to be made to begin preſently, and not *in futuro*. 2. It was objected, that although *ex indulgentia Legis*, the Law will in divers caſes conſider two diſtinct times in one inſtant (which in truth is not any time) yet no caſe can be put, that by any conſtruction three times may be admitted in one inſtant. And therefore it was ſaid, that this
[b] Caſe differeth from *Digges* Caſe, publiſhed by me in the firſt part of my Reports; for there was but two times which well ſtood with the learning of Inſtances, and with the caſe of the fine there put. But put caſe there are three Conuſors of a Fine, and the Conuſee rendreth to one of the Conuſors, for life or years, a rent, and granteth the reverſion to another of the Conuſors for life, or years, rendring rent, and by the ſame fine granteth a reverſion in fee, or in tail, to the third Conuſor; it was ſaid that ſuch fine ſhall not be received, becauſe that an Inſtant cannot be more than two times. 2. It was ſaid, that in *Digges* Caſe the uſes were raiſed by covenant out of Eſtate of the Covenantor, which may be more eaſily determined again in his poſſeſſion, than when uſes are raiſed out of a Recovery, by which is tranſmutation of poſſeſſion, and all the Eſtate deveſted out of him who limiteth and declareth the uſes. But it was anſwered and reſolved by the whole Court, That the ancient uſes in the Caſe at Bar were revoked, and the new uſes well declared in the ſame deed: For firſt, in Judgment of Law there were not in this caſe but two times concurrent in one inſtant, *viz.* the time of the ceaſing of the former uſes, and the declaration of the new; for although that the revocation and the ceſſer of the former uſes are diſtinguiſhed in words; yet in truth they are all one: For the uſe which is revoked ceſſeth, and the uſe which ceaſeth is revoked. 2. It was reſolved, That although no uſe ceaſeth until the writing of Reverſion be ſealed and publiſhed, and after the ſealing and publication thereof nothing can be added to it, yet it well ſtandeth with the words of the Proviſo, and the intention of the parties, that the new declaration may be in the ſame deed; for both being contained in one and the ſame writing, firſt its conſtruction ſhall be to make deſtruction of the former, and in the ſame inſtant to make the new uſes; and this word (*ſuch*) more properly doth extend to that writing in which the revocation is, than to another; for (*by ſuch writing*) is as much as to ſay, *per idem vel hujuſmodi ſcriptum*; and ſo it ſhall be taken in this Caſe. And this word (*ſhall be*) ſhall be ſaid future in reſpect alſo of the Indenture, and alſo in Judgment of Law ſubſequent to the revocation; although that theſe words are contradictory, and *ex diametro pugnant*, for the one doth deſtroy, the other doth create; yet the conſtruction of the Law (which delighteth in reconcilement) doth make a good accord betwixt them. For to the end the new uſes ſhall be created, the Law will adjudge that the clauſe of deſtruction ſhall have the priority, although both be contained in one and the ſame deed, and take effect by one and the ſame delivery. And as to the difference as to ceſſer of an eſtate moved between *Digges* Caſe (where the uſe was raiſed by covenant) and this *Caſe*, where the uſe was declared upon a Recovery, it was reſolved that it was all one, That when *he* who
[34] maketh the Revocation is ſeiſed or poſſeſſed of the Land for the reaſon and cauſe given in *Digges* Caſe; for it was agreed in this Caſe, That the beſt conſtruction of the Statute of 27 *H.* 8. of Uſes is, to make them ſubject to the rules of the Common Law which are certain and well known to the Profeſſors of the Law, and not to make them ſo extravagant that none know any rule to decide the queſtions which ariſe upon them, which will bring forth incertainty the cauſe of infinite troubles, controverſies and ſuits, which agreeth with the Reſolution in *Dillon* and *Freins* Caſe, in the firſt Part of my Reports, and in *Butler* and *Baker*'s Caſe, in the ſecond Part of my Reports, and in *Cholmeley*'s Caſe, in the ſame Reports, where it is reſolved, That although that uſes at the Common Law might have ceſſed without claim, yet now the uſe is transferred to the poſſeſſion; for the pleading is, *vigore ſtatuti*, *&c. de uſibus in poſſeſſ. tranſferendis*. So that now after the Statute, to ſuch qualities to which eſtates at the Common Law are ſubject, to ſuch qualities uſes after they are transferred into the poſſeſſion are ſubject; for the uſe is transferred and incorporate in the poſſeſſion, which agreeth with the Reſolution in this caſe. And upon the ſame reaſon it hath been adjudged, That if a man bargaineth, and ſelleth his Lands to another and his heirs by deed indented and inrolled, with Proviſo, that if ſuch thing be done, that the bargain and ſale ſhall be void; and afterwards the bargainor taketh a wife, and afterwards the Proviſo is broken, before entry the Husband dieth, and it was adjudged that the Wife ſhould not be endowed; for although that the Eſtate of the Bargainee veſts by the Statute of 27 *H.* 8. by execution of the eſtate of the Land to the uſe raiſed by the bargain and ſale, yet for as much as the Husband did not re-enter, he had not any Eſtate in the Land, whereof the Wife might be endowed.

Trin.

Trin. 3 Jacobi, *in the Common Pleas.*

The Biſhops of *Bath*'s Caſe.

IN a Replevin between *Bellamy* and *Fiſh*, *Fiſh* made Conuſance as Bayly to *Willam* Lord *H.* for damage feaſance; The Plaintiff ſaid, That before the ſaid Lord *W. H.* had any thing, the Biſhop of *Bath* and *Wells* was ſeiſed of the Mannor of *Blackford*, where, &c. in his demeſne as of Fee in the right of his Biſhoprick; and afterwards, the laſt of *September*, 11. *H.* 8. by writing made a Leaſe to *Elizabeth Coſin*, and *Robert Coſin* her ſon of the ſaid Mannor for threeſcore years, from the day of the making of the ſaid Writing without impeachment of Waſte, with reſervation of Rent: and further it was provided by the ſaid Writing, that if the ſaid *Elizabeth* and *Robert* ſhould die within the ſaid term of threeſcore years, that then preſently and immediately after the deceaſe of the ſaid *Elizabeth* and *Robert*, and the longer liver of them, it ſhould be lawful for the Biſhop and his ſucceſſor to re-enter into the ſaid Mannor. *Elizabeth* died, and *Robert* ſurvived her; the Biſhop died, and another is elected and conſecrated, &c. who the laſt of *Auguſt* 22 *H.* 8. by writing demiſed the ſaid Mannor to one *Clark*, to hold and occupy the ſaid Mannor, to the ſaid *Clark*, his Executors and Aſſignees, *cum poſt, ſive per mortem, ſurſum reddit. vel foriſfacturam præd. Rob. Coſin acciderit vacare*, for threeſcore years, with confirmation of the ſaid Dean and Chapter. And afterwards the Biſhop granted the Reverſion of the ſaid Mannor to the Lord *William H.* and the Tenant attorned, and afterwards *Robert Coſin* within the firſt threeſcore years died, and the ſecond Leſſee died, and the intereſt of the ſecond Leſſee came to the Plaintiff, and the Plaintiff demurred upon the bar to the Avowry. The queſtions in this caſe were two. 1. If the ſecond Leaſe ſhall ever begin. 2. Admitting that it ſhould begin, when it ſhall begin. As to the firſt, it was objected, Inaſmuch as the ſecond Leaſe is limitted to begin upon one of the three accidents, that is to ſay, when the former Leaſe ſhall determine by death, or ſurrender, or forfeiture; if none of theſe accidents happen, that the ſecond Leaſe which is to begin upon one of them, ſhall never begin: For it was ſaid, Suppoſe that the Leſſees had ſurvived the firſt term without any ſurrender or forfeitnre, the ſecond Leaſe ſhould never begin; for the term ought to begin at the time that the Leſſor doth appoint, and at no other time; and [35] if the beginning be uncertain, or if the beginning be upon an accident which never happeneth, or upon contingent, or a condition impoſſible, the Leaſe is void: For every Leaſe for years ought to have a certain beginning, continuance and end. See *Saye*'s Caſe, *Plow. Com.* 172. 14 *H.* 8. 10. 21 *H.* 7. 38. 2 *Mar. Br.* Leaſes 67. 2. It was objected, That if the ſecond Leaſe ſhall begin at all, it ſhall begin by the death of the Leſſees, for this accident happeneth, and not the other two, and by their deaths it cannot begin; for by the death (as this Caſe is) it cannot begin in poſſeſſion; for the ſaid Proviſo in the firſt Leaſe doth not make the Leaſe void upon the death of the Leſſees, but giveth re-entry to the Leſſor and his Succeſſors. So that till re-entry (notwithſtanding the death of the Leſſees) the Leaſe continueth. And therefore, for as much as the ſecond Leaſe is to begin after the avoidance of the firſt Leaſe by the death of the Leſſees, for this cauſe, either it ſhall never begin, or the term of the ſecond Leaſe ſhall inure from the time of the death of the ſurvivor of the Leſſees. As to the firſt, it was anſwered and reſolved, That it is true, That every Leaſe for years ought to have a certain beginning, but that is meant, when it is to take effect in intereſt, or poſſeſſion, then the beginning ought to be certain; for a Leaſe for years may be made upon condition, or contingent precedent; As if I grant to you, that if you pay to me twenty pound at *Michaelmas* next following, that you ſhall have my Mannor of *D.* for one and twenty years, now it is uncertain if this ſhall begin or not, and in the mean time till the payment of the mony it is not any Leaſe, but it ſufficeth that the beginning be certain when it is to take effect in intereſt or poſſeſſion. So it is true, that the continuance of it ought to be certain, but that is to be intended, either when the term is made certain by expreſs numbring of years, or by reference to certainty, or by reducing of it to certainty by matter *ex poſt facto*, or by conſtruction in the Law by expreſs limitation. As firſt, if a Leaſe be made for one and twenty years, or any other certain term, &c. it is good for the certain enumeration at the firſt. 2. By reference to certainty; as if one Leaſe the Mannor of *D.* to *I. S.* for as many years as *I* hath in the Mannor of *S*, and he hath a term for ten years, *I. S.* ſhall have the ſame term. So if a Leaſe be [b] made unto another during the minority of *I. G*, and he is of the age of ten years, this is a good Leaſe for eleven years, if *I. G.* ſo long live. But if the Wife of *I.* be great with child with a Son, and a Leaſe be made until the Iſſue the Mother goeth with ſhall come to full age, it is no Leaſe for years; for at the time when the Leaſe is to take effect, it is uncertain when the ſon ſhall be born, and by conſequence the beginning, continuance and end thereof is uncertain. And when a Leaſe for years ſhall be made good by reference, the reference ought to be a thing which hath expreſs certainty at the time of the Leaſe made, and not to poſſible, or cauſual certainty. And therefore if I have a rent of twenty ſhillings *per annum* in fee iſſuing out of *Bl.* Acre, payable yearly at the Feaſt of *Eaſter*, and I grant the ſame rent to you until you ſhall have received of the ſame rent one and twenty pound, in this caſe you ſhall have this rent for one and twenty years; for it hath reference to an expreſs certainty, *viz.* to a yearly rent which is twenty ſhillings *per annum* in certainty. But if a man leaſeth Lands of the value of twenty ſhillings *per annum* until one and twenty pound be levied of the iſſues and profits, it is but a Leaſe at will without Livery; for it is not certain that the Land ſhall be every year of one value. And ſo it was reſolved, *Paſch.* 24 *Eliz.* by the whole Court of Common Pleas. When a Leaſe ſhall be made good by matter *ex poſt facto*, It was reſolved, That if a man make a Leaſe from the Feaſt of S. *Michael*,

for

for as many years as *I. S.* ſhall name, in this caſe, if *I. S.* name a certain term (in the life of the Leſſor) it is a good Leaſe by matter *ex poſt facto*. So it is of all Leaſes which begin upon conditions precedent. And as to *Potkin*'s Caſe in 14 *H.* 1. which was cited by the Council on both ſides in this Caſe, where the Caſe was, That *Potkin*, 10 *H.* 8. demiſed a Wood to the Defendant to begin at the Feaſt of St. *Michael* next following, *pro termino unius anni & ſic de uno anno in annum, quamdiu ambabus partibus placuerit*, and there two Juſtices againſt two, it was reſolved by the whole Court, that in ſuch caſe after three years at the moſt, it was but a Leaſe at will, becauſe beyond that the term hath not any certain continuance or determination; and upon the matter it is no other, than if one demiſe Lands for ſuch term as both parties ſhall pleaſe, it is but a Leaſe at will, becauſe the term is altogether uncertain.

[36] But if a man leaſeth his Land for years, it is a good leaſe for two years, becauſe it ſhall be taken good for ſuch number with which at leaſt the plural number ſhall be ſatisfied, and that is with two years. It was alſo reſolved, That it is uſual when the Kings leaſe is doubtful, if it be good or not, and another is to take a leaſe of the ſame lands, he will make his *Habendum* to begin (if any former leaſe be, &c.) after the end or determination of the former leaſe, and if that be no leaſe then from ſuch a Feaſt for a certain number of years. And (God forbid) but that theſe leaſes ſhall be good and effectual; for in the Judgment of Law it hath ſufficient certainty of beginning; for in the eye of the Law the former demiſe is either good or void, and therefore in the Kings Caſe, which is ſtronger than the caſe of common perſons, ſuch Leaſe hath by conſtruction of Law a certain beginning. So if *A.* reciting that *B.* hath a Leaſe for years, demiſeth the Land to *C.* for years, to begin after the end or determination of the former leaſe, and in truth there is not any former leaſe, the leaſe to *C.* ſhall begin preſently; for in Judgment of Law, a void limitation at the beginning, and no limitation is all one. As to the ſecond Objection, it was reſolved, That in conſtruction of Law upon the beginning of the Leaſes, the ſtrongeſt ſhall be taken againſt the Leſſor, and moſt beneficially for the Leſſee. And in this caſe it is true, That the firſt leaſe cannot determine by the death of the Leſſees, becauſe by their deaths a re-entry is given; ſo that till re-entry the leaſe cannot determine by their deaths. And for as much as there was not any re-entry in truth, the firſt leaſe ſhall determine by effluxion of time, and not by death, ſurrender or forfeiture. But the words of the *Habendum* of the ſecond Leaſe, are not only *cum per mortem*, &c. *vacari contingerit ſed cum poſt, ſive per mortem, &c. vacari contigerit.* And although that the firſt leaſe doth not become void *per mortem*, yet certain it is that it cometh void, *viz.* (by effluxion of time) *poſt mortem* of the Leſſees; foraſmuch as both died before the determination of the leaſe and as hath been ſaid, the ſtrongeſt conſtruction ſhall be taken againſt the leſſor, and the moſt beneficial for the leſſee, and that is, that the ſecond leaſe ſhall begin either after the re-entry by force of the Proviſo, if any be, and if there be none, then after the determination and end of the firſt term. And *Wroteſley*'s Caſe in *Plowd. Com.* 192. was cited, when a woman leſſee for years took a Husband, and he in the Reverſion leaſed the Land for years to begin after the term demiſed to the Husband, where in truth the firſt term was demiſed to the Wife, and by act in Law transferred to the Husband; and yet by reaſonable conſtruction it was there reſolved,

[*b*] That the Lands was by the woman demiſed to the Husband to make the leaſe to have a good beginning. It was alſo agreed in this caſe, that the ſecond leaſe did veſt preſently in point of intereſt, and did not depend in contingency, to take effect in poſſeſſion, or at the end of the former term, if by none of the three accidents the firſt leaſe became void in the mean time; and which of them ſhould firſt happen, the leaſe ſhould begin; for it was reſolved, If a man make a leaſe for years to begin after the ſurrender, forfeiture, determination or end of a former leaſe, in this caſe the leſſee hath not any election to have the ſecond leaſe, either upon ſurrender or forfeiture, or end which he will chuſe, but which of them ſhall firſt happen, the ſecond leaſe which before conſiſted *in intereſſe termini*, ſhall begin in poſſeſſion. And therefore put caſe that the firſt leſſee ſurrendreth to the leſſor, the ſecond leſſee cannot elect that his leaſe ſhall begin after the expiration of the term, but preſently by the ſurrender his leaſe cometh in poſſeſſion, and from this time the years of the ſecond leaſe ſhall incur; for theſe words (which of them firſt happeneth) are implied in Law.

Trin. 3 Jacobi, *in the Kings Bench.*

The Dean and Chapter of *Worceſter*'s Caſe.

[37] THe Dean and Chapter of *Worceſter* were ſeiſed of the Mannor of *Hambleton* in Fee in the right of their Church, of which Mannor one *Henry Gardiner* was a Copyholder for life of certain land whereof the ancient rent was eight ſhillings and eight pence, payable at four days of the year, *viz.* quarterly, and Heriotable at the death of the Tenant, the Copy holds of which Mannor were grantable by the cuſtom of the Mannor for three lives. The Dean and Chapter, *anno* 24 *Eliz.* by deed indented under their common Seal leaſed the ſaid lands to the ſaid *Henry Gardiner* and his Aſſignees for the lives of *John*, *Richard* and *Margaret Gardiner*, and the Survivor of them; and afterwards the Dean died, the Succeſſor and the Chapter did enter to avoid the Leaſe, and the queſtion was, If this Leaſe was to be avoided by the Statute of 13 *Eliz. cap.* 10. or not? And it was argued that this leaſe was avoided for four cauſes. Firſt, That the ſaid leaſe was made for the lives of other, in which caſe it may happen that there ſhall be an occupant who ſhall not be ſubject to Waſte, no more than the Tenant by Statute Merchant,

Merchant or Tenant by Elegit, *&c.* who come in by the Law without any demiſe, *Vide 16 Ed.* 3. Waſt 100. 21 *Ed.* 3. 26. For although there is not any expreſs clauſe of reſtraint of Leaſes without impeachment of Waſt, as in the Statute 32 *Hen.* 8. *cap.* 28. yet ſuch Leaſe is againſt the intent and equity of the ſaid Statute of 13 *Eliz.* for as it appeareth by the Preamble, The Statute was made againſt unreaſonable Leaſes; and it is unreaſonable that a Leſſee ſhall at his pleaſure do waſt and ſpoil, which is againſt the Commonwealth, for intereſt *Rei pub. ne ſua re quis male utatur.* Alſo it appeareth by the Preamble, That the Statute was made againſt decay of Spiritual livings; and therefore if Dean and Chapter make a Leaſe for life, the Remainder for life, this Leaſe is not warranted by the ſaid Act becauſe it is diſpuniſhable of Waſt. 2. It was objected, That this Land had not been uſually demiſed; for a demiſe in this caſe is to be intended of a demiſe at the Common Law, and not a cuſtomary demiſe, whereof the Common Law doth not take any notice. 3. The ancient rent is not reſerved, nor the benefit which the Copyhold eſtate yeildeth to the Lord was reſerved; for the Heriot thereby is loſt; and it was not the intent of the Act, that any prejudice of any benefit which is of continuance, as doubling of the Rent, every three or four year a Heriot, or other benefit at the death of the Tenant ſhould be loſt. 4. The Rent reſerved was not payable as it accuſtomably had been paid; for now it is reſerved to be paid every half year at two Feaſts, where it was payable at four Feaſts of the year before. And to this purpoſe the Lord *Mountjoy's* Caſe was cited, which you may ſee in the fifth Part of my Reports; for by the ſame reaſon where the Rent is reſerved at two days, it might be reſerved at one day in prejudice to them in reverſion in hindrance of Hoſpitality, which the Statute (as appeareth by the Preamble) did intend to advance. As to the firſt, it was anſwered and reſolved, That a Dean and Chapter, *&c.* are reſtrained by the equity of the ſaid Act to make Leaſes diſpuniſhable of Waſt, for the cauſes alledged on the other ſide. But it was alſo reſolved, That an occupant ſhall be puniſhed for waſt, becauſe he hath the Eſtate of Leſſee for life; For the Statute of *Glouceſter cap.* 5. giveth an Action of Waſt againſt him who holdeth in any manner for life or years, and an occupant holdeth for term of life; but Tenant by Statute Merchant, by Statute Staple, or Elegit, do not hold for life, or years, and therefore they are out of the Statute. And therefore Leaſes for the lives of others, are within the ſaid Act of 32 *Hen.* 8. *cap.* 28. concerning Leaſes made by Tenant in tail, as well as they are within this Act of 13 *Eliz.* To the ſecond Objection it was anſwered and reſolved, That the ſaid Eſtate granted by Copy was in Judgment of the Common Law an Eſtate at will; and without queſtion, Lands which have been accuſtomably uſed to be demiſed at will by thoſe who have the Inheritance of the Lands, rendring Rent, are Lands accuſtomably letten to farm within the Act. And according to this reſolution was the opinion of the whole Court of Common Pleas, *Paſch.* 3 *Jacobi*, *Vide Heydons* Caſe in the ſecond Part of my Reports. To the third Objection it was anſwered and reſolved, That the ſaid Act of 13 *Eliz.* doth not avoid the Leaſe if the accuſtomed yearly rent or more be reſerved; and foraſmuch as the Heriot was not an annual thing, nor a thing depending upon Rent, it is ſufficient that the yearly Rent be reſerved. To the fourth Objection it was alſo anſwered and reſolved, That it is ſufficient if the accuſtomed Rent be reſerved yearly at one time; for the words of the Act are, whereupon the accuſtomed yearly Rent or more ſhall be reſerved. And therefore if the Rent be yearly reſerved, the Statute is ſatisfied, by reaſon of this word (*yearly*) and ſo there is a difference between this Caſe and the Lord *Mountjoy's* Caſe; for there wanted the word (*yearly*) which explaineth the intention of the makers of the ſaid Act of 13 *Eliz.*

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Paſch. 3 Jac. Rot. 980. *in the Common Pleas.*

Bellamy's Caſe.

Walker brought Treſpaſs againſt *Bellamy* for carrying away his goods, *&c.* The Defendant conveyed to him a Houſe by Feoffment, and juſtified for damage feazance; the Plaintiff pleaded a Leaſe made to one of this houſe for years by the Feoffor by deed indented, before the Feoffment, which the Leſſee did aſſign to him; the Defendant confeſſed the Leaſe, but ſaid, that the leaſe was upon condition that he ſhould not let or aſſign over without licence of the Leſſor, and alledged that the Leſſee without licence did aſſign to the Plaintiff; the Plaintiff pleaded the licence of the Leſſor to the Leſſee by deed, without ſaying *hic in cur. prolat.* and for that cauſe the Defendant did demurr in Law. And although of neceſſity the licence ought to be by deed, and the reaſon and cauſes that deeds are ſhewed to the Court is, becauſe it belongeth to the Judges to Judge of the ſufficiency or inſufficiency of them. Yet it was reſolved, that the Plaintiff need not to ſhew the Deed, for three cauſes. 1. Becauſe the the Plaintiff doth not claim by the deed of licence any intereſt in the houſe, but licence is meer collateral to the intereſt of it, and pleaded only to excuſe the forfeiture of the Leaſe, and is not like to a releaſe or confirmation; for they transfer their Right. 2. A good difference was taken and agreed when a deed is requiſite *ex inſtitutione Legis*, and when *ex proviſione hominis*; for when it is requiſite *ex inſtitutione Legis*, there it ought to be ſhewed in Court, although it concern a collateral thing, and transfer and convey nothing. As if the Major and Commonalty of *London* have an eſtate for the life of *J. S.* if in caſe the Major and Commonalty attorn to the grantee of the Reverſion, the Law doth require that it ſhould be by deed; for notwithſtanding that the grantee doth not claim in by them who attorn, and that an attorn-

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ment is but a conſent, yet in pleading, the deed of attornment ought to be ſhewed, for the deed is requiſite *ex inſtitutione Legis* in ſuch caſe. But when a deed is requiſite *ex proviſione hominis*, there the proviſion of man ſhall not change the Judgment of Law in ſuch caſe; As if a man make a Leaſe for years of Land to *A.* upon condition that he ſhall not aſſign it over but by deed only, and not by word, in this caſe *ex proviſione hominis*, the aſſignment ought to be by deed, but becauſe *ex inſtitutione Legis*, a deed is not neceſſary to the Aſſignee, he may plead the Aſſignment without ſhewing a deed of it. And if the Kings Fermor bring a *Quo minus* in the Exchequer, he ought to alledge that he is the Kings Fermor to enable him to ſue there; but he needeth not to ſhew it to the Court, for that it is meer collateral to the Action. 3. In the principal caſe the Licence was executed, and had not continuance, *Vide 6 Rich.* 2. *Monſtrance des faits* 157. 28 *Hen.* 8. 29 *Dier.* 18 *Ed.* 3. 56. 44 *Ed.* 3. 11. 45 *Ed.* 3. 28. 18 *Hen.* 8. 4. 11 *Hen.* 4. 39. 8 E. 3. 19. 18 E. 4. 12. 40 *Ed.* 3. 10. *Plowd. Com.* 149. 21 *Hen.* 7. 9. by *Frowick*. 43 *Aſſ. p.* 24. 8 *Aſſ. p.* 11. 24. *Aſſ. p.* 2. 20 *Aſſ. p.* 19. 24 *E.* 3. 52.

Hill. 3 Jacobi, *in the Kings Bench.*

Henry Finch's Caſe.

[39] *Thomas Moon* brought a Replevin againſt *Daniel Crat*, and *Thomas Baldwin*, who made conuſans as Bailiffs to *Henry Finch*, Eſq, becauſe the place where, *&c.* was parcel of the Mannor of *Eaſt-well*, whereof the Lady *Finch* was ſeiſed in fee, and by her deed dated 6 *Eliz.* did grant to the ſaid *Henry Finch* her younger Son, an yearly Rent of 20 *l. exeunt. de prædict. Manerio de Eaſtwell inter alia per nomen maneriorum de Eaſtwell, Otterplea, Potburie, & Seton, & meſſuagiorum, terrarum, tenementorum, & hereditamentorum dictæ Katherinæ, ſcituat. jacen. & exiſten. in parochiis de Eaſtwell, Weſtwell, & Challock in Com. Kanc. aut alibi in eodem Com. dict. Maneriis ſive eorum alicui quoquo modo ſpectant. vel pertinent.* to the ſaid *Henry Finch*, and the heirs of his body, payable at the feaſts of the Annunciation and St. *Michael*, by even portions, with Clauſe of diſtreſs; And for Rent behind they made Conuſans. The Plaintiff prayed Oyer of the Deed, which was entred in *hæc verba*, and had it, and ſaid, that *præter & ultra* the ſaid Mannors of E. *O. P.* and *S.* and the premiſſes appertaining to the ſaid Manors, the Lady *Finch* at the time of the granting of the ſaid Rent, was alſo ſeiſed of one Acre of Land in Fee in *Challock* aforeſaid, and died ſeiſed, which deſcended to Sir *Moile Finch* as her Son and heir; and that the ſaid *Henry* had abated in the ſaid Acre, and ſo continued ſeiſed by abatement: upon which the Defendants did demurr in Law. And the Queſtion was, If the ſaid Acre of Land (which was not parcel, nor appertaining to the ſaid Mannors) were by the words aforeſaid charged with the ſaid Rent, or not; And after many Arguments at the Bar, and the Caſe well debated at the Bench, It was adjudged, That the ſaid Rent was not iſſuing out of the ſaid Acre of Land, but only out of the ſaid [b] Mannors and Land appertaining to them. And the Chief reaſon and cauſe of their Judgment was, becauſe that in this caſe there is but one grant, and one ſentence; for there is not a full ſtop nor end of the ſentence, before the concluſion of theſe words (*aut alibi, &c.*) And the difference is between two diſtinct ſentences importing ſeveral grants, and one ſentence; As if the grant had been *Dedi & Conceſſi annuam redditum* 20 *l. exeunt de manerio de D. & terris & tenementis meis in D. S. & D. in Com. K. & de terris & tenementis meis alibi in eodem Com. dict. Manerio ſpectant. & pertin.* In that Caſe there are two ſentences, and each one may ſtand by it ſelf, for there is iteration *De terris & tenementis*, which do amplifie and enlarge the Lands and Tenements, out of which the Rent is to iſſue; but in the Caſe at barr there is not any iteration or enlagment of Lands or Tenements after the *aut alibi*; but the *aut alibi* doth not enlarge the grant of the Rent to iſſue out of other Lands or Tenements, but enlargeth the Towns or places, in which the lands before charged do extend; as if he ſaid, *in parochia de E. W. & C. aut alibi in dict. Com. K. dict. maner. ſpect. ſeu pertin.* for *hæc verba in hoc caſu tranſpoſita idem ſignificant*: Alſo, although that this conjunction disjunctive (*aut*) in this caſe amounteth in Law to a Copulative, Yet it was well obſerved that (*aut*) was never put for the beginning of a ſentence, but always as a continuance of a former ſentence, in the ſame manner as (*una cum*) conjoyneth the matter ſubſequent to the matter precedent. Alſo here in the principal Caſe, theſe Participles *ſpectan. & pertinen.* in Conſtruction agree to theſe words *Meſſuag. terr. tenement. & hereditament.* for there are not other Nouns to which they can agree; But as it hath been ſaid, if there had been after the (*Aut*) any new iteration, or mention of Lands or Tenements, with which theſe particles *ſpectan. & pertinen.* might agree in true Conſtruction, then there may be a difference.

Note Reader, although *Mala grammatica non vitiat inſtrumenta*, yet *in expoſitione inſtrumentorum, mala grammatica, quoad fieri poſſit vitanda eſt.*

Mich. 3 Jacobi, *in the Kings Bench.*

Sir *Anthony Mildmay*'s Caſe.

THis Term the Caſe, upon a ſpecial verdict in an Action of Treſpaſs, done at *Newton* in the County of *Northampton*, Between *James Hetherſall*, Leſſee of *Humphrey Mildmay* Eſq; Plaintiff, againſt Sir *Anthony Mildmay* Knight Defendant, (which was *mutatis mutandis* all one with *Corbets* Caſe reported by me in the firſt part of my Reports *f.* 84.) was argued at the bar, as it had been in ſundry Terms paſt; and was alſo argued by the Judges: And was adjudged againſt the Plaintiff, according to the judgment given in *Corbet*'s caſe. And in this caſe ſome points upon great Conſideration were reſolved, which were not moved in *Corbet*'s caſe: 1. That all theſe perpetuities were againſt the reaſon and policy of the Common law; For at the Common law all Inheritances were Fee-ſimple, as *Littleton* ſaith in his Chapter of *Eſtate tail*; and the reaſon thereof was, that neither Lords ſhould be defeated of their Eſcheats, Wards, &c. nor the Farmers or purchaſers ſhould loſe their eſtates or leaſes, or ſhould be evicted by the heirs of the grantors or leſſors; nor ſuch infinite occaſions of troubles, contentions and ſuits ſhould ariſe. But the true policy and Rule of the Common law in this point, was in effect overthrown by the Statute of *Donis Conditionalibus*, made *Anno* 13 *E.* 1. which eſtabliſhed a general perpetuity by Act of Parliament, for all who had or would make the ſame, by force whereof all the poſſeſſions of *England* in effect were entailed accordingly, which was the occaſion and cauſe of the ſaid and other miſchiefs. And the ſame was attempted and endeavoured to be remedied by divers Parliaments; and divers Bills were exhibited accordingly (which I have ſeen) but they were always upon one pretence or other rejected. But the truth was, That the Lords and Commons knowing that the eſtate tails were not to be forfeited for Felony or Treaſon; as their eſtates of Inheritances were before the ſaid Act, (and chiefly in the time of *H.* 3. in the Barons wars) and finding that they were not anſwerable for the debts or Incumbrances of their Anceſtors, nor the ſales, leaſes, or alienations of their Anceſtors, did bind them for the Lands which were intailed to their Anceſtors, always rejected ſuch Bills: and the ſame continued in the reſidue of the reign of *E.* 1. and of the reigns of *E.* 2. *E.* 3. *R.* 2. *H.* 4. *H.* 5. *H.* 6. and until and about the 12 year of *E.* 4. When the Judges upon Conſultation had amongſt themſelves, did reſolve, That the eſtate tail might be cut off and barred by a Common Recovery; and that by reaſon of the intended recompence, the Common Recovery was not within the reſtraint of the ſaid perpetuity made by the ſaid Act of 13 *E.* 1. By which it appeareth, That many miſchiefs do ariſe upon the Change of a Maxim, and Rule of the Common Law, which thoſe which altered could not ſee, when they made the change; For *Rerum progreſſus oſtendunt multa, quæ in initio præcaveri ſeu prævideri non poſſunt.* 2. It was reſolved, That it was impoſſible and repugnant, that an eſtate tail ſhould ceaſe as if the Tenant in tail were dead, (had he iſſue or not) for an eſtate tail cannot ceaſe, ſo long as it continueth; but here his intent was to continue the eſtate tail; and to ceſs it in reſpect of the party offending only, and not as to any other, which is impoſſible and repugnant, and againſt the Law; For every Condition or Limitation ought to defeat the whole eſtate, and not to defeat part of the eſtate, and to leave part not defeated; and it cannot make an eſtate to ceaſe *quoad unam perſonam*, and not *quoad alteram*: But an Act of Parliament may make an eſtate to ceaſe as if one were dead, 21 *H.* 8. that by the acceptance of the ſecond benefice, the firſt ſhall be void as if one were dead, and in 10 *Eliz. Dier* 274. there is reſtitution by Parliament with a *Quoad*. So the policy of the Common law may make a *Quoad*, as in 22 *Eliz. Dier* 369. a marriage *infra annos nubiles*, is perfect *quoad dotem*, and *quoad* other purpoſes, it is but *inchoatum & imperfectum*. So if two are joyntly and and ſeverally bound in a bond, and Judgment is given againſt one, by which it is become of Record as to one, but as to the other, it remaineth writing as it was before: But no Condition or Limitation framed by the parties words in his Deeds, can make an Eſtate tail in any Lands to ceaſe as to one perſon, and be in *eſſe* as to another, or to ceaſe for one time, and to revive after (as a rent newly created may.) And none can have an Eſtate in tail, but parties in Eſtate *ſecundam formam doni*. 3. It was reſolved, That if a man maketh a Gift in tail upon Condition, that he ſhall not ſuffer a common Recovery, that this Condition is repugnant to the Eſtate tail, and againſt Law. For there are divers incidents to an Eſtate tail. 1. To be diſpuniſhed for Waſt. 2. That his wife ſhall be endowed. 3. That the Husband of a woman, Tenant in tail after iſſue, ſhall be Tenant by the Courteſie. 4. That the Tenant in tail may ſuffer a Common Recovery, and thereby bar the Eſtate tail, and the Reverſion and Remainder alſo. And theſe inſeparable incidents which the Law annexeth to an Eſtate tail, cannot be prohibited by Condition. And therefore if a man maketh Gift in tail upon Condition that the Donee ſhall not do waſt, or that his wife ſhall not be endowed, or that the Husband of the wife, Tenant in tail after iſſue ſhall not be Tenant by the Courteſie, or that Tenant in tail ſhall not ſuffer a Common Recovery; theſe Conditions are repugnant and againſt Law, becauſe by the Gift in tail, he tacitly enableth him to commit waſt, that his wife ſhall be endowed, and to ſuffer a Common Recovery. And therefore it is repugnant to reſtrain it by Condition, for that ſhould be to give power, and to reſtrain the ſame by the ſame Deed. And as to the Caſe of Dower, *vide* 22 *E.* 3. 19. *Accord* 17 *Elizabeth Dier* 343. the Earl of *Arundel*'s Caſe. And although that a Common Recovery is but a Comon aſſurance. Yet by the Law every Tenant in tail hath power to ſuffer it to bar as well the Eſtate tail, as the Reverſion or Remainder over. And ſuch act in reſpect of the intended Recompence, is not reſtrained by the Statute of *Donis conditionalibus* as it hath been

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been ſaid. But Tenant in tail by a Common Recovery hath *poteſtatem alienandi*, notwithſtanding the ſaid Statute. As if a man before the ſaid Statute had made a Gift to one and to the heirs of his body, in this Caſe *poſt prolem ſuſcitatam*, he had by the Common Law *poteſtatem alienandi*, and therefore in the ſame caſe, if the Donor add ſuch a Condition, that after iſſue the Donee ſhould not alien, it was reſolved that the Condition in ſuch caſe had been repugnant, becauſe that after iſſue, by the Common Law, the Donee had *poteſtatem alienandi*, and in one and the ſame *Deed* to give him power *poſt prolem ſuſcitatam poteſtatem alienandi tacite* by the Law, and in the ſame *Deed* to reſtrain him of that power, is repugnant and againſt Law. *Pari ratione* after the Statute if a man maketh a Gift in tail, upon Condition that he ſhall not ſuffer a Common Recovery, it is repugnant; for by the Gift in tail he hath [b] given him power *implicite* to ſuffer a Common recovery. So if a man make a Proviſo, That Warranty and Aſſets ſhall not bar the iſſue in tail, or that a Collateral warranty ſhall not bar the iſſue, or the *Donor*, theſe Proviſoes are againſt Law and repugnant, *6 Eliz. Dier* 227. a Proviſo good at the beginning, by conſequence may become Repugnant. As if a man by his Deed grant a Rent for life, Proviſo that he ſhall not charge his perſon, this is a good Proviſo. Yet if the Rent be behind and the Grantee dieth, his Executors ſhall charge the perſon of the Grantor in an Action of debt: for otherwiſe they ſhould be without remedy, and therefore now it is become repugnant, and by conſequence void. But it was reſolved, That if a man maketh a Gift in tail, upon Condition that he ſhall not alien, this Condition to ſome intent is good, and to ſome void. And therefore if he maketh a Feoffment in fee, or other eſtate, by which the Reverſion is wrongfully diſcontinued, the Donor ſhall enter for the Condition broken: for every thing which is prohibited by the Law, or which doth wrong, a man may prohibit by a Condition, *vide* 10 *H.* 7. 11. but (as hath been ſaid) if in ſuch Caſe, the Donee ſuffereth a Common Recovery, the Condition by the Law cannot extend to it, *cauſa qua ſupra.* In the ſame manner it is, If a Deed of feoffment be made to a Husband and wife in fee, upon condition that they ſhall not alien, it is a good condition to reſtrain a Feoffment or alienation by deed, for that is wrongful, but not to reſtrain an alienation by them both by Fine; for that is lawful and incident to their eſtate. So if a man doth enfeoff an Infant in fee, upon condition that he ſhall not alien, it is a good condition to reſtrain an alienation during his minority, for that is wrongful, but not reſtrain him to alien, when he is of full age, for that is repugnant to his liberty, which the Law hath given him in caſe of Fee-ſimple; and with theſe two Caſes agree 10 *H.* 7. 11. *&* 13 *H.* 7. 23. and ſo you will better underſtand the Books in 33 *Aſſ. p.* 11. 24. 11 *H.* 6. 6. 21 *H.* 6. 33. 39. 10 *H.* 7. 11. 11 *H.* 7. 6. 13 *H.* 7. 23. 21 *H.* 7. 11. And it is to be obſerved, that before the Reign of *E.* 4. it was not reſolved, as hath been ſaid, that a Common recovery ſhould bar the Eſtate tail, and the Reverſions and Remainders depending thereupon: And therefore thoſe old Books which ſpeak of alienation made by Tenant in tail, cannot be intended but to reſtrain diſcontinuance and alienations which did wrong, and not to prohibit a Common recovery, the operation of which was not then known, and which till the Reign of *E.* 4. was not in uſe. And the reaſon of *Littleton, lib.* 3. *Cap. Condic. fol.* 84. *a.* was well obſerved, who ſaith, That if a man maketh a feoffment upon Condition, that a man ſhall not alien to any, the Condition is void, becauſe that when a man is enfeoffed of Land, or Tenements, he hath power to alien them to any perſon by the Law: For if ſuch Condition ſhould be good, then the condition ſhould take that power from him, which the [42] Law giveth him, which ſhall be againſt reaſon, and therefore ſuch Condition is void; all which are the words of Mr. *Littleton*, the reaſon of which agreeth with the reſolution of this point in this Caſe. And it was ſaid, that the Law doth favour Eſtate tails in poſſeſſion, and doth not regard Remainders or Reverſions expectant upon the Eſtate tail. For it was adjudged in *Capel*'s Caſe, as appeareth in the firſt part of my Reports, That if Tenant in tail ſuffereth a Commmon recovery, it ſhall bar not only the Eſtate tail, and Remainder and Reverſion, but the Rent alſo that he in the Remainder or Reverſion hath granted. So it was adjudged in 12 *Eliz.* between *Terling* and *Trafford* in the Kings Bench, That a Remainder or Reverſion expectant upon an Eſtate tail is no *Aſſets* to the Heir in debt upon an Obligation made by his Father. So *Hil.* 14. *Eliz.* it was reſolved by all the Juſtices of the Common Pleas in *Copwoods* Caſe, That if there be Tenant in tail, the Remainder to the right heirs of *I. S.* and Tenant in tail ſuffereth a Common recovery, *I. S.* being then alive, it ſhall bar the Remainder, which was in abeyance and conſideration of the Law. 4. Where the Proviſo is, That if when, and as often as the ſaid *Anthothony Mildmay*, &c. ſhall be fully and finally reſolved and determined, and ſhall adviſedly, determinately and effectually deviſe, conclude and agree, or enter into any communication, promiſe, or covenant whatſoever, or ſhall adviſedly attempt, procure, go about, or aſſent to or for any act or acts, thing or things, for or touching any bargin, ſale, diſcontinuance, alienation, conveyance or aſſurance to be had or made of any of the ſaid Mannnors, &c. whereby any eſtate, &c. may, ſhould or might in any wiſe, or by any means be undone, diſcontinued, &c. and the ſame bargain, &c. or ſhall adviſedly and effectually attempt, procuce, go about, to or for any act or thing for or touching any bargain, ſale, diſcontinuance, &c. and the ſame bargain, or any other open matter, &c. ſhall attempt, go about, cauſe, &c. by acknowledgment of any note of any fine, or any warrant or warrants of Attorney for any recovery or voucher, or by acknowledgment of any deed, or by any other act or acts, thing or things whatſoever in deed or in Law, &c. That then immediately after ſuch time of ſuch procuring, attempting, or going about in form aforeſaid, and before any ſuch bargain, ſale, diſcontinuance, &c. had, made, &c. or done, the ſaid uſe or uſes, eſtate and eſtates, &c. ſhall from time to time ceaſe, as only in reſpect and having regard to ſuch perſon or perſons ſo attempting, going about, &c. and no otherwiſe. It was reſolved, That theſe words (*Attempt*) or (*go about*, &c.) or (*enter into communication*) &c. are words incertain, and void in Law, and God forbid that the inheritances and eſtates of men ſhould depend upon [b] ſuch incertainties; For it is true, *Quod miſera eſt ſervitus, ubi jus eſt vagum: & quod non definitur in jure quid ſit conatus, ne quid* is a *going about*, &c. or *communication*: And therefore the Rule of Law doth decide this point *Non efficit conatus neſi ſequitur effectus*: And the Law doth reject *Conations and goings about*

as

as things incertain, which cannot be put in iſſue. For if one who is tied with ſuch perpetuity goeth to Council learned, to know whether he might alien part for payment of his debts, or for advancement of his younger Children, or for any other needful uſe, is that a breach of the Proviſo or not? or if the heir or other in Remainder who knew not of the Proviſo, *& qui habet juſtam ignorantiam*, thinketh that he may levy a Fine, And thereupon a Note of a Fine is drawn, &c. and before that it be recorded, he knoweth of the Proviſo, and then all is cancelled, is that a breach of the Proviſo? And a hundred ſuch like Queſtions, where nothing is done, may ariſe, which the Eye of Law never ſaw, but of late times are invented; And ſuch Proviſo is full of Cruelty and againſt the Freedom and Liberty of a Freeman: For the ſame (as if he had Bolts of Iron upon his Legs) doth reſtrain him to go about; and alſo it ſealeth up his Lips, and depriveth him of the uſe of his Tongue; For it reſtraineth him to enter into Speech. And in the ſaid Books aforeſaid, where the alienation of Tenant in tail is reſtrained, no mention was ever made of reſtraining of going about, or entring into Communication, for that was then thought idle, and there is not any touch of any ſuch matter in any of the ſaid Books, or in any other Book of the Law. Caſe of *Richil*, reported by *Litleton*, *lib.* 3. *cap.* Warranty, 163. *Richil* reſtrained his Sons for aliening, and not of going, or entring Communication of aliening, and yet if he could have reſtrained the going about, &c. it had avoided one of the Cauſes, that his conveyance was againſt Law. For *Littleton* ſaith, That if the firſt Son alieneth the Tenements in fee, then is the Free-hold and Fee-ſimple in the Alienee, and in no other, &c. then although for ſome reaſon it might be, that ſuch Remainder ſhould begin and have its eſſence immediately after alienation made to a Stranger, who had by the ſame alienation the Free-hold and Fee-ſimple; But if Juſtice *Richil* could have reſtrained the going about or entring into Communication, or making of a Charter of Feoffment, or of a Note of a Fine, he might have avoided the principal cauſe for which his Conveyance was ſufficient in Law. And in the ſame manner it may be ſaid of the Conveyance of *Thirning* Chief Juſtice, reported in 21 *H.* 6. 33. And it was ſaid, that a going about, or entring into Communication was not iſſuable. Farther it was ſaid, that if a man maketh a Gift in tail, upon condition that he ſhall not make a Feoffment, it is a good Condition; but if the Condition be that he ſhall not make a Charter of Feoffment, it is not good, for that without Livery (as *Littleton* ſaith *fol.* 15.) doth not amount but to a tenancy at Will, which Tenant in tail cannot be reſtrained to make. So if a man maketh a Gift in tail, upon condition that he ſhall not make a Leaſe for his own life, it is void and repugnant; But if a man maketh a Leaſe for life or years, upon condition that he ſhall not alien or leaſe the Land, it is good. For at the Common Law, Leſſee for life or years might have done waſte, which was *ad exhæreditationem* of the Leſſor, and therefore there was confidence betwixt the Leſſor and Leſſee, and therefore the Leſſor might reſtrain the Leſſee to alien, or to demiſe to another, in whom perhaps the Leſſor had not ſuch confidence. And therefore reaſon would, that when he who had the Inheritance made a Leaſe for life or years, that he might reſtrain ſuch particular Tenants to alien or Demiſe for the benefit of his Inheritance. But when a man makes a Gift in tail (which is an Eſtate of Inheritance, and by poſſibility may continue for ever) and thereby maketh the Donee chief Owner of the Land, he cannot reſtrain him to make any lawful act or eſtate which doth not wrong to any, and which by Law he may do of the ſame Land. So and for the ſame reaſon, if a man maketh a Gift in tail of a Mannor, upon condition that he ſhall not make any voluntary Grant of the Lands by Copy according to the Cuſtom of the Mannor, &c. it is not good; But if he make a Leaſe for years or life with ſuch condition, it is good, *cauſa qua ſupra.* And by theſe differences you will better underſtand your Books in 21 *H.* 6. 33. 8 *H.* 7. 10. *b.* 11 *H.* 7. 6. *b.* 13 *H.* 7. 23. *a.* Laſtly, the intent of the Statute of 27 *H.* 8. (as appeareth by the Preamble) was to reſtore the ancient Common Law, and to root out and extinguiſh all ſubtil inventions, imaginations and practices of uſes which had introduced many miſchiefs and inconveniencies mentioned in the Preamble. And that was very good and neceſſary for the Commonwealth: For the Common Law hath certain Rules to direct the Eſtates of Inheritances of Lands, and therefore it is without any compariſon better to have Eſtates of Inheritances provided by the certain Rules of the Common Law (which hath been an old, true and faithful Servant to this Commonwealth) than by the incertain imagination and conjecture of any of theſe new Inventors of uſes, without any approved ground of reaſon or Law. *Note Reader*, this Judgment agreeth with the former Judgment, as well in *Corbet*'s Caſe, as the caſe between *Humble* and *Cholmeley*, and *Germin* and *Arſcot*, there cited, and with the Judgment in *Dillon* and *Frein*'s Caſe. And in this Caſe it was obſerved, That in the ſaid Proviſo found at large by the ſpecial verdict, there are more than a thouſand words, where in our Books, when Tenant in tail was reſtrained to alien, there were not above twelve words in the Reſtraint. *Et hæc fuit candida illius ætatis fides, & ſimplicitas, quæ pauculis lineis omnia fidei firmamenta poſuerunt.* And ſo this Caſe is now adjudged in both Courts. [43] [b]

Mich.

Mich. 3 Jacobi, *in the Common Pleas.*

Blake's Caſe.

EDen brought a Writ of Covenant againſt *Blake* Aſſignee of *Price*, and the breach was for not repairing of the Houſe, the Defendant pleaded an Accord between him and the Plaintiff, and execution thereof in *ſatisfactione & exoneratione decaſus reparationum prædict.* upon which the Plaintiff did demurr; which Plea began in the Common Pleas, 3 *Jac. rot.* 1033. And it was objected, That this Action of Covenant was founded upon the Deed, and could not be diſcharged but by matter of as high nature, and not by any accord or matter in *pais*. For *Nihil tam conveniens eſt naturali æquitati, unumquodque diſſolvi eodem ligamine quo ligatum eſt.* And it appeareth by our Books, That neither Arbitrament, nor Accord with ſatisfaction is a Plea, when the Action is grounded upon a Deed, *Vid.* 1. *H.* 7. 14. 33 *H.* 8. 59 *Dier.* 1 *H.* 5. 6, 7. 45 *E.* 3. 4. 25 *H.* 8. *B. Det.* 173. 2. When the action is in the realty, or mixt with the realty, accord with ſatisfaction is no Plea; for accord with ſatisfaction is a bar for the perſonalty, and not of the realty, and when the perſonalty is mixt with the realty it is no bar for the perſonalty; for *omne majus trahit ad ſe minus.* *Vide* 11 *H.* 7. 13. 13 *H.* 7. 20. in Waſt. So in a raviſhment of Ward, *Quare impedit, &c.* But it was reſolved by the whole Court, that the Defendants Plea was
[44] good in the Caſe at bar; For there is a difference, when a Duty doth accrue by the Deed in certainty *tempore confectionis ſcripti*, as by Covenant, Bill, or Obligation, to pay a ſum of mony, there this certain Duty taketh his eſſence and operation originally and ſoly by the writing; and therefore it ought to be avoided by a matter of as high nature, although that the Duty be meerly in the perſonalty; but when no certain Duty doth acrue by the Deed, but a wrong or default ſubſequent, together with the Deed, giveth an Action for to recover damages which are only in the perſonalty, for ſuch wrong or default, accord with ſatisfaction is a good Plea; As in the Caſe at Bar, the Covenant doth not give to the Plaintiff at the time of the making of it any cauſe of Action, but the wrong or default after in not repairing of the Houſe, together with the Deed, giveth an Action to recover damages for default of Reparations. And for as much as the end of the Action is but to have amends, and damages in the perſonalty for this wrong, for this cauſe amends and ſatisfaction given to the Plaintiff is a good Plea. For the Action is not meerly grounded upon the Deed, but alſo upon the Deed and the Wrong together, which wrong is the cauſe of the Action, and for which damages ſhall be recovered, as in 13 *E.* 4. 1. *&* 5. in Treſpaſs the Plaintiff recovered by verdict, the Defendant brought attaint againſt the Plaintiff and Petit Jury, and one of the Petit Jury pleaded Accord with ſatisfaction, between the Plaintiff and Defendant, and held a good Plea. For the Writ of Attaint is not only grounded upon the Record, but upon the matter in fact alſo, for the ſuppoſition of the falſity of the oath, is matter in fact. And in 35 *H.* 6. 30. in Attaint brought upon falſe oath in Appeal of *Mayhem*, one of the Petit Jury pleaded arbitrament between the Plaintiff and Defendant; And in all Caſes where Arbitrament is a good Plea, accord with ſatisfaction is a good Plea. *Vide* 6 *H.* 7. 10. *ac.* And generally in all Actions where damages only are to be recovered, Arbitrament or Accord with ſatisfaction is a good plea; as in an Action of Waſt in the *tenuit*, where damages are alone to be recovered: and ſo is the Report of Serjeant *Bendlows* to be underſtood: For, in an Action of Waſt againſt Leſſee for years in the *tenet*, accord is no plea, as it hath been before ſaid. So it is to be here gathered upon the book of 35 *H.* 6. 30. that in Appeal of *Mayhem*, accord with ſatisfaction is a good plea, becauſe in the ſame action damages are only to be recovered. And ſo is the general Rule put in 6 *E.* 6. *Dier* 75. in *Andrews* Caſe. *Vide* 47 *E.* 3. 20. accord for a Rent reſerved upon a Leaſe for years, 7 *E.* 3. *Iſſue* 9. 11 *H.* 7. 4.

Mich. 3 Jac. *in the Common Pleas.*

Higgins's Caſe.

[*b*] IN Debt by *Randall* and his wife Executrix of *Themilthorpe* againſt *Higgins*, upon an Obligation made to the Teſtator, the Defendant pleaded that the Teſtator in *vita ſua in curia de banco hic recuperavit debitum prædictum, ac* 40 s. *pro damnis*, (without alledging any Execution,) *quod quidem recordum recuperationis*, was removed *extra bancum per br. de Errore coram Rege, & ibidem remanet minime reverſatum ſeu adnullatum*, And thereupon it was demurred. And it was Objected, That if a man recovereth debt upon a bond, or Rent upon a leaſe for years, it is at the Plaintiffs election to ſue execution upon that Judgment, or to have a new action; and that for divers reaſons. 1. By the Judgment, the deed or rent is not changed, but continueth a deed and a Rent, notwithſtanding the Judgment; As if a man be indebted in arrearages upon accompt, and taketh a bond for the payment of them, yet

yet he may have his action upon the one or the other, as it is agreed in 11 *H.* 4. and *Mich.* 2 *Jacob.* Rot. 3272. in this Court in Debt by *Richard Branthwaite* againſt Sir *William Cornwalleys* upon an Obligation for payment of mony, the Defendant pleaded in barr, that the Plaintiff after the day of payment of the mony, and before the writ brought did accept of a Statute Staple for the ſame debt, and in full ſatisfaction of the Obligation; upon which the Plaintiff did demurr; And it was adjudged for the Plaintiff. For although that he had taken a Statute for the ſame debt, which is a matter of Record, and of a higher nature than the Obligation is, yet the Obligation did remain in force; and it was in the Plaintiffs election, to bring his action or remedy upon the one or the other. 2. It was objected, That it ſhould be againſt reaſon, to inforce the Plaintiff to ſue execution upon the firſt Judgment, for perhaps the Plaintiff knoweth that the firſt Judgment is erronious, or that he has recovered by falſe Oaths, in which caſe the Judgment is reverſable by Error, or Attaint, and therefore if he ſhould ſue execution, it ſhould be in vain; for he ought to reſtore (when the Judgment is reverſed) all that which he hath received. 3. It was objected, if in debt upon an Obligation the Defendant doth deny his deed, and it be found his deed, in this caſe the deed ſhall be delivered to the Plaintiff, and the cauſe is, to the end he may have a new action if he will; but if it be found not his deed, the deed ought always to remain in Court, till the Plaintiff hath reverſed the Judgment, *Vide 9 E.* 4. 50. 4. If two be bound in an Obligation joyntly and ſeverally, and the Obligee doth recover againſt one of them upon this bond, the nature of the bond is not changed by this Recovery, but he may upon the ſame bond have an action againſt the other. But it was Reſolved, that as long as the Judgment doth remain in force he cannot have a new action upon the ſame bond; for as he who hath a debt by ſimple contract, and taketh an Obligation for the ſame debt, or part of it, the Contract is determined, 3 *H.* 4. 17. 11 *H.* 4. 9 *E.* 4. 50, 51. So when a man hath a debt upon an Obligation, and by Ordinary Courſe of Law hath Judgment, that upon the Contract by ſpecialty which is of the inferiour nature, is by the judgment of Law changed into a matter of Record, which is of a higher nature. 2. If he who recovereth may have a new action and a new Judgment, he may have infinite actions, and infinite Judgments, to perpetual vexation and charge of the Defendant, *& infinitum in jure reprobatur.* 3. Upon every Judgment the Defendant ſhall be amerced, and if he be a Duke, Marqueſs, Earl, Viſcount, or Baron, he ſhall be amerced to 100 s. and ſo the Defendant might be infinitely amerced upon one and the ſame Obligation, which ſhould be miſchievous, *& intereſt reipublicæ ut ſit finis litium.* And if a man hath a liberty by preſcription, and taketh Letters Patents of them, the matter of record doth drown the preſcription which was the inferiour, as it is holden in 33 *H.* 8. *Br. preſcription* 102. *Vid.* 10 *H.* 7. 21. *&* 24. 2 *E.* 4. 14. *b.* 22 *H.* 6. 56. 8 *H.* 4. 16. 34 *H.* 6. 26. &c. And if a man hath an annuity by deed or preſcription, and bringeth his Writ of annuity, and hath Judgment, ſo long as this Judgment doth remain in force, he ſhall never have a Writ of annuity, (although it be annuity of inheritance) but a *Scire fac.* upon that Judgment; becauſe that the matter of the ſpecialty or preſcription, is by the Judgment altered into a thing of a higher nature. *Vide* 37 *H.* 6. 13. Judgment in an action of Forgery of a falſe deed, is a good barr in another action upon the ſame forgery. But if recovery be in debt upon an Obligation in the County by *Juſticies*, there notwithſtanding ſuch judgment, the Plaintiff may have an action of debt upon the bond in a Court of Record, for the County Court is not of Record, and therefore the Obligation is not changed with a thing of a higher nature; but ſo long as ſuch judgment remaineth in force, the Plaintiff ſhall not have an action by *Juſticies* in the ſame Court, for the infinite vexation of the party, as hath been ſaid. And as to the Caſe of *Branthwait*, it was agreed to be good Law; for a Statute Staple, or Obligation in the nature thereof, is but an Obligation recorded, and one Obligation, be it of record, or out of record, cannot drown another. Alſo an Obligation, and Obligation in the nature of a Statute Staple, are two diſtinct bindings, made by aſſent of the parties without proceſs of Law, whereof the one hath no dependency on the other. But in an action brought upon an Obligation, the Suit is grounded upon the Obligation, as a building upon a foundation; and the Plaintiff hath Judgment to recover the debt due by the Obligation: ſo that by judicial proceeding, and act in Law, the debt due by the Obligation, is transformed and metamorphoſed into matter of Record; And Judgment in a Court of Record is of higher nature than a Statute Staple, Statute Merchant, or any Recognizance, acknowledged by the aſſent of the parties, without judicial proceedings. And as to the Objection which was made, that perhaps the recovery is erroneous; To that it was anſwered, that that was the Plaintiffs fault, and although it be erroneous, yet ſo long as it remaineth in force, it ought to be executed; and when it is reverſed, than the Obligee is reſtored to his new action upon the Obligation. And it is true, that in old books, after Judgement given in an action of debt, upon an Obligation, the Obligation ſhall be damned, becauſe the duty was changed into another nature, and that was the true reaſon of the old books, and not the reaſon which *Brook* ſuppoſeth in abridging of the Caſe of 11 *H.* 4. *faits* 19. that otherwiſe the Obligee might again recover thereupon. And therewith agreeth 9 *E.* 4. 51. 7 *H.* 4. 39. 11 *H.* 4. 73. 45 *E.* 3. 11, &c. And the Court had conſideration of the Book of 17 *E.* 3. 24. Where *Ed. Devon* brought an action of debt upon an obligation of 20 *l.* againſt *Hugh Scot*, who pleaded, that before, the Mayor and Bailiffs of *Newcaſtle* upon *Tine*, the Plaintiff by plaint upon the ſame bond, recovered, and had execution; and there becauſe the Defendant did not procure the bond to be damned, the Plaintiff had Judgment to recover again, notwithſtanding the former judgment and execution. And there *Shard* ſaid to the Defendant, ſee now the deed be damned. But the Court ſaid, that that Judgment was given becauſe it was the Defendants folly, that the deed was not damned upon the firſt judgment. For in the time of *E.* 3. *R.* 2. and *H.* 4 it was holden, That when a man did recover upon an Obligation, that the Obligation, (as hath been ſaid) ſhould be damned. In which was noted, the contentation, and quietneſs of men in old times, that when Judgment was given againſt them by courſe of Law, they were ſatisfied therewith without prying with Eagles eyes into matters of form,

[45] [b] [46]

or

or the manner of proceeding, or trial, or inſufficiency of pleading, &c. to the intent to find error to force the party to a new ſute, and himſelf to a new charge and vexation. But after that, men became more contentious, and not ſatisfied with any trial or judgment, but Writs of *Error*, and *Attaints*, which in old times, were rare, (and eſpecially Writs of *Error*) were ſo frequent, as of more late time they were, the Judges thought it dangerous to cancell the deed, either where the Plaintiff recovered, or where he was barred by judgment, for in both caſes the judgment might be reverſed by Error or Attaint; and therefore the reaſon and cauſe of the ſaid judgment in 17 *E.* 3. is now changed, and there is not any Queſtion but judgment and execution upon a bond, is a good barr in a new action thereupon: and therefore the ſaid book of 17 *E.* 3. is not to be urged againſt this judgment. Alſo the Court ſaid, that if a man bring an action of debt upon a bond, and is barred by judgment, ſo long as the judgment ſtandeth in force, he cannot have a new action. By the ſame reaſon, when he hath judgment in an action upon the ſame bond, ſo long as the judgment ſtandeth in force, he ſhall not have a new action. And as to the caſe which hath been objected, that where two are bounden joyntly, and ſeverally, and the Obligee hath Judgment againſt one of them, that yet he may ſue the other, it was agreed. For againſt him the nature of the bond is not changed, for notwithſtanding the Judgment, he may plead that it is not his deed. And afterwards in the Caſe at Barr, Judgment was given againſt the Plaintiff, and the doubt in 9 *E.* 4. 50, 51. where this matter is well debated on both ſides, well reſolved.

Mich. 3 Jacobi, *in the Common Pleas.*

Dowdale's Caſe.

[*b*] IN Debt by *Richardſon* againſt *Dowdale*, Executor of the Teſtament of *Lante*, the Defendant pleaded, fully adminiſtred, and the Plaintiff ſaid, that he hath Aſſets at *Exceſter*, and the Jury found that the Teſtator died *infra regnum Hiberniæ*, and that the Defendant after the Teſtators death, within the Realm of *Ireland*, took divers of the Teſtators goods, and adminiſtred, to the value of the debt, and that the Defendant, *Nulla alia ſive plura bona quæ fuere teſtatoris, poſt mortem teſtatoris infra regnum Angliæ unquam adminiſtravit, Et ſi, &c.* And it was objected by the Defendants Counſell, that it hath been a queſtion in old books, If the Jurors might find tranſitory things in a forreign County: And in 2 *Ma. Br. Attaint* 104. it is holden that the Jurors of one County, are not compellable to find tranſitory things in another County, but at their pleaſures; And it was ſaid, As Jurors in one County cannot find a thing which is local in another County: So Jurors cannot find any thing, although it be tranſitory, in any other Realm; for by preſumption of Law neither in the one caſe, nor in the other, the Jurors can take knowledge of the thing. As in 10 *Eliz. Dyer* 271. In Debt brought in *London* againſt one as Son and heir, upon an Obligation made by his Father, who pleaded nothing by deſcent at the time of the Writ brought, nor ever after, &c. And the Plaintiff did add Aſſets by deſcent in any *London*, in *Parochia & Ward. prædict.* and the Plaintiff in Evidence gave Aſſets in *Cornwal*; And, if that were good Evidence, or if the Jury might find it or not was the Queſtion; And there it was
[47] conceived, that it was not good Evidence: nor the Jury could not find this local matter in a forrein County. And 47 *E.* 3. 2. 21 *E.* 4. 10. 22. and 36. 10 *H.* 7. 22. 11 *H.* 7. and many other books are, that a thing meerly done beyond Sea, ſhall not be tried here: But after many Arguments and good Conſideration, it was reſolved, that Judgment ſhould be given for the Plaintiff. And in this caſe theſe points were reſolved for good Law. Firſt, when the place is material, as when it is made parcel of the iſſue, there the Jurors cannot find the point in iſſue in any other place, for by ſpecial pleading, the point in iſſue is reſtrained to a certain place. 2. There is a difference, when the place is named but for conformity and neceſſity; as when (as it hath been ſaid) it is parcel of the iſſue, as in the caſe which hath been put of 10 *Eliz.* in debt againſt the heir, he pleadeth nothing by deſcent generally, in that caſe the Plaintiff cannot reply in ſo general manner, for then no trial can be thereof, but in ſuch caſe, for conformity, and neceſſity of trial, he ought to name a certain place, as there he did, within a Pariſh and Ward within *London*. But God forbid, but that Jurors may find aſſets by diſcent, in any other County within *England*, and the Law is, that the Plaintiff in ſuch caſe, ſhall have in Execution, all the lands which the heir hath, and perhaps he hath lands in divers Counties, and therefore, although that one place be named for neceſſity, yet the Jurors may find all that which by Law ſhall be chargeable in ſuch caſe, in what Town or County ſoever it lieth. And ſo was the principal caſe reſolved afterwards in 10 *Eliz.* although it be not there ſo reported: and therewith in effect agreeth 10 *H.* 6. 13. adjudged, and therefore the ſaid conceit of *Brook* 2. *Ma. Attaint.* 104. was utterly denied for Law, by the whole Court, for they are bound under pain of Attaint, to find Aſſets in any County whatſoever. For, (as it hath been ſaid) it may be that the Executor hath goods of the Teſtator in divers ſeveral Counties, and that in none of the ſaid Counties, by it ſelf is Aſſets. So if a man hath 20 Acres of Land in tail in the County of *N.* and 20 acres of equal value of Lands in fee-ſimple in 20 ſeveral Counties, and maketh a Feoffment in Fee of the Land in tail, with warranty and dieth, the Iſſue in tail bringeth a Formedon for the Land in *N.* in this caſe the Feoffee cannot alledge Aſſets in one County only; But the Jurors are tyed upon manifeſt proof upon pain of Attaint, to find the Aſſets in all the ſeveral Counties, in which the Feoffor had Lands in Fee-ſimple. 3. Upon every general iſſue, The Jurors ought to find all local things in any other County, which

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are material in Law for the matter in queſtion, as Warranty and Aſſets in another County: So where Lands are exchanged for Lands in another County. 4. When a bar is pleaded in a real or perſonal action, as a Releaſe, &c. in a foreign County, there the Jurors which try it, ſhall aſſeſs damages for the profits of the Lands in another County, and ſo by a mean ſhall enquire of things local in another County, which originally they cannot do, *quia multa conceduntur per obliquum, quæ non conceduntur de directo.* And when they try the matter of the Bar upon good and pregnant Evidence they ought to find all dependants thereupon, as damages, &c. And by theſe differences you will better underſtand your books, in which at the firſt there ſeemeth ſome diſcordance, 3 *E.* 3. *Aſſize* 446. 18 *E.* 3. 38. 21 *E.* 3. 11. 1 *Aſſ. p.* 16. 3 *Aſſ. p.* 4. 6 *Aſſ. p.* 4. 5 *Aſſ. p.* 7. 21 *Aſſ. p.* 8. 29 *Aſſ. p.* 5. 44 *E.* 3. 6. *b.* 14 *H.* 4. 35. 5 *H.* 5. 2. 10 *H.* 6. 13. 21 *H.* 6. 51. 33 *H.* 6. 37 *H.* 6. 2. 7 *E.* 4. 45. 18 *E.* 4. 1. 22 *E.* 4. 19. 13 *H.* 7. 17. *Br. Iſſue* 82. 2 *Mar. Br. Attaint.* 104. and the *Quære* in *Dyer* 10 *Eliz.* well reſolved. But it was Reſolved, That in the Caſe of Felony the tryal ſhall be always by the Common Law in the ſame place where the offence was, and ſhall not be ſuppoſed in any other place; For in Criminal Cauſes the Rule holdeth *Ubi quis delinquit, ibi punietur.* Laſtly it was reſolved, That the Jurors have found the ſubſtance of the iſſue, that is to ſay, Aſſets; and the finding that they are beyond Sea is ſurpluſage. For, if the Executors have goods of the Teſtators in any part of the world, they ſhall be charged in reſpect of them. For many Merchants and other men, who have ſtocks and goods to a great value beyond Sea, are indebted here in *England*, And God forbid, that their goods ſhould not be liable to their debts; for otherwiſe there ſhould be great defect in the Laws, *Vide M.* 30 & 31 *Eliz.* in an Action upon the Caſe upon *Aſſumpſit*, (which Action was grounded upon an inſtrument called a policy, commonly made between Merchants for aſſurance of their Goods) the Plaintiff declared, that the Defendant at *London* did aſſume, that ſuch a Ship ſhould ſail from *Melcomb Regis* in the County of *D.* unto *Abvile* in *France*, ſafely without violence; And the Plaintiff declared, that the ſaid Ship in ſailing towards *Abvile*, *s.* in the River of *Soame* in the Realm of *France*, was arreſted by the King of *France*, &c. and the parties came to an iſſue, whether the ſaid Ship were ſo arreſted or not; And this iſſue was tryed by *Niſi prius* before *Wray* chief Juſtice in *London*, and found for the Plaintiff; And it was moved in arreſt of Judgment, that this iſſue, ariſing merely from a place which is out of the Realm, could not be tried: For whether the Ship was arreſted in the River of *Soame* in *France*, or not, is merely and wholly out of the Realm; and therefore it could not by tried: and thereupon the Books were cited in 10 *H.* 7. 11 *H.* 7. 16. 21 *E.* 4. 10. 47 *E.* 3. 2. 12 *H.* 4. 16. 13 *E.* 1. *Mortdaunceſt.* 47. 12 *H.* 3. *ib. p. ult.* 29 *Aſſ. p.* 11. And if it may be tryed, it was ſaid, That the Jury ſhould come from *Melcomb*, for by Common intendment they may have beſt knowledge of the arreſt. And it was anſwered and Reſolved, That this iſſue ſhould be tried where the Action was brought; And it was agreed, That where as well the Contract as the performance of it is wholly made, or to be done beyond Sea, and it ſo appeareth, there wanteth trial in our Law; but here the Promiſe was made here in *London*, which is the ground and foundation of the Action: and therefore there in this caſe of neceſſity it ſhall be tried, or otherwiſe ſhould not be tried at all. And the Arreſt which is in iſſue is not the ground of the Action, but the *Aſſumpſit*, and the arreſt is the breach of the *Aſſumpſit*; and therefore in this caſe of neceſſity it ſhall be tried where the *Aſſumpſit*, which is the ground and original cauſe of the Action, was made. And the Record of a Caſe in an Action of debt of 500 l. between *Hugh Gynne* Plaintiff, and *Evangeliſt Conſtantine* Defendant, *Paſch.* 28 *Eliz.* was ſhewed to the Court; which was, That *Conſtantine* by Indenture of Charter-party made at *Thetford* in *Norfolk*, did Covenant with *Hugh Gynne*, that ſuch a Ship ſhould ſail from *Blackney* in *Norfolk* to *Muttrel* in *Spain*, and ſhould there ſtay for a certain time, and bound himſelf in 500 l. to perform it. In which the iſſue was, If the Ship did ſtay at *Muttrel* aforeſaid for a certain time; which iſſue was tried for the Plaintiff by Jurors *de vicineto de Thetford*, where the Charter-party was made; and after long deliberation, Judgment was given in the Kings Bench for the Plaintiff. Note Reader, this Point hath been twice adjudged, *Vide* 7 *H.* 6. 14. in *Quare Impedit*, *vide* 5 *R.* 2. *Tryal* 54.

[*b*] [48]

Mich. 3 Jacobi, *in the Kings Bench:*

Boſwell's Caſe.

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ANthony *Lowe* brought a *Quare Impedit* of the Church of *Wimbiſh* againſt *Richard* Biſhop of *London*, and *John Lancaſter*, and Counted, That *Henry* Earl of *Suſſex* was ſeiſed in Fee of the Mannor of *Wimbiſh*, to which the ſaid Church was appendant, who preſented *John Lancaſtre* one of the Defendants, who was admitted, inſtituted and inducted, and after the ſaid Earl died ſeiſed, after whoſe death the Mannor deſcended to *Robert* now Earl of *Suſſex*, who levied a Fine of the ſaid Advowſon to *Edward Hammond* in Fee, who granted the next Advoydance to *Anthony Lowe* the Plaintiff, and afterwards the ſaid *John Lancaſtre* reſigned to the ſaid *Richard* Biſhop of *London* the other of the Defendants, by which the Church became void by the ſaid Reſignation, and ſo it did belong to the Plaintiff to preſent, and the Defendant did diſturb him. The Biſhop pretended, *Quod ipſe nihil habet, nec habere clamat in Eccleſia prædict. niſi admiſſionem, inſtitutionem & deſtitutionem perſonarum, &c. & petit judicium ſi abſque ſpeciali impedimento, &c.* *John Lancaſtre* the other Defendant pleaded, That before the Writ brought he

was in the ſaid Church by the ſpace of ſix months, of the Preſentment of *Henry* Earl of *Suſſex*, *abſque hoc*, that the Church was void *modo & forma*, as the Plaintiff hath declared. As to the plea of the Ordinary, the Plaintiff prayed a Writ to the Biſhop, *& conceditur, ſed ceſſet executio quouſque* the Plea between the Plaintiff and the other was determined. As to the Plea of *Lancaſter*, the Plaintiff did maintain that the Church was void *modo & forma*, &c. upon which they were at iſſue, and at a *Niſi prius* it was found for the Plaintiff: And farther the Jury did enquire of the three ordinary points, 1. *Si Eccleſia plena ſit, & ſi ſic, ex cujus præſentatione.* 2. The yearly value of the Church. 3. If 6 months paſſed after
[49] the Avoidance. As to the firſt, They found that the Church was full of *Lawrence Boſwel*, *ex præſentatione Dominæ Reginæ Angliæ pendente breve de Quare Impedit.* As to the ſecond, That the Church was of the yearly value of 80l. As to the third, That the Action was brought within ſix months after the Avoidance: upon which Verdict, Judgment was given in this manner. *Ideo conſideratum eſt, quod prædict. Anthonius recuperet verſus præfat. Johannem Lancaſtre præſentationem ſuam ad Eccleſiam prædict. quæ modo plena exiſtit de præfato Laurentio Boſwell, ex præſentatione dict. nuper Reginæ Angliæ pendente bre. præd. de Quare Impedit inter ipſum Anthonium & præfat. Johannem, & damna ſua ad valorem Eccleſiæ prædict. per dimid. anni, quæ in ſe attingunt ad 40 l. per Jurator. prædict. in forma prædict. aſſeſſ. & habeat breve præfato Epiſcopo London. illius Ordinario, quod non obſtante reclamatione ſua, aut reclamatione prædict. Laurentii & Johannis, ſeu eorum alterius (licet idem Laurentius ad Eccleſiam prædict. pendente breve prædict. admiſſus, inſtitutus, & in eandem Eccleſiam inductus exiſtit) eundem Laurentium ab Eccleſia prædict. removeat, ac ad Eccleſiam illam ad præſentationem ipſius Anthonii idoneam perſonam admittat: Et prædict. Johannes in miſericor.* And upon this Judgment a Writ of Error was brought, and divers Errors aſſigned. And now this Term, after many arguments at the Bar and Bench, by the whole Court theſe points were Reſolved. 1. That at the Common Law before the Statute of *Weſt. 2. cap.* 5. If one Common perſon had preſented to a Church which did belong to another Common perſon, and his Clerk had been admitted and inſtituted, (in which Caſe, in the Caſe of a Common perſon, the Church was full) preſently thereby the Rightful Patron was out of poſſeſſion, and the Uſurper had gained the Inheritance of the Advowſon by wrong, and the Lawful Patron had loſt the preſentment *hac vice* for ever. For he had no other remedy but a Writ of Right of Advowſon, in which the Inheritance of the Advowſon ſhould be recovered, but the incumbent ſhould not be removed. And that is the reaſon wherefore full or not full ſhall be tried by the Biſhop, becauſe the Church is full by Inſtitution, which is a Spiritual act; For if it ſhould not be full till Induction, then full or not full ſhould be tried by the Verdict of twelve men, according to the Common Law: For Induction is a notorious thing, and ſhall not be tried by the Biſhop, *Vide* 22 *H.* 6. 27. *&c.* And yet in ſome Caſe a Jury ſhall enquire of the plenarty, as in this caſe, and all other *Quare Impedits*, one of the points inquirable is, If the Church be full, or not. And at the Common Law as well Infants, as Feme Coverts, were put to their Writs of Right of Advowſon in the ſame caſe for two reaſons, which
[b] were at the Common Law in the ſaid Caſe. 1. That he who came in by Admiſſion and Inſtitution, came in by a Judicial act, and the Law doth preſume that the Biſhop who had Cure of Souls of all within his Dioceſs, for which he was to anſwer at his fearful and laſt Accompt (in reſpect of which he ought to keep and defend them againſt Hereticks and Schiſmaticks, and other of the Devils Miniſters) would not do, or aſſent to any wrong to be done to their Patronages, which is of their earthly poſſeſſion; But if the Church be Litigious, that he would inform himſelf of the truth *de Jure Patronatus*, and ſo do right. 2. Another reaſon was, that by the Common Law, in every Pariſh there ought to be *idonea perſona*: For ſo it appeareth by the words of *Quare Imp. Quod permittat præſentare idoneam perſonam, &c.* which Epithite *Idonea*, includes ability in Learning and Doctrine, in honeſty and converſation, and diligence in his function, and all that to Inſtruct the people of God in true Religion and good Converſation; and to avoid contention, and to the intent that he who had ſo great a Charge might effectually and peaceably intend his charge, The Common Law did provide, that after Inſtitution he ſhould not be ſubject to Actions; and ſo neglect his duty, in loſing his time in ſutes and troubles in Law; and that was the reaſon, That at the Common Law, That after Inſtitution to the Church at the preſentation of another, although he had not right, that the Incumbent ſhould not be removed at the ſute of any Common perſon; But to recover his Right, he might have a Writ of Right of Advowſon, by which the Incumbent ſhould not be removed. And it is to be obſerved in theſe caſes, for as much as the final end of the ſame was to have *idoneam perſonam*; and that no profit might by any means ariſe to the Patron (for that ſhould be deteſtable Simony) the Common Law did prefer the ſervice of God to be celebrated, and the people of God to be inſtructed *per idoneam perſonam*, in peace and quietneſs, before the right of any other perſon, and without regard to infancy, coverture, or any ſuch like diſability of the Patron. But at the Common Law, if one had uſurped upon the King, and his preſentee had been admitted, inſtituted and inducted, (for without induction the Church is not full againſt the King) yet the King at the Common Law, might have a *Quare Impedit*, and thereby have removed the incumbent; for no Act of the Biſhop or any other could bar the King of his right: *& nullum tempus occurrit Regi.* But in ſuch caſe, although it touched the King, if the preſentee of another be admitted, inſtituted and inducted, the King could not preſent until he had removed the uſurpers incumbent by *Quare Impedit*, and that was (as hath been ſaid) to avoid contention in the Church: ſo that he who is in in ſuch manner, ſhall not be removed, but by proceſs and courſe of Law, although it were in the Kings caſe. But if a Biſhop
[50] do Collate without title to a Church preſentable, and his Clerk is inducted, yet it ſhould not put the Rightful Patron out of poſſeſſion: for the ſame is but a proviſion for the celebration of Divine ſervice in the mean time; till the Patron preſent, and that appertaineth to his office, and therefore ſhall not put the Patron to a *Quare Impedit* in ſuch caſe, but his preſentee ought to be received without any proceſs of Law; and therefore in ſuch caſe no plenarty by collation can be pleaded againſt the Patron: for no plenarty is available in Law, againſt him who hath title to preſent, but only plenarty by preſentation. And therewith agreeth the words of the Statute of *Weſtm. 2. cap.* 5. *Cum aliquis, &c.*

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præſentaverit ad aliquam Eccleſiam. &c. But Plenarty by collation at the Common Law, did put him who had right to collate to his Writ of Right at the Common Law. For as Plenarty by preſentation puts him who ought to preſent, out of poſſeſſion at the Common Law, *pari ratione & jure*, plenarty by collation puts him who had right to collate out of poſſeſſion. For *eadem lex eſt ubi eadem eſt ratio.* And that appeareth by the Judgment in 17 E. 3. 64. *b.* in the Dean of *Lincoln*'s Caſe. But for as much as Biſhops would admit and inſtitute preſentees, without informing themſelves, (as they ought to have done) of the right of him who preſented, Many Patrons loſt their preſentments without any regard to infancy, Coverture, &c. For this cauſe the ſaid Act of *Weſtm.* 2. *cap.* 5. was made, and that reciteth. *Cum aliquis jus præſentandi non habens præſentaverit ad aliquam Eccleſiam, cujus præſentatus ſit admiſſus, (id eſt inſtitutus) ipſe qui eſt verus Patronus per nullum aliud breve recuperare potuit advocationem ſuam quam breve de Rectio.* By which act three points amongſt others, were provided. 1. If uſurpation be upon an Infant, or Feme Covert, who hath an advowſon by deſcent, the Infant after his full age, and the wife after the death of her husband, ſhall have the ſame Action by *Quare Impedit*, or *Aſſiſe* of *Darrein* preſentment, as her late Anceſtor might have had. So if Tenant in Dower, and Tenant by the Courteſie, or Tenant for life, or in tail, ſuffer an uſurpation, he in reverſion, who claimeth the ſame by deſcent, ſhall have the ſame remedy. So in the ſame Law of an uſurpation in the time of the vacancy of the Biſhoprick, Archdeaconry, Rectory; but in all theſe Caſes the uſurper had gained the inheritance by wrong, and the Statute did not veſt the right, but only gave a poſſeſſory Action to remove the Incumbent; where by the Common Law they had not any remedy, but by Writ of Right in which they were to recover their inheritance, and not their preſentments. 16 E. 3. *Quare Impedit* 67. *Adams* Caſe. *D.* was ſeiſed of a Mannor to which an Advowſon was appendant, and died; the Mannor to which &c. deſcended to an Infant, the Church became void, and *Adam* uſurped during the Infancy of *E. E.* at full age enfeoffed *F.* of the Mannor, and afterwards the Church became void, and *F.* preſented, and the aſſigns of *Adam* brought a *Quare Impedit*, and it was adjudged, that by the uſurpation the Infant was put out of poſſeſſion of the Advowſon, ſo that by his feoffment of the Mannor at his full age, the Advowſon did not paſs to the feoffee, becauſe the feoffor had but a right, and the uſurpation was voidable by Action, which could not be transferred to a ſtranger. And it ſeemeth alſo by the book, that E. alſo was without remedy in ſuch caſe. But it is agreed by the whole Court in 50 E. 3. 14. *b.* That if Tenant for years, or Gardian, bring a *Quare Impedit*, although that the Defendant hath a writ to the Biſhop againſt the Termer or Gardian, and his preſentee be admitted, inſtituted and inducted, yet the Tenant of freehold is not thereby put out of poſſeſſion. Note a difference betwixt him who uſurpeth the wrong, as in 16 E. 3. aforeſaid, and him who hath not right, and yet his preſentee cometh in by courſe of Law: and note, that the words of the Statute are general, *Jus præſentandi non habens.* The ſecond thing which is enacted by the ſaid Act is, that Plenarty is no plea in an Aſſize of *Darrein* preſentment, or *Quare Impedit*; for the words of the Statute are, ſo that the Writ be purchaſed within ſix months, though he cannot recover his preſentation within ſix months. The third thing is, From henceforth in Writs of *Quare Impedit*, and *Darrein* preſentment, damages ſhall be awarded; *viz.* if the time of ſix months paſs by the impediment of any, ſo that the Biſhop doth preſent, and the very Patron loſeth his Preſentation for the time, damages ſhall be awarded for a years value of the Church: and if the ſix months be not paſt, and the preſentment be determined within the ſaid time, then damages ſhall be awarded to the half years value of the Church, &c. If an Infant, or a feme Covert hath an Advowſon by purchaſe, they are not within the ſaid firſt purview of the ſaid Act, but they are within the ſecond branch, if they purſue their remedy within the ſix months, by *Quare Impedit*, or Aſſize of *Darrein* preſentment. So of an Advowſon which they have by deſcent, they may by the ſaid ſecond purview, have a *Quare Impedit*, or Aſſize of *Darrein* preſentment within the ſix months: but if they ſurceaſe this time, then the infant, after he ſhall come of full age, ſhall have alſo his remedy. the ſame Law of a Feme Covert after the death of her husband. See *Bracton Lib.* 4. *fol.* 244. 1 E. 2. *Quare Impedit* 43. 20 E. 2. *Common* 22. 44 E. 3. 18. 34 H. 6. 30. 35 H. 6. 63. And note that if tenant in tail ſuffereth an uſurpation, and dieth, the iſſue in tail is remedied by the equity of the firſt branch; which eſtate tail was created at the ſame Parliament. For, after the Statute, the iſſue in tail cannot have a Writ of right of Advowſon, and therefore ſhall be aided by the ſaid firſt branch, as it is holden in 43 E. 3. 24. and 25 *Vid.* 46. *Aſſ. p.* 4. 8 E. 2. *Quare Imp.* 167. 34 H. 6. 20. Alſo it was reſolved, that in a *Quare Impedit*, or Aſſize of *Darrein* preſentment at the Common Law, the ſaid three points were not inquirable *ex officio*, (as appeareth by *Bracton*, *lib.* 4. *tract.* 2. *cap.* 6. & 7. *fol.* 246.) who wrote in the time of *H.* 3. before ſaid Act of *Weſt.* 2. but now they are inquirable by force of the third branch of the ſame Act. For in as much as that by it the Plaintiff is to recover the value of the Church for two years, if he cannot recover his preſentment, and the value of the Church by half a year, It is needful for the Court to inquire, If the Church be full, or void. 2. If full, of whoſe preſentment it is full, to the intent it may appear to the Court, if he may recover the preſentment or not; and laſtly, the inquiry of the value of the Church is needful, for as much as according to that he ſhall recover damages, *Vide* 8 E. 3. 5. 27 E. 3. *Damages* 106. 43 E. 3. 11. 11 H. 4. 40. 3 *Eliz. Dyer* 194. And at the Common Law before that Statute in a *Quare Impedit* the Patron did not recover any damages; for the Law doth ſo abhor Simony, that it gave not the Patron any recompence either for his preſentment, or for any diſturbance thereof. But at the Common Law a *Quare Impedit* did lye, when the Biſhop by any colour or cauſe, would not admit his Clerk, or when any other did diſturb him, ſo that he could not prefer his Clerk; then before the Church was full he might have a *Quare Impedit*, and have a Writ to the Biſhop, but he ſhould recover no damages. Note Reader, It was adjudged *Paſch.* 32 *Eliz.* in a Writ of Error in the Kings Bench between *Burckherd* and the Queen upon a Judgment given in a *Quare Impedit* in the Common Pleas againſt him for the Church of *Rettingden*, in the County of *Eſſex*, That the Queen ſhould not recover damages in a *Quare Impedit*, and the reaſon and cauſe thereof was

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ſhewed by *Wray* Chief Juſtice: 1. Becauſe at the Common Law no damages were recovered in a *Quare Impedit*, and at this day no damages can be recovered but only in caſe where they are given by the ſaid Statute of *Weſtm.* 2. and therefore the Queen cannot recover any by the Common Law. 2. The Queen is not within the ſaid clauſe of the Act of *Weſtm.* 2. which giveth the damages, for the ſaid clauſe, as appeareth before, hath two branches: Firſt, *If the time of ſix months paſs by the impediment of any, ſo that the Biſhop doth not preſent, and the very Patron loſeth his preſentation*, &c. and the Queen is not within this Branch; for ſhe cannot loſe her preſentment, and by conſequence ſhe cannot have double damages. The ſecond branch is, *And if the ſix months be not paſt*, &c. doth depend upon the other; ſo that foraſmuch as the Queen is not within the firſt, ſhe cannot be within the ſecond. And ſo the doubt in 7 *Eliz. Dier*, [b] in Sir *John Thinn's* Caſe, now upon the true ſence and underſtanding of the Law is well reſolved againſt the Judgment given in *temp. E.* 1. *Quare Imped.* 181. which ſeemeth to be the error of the Clerk, or of the Reporter; for all the preſidents in the ſame time, and all times after are to the contrary, two or three only of later time which paſſed in ſilence. But with this judgment agreeth 3 *H.* 6. Damages 17. adjudged, 34 *H.* 6. 12 *E.* 3. Champerty 9. 18 *E.* 3. 2. and all the preſidents as is aforeſaid. And the Judgment given in ſuch caſe of the Queen in the Common Pleas which was entred by the Clerks without advice of the Court was reverſed. Yet note, That all the Counts of the King in a *Quare Impedit* are to his damages, and yet no damages ſhall be recovered. It was further reſolved in the caſe at Bar, That at the Common Law in ſome caſe he who was admitted, inſtituted and inducted at the preſentment of another, ſhould be removed by Judgment in a *Quare Impedit*. As in a *Quare Impedit*, if the diſturber being Defendant preſent depending the Writ, and his Clerk is admitted, inſtituted and inducted, and afterwards Judgment is given againſt the Defendant, ſuch Clerk ſhall be removed. The ſame Law, if a ſtranger uſurpeth pendant the Writ, his Clerk ſhall be removed by the Judgment at the Common Law. And ſo in all caſes when any Clerk cometh in by preſentment of any ſtranger, againſt whom the Plaintiff hath good title his Clerk ſhall be removed. So if the Queen uſurpeth, and a *Quare Impedit* is brought againſt her Incumbent (for it doth not lie againſt the Queen) and pendant the Writ the Queen preſenteth another, who is inſtituted and inducted, he ſhall be removed, for he cometh in under the title of the Plaintiff. But if a ſtranger to the Writ, who hath good right, preſenteth his Clerk pendant the Writ, and his Clerk is admitted, and inſtituted, he ſhall not be removed; for then by ſuch device the rightful Patron may be defeated of his preſentment. And that was one of the cauſes, that after the ſaid Act of *Weſtm.* 2. it ſhall be enquired if the Church be full, and of whoſe preſentment, to the end it may appear whether the Plaintiff ſhall recover his preſentment or not, and the ſame agreeth well with the reaſon of the Common Law; for in every *Præcipe* where any Land, or other thing is recovered, when Judgment is given for the Demandant, if it be pleaded in bar in any other action, the Tenant ought to add, that the title of the now demandant is mean between the Judgment and the title of the demandant in the firſt Action; ſo that although there be twenty deſcents, &c. it ſhall not hurt; *vide* 33 *E.* 3. Title 3. 22 *E.* 4. 52. 27 *H.* 8. 14. So that although there be twenty uſurpers pendant the Writ, they ſhall not hurt them at the Common Law. It was alſo reſolved, That no Incumbent ſhall be removed by the ſaid Statute by *Quare Impedit*, or Aſſiſe of *Darr.* preſentment purchaſed within ſix months, if the In- [52] cumbent be not named in the Writ, *quia res inter alios acta alteri nocere non debet*, although that the Incumbent be in by deſeiſible title; and therewith agreeth 30 *E.* 3. 46 *E.* 3. 15. 9 *H.* 6. 32. & 56. 19 *H.* 6. 68. *b.* 5 *E.* 4. 115. 9 *E.* 4. 30. *Quia quicunque aliquid ſtatuerit parte inaudita altera, æquum licet ſtatuerit, haud æquus fuerit.* Alſo when the *Quare Impedit* is brought againſt the diſturber and the Biſhop and ſix months paſs as hath been ſaid, the Biſhop cannot collate for Lapſe. Then admit that ſix months paſs, ſo that time is devolved to the Metropolitan, who is not named in the Writ, whether ſhall he preſent for Lapſe? And it was reſolved, That he cannot; for he ſhall never preſent by Lapſe, but when the inferiour Ordinary might have collated for Lapſe, and ſurceaſeth his time; ſo that the firſt degree in ſuch caſe faileth; and therewith agreeth 11 *H.* 4. 8. It was alſo reſolved, That in the Caſe at Bar, although it was found *ex officio*, that the Church was full of *Boſwell*, who was a ſtranger to the Writ, and it doth not appear whether he came in by better title than the Plaintiff had, yet the Plaintiff ought to have a general Writ to the Biſhop, and the Biſhop ought to execute it; (prevail he who can) and he cannot return upon the Writ directed to him, That the Church is full of another; for no iſſue can be joyned between the Plaintiff and him; for he hath no day in Court, no more than the Sheriff can upon an *Habere facias ſeiſinam*, return that another is Tenant of the Land by right; for that cannot come in iſſue between the demandant and him, and therefore he ought to execute the Kings Writ, and ſo ought the Biſhop to do in the other caſe. And although that the third perſon hath right, yet they are excuſed, becauſe they have their warrant by proceſs of Law, and then the parties may try their rights, as the Law requireth. And ſo you will better underſtand the Books in 18 *E.* 2. Preſentment 20. 50 *E.* 3. Incumbent 10. 21 *H.* 7. 8. *a & b.* 9 *Eliz. Dier* 260. 14 *H.* 8. 31. 19 *E.* 2. Darr. preſentment 21. 10 *E.* 3. 17. 9 *H.* 6. 31. 6 *E.* 6. *Dier, Henſloe's* Caſe.

Mich.

Mich. 3 Jacobi, *in the Star-Chamber.*

Iſabella Counteſs of *Rutland*'s Caſe.

IN the Great Caſe this Term in an Information preferred by the Attorney General againſt *S.* and divers other Serjeants at Mace, and others, for arreſting of the body of *Iſabella* Counteſs of *Rutland*, late the Wife of *Edward* Earl of *Rutland* by force of a *Capias ad ſatisfaciend.* upon Judgment in Debt given in the Common Pleas againſt her, theſe points were reſolved for good Law by the Lord Chancellor *Egerton*, *Popham* and *Gawdy* Chief Juſtices, *Fleming* Chief Baron, and by the whole Court of Star Chamber, although that ſome preſidents by ignorance of Clerks are to the contrary. 1. That the perſon of one who is in Law a Counteſs by Marriage, or by deſcent, is not to be arreſted for Debt or Treſpaſs; for although in reſpect of her Sex ſhe cannot ſit in Parliament, yet ſhe is a Peer of the Realm, and ſhall be tried by her Peers, as it appeareth by the Statute of 20 *H.* 6. which was but a declaration of the Common Law. And there are two reaſons wherefore her perſon ſhall not be arreſted in ſuch caſes; one in reſpect of her Dignity, and the other in reſpect that the Law doth preſume that ſhe hath ſufficient Lands and Tenements in which ſhe may be diſtrained. 2. It was reſolved, that the perſon of a Baron, who is a Peer of Parliament ſhall not be Arreſted in Debt or Treſpaſs by his body for the cauſes aforeſaid; for none of the Nobility, who is Lord of the Parliament, and by the Law ought to be tried by his Peers, ſhall be in ſuch caſes arreſted by his body. And both theſe points are well confirmed by our Books, 11 *H.* 4. 15. In a *Homine replegiando* againſt the Lady *Spencer*, it appeareth that the Lady *Spencer* was a Peer of the Realm, and that in Debt or Treſpaſs, *Capias* lieth not againſt an Earl, Baron, or Baronneſs, and the like; for becauſe of their ſtate and dignity they are intended to have Aſſets, 3 *H.* 6. 48. A Writ of Debt upon arrearages of Accompt was brought by the Lady *Aburgaveny* againſt another; the Defendant pleaded, That he owed her nothing, and was ready to wage his Law, and prayed by force of the Statute of 5 *H.* 4. *cap.* 8. that the Plaintiff ſhould be examined, which Act is general, that examination ſhall be made, which always is intended upon Oath. And there *Cokein*, which gave the Rule, ſaid, That the Lady *Aburgaveny* is a Peer of the Realm, and it ſhall not be well to cauſe her to appear to be examined; for by that reaſon you may cauſe every Duke, or Earl of *England* to appear. *Rolf*, Serjeant, asked, Why not? Sir, the ſaid Act of 5 *H.* 4. is general, and is for every man high and low. To which *Cokein* ſaid, The Law will have a difference between a Lord or a Lady, and another perſon. By which Book it is to be obſerved, That a Lady, who was but the Wife of a Baron, is a Peer of the Realm, and is in equipage as to Nobility and privileges incident to their Dignities with Dukes, Earls, *&c.* 41 *E.* 3. 30. *Ralph Everden* Knight, brought a Writ out of the *Chancery*, and alſo a Writ of Privy Seal to the Juſtices, reciting that he was a Baron, commanding them to diſcharge him of ſwearing in *Jurat. aſſiſ. ſeu recognitionibus quibuſcunque*, becauſe the Barons ought not to be of any Inqueſt or Aſſiſe without their will, and upon good advice he was abſolutely diſcharged. *Vide Regiſt.* 179. 35 *H.* 6. 46. in Attaint in the Kings Bench, the Grand Jury did appear, and one challenged himſelf foraſmuch as his Anceſtors had been Barons and Lords of Parliament, and that they have had place in the ſame Houſe of Parliament. And this matter was tried by ſix Triors of the ſame Jury, for which he prayed allowance of his challenge, and that he ought to be diſcharged. *Forteſcue* Chief Juſtice, We cannot allow it without a Writ, teſtifying the ſame; for we ought to be informed of your challenge by matter of Record, otherwiſe we cannot allow it; which the whole Court aſſented unto. Note, Duke or not Duke, Earl or not Earl, Baron or not Baron, ſhall not be tried by the Country, but by Record; for if they be Lords of Parliament it appeareth by Record, and therefore by Record, *viz.* by the Kings Writ it ought to be certified. But a woman who is a Dutcheſs, Counteſs, Baroneſs, by marriage, which is a matter *in fait*, in ſuch caſe, not Dutcheſs, *&c.* ſhall be tried by the Country; for their dignity accrueth to them by matter *in fait*; *vide* 2 *H.* 6. 11. The Wife of the Earl of *Arundel* ought to be named Counteſs, in an Action brought againſt her, or by a name which doth amount to as much, 12 *E.* 3. brev. 254. accord. *vide Plow. Com.* 223. *Hen. Barkley, miles, Dom. Berkley, &c.* 14 *H.* 6. 2. An action of Debt was brought againſt a man and a woman, Counteſs of *D.* againſt whom an *Exigent* was prayed. *Newton*, You ſhall not have an *Exigent* againſt an Earl, no more againſt a Counteſs: And *Fulthorpe* there ſaid, that the cauſe thereof was not only, becauſe that it cannot be intended that an Earl can be without Lands, but another cauſe is for the dignity of his name: For an *Exigent* is not awardable againſt a Duke, Earl, Baron. *Martin* in that caſe, The woman hath loſt the name of Counteſs by taking of Husband; for by taking of Husband all the names which ſhe had before are loſt; which *Paſton* affirmed, for which cauſe the Writ ſhall abate wherein ſhe is named Counteſs. But not a difference between a Baronneſs or Counteſs by marriage, and by deſcent; for it is true, *ſi Baroniſſa, &c.* by marriage marrieth under the degree of Nobility, ſhe hath loſt her name of dignity; for in ſuch caſes, *Si mulier nobilis nupſerit ignobili, deſienit eſſe nobilis.* But if ſhe be noble by birth or deſcent, whoſoever ſhe marrieth yet ſhe remaineth noble; for Birthright is *caracter indelebilis*; but that which is gained by Marriage may alſo be loſt by Marriage; for *eodem modo quo quicquid conſtituitur diſſolvitur.* And as to the Book in 8 *H.* 6. 9. & 10. where the caſe was, that a Writ was, *Præcipe Joh. Lovel militi & B. dominæ Abergaveniæ unum meſſuagium*, and the Defendant demanded judgment of the Writ, for that this *John Lovel*, Knight, is Lord, not named, judgment of the Writ, *& non allocatur* by the whole Court. *Rolf*, Then judgment of the Writ; for no more than he ſhall be called Lord,

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Lord, ſhall ſhe be called Lady; judgment of the Writ. *Babington.* At the moſt it is but ſurpluſage, and the Writ is not the worſe. And it was reſolved, that this Book was not good Law, but ill reported: For as to the Plea of the Writ, that the ſaid Sir *John Lovel* was *Dominus*; it was ſufficient for three cauſes. 1. He ought to have pleaded that he was a Baron of the Parliament; for *Dominus* is too general. 2. If he had ſo pleaded, he ought to have ſhewed a Writ under Seal, teſtifying the ſame, becauſe it was dilatory in abatement of a Writ. 3. If the ſaid Woman being the other demandant was not Baroneſs in Law, without doubt the naming of her Baroneſs ſhould abate the Writ, as it appeareth by the ſaid Book of 14 *H.* 6. 2. And peradventure this *Lovel* was Lord in reputation, as many are at this day, and not a Lord of Parliament; As the eldeſt Son of a Viſcount, Earl, &c. who are not Barons in Law but by reputation; and therefore in Legal and Judicial proceedings ſhall not be ſo named. And if the ſaid Book ſhall be otherwiſe intended, it ſhould be erroneous and againſt all other Books in all ſucceſſions of Ages. And every Baron of the Parliament ought to have a Knight retorned of his Jury, as appeareth in 13 *E.* 3. Inqueſt 44. 27 *H.* 8. 22. 4 *Eliz.* *Dyer* 208. 14 *Eliz.* 107. 111. And an Earl or Baron ſhall be amerced a hundred ſhillings, 9 E. 4. 50. 3. It was reſolved, That foraſmuch as in the Caſe at Bar, a *Capias* was awarded againſt the Counteſs by the Court of Common Pleas, That the Sheriff or his Officer by his Warrant might without any offence execute the Writ; for they ought not to diſpute of the Authority of the Court, but ought to execute the Writs directed to them. And although that it appeareth in the *Capias* that ſhe was a Counteſs, againſt whom by the Law no *Capias* in ſuch caſes did lie, *& ignorantia juris non excuſat*, and chiefly Sheriffs and other Miniſters of Law and Juſtice, as was Objected. Yet for as much as in ſome Caſes of contempt, &c. a *Capias* lyeth againſt them, for this cauſe it was reſolved, That the Sheriff and his Officers ought not to examine the Judicial Act of the Court, but ought to execute the Writ, and therewith agreeth the opinion in 36 *H.* 8. *Dyer* 60. If a *Capias* or *Exigent* cometh to the Sheriff againſt a Duke or Earl, &c. where it lieth not againſt them, he ought to execute the Writ, and not to argue and diſpute the validity of it. But the truth of the Caſe of the Counteſs of *Rutland* was, That the Sergeant who had a Warrant to arreſt the ſaid Counteſs upon the ſaid *Capias ad Satisfaciendum*, being fearful that ſhe ſhould be reſcued by her Servants and Friends, and ſo eſcape, for which the Sheriffs (if ſhe ſhould be arreſted upon the *Capias ad Satisfaciendum*, and eſcaped) ſhould be charged. The Sergeants at Mace did counſel the ſaid *S.* to enter a feigned Action of a thouſand pound before the Sheriffs in *London*, according to their Cuſtom, upon which they would firſt arreſt the ſaid Counteſs, and by force thereof bring her to the Compter, and then take her body in Execution upon the *Capias ad Satisfaciendum.* And afterwards the ſaid Sergeants in *Cheapſide*, with many others, came to the Counteſs in her Coach, and ſhewed her their Mace, and touched her body with it, ſaying; We arreſt you *Madam*, at the ſute of the ſaid *S.* which were all the words they uſed, and thereupon they compelled the Coachman to carry the ſaid Counteſs to the Compter in *Woodſtreet*, and at the door thereof the Sheriff came, and carried the Counteſs to his houſe, where ſhe remained ſeven or eight days, until ſhe had paid the debt. And it was Reſolved, That the Sheriff, or any other by his Authority who arreſteth the perſon of another, ought upon the Arreſt, ſhew at whoſe ſute it is; out of what Court, for what cauſe he doth it, and when the proceſs is retornable, that he pay it, and free his body (if he will) of Impriſonment; and if it be upon a Meſne Proceſs, either to agree with the party, or to put in bail according to Law, and to know when he ſhould appear. And for this cauſe it was Reſolved, that the ſaid general Arreſt cannot be ſaid by force of the ſaid Writ of Execution; And that the ſaid Arreſt of the Counteſs by the Sergeants at Mace of their own heads, without any warrant, is againſt Law, and the ſaid Counteſs was falſely impriſoned. And ſo in Summons in real Actions, the Summoners in the preſence of the pernors and veuers, &c. ought to ſummon the Tenant, 1. To keep his day of Return, and name it certain, to anſwer, &c. 2. They ought to name the name of the Demandant. 3. The Land in demand, *Vide* 3 *E.* 3. 48. 43 *E.* 3. 32. And that was the principal cauſe that a ſevere Sentence was given againſt *S.* the Sergeants; and the others their Confederates; And the entring of ſuch feigned Actions in *London*, was utterly condemned by the Court: For by colour of Law and Juſtice, they by ſuch feigned means do againſt Law and Juſtice, and ſo make Law and Juſtice the author and cauſe of wrong and Injuſtice *vide* the Statute of 5 *H.* 4. *cap.* 8. in the preamble.

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Trin.

Trin. 4 Jacobi.

The Lord *Chando*'s Caſe.

KIng *H.* 7. by his Letters Patents in the 19th year of his Reign granted to *Giles Bridges* Eſquire the Mannor of *Blunſden* in the County of *Wilts*, to have and to hold to him and the heirs males of his body. The ſame King, *Anno* 24. of his Reign by his Letters Patents reciting the former Patents of Intail, *Ac cum poſtmodum*, the ſaid *Giles* came into our Chancery before *William* Archbiſhop of *Canterbury* our Chancellor, and there ſurrendred the ſaid Letters Patents to to our uſe to be cancelled; By vertue whereof the ſaid Letters Patents were then and there cancelled; by vertue whereof we were ſeiſed, and at preſent are of the ſaid Mannor in our demeſne as of Fee; Know ye, that of our eſpecial grace, certain knowledge, and mere motion, we have given and granted to the ſaid *Giles* and *Iſabel* his wife, the ſaid Mannor with the appurtenances, (without any grant of the Reverſion of the ſaid Mannor,) To have and to hold to them and the heirs of *Giles*. And if the Reverſion ſhall paſs or not by this grant, was the Queſtion, between *Grey* Lord *Chandos*, iſſue and heir of the ſaid Intail, and Sir *Thomas Lowe* Knight Alderman of *London*, who had taken a Leaſe for years of the ſaid Mannor of *William* Lord *Chandos*, Father of the ſaid Lord that now is; and a Fine was levied by the Lord *William* for aſſurance of the ſaid Leaſe: But if the Reverſion doth remain in the King, then the ſaid Leaſe was voidable, and the ſaid Fine cannot make it good, for that it is reſtrained by the Statute of 34 *H.* 8. And upon a Petition to the King of the ſaid Sir *Thomas Lowe*, who was diſpoſſeſſed by the ſaid *Grey* Lord *Chandos*, the King referred the Conſideration thereof to the Lord Chancellor, and Lord Treaſurer of *England*, who heard Council on both parts. And becauſe the caſe was doubtful they referred the ſame to the Lord Chief Juſtice of *England*, and Lord Chief Baron, who often times heard the Caſe debated betwixt the Counſel of both parties. And it was objected by the Council of the Lord *Chandos*, that the ſaid grant of the ſaid Mannor by the ſaid Letters Patents of 24 *H.* 8. were void for divers cauſes. 1. That the ſaid eſtate tail was not recited, as an eſtate continuing, upon which the Reverſion might be granted, but as an eſtate determined; And therefore the King granted the ſame as a thing in poſſeſſion, when in truth he had but a reverſion expectant, upon an eſtate in tail. 2. The King was deceived in his grant, for the King upon the ſuggeſtion of the party, did think, that by the ſurrender of the ſaid Letters Patents of *Anno* 19 *H.*7. the eſtate tail was thereby defeated and determined, by reaſon that the King was ſeiſed thereof in his demeſne as of Fee, in which the King was deceived. For by the ſurrender of the ſaid Letters Patents the eſtate tail was not determined, nor the King ſeiſed of his demeſne as of Fee, but the King had only a Reverſion in Fee expectant upon the eſtate tail. 3. The King was deceived in the eſtate he granted, for he did intend to grant an eſtate in Fee in poſſeſſion; and not a Reverſion expectant upon an eſtate in tail; and the King granted *Manerium de Blunſden, & non reverſionem Manerii.* And after many arguments and good deliberation had with divers other Juſtices, It was Reſolved, that the Reverſion ſhould paſs by the ſaid Letters Patents of 24 *H.*7. And as to the ſaid three Objections, it was conſidered, when the recital was the ſuggeſtion of the party, and when the affirmation of the King himſelf. And as to that, it was Reſolved, That the recital of the eſtate tail, and that the ſaid Patentee had ſurrendred or delivered up the ſaid Letters Patents to the Chancellor to be cancelled, both theſe were in Judgment of Law the information and ſuggeſtion of the party; But the Clauſe (by vertue whereof we were ſeiſed in our demeſne as of Fee) was but the Collection of the King himſelf, as a Conſequence upon the Surrender, in which the King miſtook the Law. Alſo the party doth inform the King, that he had delivered the Letters Patents to the Chancellor, to be cancelled; upon which the King affirmeth (which ſaid Letters Patents then and there were cancelled) that is not the information of the party, but the affirmation of the King; and the collection or information of the King (upon the information of the party) when it is not any part of the conſideration, ſhall not avoid the grant. For all that the party had informed was true; And the Error was in the Conſequent or collection which the King made upon it; Then for as much as the party had truly informed the King of the eſtate tail, and of the delivery of the Letters Patents to be cancelled; Although the King hath miſtaken the Law, or the matter in fact, in that caſe, the ſame being no part of the Conſideration, ſhall not avoid his grant, for no fault was in the party. Alſo it was Reſolved, that by the grant of the Mannor, without the word Reverſion, the Reverſion ſhould paſs; for the word Mannor Includeth all eſtates, and degrees of eſtates of or in the Mannor of *D.* to *B.* in tail, and afterwards the Donor is attainted of Treaſon, by which the King is ſeiſed of the Reverſion, and afterwards by his Letters Patents granteth *Manerium de D.* to another and his heirs: in that caſe, although that the King granteth the Mannor of *D.* as in poſſeſſion, yet the reverſion ſhall paſs. For the King had an eſtate (the reverſion in Fee) grantable in him; and the eſtate tail by a Common perſon needed not to be recited, And it is not like to the Caſe of *Alton woods*. For there the King was not conuſant, nor informed of his true eſtate, *ſcil.* that he was ſeiſed in tail, with the reverſion expectant, to his heir and ſucceſſors, and his grant in the ſame caſe, cannot take effect by fractions of eſtates, or wrong done, and therefore the Caſe of *Alton* woods, was not to be likened to this caſe. For in our caſe, the party hath informed the King of the truth of all matters in fact, of the eſtate tail, and of the delivery of the former Letters Patents, ſo that in true judgment of Law upon the matter contained in the Patent, the King had but a reverſion in fee expectant upon an eſtate tail: and in this caſe no wrong is done to any, nor is there any fraction

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fraction of eſtates. And here the Kings intent was to depart with all his eſtate, and leſſe paſſeth by this grant, (s. the reverſion) then he did intend to paſs; for he did intend to paſs the poſſeſſion; and ſo it is not any prejudice to the King. But if more ſhould paſs, than he meant to paſs, as where he intendeth to paſs only the reverſion, that the poſſeſſion ſhall paſs, there it ſhall be otherwiſe. Alſo this grant was made *ex certa ſcientia, & mero motu*, and ſhall be taken in the moſt liberal and beneficial ſenſe, according to the Kings intent and meaning expreſſed in his grant.

Hill. 4 Jacobi, *in the Common Pleas.*

Brediman's Caſe.

[*b*] HIll. 45 *Eliz. rott.* 105. *Charles Brediman* did arrain an *Aſſize* of *Novel diſſeiſin* againſt *Robert Bromley*, *Thomas Reyner*, and *Francis Cotton*, of a rent of 10 *l.* in *H.* &c. in the County of *Midd.* and made his title, that Sir *Richard Pepal* Knight, was ſeiſed of the Mannor of *Swacliffe*, in *H.* &c. in his demeſne, as of fee, and held the ſame in ſocage of *Michael Shorditch*, and 9 *Octobr.* 13 *Eliz.* made his Will in writing, and thereby demiſed to the Plaintiff a rent of 10. *l.* iſſuing out of the ſaid Mannor of *Swacliffe* for his life, yearly to be payed, and by the ſame Will demiſed to Dame *Elenor* his Wife the ſaid Mannor, to have from the day of his death, for 15 years; and afterwards the ſaid Sir *Richard*, 10 *Octobr.* 13 *Eliz.* died. *Elenor* entred into the ſaid Mannor, and paid the ſaid rent of 10 *l.* and for the rent of 10 *l.* due the 10*th.* of *Octobr.* 40 *Eliz.* and for the arrearages of 16 years before: the Plaintiff the ſaid 10th. day of *October* 40 *Eliz.* half an hour before ſun ſet of the ſame day, came to the capital houſe of the ſaid Mannor, and there remained till after the ſun ſet, *petendo tam prædict.* 160 *l. de arreragiis prædict. redditus quam prædict. decem libras in prædicto decimo die Octobris anno* 40 Eliz. *ſupradict. eidem* Carolo *tunc ſic debit. exiſten. ſibi ſolvi.* And the Defendants; *ad tunc tenentes, &c. ſeu eorum aliquis, nec aliquis alius arreragia prædicta ſeu reditum prædictum aut aliquam inde parcellam eidem* Carolo *ad tunc ſic ut præfert debit. & inſolut. exiſten. eidem* Carolo *ſolverunt ſeu ſolvit, ſed illa ei ad tunc & ibid. ſolvere denegarunt, & eorum quilibet ſolvere denegavit, & ſic prædict.* Robertus, Thomas & Franciſcus, *ipſe* Carolum *de redditu prædict. ad tunc & ibid. injuſte & ſine judicio diſſeiſiver. & hoc, &c.* And the Aſſize was taken againſt
[57] the ſaid *Thomas* and *Francis* by default, and *Robert* pleaded *Nul. tort.* and the Recognitors of the Aſſize found for the Plaintiff, *ſcil.* the ſeiſin and diſſeiſin of the rent: and the only point which was debated at the Bar, and at the Bench was, if the payment of the ſaid rent by *Elenor*, who was Termer for years, were a ſufficient ſeiſin of the rent to maintain an Aſſize againſt the Terre-Tenant after the years determined. And this caſe was oftentimes argued at the Bar in the time of the Lord *Anderſon*, and in the time of the Lord *Gawdy*, and of *Coke* now Chief Juſtice. And it was objected at the Bar, that the ſeiſin had by the hands of Tenant for years is ſufficient to have an Aſſize, for it appeareth by 33 *E.* 3. Verdict 47. That ſeiſin by the hands of a Baily, or Procurator, is ſufficient: and 8 *H.* 6. 17. in ſome caſe, ſeiſin by the hands of him who hath nothing in the land is ſufficient. As if there be a Lord and Tenant, and the Tenant maketh a feoffment in fee, before notice made by the Feoffee, the payment of the Feoffor is a good ſeiſin. And 27 *E.* 3. 83. in a *Scire facias* upon a fine levied of a Rent, the Tenant ſaid, That the demandant had received 16 s. parcel of the ſame rent pendant the Writ, by the hands of one who held the Land out of which the rent was iſſuing at will, and took his plea to the whole, becauſe the ſaid Rent was a Rent-ſervice, and ſeiſin of parcel gave ſeiſin of the whole, and ſo the fine executed by that ſeiſin; upon which the Plaintiff did demurr, and it was awarded that he ſhould anſwer to the Remnant, by which it appeareth, (as it was objected) that ſeiſin by the hands of a Tenant at will, was a ſufficient ſeiſin as to that which was paid. And ſee 8 *Aſſiz. p.* 31. and 8 *E.* 3, 53. and *Fitz. N. B.* 179. that payment of the Rent by Tenant for years is ſufficient to have an Aſſize for the Rent. And it was ſaid that the other ſeiſin the deviſee of the Rent could not have during the Term, by other hands than by the Tenant for years; and the payment of the Rent was a local thing, and which of right ought to be paid; and therefore the ſaid payment by the Tenant for years ſhall bind the Tenant of the Free-hold, and ſhall give unto him ſufficient ſeiſin to have an Aſſize. And upon ſolemn Argument this Term by the Judges of the Common Pleas, It was reſolved by the whole Court, *ſcil. Coke* Chief Juſtice, *Walmſley*, *Warburton* and *Daniel*, That the ſaid payment of Rent by the ſaid Tenant for years, was no ſeiſin to bind the Terre-tenant after the years determined for divers Cauſes. 1. In reſpect of the imbecillity and exility of the Intereſt of Tenant for years, who at the Common Law could not draw the eſtate of Free-hold into Queſtion; For although that the Recovery againſt the Tenant of the Free-hold were by agreement, Tenant for years could not be reſtrained before the Statute of *Gloceſter*, nor he could not falſifie the Recovery before the Statute of 21 *H.* 8. So that by the Common Law Tenant for years was ſubject to the pleaſure of the Tenant of the Free-hold; For he cannot falſifie a Recovery of the Free-hold in reſpect of the feebleneſs of his eſtate, and none by the Common Law can falſifie a Recovery of the Free-hold, but he who hath a Free-hold, *Vide* 7 *H.* 7. 12. 9 *E.* 4. 38. 30 *H.* 6. 16. 7 *H.* 4. 12. 19 *E.* 3. *Aſſ.* 82. The ſecond reaſon was, *ex Etymologia & vi termini, ſcil.* that he who hath not ſeiſin in the Land charged, cannot give a
[*b*] ſeiſin of Rent; *nemo poteſt plus juris in alium transferre quam ipſe habet.* And that is the cauſe, that a *Præcipe* lieth not againſt a Termor, becauſe he cannot give ſeiſin, and yet in one caſe one manner of *Præcipe ſolum* lieth againſt him who hath but a Chattel, and no Free-hold; and that is in a Writ of *Dower* againſt Guardian

Gardian in Knights ſervice, as appeareth in *Tempr. E.* 1. *Breif.* 863. 8 *E.* 2. *ibid.* 809. 6 *E.* 3. 8. *&c.* And a Writ of *Dower* lieth againſt Gardian in Knights ſervice for two cauſes, 1. Otherwiſe the Tenant in Dower ſhould be without remedy, for in ſuch Caſe no Writ of *Dower* lieth againſt the heir, as it is adjudged in 9 *H.* 6. 6. in *Freuils* caſe. 2. The Gardian may pray, (if the caſe ſo require) that the Demandant endow her ſelf *de le plais beuale*; but no other *Præcipe* lieth againſt ſuch Gardian. And no Writ of *Dower* lieth againſt Gardian in Socage, nor he cannot aſſign *Dower*, as it appeareth in 29 *Aſſ.* And it was ſaid, as *Poſſeſſio* is derived, *a poſſe & ſedeo*, becauſe that he who is in poſſeſſion may ſit down in reſt and quiet: ſo *Seiſina* alſo is derived *a Sedendo*, for till he hath Seiſin, all is, *labor & dolor, & vexatio Spiritus*; but when he hath ſeiſin, he may ſit down, and reſt in peace and quietneſs. The third reaſon was a manifeſt difference that was between receiving and giving of ſeiſin; For it is true, that he who hath but a Term for years may take ſeiſin for the benefit of him who hath the freehold, 45 *E.* 3. 26. Grantee for years of a Common uſeth the ſame, the ſame giveth ſeiſin to him in the Reverſion, 22 *Aſſ.* 84. *acc.* 12 *E.* 3. *Aſſ.* 86. payment to the grantee for years of a Rent, is a ſufficient ſeiſin for him in the Reverſion, *M.* 39 *&* 40 *Eliz.* in my 5 Reports, preſentment by the grantee of the next Avoydance for years, is ſufficient title in a *Quare Impedit* for the grantor; and all our books are, That the poſſeſſion of Leſſee for years, or Gardian, &c. is ſufficient ſeiſin in the Reverſion to have an Aſſiſe. But *ſicut beatius eſt, ita majus eſt dare, quam accipere.* For in the firſt caſe he who giveth ſeiſin is Tenant of the Freehold, and he who receiveth Tenant for years, but in this Caſe he who maketh the payment is but Tenant for years of the Land, and he who receiveth claimeth a free-hold in the Rent, and therefore the Tenant for years by his payment cannot give ſeiſin to bind him who hath the Free-hold; and therewith agreeth 2 *H.* 6. 3 & 8 *H.* 6. 7. *Vide* 11 *H.* 4. 29. Homage done by the Husband before iſſue ſhall not bind the Wife; but ſeiſin by the hands of a Diſſeiſor, or by one who hath a defeaſible title, is ſufficient to bind him who hath right, for he is Tenant of the land, and the act is lawfull; but encroachment of rent by his hands, ſhall not bind him who hath right, for that is not lawfull; and therewith agreeth 8 *H.* 6. 18. 39 *H.* 6. 2. 33 *E.* 3. *Avowrie* 255. 8 *Aſſ.* 6. 16. 31. but in the ſame caſe, if there be any covin between the Diſſeiſor and him who hath the rent, and that the purpoſe of the diſſeiſin was, that the diſſeiſor ſhould give ſeiſin of the Rent there, ſuch ſeiſin ſhall not bind the diſſeiſee, or him who hath right, for the covin maketh it unlawfull, in the ſame manner is it as Dower aſſigned by ſuch diſſeiſor, or recovered againſt him, if the diſſeiſin be had againſt him by agreement or covin. But it was ſaid, When there are Lord and Tenant, and the Tenant maketh a feoffment in fee, before notice and tender of the arrerages the Feoffor may give ſeiſin, for he is Tenant as to Avowry, 8 *H.* 6. 18. for in ſuch caſe if the Lord avoweth upon the Feoffee before tender of the arrerages, he ſhall loſe them, as it is agreed in 7 *E.* 3. & 7 *H.* 4. *&c.* And therefore, for as much as in ſuch Caſe the Common law doth compell the Lord to avow upon the Feoffor, for this cauſe at the Common law ſuch ſeiſin by the Feoffor, *cauſa neceſſitatis*, was good. And in this caſe difference was taken and agreed between Attornment and Seiſin; for in caſe of a grant of a Seigniory or Reverſion, *&c.* to Attornment privity of eſtate was requiſite; but not to ſeiſin: But at the Common law the Lord was not compellable to take his rent of any other but of him who was his immediate tenant in privity, and therefore at the Common law, the Lord paramount was not compellable to accept his rent by the hands of the Tenant peravail, or by the hands of Tenant for life, where the reverſion was over to another, and the ſame appeareth by the Statute of *Weſt.* 2. *cap.* 9. *Capitalis Dominus ſervitia & conſuetudines ſibi debit. renuebat accipere per manus alterius quam per manus proximi tenentis ſui, & ſic tenentes in dominico amiſerunt proficua tenementorum ſuorum; non habeat capitalis dominus poteſtatem diſtringendi tenentes in dominico, dum prædictus tenens offerat ei ſervitia debita & conſueta:* And yet ſeiſin had by the hands of the Tenant peravail, or leſſee for life was good, if the Lord accepteth of it. And it was ſaid, That if Tenant in tail maketh a feoffment in fee, if the donor happeth ſeiſin of his rent by the hands of the Diſcontinuee, it is ſufficient to have an Aſſiſe, and yet he cannot avow the Diſcontinuee, nor there is not any privity between them. The fourth reaſon was drawn from the nature of the Rent in the caſe at barr, which as it was ſaid, hath three aſpects. 1. It is againſt Common right. 2. It is in creation *redditus ſiccus*, barren without fruit, and for his drineſs is compared to a ſtone: *Summa petit ſcopuli, ſiccaque in rupe reſedit.* 3. It is *Redditus cæcus & ſiccus*; For it is a rent remedileſs, which cannot ſee any way or remedy to attain to it. And it is to be obſerved, That a Right (without any eſtate in poſſeſſion, reverſion, or remainder) for which good remedy by action is given, is not yet aſſetts, untill it be recovered and reduced into poſſeſſion: So an eſtate, as in Rent-ſeck, which deſcendeth, for which the heir hath not remedy, is not Aſſets, until he hath gained ſeiſin, for want of right, and want of remedy are in one equipage. So one ſhall not be remitted to a Right remedileſs, as it appeareth in the *Marqueſs of Wincheſters* Caſe in the fourth part of my *Reports*: And *Mich.* 12 *&* 13 *Eliz.* between *Tirling* and *Trafford* it was adjudged, That a Reverſion expectant upon an eſtate tail was not Aſſetts, becauſe it lay in the power of Tenants in tail to cut it off, and to barr it at his pleaſure: And thereupon it was concluded, That for as much as ſuch firſt ſeiſin which ſhould give vigor and life to this remedileſs rent, and ſtill charge the Free-hold, ought to be given by him who hath a Free-hold at leaſt, and not by him who hath but a Chattel, for this cauſe ſeiſin given by him who hath but a term for years was not ſufficient. And it was ſaid, That the rent-ſeck in the Caſe at bar was remedileſs in its creation, becauſe it was created by Will; ſo that there failed not only a remedy for the Rent, but a Writ of Annuity alſo; But if a man granteth a rent by deed out of certain Lands, there as to charge the Land it is remedileſs, but the grantee may charge the perſon of the grantor in a Writ of Annuity. And therefore it was ſaid in ſuch caſe, If he addeth a Proviſo, that it ſhall not charge the perſon of the grantor, it is void, if he doth not give him ſeiſin upon the delivery of the deed; For ſuch Proviſo doth take away all his Remedy; and to avoid the ſame, *Littleton* in his *Chapter of Rents*, puts his caſe of a rent charge, in which there was ſuch a Proviſo, in which caſe the grantee was not bereft of all his remedy. It was further agreed, That for as much as a Rent-charge, or a Rent-ſeck was againſt Common Right, that in an

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Aſſiſe thereof all the Terretenants, *ſc.* the Tenants of the Free-hold (who always are in Law intended within theſe words Terretenants) ought to be named; as it is agreed in 9 E. 3. 13. 22 H. 6. 24. 33 E. 3. *Aſſ.* 456. &. And thereupon it was concluded, that if in caſe of diſſeiſin which is tortious, and privation of ſeiſin, the Tenants of the Free-hold ought to be named and made party, *a fortiori*, in the caſe of ſeiſin, which in this caſe is creation of Remedy for the Rent, the Tenant of the Free-hold ought to be party and principal agent in the perfection thereof: and he who hath a Rent hath not taken the explees thereof, until he hath ſeiſin by the hands of the Tenant of the Free-hold: for *expletia derivantur de verbo expleo*, that is, to fill or make up, or to make perfect; For he who hath a Rent, (and chiefly a rent-ſeck) hath not perfect and expleat, or compleat eſtate in the rent, until he hath had a ſeiſin thereof, and when he hath ſeiſin, his eſtate is compleat, and certain and perfect, for he hath reaped the explees, ſcil. [59] the fruit and commodity thereof. See *Bracton lib.* 2. *fol.* 40. *Item nec expletia capere poſſit, quia nondum venit tempus meſſium nec vindemiarum: ſi autem fructus non maturos percepit, vel arbores proſtraverit, iſta non debent dici expletia, cum ſint potius ad damnum quam ad commodum.* And *Littleton, Cap. Attornment.* 125. was cited, If there be Lord, Meſn and Tenant, and the Lord will grant the ſervices of the Meſne, although in his grant he doth not make mention of the Meſne, yet it behoveth that the Meſne attorn, and not the Tenant peravail, becauſe the Meſne is Tenant to him, but otherwiſe it is where Land is charged with a Rent-charge, or Rent-ſeck, for in ſuch caſe if he who hath the Rent, granteth the ſame to another, it behoveth, that the Tenant of the Free-hold attorn to the grantee, becauſe the Free-hold is charged with the Rent, &c. And if the Tenant of the Free-hold ought to attorn to a grant (as *Littleton* holdeth) *a fortiori*, the Tenant of the Free-hold ought to give ſeiſin. For ſeiſin is more than Attornment, for every local ſeiſin includeth Attornment; but Attornment doth not include ſeiſin. And it appeareth by 21 *H.* 6. 9. That if the Terretenant out of which the rent is iſſuing be diſſeiſed, and he who hath the Rent granteth it over, the diſſeiſee cannot Attorn, becauſe he hath not the Free-hold, although he hath the mere right to it, *a fortiori* Tenant for years who hath no Free-hold, nor right of Free-hold, ſhall not give ſeiſin. Laſtly, It was agreed, That it ſhall be full of many Inconveniences, if he who hath not the Free-hold ſhall give ſeiſin. For then Tenant by Statute Merchant, or Staple, Tenant by *Elegit*, Gardians, Grantees of Wards, &c. Alſo if the King extend and leaſe over, all theſe might put Lords, or Owners of Rents in poſſeſſion of the Rent or Services, of which they had not any ſeiſin within time of Limitation, which ſhall be very perillous and dangerous, and the cauſe of many ſutes and troubles. And as to the Objection, *ſcil.* That payment by a Baily ſhall be ſufficient, it was agreed, if it worketh not ſpecial prejudice to the Lord: as if the Lord hath not been ſeiſed of his Rent within ſixty years, and the Tenant maketh one his Baily generally of his Mannor, he cannot without expreſs Commandment of his Maſter pay this Rent remedileſs to the Lord, for that ſhall be a ſpecial prejudice to him, which a Baily without Commandment cannot do. And as to the Caſe of 27 E. 3. 83. it was agreed, for there the Tenant pleaded the payment of the Rent by the hands of Tenant at Will, and ſo avowed the payment as his own payment by the hands of Tenant at Will, *Vide* 4 H. 6. 29, 30. In a Replevin againſt *W.* he made Conuſans as the Kings Baily; and ſaid, That the King was ſeiſed of the Caſtle of [b] *Lanton*, as parcel of his Dutchy of *Cornwall*; and had a Rent of 20 s. iſſuing out of the Town of *T.* and that all who had been Dukes there, had been ſeiſed time out of mind by the hands of thoſe who were demurrant and reſident within the ſame Town, and preſented to diſtrain for it *quoties, &c.* And it was holden a good ſeiſin; for the Rent was iſſuing out of the whole Town, and that all the reſidents and dwellers ought to pay it, in which caſe he could not alledge ſeiſin by the hands of any perſon certain, for the ſeiſin given by one, bound all, and it cannot be intended, That a man may have knowledge of all the Inhabitants, for which cauſe, by the advice of the Court, the Conuſans in ſuch caſe was awarded good.

Hill. 4 Jacobi, *in the Common Pleas.*

Gateward's Caſe.

IN Treſpaſs by *Robert Smith* againſt *Stephen Gateward* Gent. for breaking of his Cloſe at *Horſington* in the County of *Lincoln* called *Horſington Holms*, *cum quibuſd. averiis, viz. equis, vaccis, bidentibus, &c. depaſtus fuit* 1 *Aug. An.* 43 *Eliz.* with continuance. The Defendant *quoad porcos*, pleaded Not guilty: And as to the reſidue of the Treſpaſs he pleaded; That the Town of *Stixwold* is an ancient Town, and lieth near the ſaid Cloſe called *Horſington Holms*; and that within the ſaid Town, time whereof the memory of man hath not been to the contrary, there hath been a Cuſtom, That the Inhabitants within the ſaid Town of *Stixwold* aforeſaid, *infra aliquod antiquum meſſuagium ibidem ratione commorantiæ & reſidenciæ ſuæ in eadem, habuerunt & uſi fuerunt & conſueverunt habere Com. paſturæ in prædict. loco in quo, &c. pro omnibus, & omnimodis, & bobus, & equis, & aliis groſſis animalibus communicalibus ſuper hujuſmodi antiqua meſſuagia ſua infra prædict. villam de Stixwold prædict. modo & forma ſequente, viz. quolibet anno ad omnia tempora* [60] *anni, necnon pro bidentibus ſuis levant. & cuhant. &c. quolibet ann. ſuper primum diem Auguſti, & abinde uſque feſtum annunciationis beatæ Mariæ virginis tunc prox. ſequen.* And pleaded that he *prædict. tempore quo* was, and yet is *commorans & inhabitans* in the ſaid Town of *Stixwold*, in an ancient houſe in *Stixwold* aforeſaid, and ſo juſtified; upon which the Plaintiff did demurr in Law. And this plea began, *Trinit.* 3 *Jacobi*, and was oftentimes argued at the Bar, and now this Term was openly argued at the Bench by all the Juſtices; and it was unanimouſly Reſolved by all the Juſtices of the Common Pleas, That the Cuſtom was againſt Law for divers cauſes. 1. There are but four manner of Commons, *ſc.* Common appendant,

appendant, appurtenant, in groſs, and by reaſon of vicinage, and this Common *ratione commorantiæ & reſidentiæ* is none of them, and *argumentum a diviſione eſt fortiſſimum in jure.* 2. What eſtate ſhall he have who is Inhabitant in the Common, when it appeareth he hath not any eſtate or intereſt in the houſe, (but a mere habitation and dwelling) in reſpect of which he ought to have his Common? For none can have Intereſt in Common in reſpect of a houſe in which he hath no intereſt. 3. Such Common ſhall be tranſitory, and for no certain time or eſtate, but during his Inhabitancy, and ſuch manner of Intereſt the Law will not ſuffer, for Cuſtom ought to extend to that which hath certainty and continuance. 4. It ſhall be againſt the nature and quality of a Common, for every Common may be ſuſpended or extinguiſhed, but ſuch a Common ſhall be ſo incident to the perſon, that no perſon certain can extinguiſh it, but ſo ſoon as he who releaſeth, &c. removeth, the new Inhabitant ſhall have it. 5. If the Law ſhould allow ſuch Common, the Law would give an Action, or Remedy for it; but he who claimeth it as Inhabitant, cannot have any Action for it. 6. In theſe words, Inhabitants and Reſidents, are included Tenants in Fee-ſimple, Tenant for life, for years, Tenant by *Elegit*, &c. Tenant at will, &c. and he who hath not any Intereſt, but only a habitation and dwelling; and by the Rule of all our Books without Queſtion, Tenant in Fee-ſimple ought to preſcribe in his own name, Tenant for life, years, by *Elegit*, &c. at will, &c. in the name of him who hath Fee, and he who hath not any Intereſt cannot have any Common; So that none that hath any Intereſt, be it but at will, and ought to have Common, but by good pleading he may enjoy it. 7. No improvement can be made in any Waſts, if ſuch Common ſhall be allowed, for the Tenants for life, or years, at Will, Tenant by *Elegit*, Statute Staple, and Statute-Merchant, of houſes of the Lord himſelf ſhall have Common in the Waſts of the Lord himſelf, if ſuch preſcription [b] ſhould be allowed, which ſhall be inconvenient. But two differences were taken and agreed by the whole Court. 1. Between a Charge in the Land of another, and a diſcharge in his own Land. 2. Between an Intereſt or profit taken or had in anothers Land; and an eaſement in anothers Land; And therefore a Cuſtom that every Inhabitant of a Town hath paid a *Modus Decimandi* to the Parſon in diſcharge of their Tithes is good, for they claim not a charge, or profit apprender in the ſoil of another, but a diſcharge in their own land. So of a Cuſtom that every Inhabitant of ſuch a Town ſhall have a way over ſuch Land, either to the Church or Market, &c. is good, for the ſame is only an eaſment, and no profit; and a way or paſſage may well follow the perſon, and no ſuch Inconvenience as in the Caſe at Bar. 8. It was Reſolved, That Copyholders in fee, or for life, may by Cuſtom of the Mannor have Common in the demeans of the Lord of the Mannor, but then he ought to alledge the Cuſtom of the Mannor to be, *quod quilibet tenens Cuſtomarius cujuſlibet antiqui Meſſuagii cuſtomar.* &c. and not *quod quilibet inhabitans infra aliquod antiquum Meſſuagium Cuſtomar.* &c. For a Copyholder hath a Cuſtomary Intereſt in the Houſe, &c. And therefore he may have a Cuſtomary Common in the Lords Waſts; and in ſuch Caſe he cannot preſcribe in the name of the Lord; For the Lord cannot claim Common in his own land, and therefore of neceſſity ſuch Cuſtom ought to be alledged, *Vide* 21 E. 3. 34. See the 4th. part of my Reports, *Foiſton's* Caſe, 31, 32. Another difference was taken and agreed, between a Preſcription which always is alledged in the perſon, and a Cuſtom, which always ought to be alledged in the Land: For every preſcription ought to have by Common intendment a lawful beginning, but otherwiſe is it of a Cuſtom; for that ought to be reaſonable, *& ex certa cauſa rationabili uſitata*, as *Littleton* ſaith; but needeth not have intendment of a lawful beginning, as Cuſtom to have Land deviſable, or of the nature of Gavelkind, or Borough Engliſh, &c. Theſe and the like Cuſtoms are reaſonable, but by Common Intendment they cannot have a lawful beginning, by no grant, or act, or agreement, but only by Parliament. See alſo for this matter *Foiſton's* Caſe. Alſo it was agreed, That the Cuſtom of a Mannor that *Dominus pro tempore* ſhall grant lands Cuſtomary, is good, and Tenant at will may [61] make ſuch a grant, and ſo 20 *H.* 6. by the Cuſtom of the Court of Common Pleas, the chief Juſtice doth grant divers Offices for life, and theſe Cuſtoms are good. But in ſuch Caſes, he who granteth them hath an Intereſt in the Mannor or Office, and their grant is made good by cuſtom. And 19 *R.* 2. *Action ſur le caſe* 52. Beadel of the Hundred ſhall have 3. Lag. of Beer of every Brewer who ſelleth within the Hundred, *cauſa qua ſupra.* But a Cuſtom, That an Inhabitant or Reſident, ſhall grant or take any profit, is merely void. 9. It was Reſolved, That if the Cuſtom had been alledged, That *quilibet pater familius infra aliquod antiquum Meſſuag.* &c. it ſhould be alſo inſufficient for the Cauſes and reaſons aforeſaid; and if he hath any Intereſt, he may be relieved as aforeſaid, *Vide* 7 E. 4. 26, 15 E. 4. 29. & 32. 18 E. 4. 3. *b.* 20 E. 4. 10. 18 *H.* 8. 1. *b.* 19 *H.* 8. reported by *Spilman*, that ſuch Cuſtom is not warranted by Law, and ſo was it adjudged in this Court, *Trin.* 33 *Eliz. Rot.* 422. See the Book of *Entries, Treſpaſs*, 85. *Common* 16. *Vide* 9 *H.* 6. 62. 7 E. 6. *Dier Iſam's* Caſe. Note Reader, the Law in this general Caſe well reſolved; and no book in the Law is adjudged againſt it. And hereby appeareth how pleaders may ſafely plead in theſe and the like Caſes; and obſerve well, That the Cuſtom in the Caſe at Bar was inſufficient and repugnant in it ſelf; For it was alledged, that the Cuſtom of the Town of *Stixwold* was, that every Inhabitant within the ſame had uſed, &c. to have Common within a place in the Town of *H.* which was another Town, *Vide* 21 *Eliz. Dyer* 363.

Mich. 4 Jacobi, *in the Common Pleas.*

Catesby's Case.

[b] GEorge *Catesby* brought a *Quare Impedit* of the Church of *Wiſhton* in the County of *Northampton*, against the Biſhop of *Peterborough*, and *Walter Baker* Clark, and the Plaintiff Counted, That *Thomas Catesby* his Father was ſeiſed of the Mannor of *Wiſhton*, &c. to which, &c. in Fee, and preſented *Francis Foſter* his Clark to the ſaid Church who was admitted, inſtituted and inducted. *Paſch.* 34 *Eliz. Thomas Catesby* levied a fine of the ſaid Mannor, to which, &c. to *Henry Yelverton* Eſquire, and *Thomas Heſilrigge*, and to the heirs of the ſaid *Henry*, to the uſe of himſelf for life, and after his deceaſe, to the uſe of the Plaintiff for life, and afterwards *Thomas* died; after whoſe death the Church became void, by deprivation of *Thomas Foſter* canonically made, 15 *Januarii* 1604. and yet is void, and ſo it did appertain to him to preſent; and the Defendants did diſturb him. The Biſhop confeſſed the ſeiſin of *Thomas*, and the fine, and the uſes thereof, and that the Church is now void by the ſaid deprivation, as the Plaintiff hath counted; and farther pleaded, that at the time of the ſaid deprivation, *ſcil.* 24 *Feb.* 1604. he gave notice of the ſaid deprivation to the ſaid *George Catesby* then Patron, &c. and that the Church remained void ſix months after the ſaid notice, for which the Biſhop, as Ordinary, after the ſix months, *viz.* 12 *die Auguſti*, 1605. *per lapſum temporis*, did collate the ſaid *W. Baker* the other Defendant, as it was lawful for him to do. To which the Plaintiff ſaid, that it appeareth by the plea of the Biſhop, that he did collate *infra tempus ſemeſtre proximum poſt diem notitia*: and note, the other Defendant pleaded the ſame plea; and the Plaintiff made the like replication; and upon the replications, the Defendants did ſeverally demurr in Law. And the only point in this caſe was, If the ſix months ſhall be accounted according to the computation of twenty eight days to a month, for then the ſix months were paſt, and then the Ordinary hath well collated, or if the computation ſhall be according to the Kalender, and then the ſix months according to ſuch computation, were not paſt. And this plea began, *Trin.* 4 *Jacobi*, *Rot.* 1928. and upon argument at Bar and Bench, it was adjudged for the Plaintiff, and the principal cauſes and reaſons of their Judgment were theſe. 1. *Tempus ſemeſtre*, being ſpoken in the ſingular number, (as it appeareth by the Dictionaries) doth ſignifie half a year, or ſix months, *ſcil. tales 6 menſes, qui conficiunt dimidium anni.* And there is great difference in our ordinary ſpeech, between the ſingular number, as a twelve month, doth include all the year, according to the Kalendar, but twelve months ſhall be reckoned according to twenty eight days to the Month. 2. *Verba accipienda ſunt ſecundum ſubjectam materiam.* And becauſe this computation of ſix months doth concern thoſe of the Church, it is great reaſon that the computation be according to the Churches computation, which they beſt know. 3. It appeareth by the Statute of *Weſtm.* 2. *cap.* 5. that ſuch computation ought to be made, &c. For *ſi tempus ſemeſtre non tranſierit, &c. tunc adjudicentur damna ad valorem medietatis Eccleſiæ per unum annum:* ſo that the Statute doth intend to reckon by the year, and not by months. 4. It is commonly ſaid in our Books, that if a year and a half be paſt, title is devolved to the King to preſent by Laps, by which it appeareth, that the computation ſhall be according to the Kalender, and not according to twenty eight days, for that doth not amount to a year and a half. 5. When the computation is doubtful, it is good to determine it for the relief and remedy of him who hath right, and for the advantage of his right, to give him the longeſt time; to the end that he loſe not his right: and theſe were the reaſons that were given of this Judgment. For Authorities: A reſolution of this Court in the time *E.* 2. in the Book written of Caſes in his time; in which Book, (which belongeth to Juſtice *Walmeſley*) appeareth a Writ awarded out of this Court, in theſe words. *Rex venerabili in Chriſto, W. eadem gratia* Lincoln. *Epiſcopo ſalutem. Cum Magiſter militiæ Templi in* Anglia *quandam Aſſiſam ultimæ præſentationis quam per breve noſtrum arraniavit coram dilecto & fideli noſtro* I. *de* C. *Juſticiario noſtro, &c. verſus* G. *de* W. *de Eccleſia de* M. *vacante, & ad ſuam præſentationem ſpectant ut dicebat. Advocationem illius Eccleſiæ diſrationavit in Curia noſtra per breve noſtrum de Judicio. Vobis obtinuerit demandare quod ad præſentationem ſuam idoneam perſonam admitteretis ad Eccleſiam ſupradictam, vos ut accepimus lapſis & computatis ſingulis diebus a morte Rectoris Eccleſiæ illius, uſque ad numerum octies viginti & octo dierum continue ſequentium, qui ſex menſes facere videntur aſſerentes prædictam Eccleſiam authoritate Conſilii, ratione lapſus hujuſmodi ſemeſtre temporis ad vos ea vice legitime fuiſſe devolut', idoneam perſonam ad mandatum noſtrum prædictum ad præſentationem prædicti Magiſtri admittere diſtuliſtis ad eandem, in ipſius Magiſtri præjudicium, & exhæreditationem manifeſtam. Vos igitur quia in vacationibus Eccleſiarum, ſecundum legem & conſuetudinem hactenus obtentam & uſitatam in regno noſtro hujuſmodi tempus computari debet, & non a die mortis Rectoris, ſed a die ſcientiæ Patroni, uſque ad ſex menſes completos, non juxta numerum ſingulorum dierum, ſed juxta numerum ſex menſium, qui menſes in Kalendario computantur, eundem magiſtrum præſentationem ſuam ad Eccleſiam illam indebite defraudare volentes, vobis mandamus firmiter injungentes, quod ad præſentationem prædictam idoneam perſonam admittere non differatis in Eccleſiam ſupradictam. Teſte, &c.* And now the Law is taken, that the ſix months ſhall be taken from the death, and that in ſuch caſe there needeth not any notice. Yet, (begin it when it will) it appeareth there by the award of the Court, that the ſix months ſhall be accounted according to the Kalender, and not *ſecundum numerum ſingulorum dierum, &c.* Alſo *Marrow* in his reading in the time of *H.* 7. was of the ſame opinion. And Juſtice *Spelman* doth report (that I have ſeen in the Book of Juſtice *Yelverton*) a caſe reſolved in the time of *H.* 8. in theſe words. A matter in Law was put to two Juſtices in the time of King *H.* 8. to have their opinions, and

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and reſolutions, between the Biſhop of *Lincoln* and one Dr. *White*, how the ſix months ſhall be accounted in a *Quare Impedit*, whether according to four weeks to a month, or according to the Kalendar, *ſcil. Septembr. Octobr.* &c. and they by the advice of their companions, ſaid, that the ſix months ſhall be accounted according to the Kalender, and not by the weeks. And of ſuch opinion was *Wray* Chief Juſtice, which I my ſelf heard. And with this reſolution agreed *Popham* Chief Juſtice of *England*, *Flemming* Chief Baron, and all the other Juſtices at Serjeants Inn in *Fleetſtreet*. And notwithſtanding a Writ of Error was brought upon this Judgment in the Kings Bench, where the Judges for the reaſons aforeſaid did affirm the Judgment.

Mich. 4 Jacobi, *in the Common Pleas.*

Sir *Moyl Finch*'s Caſe.

IN a Replevin between *Avery*, and *Daniel Crat*, which began in the Common Pleas, *Paſch.* 1 *Jacobi*, *Rot.* 1610. upon long and intricate pleading, the caſe was ſuch: *Katherine* Lady *Moyle* was ſeiſed of the Mannor of *Beamſton* in the County of *Kent*, for the term of her life, the remainder to *Katherine* Lady *Finch* in fee: and afterwards the Lady *Finch* took to Husband *Nicholas Seintleger*, *Hill.* 10 *Eliz.* *Seintleger* and his wife, and one *Anthony Deal*, levied a fine of all the demeans of the ſaid Mannor, (by certain quantity of acres which did include all the demeans of the Mannor) to *Thomas Finch* and his heirs, who granted, and rendred the demeans of the ſaid Mannor to the ſaid *Deal* for fifty years, from the feaſt of S. *Michael* then laſt paſt, rendring 5 *l.* rent, and granted the reverſion to *Seintleger*, and the Lady *Finch*, and to the heirs of the Lady *Finch*: which fine was levied according to certain indentures before made between the parties, by which, amongſt other Covenants, it was agreed, that the ſaid *Nicholas Seintleger*, and the Lady *Finch*, &c. ſhould have free ingreſs and egreſs, in and out of the ſaid Mannor, for them, their Steward, Servants and Tenants, to hold the Court Baron, in and upon the ſaid demeans: and it was added, that the ſaid demeans, together with the ſervices, were from the time of the fine levied, during all the life of the ſaid Lady *Katherine Finch*, at *Eaſtwell*, and elſewhere in the County of *Kent*, commonly known, holden, reputed and called by the name of the Mannor of *Beamſton*. And afterwards by indenture tripartite, *Anno* 16 *Eliz.* between Sir *Thomas Heneadge* and *Anne* his Wife, of the firſt part, *Seintleger* and his ſaid Wife of the ſecond part, and Sir *Moyl Finch* of the third part, it was covenanted and agreed, that the ſaid *Seintleger* and the ſaid *Katherine* his Wife, ſhould levy a fine of the Mannors of *Eaſtwell*, *Potbury*, *Setons*, *Willington*, *Uckin*g and *Ulley*, in the County of *Kent*, and all other Lands, Tenements and Hereditaments of the ſaid *Katherine* in the ſaid County of *Kent*, except the Mannor of *Beamſton* in the ſaid County, to the uſe of *Katherine* Lady *Finch* for life, and afterwards to the uſe of the ſaid Sir *Moyl Finch* in tail, with divers remainders over, which fine was levied accordingly, in which as many acres were contained, that were ſufficient to paſs the ſaid demeans. *Anthony Deal* being poſſeſſed of the ſaid intereſt of the term as aforeſaid, made his Will in writing, and thereof made *Moyle Deal* his Son his Executor, and *Anno* 19 *Eliz.* died, the ſaid *Moyl* then being of the age of three years, and preſently after his death, adminiſtration of the Goods of the ſaid *Anthony*, *Ratione minoris ætatis* of the ſaid *Moyl Deal*, was committed to *Robert Thomas*, and afterwards, *Anno* 23 *Eliz.* *Seintleger*, and his Wife levied a fine of the Mannor of *Beamſton*, and of divers acres ſufficient to paſs all the demeans, to the uſe of *Seintleger*, and *Katherine* his Wife, and to the heirs of the ſaid *Katherine*, until the ſaid *Seintleger*, with the aſſent of the ſaid *Katherine* his Wife in writing, ſigned and ſealed by him, declared to what other uſes, and then to the ſame uſes. *Robert Thomas* the Adminiſtrator demiſed the tenement aforeſaid, to *Pa. Lofty* for 10 years, and afterwards the ſaid *Katherine* Lady *Moyl*, *Anno* 26 *Eliz.* died, *Pa. Lofty* entred, *Anno* 27 *Eliz.* *Seintleger*, with the conſent of his ſaid Wife, according to the ſaid limitation, declared the uſes of the tenements aforeſaid, to be to *Hancock* and *Sturges*, and their heirs, who ejected *Pa. Lofty*, and did thereof enfeoff *Glanvile* and *Sturges*, and their heirs, to the uſe of the ſaid *Katherine* Lady *Finch* for her life, and after to the uſe of *Henry Finch*, her younger Son, and *Urſula* his Wife, and the heirs of their two bodies. *Pa. Lofty* the Leſſee of the Adminiſtrator, doth reenter, *Katherine* Lady *Finch* died, the Rent reſerved by the ſaid fine, *Anno* 10. was arrear for thirteen years, ended 44 *Eliz.* and for the ſaid Arrearages, the Defendants, as Baylies to *Henry Finch*, did diſtrein, and the Plaintiff Leſſee of Sir *Moyl Finch*, brought a Replevin. And in this caſe four points were moved, and argued, as well at the Bar, as this Term, by *Daniel*, *Warberton*, *Walmſley* and *Coke* Chief Juſtice at the Bench. The firſt point was, if by the time of 10 *Eliz.* in which was ſuch a grant and tender, as is aforeſaid, the Mannor was deſtroyed for ever, and that was called the deſtroying point. 2. Admitting the Mannor was for ever deſtroyed, if the exception in the ſaid indenture of 16 *Eliz.* by the name of the Mannor of *Beamſton*, be ſufficient to except, and ſave the Mannor out of the fine of 16 *Eliz.* levied to the uſe of the ſame indentures; and that was called the ſaving point. 3. If the Leaſe made by the Adminiſtrator, *ratione minoris ætatis*, for ten years, be good or not, and that was called the making point. The fourth and laſt point was, If there needed any attornment, or that the regreſs of *Paul Lofty* the Leſſee for part of the time, *ſcil.* ten years, ſhould amount to an attornment; and that was called the perfecting point. As to the firſt, It was reſolved by the whole Court, that although that on an inſtant the demeans were granted to *S.* and *Katherine* Lady *Finch*, and to the

[63] [b] [64]

the heirs of *Katherine*, ſo that there was not any tranſmutation of any poſſeſſion, yet the demeans being once by act of the party ſevered in fee ſimple, from the ſervices of the Mannor, the Mannor is deſtroyed for ever. And the difference was taken between the act of the parties and the act of the Law; For if there be two Coparceners of a Mannor, and upon a partition the demeans are allotted to the one, and the ſervices to another, in this caſe, although there is an abſolute ſeverance, yet if one dieth without iſſue, and the demeans deſcend to her who hath the ſervices, the Mannor is revived again; becauſe upon the partition they were in by the act of Law, and the demeans and ſervices were united again by act in Law. And ſo was the clear opinion of *Thorpe* and other Juſtices, in the time of *E.* 3. as *Thirning* Chief Juſtice reporteth in 12 *H.* 4. 25. And the caſe intended was the caſe of *Hugh Audley* Earl of *Glouceſter*, which began 17 *E.* 3. 72. but there was not reſolved. *Vide* 10 *H.* 66. 26. acc. So if upon partition an Advowſon is allotted to one, and the Mannor to another, and afterwards one dieth without iſſue, by which the Law uniteth them again, in that caſe the Advowſon which was once ſevered, is now appendant again. Alſo it is agreed in 26 *H.* 8. 4. that if partition be made of a Mannor betwixt two Coparceners, and upon the partition each hath parcel of the demeans, and parcel of the ſervices, becauſe each of them is in by act of Law, each of them hath a Mannor. But if a man hath a Mannor, and he granteth part of the demeans, and part of the ſervices to another, he ſhall not have a Mannor, for a man by his own act cannot create a Mannor at this day; and ſo it appeareth, that *fortior & potentior eſt diſpoſitio legis quam hominis*. As to the ſecond point, it was objected, That for as much as in *Anno* 10 *Eliz.* the Mannor was deſtroyed, it cannot be excepted by the name of a Mannor in *Anno* 16 *Eliz.* and that for three cauſes. 1. The time of five or ſix years is not ſufficient time to make reputation, but it was urged it ought to be time out of mind, &c. As when Land paſſeth as appertaining to a houſe, it ought to be averred to be uſually occupied with the houſe time out of mind, &c. as it appeareth in *Hill* and *Grange*'s Caſe, *Plow. Com.* 170. *b.* 2. The averment that from the time of the levying of the fine during the life of the Lady *Finch*, it was known and reputed for a Mannor was impoſſible, for it cannot be reputed and known preſently after the fine levied, but time ought to give name and Conuſans, and *eo potius*, becauſe the ſaid fine was levied of the Reverſion; For the Lady *Moyl* had all for the term of her life, and ſuch Reputation or Conuſans cannot be of a Reverſion expectant upon eſtate for life, as it may be of a poſſeſſion. 3. Although the Reputation of a vulgar name will ſerve in grants and conveyances, yet it will not ſerve in Judicial proceedings of the Law, which are framed by learned men; [b] And therefore by the ſaid Fine of *Anno* 23. which is a Judicial proceeding of Law, it ſhall not paſs by the name of a Mannor, which in truth and in Law is not a Mannor. But it was reſolved, That the Exception as this caſe is, is ſufficient to except the Demeans and Services, by the name of a Mannor, notwithſtanding the Mannor was deſtroyed. 1. It was the good and true intent of the parties: For the Lady *Finch* and the other who were parties to the Fine and Indentures of 10 *Eliz.* did not think of any diſmembring or deſtroying of the Mannor: For in the ſame Indenture proviſion was made to have ingreſs and egreſs to hold the Courts of the Mannor. Alſo all the parties to the Indenture 16 *Eliz.* thought that it was a Mannor, (whereof Sir *Moyl Finch* was one) for by expreſs words it is excepted by the name of a Mannor, and in the fine of 16 *Eliz.* divers Mannors are named, but no mention of the Mannor *Beamſton*, for that was intended to be excepted; but the ſame is by the expreſs name of the Mannor of *Beamſton* mentioned in the fine of 23 *Eliz.* ſo that the true meaning of all the parties appeareth, that it ſhould be excluded out of the Fine of 16. and included within the fine of 23. And it is well ſaid in *Hill* and *Grange*'s Caſe, *Plow. Com.* 170. It is the office of a Judge to take and expound the words which the Common people uſe to expreſs their meaning, according to their intents, and not according to the very definition. And *Bracton* ſaith, *Nihil tam inconveniens eſt naturali æquitati, quam voluntatem Domini volentis rem ſuam in aliam transferre ratam habere.* And although a general Rule is generally to be underſtood, yet the ſaid Rules are principally to be obſerved in Wills, and alſo in caſes of uſes which were but Truſts and Confidences between man and man. And to this purpoſe *Shelley*'s Caſe in the Firſt part of my Reports, and *Carter* and *Ringſtead*'s Caſe there vouched were cited and applyed to this purpoſe. 2. For as much as the true intent and meaning of the parties appeareth, what is the hindrance that we the Judges ſhould not adjudge it good? It hath been objected, That the thing excepted is not well named: For in Law *Beamſton* is not a Mannor, for it was deſtroyed by the fine of 10 *Eliz.* and for that deſtruction, the Exception of it by the name of a Mannor ſhall be void. In the argument of which point it was ſaid, That the Law doth not favour advantages of Miſnoſmer more than the ſtrict rule of Law doth require, neither in Writs which may be abated, and new brought, nor (chiefly) in grants or other conveyances, in which caſe the party hath not any remedy to have newer. And therefore if two be joyned in one Writ, the one ſhall not plead Miſnoſmer of the other, as it is agreed in 14 *H.* 6. 3. In an Action againſt Husband and Wife, although that they are one perſon in Law, yet the one ſhall not plead Miſnoſmer of the other. 33 *E.* 3. *Maintenance de bre.* 63. In Treſpaſs in *Holderneſs apud W.* the Defendant pleaded (that in reſpect of ſuch Miſnoſmer) that it was not Town, Hamlet, or place known, &c. The Plaintiff replyed that it was, without ſhewing certain, either that it was Town, Hamlet, or known place, and all that in deteſtation of nice and dilatory Exceptions. And it was alſo obſerved, That till theſe later times it was never read in any of our Books, that any Body Politick or Corporation did endeavour or attempt by any ſute to avoid any of their Leaſes, Grants, or Conveyances, or other of their own deeds for the Miſnoſmer of the true name of their Corporation; but after that a window was opened to give light to avoid their own grants for the Miſnoſmer of themſelves, what ſutes and troubles followed thereupon every one knoweth. But it was ſaid, for every curious or nice Miſnoſmer, God forbid, that their leaſes, or grants ſhall be avoided, for *apices juris non ſunt jura.* But it was reſolved. That as this caſe is, there was a ſufficient name in Law to make the Exception good. For *nomen dicitur a noſcendo, quia notitiam facit*, and in this caſe it is averred, *præd. cognitum fuit per nomen, &c.* So that it is not only *notum*, but *Cognitum*, which is more; and by true Etymology and ſenſe, *Cognomen*

nomen majorum eſt ex ſanguine tractum, hoc intrinſec' eſt, agnomen extrinſec' ab eventu; and yet the Law doth not regard this preciſe propriety of words. For if a grant be made to a Baſtard by the ſurname of him who is ſuppoſed to beget him, it is good if he be known by ſuch a name. So if a Remainder be limited *Rich. filio Rich. Marwood*, it is good, although he be a Baſtard, if in vulgar Reputation and knowledge he be known by ſuch name, as the book is in 39 *E.* 3. 11. and yet in truth and in Law he is *nullius filius*: For of a Baſtard it is ſaid,

Cui pater eſt populus, pater eſt ſibi nullus, & omnis;
Cui pater eſt populus, non habet ille patrem.

In 41 *E.* 3. 19. is a notable Caſe. *Richard Thomſon* had iſſue by one *Johan* before marriage *Agnes*, and afterwards married *Johan*, and made a Feoffment in fee, and took back an eſtate to him for life *remanere inde Agnetæ filiæ prædict. Richardi & Johannæ*; and agreed that it is a good Remainder, without any averment that ſhe was known to be their daughter, as it was in the caſe of 39 *E.* 3. but there it was objected, that a Baſtard is not their daughter in Law, and therefore the Remainder void: But there *Finchden* gave the Rule and ſaid, It is found that the daughter was born before the marriage, ſo that by their marriage after ſhe was their daughter. In which is to obſerved, That although by the Common law ſhe was not their daughter; yet becauſe ſhe had colour by the Eccleſiaſtical Law, which ſaith, *Quod ſubſequens matrimonium tollit peccatum præcedens*, this colour is ſufficient in caſe of a Conveyance to make the Remainder good. And ſo note a difference between a deſcent and purchaſe; and therewith expreſly [b] ageeth, 36 *Aſſ.* 13. In 27 *E.* 3. 85. *William* Abbot of *Worceſter* by the name of *W.* Abbot of *W.* by his deed with the conſent of his Covent granted to the Burgeſſes of *W.* Common of Paſture in certain Lands, and although his Chriſtian name was miſtaken, yet becauſe there was ſufficient certainty to make a certain name of the Grantor, *ſcil.* Abbot of *W.* for this cauſe the grant was adjudged good: for in this ſenſe it is true, *Nil facit error Nominis cum de Corpore conſtat*, but otherwiſe it is in a Writ; for there if the Abbot be miſnamed by a falſe Chriſtian name, the writ ſhall abate, becauſe he may have a new writ, and therewith agreeth 18 *E.* 4. 8. 15 *H.* 7. 1. and 22 *H.* 6. &c. As to the ſecond Objection which hath been made, that in this caſe, there was not a ſufficient time to make the Reputation of a Manor, and that time out of mind is requiſite in this caſe; It was anſwered and Reſolved, That there is a difference between a title to a thing to be created and claimed by preſcription of time, and the name of a thing in *eſſe* to make it paſs in a Conveyance. For no man can claim a Rent, Common, or other profit of Inheritance by uſage, but he ought to claim it by preſcription time out of mind, for ſuch time is requiſite by the Law; but to make a thing in *eſſe* to paſs by a name, there needeth not time out of mind, *&c.* but ſuch convenient time that it may be known by ſuch name. And it would be demanded, to what places ought ſuch knowledge to extend? To all *England*? or to all the County in which the Land lieth, or to what place? To that it was anſwered and reſolved, that it extendeth only in Law *ad vicinetum* of the Town where the Land lieth; for there the knowledge ought to be, where it ought to be tried, and that is *in vicineto* of the place where the Land lyeth. For the name of a Mannor or Land, or other local thing is to be tried where the Writ is brought, becauſe it is local, and the name of a perſon is tranſitory; and therefore it was agreed, That the Houſe in the *Strand* now of late called *Exeter* Houſe, and the Houſe in *Fleetſtreet* called *Dorſet* Houſe, have within theſe three years gained ſufficient names amongſt all their [c] Neighbours to know it by ſuch name, and thereby to diſtinguiſh the houſe from other houſes. In 41 *E.* 3. *Maintenance de bre.* 49. the caſe was, That in truth there was a mannor called *Aſplegiſe*, and was alſo known by the name of *Aſple* only, and there in a *Præcipe* of the Mannor by the name of the Mannor of *Aſple* (without addition) the Tenant after the View, demanded Judgment of the Writ, becauſe that the Mannor which was put in view was the Mannor of *Aſplegiſe*; and the Demandant ſaid, that the Mannor put in view is known by the name of *Aſple*, and thereupon iſſue was joyned. In which was obſerved, 1. That the plea for the maintenance of the writ was, That the Mannor is known in the preſent tenſe, which is intended, at the time of the Writ brought. 2. That although a Mannor cannot begin within time of memory, yet a Mannor may get a name to be demanded in a *Præcipe* within convenient time. 3. That ſuch name gotten by knowledge of the Country is ſufficient, without the true and proper name, *Vide* 8 *H.* 6. 32. for in ſuch ſenſe it is true, *de nomine proprio non eſt curandum, dum in ſubſtantia non erretur, quia nomina mutabilia ſunt, res autem immobiles.* In a *Quare Impedit* of the Church of *B.* the Defendant pleaded, That there was no ſuch Church in the County where the Writ is brought, [66] afterwards iſſue was joyned that there was a Church in the ſame County known by the name of *B.* for *Finchden*, who gave the Rule there ſaid, if any Church within the County be known by ſuch name, it is ſufficient to maintain the Writ, which agreeth with the book of 41 *E.* 3. In 21 *H.* 6. 4. In Treſpaſs againſt *John Arderne* Abbot *Sancti Johannis Baptiſtæ* in *Colcheſter*; The Abbot pleaded, that he was founded by the name of Abbot of the Church and Monaſtery of St. *John Baptiſt*, &c. The Plaintiff ſaid, That the Abbot was known by the one name and the other, and ſo to iſſue; In which it was obſerved, that it ſatisfyeth to ſay, That this Abbot (without ſaying, and his Predeceſſors) was known by ſuch name. *Ergo*, there needeth not time out of mind, *&c.* 47 *E.* 3. 5. there it appeareth, That if a Chappel be in the time of *H.* 3. and when it became void, the King preſenteth to the ſame as a Church, and ſo did *E.* 1. and *E.* 2. and afterwards *E.* 3. being diſturbed brought a *Quare impedit* as to a Church; and there *Chavendiſh* Chief Juſtice ſaid, That after the ſaid preſentees had been received as to a Church, I ſay it is not now a Chappel, but a Church; By which it appeareth, that the ſaid Rule is true, *nomina ſunt mutabilia, res autem immobiles.* And therewith agreeth 11 *H.* 6. 18. where the caſe was, That a Parſon had an Annuity by preſcription of a Vicar, and afterwards *E.* 3. when the Vicar died, preſented *I.* as Parſon, and ſo were all his ſucceſſors preſented as Parſons, and the Parſon made a ſpecial preſcription, *ſcil.* That *A.* was Vicar, and that he and all his predeceſſors Vicars, *&c.* And that after the death of *A.* the King

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preſented as to a Parſonage, and ſo he and his predeceſſors Parſons had payed, &c. and charge the Defendant as Parſon in a Writ of Annuity, and there it appeareth, that by the ſaid preſentments the name of Vicaridge was changed into a Parſonage. As to the 2. Objection, That the averrment was impoſſible and repugnant, that from the time of the levying of the fine it was known, reputed, *&c.* To that it was anſwered and reſolved, That there was not any impoſſibility or repugnancy, for in the averment there are four words, *cognit. habit. reputat. & nuncupat.* and they were true before 10 *Eliz.* for then, and time out of mind, *&c.* it was in truth a Mannor, ſo that the Conuſans, Reputation, or appellation, did not begin from the fine in 10 *Eliz.* but this averment doth continue that which was in truth before the fine a Mannor, from the time of the fine to be known, reputed and called a Mannor. And always the Reputation is beſt, when it hath a ground and is founded upon truth. And therefore if a Man marrieth with a woman precontracted, and hath iſſue by her, this iſſue in Law and truth carrieth the ſurname of his Father. But if after the Husband and wife be divorced for the precontract, now the iſſue hath loſt his Surname; For as hath been ſaid, *Cognomen majorum eſt ex ſanguine tractum*, and now the [b] iſſue is Baſtard *& nullius filius*; and yet becauſe once he had a lawful Surname, it is a good ground of Reputation ſubſequent. So if I have a Park by the Kings Licenſe and grant, and it is commonly known by the name of a Park, and afterwards I ſurrender my Patent to the King, by which in Law it is no Park, yet having once the name of a Park in truth, it is a good ground for reputation and continuance of the name of a Park after; And the avowant might have preſcribed as this caſe is, That the demeans and ſervices had time out of mind been known by the name of a Mannor; For before the fine it was known in truth, and after the fine in reputation, and ſo it is no creation of a new name, but a continuance of old name. *Vid.* 7 *Eliz. Dier* 223. The King ſeiſed of a Mannor, whereof all the demeans are leaſed for life by the Leaſe of an Abbot, rendring rent, in this caſe the King hath not a Mannor in poſſeſſion, nor can hold Court; and yet if the King leaſeth the Mannor to another for years as a Mannor in poſſeſſion, the Leſſee ſhall have the Reverſion and the rent: For although it is not a Mannor in *eſſe*, yet it is well known that it was intended to be demiſed. And to this purpoſe in 20 *Eliz. Dier* 362. where the Caſe was, That *Ed.* 6. was ſeiſed of the Mannor of *Cleverly*, of which a wood containing 300 Acres was parcel, *Ed.* 6. by his Letters Patents granted the ſaid wood in Fee, and afterwards the ſaid wood eſcheated to him for Treaſon. Afterwards the Queen granted the ſaid wood in Fee, the grantee regranted the ſame to the Queen, who by her Letters Patents granted the ſaid Mannor *& omnes boſcos modo vel antehac cognit. vel reputat. ut pars membrum, vel parcell. ejuſdem Manerii* to the Earl of *Leiceſter* in fee: And although that in truth before the ſeverance made of the wood by King *E.* 6. it was always parcel of the Mannor; yet in good propriety of ſpeech it was there *cognit. ut pars & membrum dicti Manerii*; for although that (*ut*) is a word of ſimilitude, and not of identity, yet truth is the moſt ſure foundation of Reputation, and therefore it was there adjudged, that the wood did paſs. As to the third Objection, that a Mannor in reputation and not in truth ſhall not paſs by fine, which is a legal proceeding drawn by men learned in the Law, and therefore vulgar reputation will not ſerve in it; To that it was anſwered and reſolved, that the rule which *Stonor* gave in 9 *E.* 3. 38. in another caſe, was true, That the proceſs of the Court ſhall not be maintained by uſage in *pais*; but there is a difference between *Brevia adverſaria*, *ſc.* brought by an adverſary to recover land, *& brevia amicabilia* brought by conſent and agreement amongſt friends; for it is true in *brevibus adverſariis*, the proceſs of this Court ſhall not follow the [67] cuſtom or reputation of the Country, as in 6 *E.* 3. 11. The Demandant in a writ of Entry demanded the Mannor of *C.* the Tenant ſaid that the tenements put in view, are a houſe and a carue of land called, *&c.* and not a mannor, *&c.* by which it appeareth, that if it were not in truth a Mannor, although it were in appellation, the writ ſhall abate: But it was adjudged in Sir *John Buryn*'s Caſe, in the beginning of the Reign of Queen *Eliz.* That in a Common Recovery, which is by agreement and aſſent of the parties, of acres of land, account ſhall be according to the occaſionable and uſual meaſure of the Country, and not by the Statute *de terris menſurandis* made *an.* 33 *E.* 1. So it is agreed in 47 *E.* 3. 18. That if a man bargaineth and ſelleth ſo many acres of wood, it ſhall be meaſured according to the uſage of the County, *ſcil.* according to 20 foot to the rod, and not according to the ſaid Act, for *conſuetudo loci eſt obſervanda.* And it appeareth by the book in 29 *E.* 3. 11. that the remainder limited to a Baſtard by the name of ſon of *Richard Marwood*, whereas in truth he was *nullius filius*, was good, becauſe he was known and reputed his ſon. And *Mich.* 22. and 23 *Eliz.* in the Kings Bench, in an *Ejectione firmæ* between *Vines* and *Durham*, a leaſe was pleaded of a Mannor, *&c.* whereof the tenements in which were parcel, and iſſue was joyned, *quod non demiſit Manerium*; and upon that iſſue the Jurors gave a ſpecial verdict, *ſcil.* [68] that there were not any Freeholders, but divers Copiholders of the ſaid Mannor, and that it was known by the name of a Mannor, and after good conſideration it was adjudged by Sir *Chriſtopher Wray* chief Juſtice, and the whole Court, that although it was not a Mannor in Law for want of freeholders, and although it was in pleading, which always is by learned men, and that it was in an action adverſary, and not amicable; yet that foraſmuch as an iſſue is tryable by Lay-men, and in truth the tenements in which did paſs by the Leaſe (and becauſe it is not like to a writ) it was adjudged for him who pleaded the demiſe of the Mannor, *Hill.* 25 *Eliz.* in this Court, *Carter*'s Caſe was, that where it was required by the Statute of 1 *H.* 5. *cap.* 5. that in every writ original, *&c.* in which an Exigent ſhall be awarded, that additions ſhall be given to the Defendants of their eſtates or degrees, or of their trade, *&c.* and the caſe was, that one was yeoman by birth, and yet commonly called Gentleman; In this caſe, in ſuch writ brought againſt him, he may have the addition of Gentleman, although in truth he is not a Gentleman, but only by vulgar reputation; but foraſmuch as the intent of the Act is to have ſuch a name, by which he may be known, it is ſufficent to ſatisfie the act of Parliament. Another reaſon was given, that in this caſe there was at the time of the making of the Indentures in *Anno* 16 *Eliz.* a Mannor in truth, *ſcil.* in the Lady *Moyle* for the term of her life, which was ſufficient to ſupport the name of a Mannor, and to make the demeans and ſervices to paſs by the name of it: For which cauſe it

of it: For which cauſes it was concluded, That by the name of the Mannor of *Beamſton*, the demeans and ſervices, late parcel of the Mannor, were excepted by the Indenture in *Anno 16 Eliz.* As to the third point it was reſolved, that the Leaſe made by the Adminiſtrator *ratione minoris ætatis* was good: although it was not neceſſary that the Leaſe ſhould be made: for the Lady *Moyle* was then Tenant for life; ſo that this leaſe doth enure as *intereſſe termini* to begin after the death of the Lady *Moyle*. And this difference was taken; That when a man maketh an Executor of ſuch tender years, (as in this Caſe of three years) that he cannot execute the will, then if the adminiſtration *ratione minoris ætatis* be granted ſpecially, as it was *M.* 41 & 42 *Eliz.* in *Prince*'s Caſe, *Adminiſtr. omnium bonorum, ad opus, commodum, & utilitatem executor. durante minore ætate, & non aliter, nec alio modo committimus, &c.* there ſuch ſpecial Adminiſtrator cannot make ſuch leaſe, as in the caſe at Bar: But when the adminiſtration is committed generally *ratione minoris ætatis*, without any reſtraint or limitation, there ſuch leaſe made, as in the Caſe at Bar is good: For by the Eccleſiaſtical Law, *Minor* 17. *annis non admittitur fore executorem*; and ſuch general Adminiſtrator, *ratione minoris ætatis*, ſhall not only have an action to recover debts and duties (for the intereſt of the actions is in him, and alſo ſhall be liable to all action; for, during the time the Teſtator dieth *quaſi inteſtatus*) but alſo he may make leaſes or demiſes, and they ſhall be good; for which cauſe the leaſe in the caſe at Bar was good; and the rather in the caſe at Bar, becauſe that no entry is pleaded by the Executor, and he who pleadeth the demiſe is a ſtranger to it, and therefore cannot know what rent is reſerved, and therefore when he pleadeth *demiſit*, if the ſame for any cauſe were void, ſhe might take iſſue *quod non demiſit*, or ſhew the ſpecial matter, but it ſhall be intended *prima facie*, that the leaſe is good, and without queſtion it is good till the Executor hath attained to 17 years, and alſo till he entreth, as ſome ſaid. As to the laſt point it was Reſolved, 1. That foraſmuch as *Paul Lofty* had but *intereſſe termini* during the life of the Lady *Moyle*, for this cauſe as to the ſaid Intereſt upon the fine of *Anno* 23 *Eliz.* (which was levied in the life of the Lady *Moyle*) no Attornment could be. 2. When after the death of the Lady *Moyle* the Leſſee entreth, now he maketh the reverſion in *Seintleger*, and the Lady *Katherine* his wife, and when they make Declaration of Uſes to *Hancock* and *Sudger*, this uſe doth riſe out of the Fine, to which Fine no Attornment can be had by him who hath a future intereſt, as is aforeſaid: For when Attornment is not requiſite to a Fine, which is the root, no Attornment is requiſite to the Declaration of the Uſes, which are but the branches. 3. It was Reſolved, That if a man [86] be ſeiſed of a Mannor, part of which is in leaſe for life, and part in leaſe for years, and he levieth a fine to *A.* to the uſe of *B.* in tail, with divers remainders over, in this caſe *B.* ſhall avow for the rent, or have an action of Waſt without Attornment; for when a reverſion is ſetled in any one in Judgment of Law, and he hath not a poſſible mean to compel the tenant to attorn, and no Lacheſs or default is in him, there he ſhall awow and have an action of waſt without attornment; for the rule is, *quod remedio deſtituitur, re ipſa valet, ſi culpa abſit*, as in 20 *E.* 3. *contra formam collat.* becauſe that the Founder cannot have a *contra formam collationis* of an Advowſon, he ſhall preſent without any ſuit, ſo in 7 *E.* 3. & 3 *H.*7. A man ſhall be tenant by the curteſie of a rent or Advowſon, although the wife dieth before the day encurreth, or the preſentment falleth; So if the Lord in Mortmain, or if a Villain, claimeth a Reverſion, by the claim the Law veſteth the Reverſion in him, and he hath not means to compel the Tenant to attorn, and therefore he ſhall avow and have an Action of waſt, without attornment; the ſame Law of Letters Patents, and of deviſe of a Reverſion, as it appeareth in 34 *H.* 6. for in all the ſaid Caſes *Culpa abeſt.* But it was Objected, That in the ſaid caſe of fine there was default and Lacheſs in the Count, for he might have made mention of the leaſes in the fine, and then he might have brought a *Quid juris clamat*, and compelled the leſſees to attorn, which becauſe he hath pretermitted, there was fault in him, and by conſequence he ſhall not have an action of waſt, nor ſhall avow without Attornment, no more than if a fine be levied to another of land, which is in leaſe for life, he is without remedy for rent, or waſt, without Attornment. To which it was anſwered and reſolved, that in the ſaid Caſe the Conuſee by no poſſibility can have a *Quid juris clamat*: for although he had recited the particular eſtates in the fine, yet he could not have a *Quid juris clamat*, for after the Conuſans or Concord, and before the fine engroſſed, he ought to ſue the *Quid juris clamat*, and preſently by the Conuſans or Concord, the Reverſion paſſed to the Conuſee. *Vide F. N. B.* 147. & 22 *H.* 6. 57. and *eo inſtante* the ſame is executed by the Statute of 27 *H.* 8. of Uſes; ſo that it is not poſſible for him to have a *Quid Juris clamat*, nor any remedy to compel the tenants to attorn. And foraſmuch by the Act of Parliament, which is an act in Law, *ſcil.* by execution to the poſſeſſion of the uſe, the benefit of the Conuſee, to have a *Quid Juris clamat*, is taken away, reaſon requireth, inaſmuch as every ſubject, *ſcil.* the conuſor, conuſee, particular tenants, and all others, are parties and privies to the Act of Parliament, the ſame ſhall not turn to the prejudice of any, for *impotentia excuſat legem*, and the act of Law ſhall prejudice no man. It was adjudged in the *Kings Bench*, *Paſch.* 41 *Eliz.* between *Heſton* and *Ruddleſton.* 1. That at the Common Law by conviction of felony, although that he hath his Clergy, he ſhall forfeit all his [b] goods which he had at the time of the conviction, or which he ſhall get after, and ſhall remain diſabled to get goods to his own uſe, until he hath made his purgation. 2. That where by the Statute of 18 *Eliz. cap.* 7. it is enacted, That after Clergy allowed, he ſhall not be delivered to the Ordinary, as before was uſed, to make his purgation, but ſhall be burnt in the hand and delivered; which act hath taken away the means to inable him again; and therefore it was adjudged, that after he is delivered by force of the act, he ſhall be inabled in the ſame manner as if he had made his purgation. And it is in effect all one with a bargain, and ſale by Deed indented, and inrolled, for there the uſe paſſeth from the party, and the Statute doth execute the poſſeſſion, and the party hath no remedy, nor is there any fault in him, and therefore the reverſion ſhall be in him without attornment. So in the ſaid caſe of fine, the limitation of the uſe is declared by the Conuſor, and *Ceſtui que uſe* hath the uſe by him, and the ſame is executed by the Statute; and *B.* in the ſaid caſe ſuppoſeth the gift to be made by the Conuſor, as it is adjudged in 7 *E.* 6. *Br. Formedon.* And for the ſame cauſe it was reſolved, that in

the case at Bar, When *Scintleger* and his wife levied the fine in 16 *Eliz.* and by the numbring of the acres and towns, all the demeans of *Beamston* did pass, and the Law (forasmuch as they were excepted out of the Indentures of Uses in 16 *Eliz.*) did create and vest the use in *Scintleger* and his wife again, as it was before; or otherwise there shall be great mischief in infinite such cases: so be the use limited upon the fine to a stranger, or to himself, created by act in Law, or limited by declaration of the party, it is all one. But *Oxsey*'s Case, *Mich.* 36 & 37 *Eliz.* reported by me in my fifth part, in *Mallorie*'s Case, where Conusee of a Reversion by fine doth disseise the lessee for life, and maketh a feoffment in fee, and the lessee re-entreth, the same is no attornment, for he cannot *plus juris in alium transferre quam ipse habet.* So in *Knattisford*'s case then cited, if such Conusee of a reversion before attornment, doth bargain and sell the reversion, by Deed indented, and inrolled, that such bargainee shall not avow, or have an action of wast without attornment, *causa qua supra.* And *Walmesley* said, that the case of limitation of a use upon a fine had been adjudged in this Court, according to this resolution. Note, a good resolution for all conveyances upon consideration of marriage, or otherwise, upon limitations of uses upon fines levied, or recoveries, &c. And observe, that by this resolution there is great safety for them to whom uses are levied; which is also good for the benefit of the Commonwealth, that particular estates shall not be dispunishable for wast, nor those in the reversion barred to recover their rents, which in all equity and reason are due to them, and no inconvenience to the particular tenants. For upon execution of estates by the Statute of 27 *H.* 8. of uses, (as upon covenants in consideration of bloud, or upon bergain and sale, by Deed intended, and inrolled, and the like) there needeth not any attornment. 4. It was resolved, that although there was not any privity between them in the reversion, and *Pa. Lofty*, for he had but a particular term for ten years out of the lease of 50 years, and if the reversion had been granted over, that he could never have attorned; yet when those in the reversion eject the second lessee, and enfeoff *Glanvile* and *Sturges*, &c. that by regress of the second lessee those in the reversion, by force of the feoffment, shall avow for the rent, and that for divers causes: 1. Because that this re-entry is not in all respects to be resembled to an express attornment; for to an express attornment, notice is inseparably incident, as it appeareth in *Tooker*'s case, but he who re-entreth, may be ignorant of the feoffment. 2. Those who claim by the feoffment have the reversion in them, and have not any means to compel the tenant to attorn, as it hath been said before: But when a maketh a feoffment of a Mannor, there the services shall not pass till attornment, but remain till attornment in the feoffor, as *Littleton* holdeth: and so was it adjudged in the *Common Pleas*, 15 *Eliz.* in *Brasbriche*'s case. But in pleading of a feoffment of a Mannor, he needeth not to alledge attornment of the tenants of the Mannor, [69] but the same shall come in on the other part. And so the Books 21 *E.* 3. 29 *E.* 3. the Bishop of *Canterburies* Case, 30 *E.* 3. *in Droit de gard*, 8 *H.* 4. 1. 9 *E.* 4. 33. 42 *Ass.* 6. 20 *H.* 6. 7. 37 *H.* 6. 24. 1 *H.* 7. 3. 13 *H.* 7. 14. 34 *E.* 3. *Double plea* 24. 43 *Ass.* 20. *temp. E.* 1. attornment, are well reconciled. 3. By the regress of the second lessee, the same doth revest all interests, and settle a reversion, which act subverteth not only the second lessee to distress, but the first lessee to wast, and after the second term ended, to distress also: For the first lessee hath put this act, *scil.* to make re-entry, in the power of the second lessee, and therefore his re-entry, which is the act which maketh a reversion shall bind both: and the re-entry of one may subject himself to a distress, and an action of wast, who of himself could not attorn; and therefore it is holden in 32 *E.* 3. *Age* 80. that a man *non compos mentis*, cannot attorn, for he who is (*amens*) without understanding, cannot make an attornment, which is an agreement; and yet if a man, *non compos mentis*, be lessee for years, rendring rent, and the lessor ejecteth him, and maketh a feoffment, and afterwards the *non compos mentis* re-entreth, this act of re-entry doth subject himself to distress, and action of wast, although he cannot make an express attornment. So in the case at Bar, although that the second lessee cannot make an express attornment, yet his re-entry revesting all interests and estates which were devested by the act and wrong of the feoffor, shall subject both the lessees to distress, &c. And as the second lessee may assent, that he in the reversion shall make [b] a feoffment, and livery, and seisin upon it, and the same shall bind the first lessee because he hath given to him the possession; So in the case at Bar, the first lessee having made a lease to the second lessee, he thereby hath given him power to re-enter, which act shall subject them both to distress, &c. 4. The Law is grounded upon great reason and equity in this point. For peradventure the feoffee being a purchaser, and a stranger, knew nothing of the lease, or knew of it, and thought that it was void, or defeated; God defend, if after the lessee hath evicted, and lawfully taken the possession from him, which he thought to have enjoyed, *quod afflictio adderetur afflicto, sc.* to lose the possession, and also to be without remedy, either for the rent reserved, (which the lessee enjoying the land in conscience ought to pay) or for wast (which the lessee by the Law is forbidden to do.) And *Coke* Chief Justice said, That by the eviction by the lessee by entry, or by action, that the reversion doth remain in the feoffee, and he shall avow, and have an action of wast, against the opinion of *Ashton*, in 34 *H.* 6. 6. *b.* according to the opinion of *Thorpe* Justice in 41 *E.* 3. 18. *b.* who saith, That if he in the reversion disseiseth the tenant for life, and alieneth in fee, although that the tenant doth recover the Freehold, yet the reversion is not restored; So saith *Seton* in 18 *E.* 3. 48. *b.* that if I disseise my tenant for life, and make a feoffment to another in fee, although my tenant for life recovered after in an assise, the reversion remaineth in the feoffee. 5. *Fortior & æquior est dispositio legis quam hominis*; and therefore he who hath a future interest, cannot surrender the same by any express surrender, but by taking of a new lease, which is an act, and amounteth to a surrender in Law, it may be surrendred and determined, as it is holden in 37 *H.* 6. &c. So if the father be infeoffed in fee, and the feoffor warranteth the land to him and his heirs, now his assignee shall not vouch. But if the father enfeoffeth his son and heir apparent with warranty, and dieth, in this case the heir being in truth assigned, shall vouch: for the Law which hath determined the warranty of the father to the son, will give the son the benefit of the first warranty, as it is adjudged in 43 *E.* 3. 5. by which it appeareth, that the act of Law is stronger, and more equal than any act the party could have made. So in the case

caſe at Bar, the entry of the Leſſee, by which by the act and judgment of Law, all intereſts and eſtates are ſetled according to the Law is ſtronger than an Expreſs Attornment; For that the ſecond Leſſee cannot make; and more equal, for in as much as the poſſeſſion is evicted by the ſecond Leſſee, and thereby the Intereſt of the firſt Leſſee reveſted, and a Reverſion ſetled in the Feoffee, equity requireth, that the Feoffee, who hath loſt the poſſeſſion, ſhall not be without remedy to recover the Rent, and to puniſh Waſt, 18 *E.* 3. 47. *Audeley* Earl of *Glouceſter*'s Caſe. The Leſſor diſſeiſeth his leſſee for life, and maketh a Leaſe for life to another, the firſt Leſſee reentreth, he leaveth the reverſion in the ſecond Leſſee for life, and he ſhall have the Rent reſerved, 46 *E.* 3. 30. If he in the Reverſion doth put out Tenant by Statute Merchant, and maketh a Feoffment in fee, and the Tenant by Statute Merchant doth re-enter, it maketh the Reverſion in the Feoffee, yet there is not any attendance, *vide* 44 *Aſſ. p.* 11. *Baſſingborn Aſſ.* 2 *H.* 5. 5 *H.* 5. 12. 9 *H.* 6. 16. and 34 *H.* 6. 6. *Vide* 9 *H.* 7. 25. where the Caſe is miſprinted. For the true Caſe is as I have ſeen it in the Manuſcript; That if he in the Reverſion diſſeiſeth the Donee, and maketh a Feoffment in fee, and the Donee re-entreth, he leaveth the Reverſion in the Feoffee: But if the Donee be diſſeiſed, and the Donor diſſeiſeth the diſſeiſor, and maketh a Feoffment in fee, and the Donee doth make regreſs, the Feoffee ſhall not have the Reverſion but the diſſeiſor; for there is a difference between an Eſtate and a Right. An Eſtate may well paſs to the Feoffee by the Feoffment, as where he in the Reverſion diſſeiſeth the Donee, or the Leſſee for life; but where the Donee or Leſſee is diſſeiſed, now he in the Reverſion hath but a Right, which he cannot paſs to another, and therefore when he diſſeiſeth the diſſeiſor, and maketh a Feoffment, it paſſeth the eſtate which he hath gained by diſſeiſin, and extinguiſheth his antient Right, which he could not transfer to another; And then the firſt diſſeiſor hath the firſt poſſeſſion, and better right than the Feoffee of him in the Reverſion, for he cometh in under him who diſſeiſeth the firſt diſſeiſor, and the antient right is extinct. So if the diſſeiſee diſſeiſeth the heir of the diſſeiſor, now he hath gained an eſtate by diſſeiſin, and hath an ancient right, if he maketh a Feoffment in fee to another, by that he paſſeth the eſtate which he hath got by diſſeiſin, and extinguiſheth his ancient Right, which he could not transfer to another: For there is ſo extreme and natural enmity between the eſtate by wrong got by diſſeiſin, and the old right, that the right cannot incorporate it ſelf in the eſtate by wrong and paſs with it, but in ſuch caſe rather ſuffer extinguiſhment than to paſs with it; So when the heir doth re-enter he ſhall hold the Land for ever, as well againſt the Feoffor as the Feoffee: So if Lord and Tenant be by Fealty and Rent, and the Lord diſſeiſeth the Tenant of the Land and maketh a Feoffment in fee, the Seignory thereby is extinct. But if a man maketh a gift in tail, or a Leaſe for life rendring rent, and diſſeiſeth the Tenant in tail, or for life, &c. and maketh a Feoffment in fee, there the eſtate paſſeth to the Feoffee, and when the Donee or Leſſee re-entreth, he reviveth the Rent as incident to the Reverſion. The ſame Law of a Leaſe for years in the Caſe at Bar. So there is a difference between a Reverſion, with Rent incident to it, and a Right, or Seignory, or Rent in Fee, 28 *H.* 8. *Dyer* 33. *b.* 4 *Eliz. Dyer* 212. the Caſe of the *Greyhound*. And Judgment was given for the Defendant, who made Conuſans in the Right of *Henry Finch*, And this was the firſt matter in Law, that *Coke* chief Juſtice argued in the Common Pleas after he was chief Juſtice there. [79]

Hill. 4 Jacobi, *in the Common Pleas.*

The Lord *Darcy*'s Caſe.

THomas Lord *Darcy* of *Chicheſter* brought a Writ *de Valore Maritagii* againſt *Stephen Page*, Brother and heir of *Brian Page*, *Quare cum Maritagium ipſius Stephani ad ipſum Tho. Dominum Darcy pertineat pro eo quod præd. Brianus terram ſuam de eo tenuit per ſervitium Militare, & idem Tho. Dominus Darcy præfat. Stephan. dum fuit infra ætatem & in cuſtodia ſua, competens Maritagium abſque diſparagatione, juxta formam Statuti, de communi conſilio regni Regis Angliæ inde proviſ. ſæpius obtulerit, idem Stephanus maritagium illud renuens, præfat Tho. Domino Darcy de maritagio ſuo non ſatisfacto, ſe in terras & tenement. illa intruſit, & de maritagio ſuo eidem Tho. Domino Darcy ſatisfacere contradicit*: And declared that the ſaid *Brian* held twenty five Acres in *Peldon* in the County of *Eſſex* of the Plaintiff, as of his Mannor of *Newhall* in *Peldon* aforeſaid by Knights ſervice, and afterwards *Brian* died in his homage without iſſue, the Defendant being his Brother and heir, and of the age of twenty years and ſix months, and that the Plaintiff did tender to him being then within age a Competent Marriage, *ſc. Mary Mannock* daughter of *Anthony Mannock* Gentleman, then of the age of eighteen years without diſparagement, and that the Defendant did refuſe. The Defendant denied the tender; upon which the Plaintiff did demurr. And this Caſe had been many times argued at the Bar, and this Term was argued by the Juſtices at the Bench, and upon open argument it was adjudged for the Plaintiff, for the reaſons and cauſes reported in *Palmer*'s Caſe in the fifth part of my Reports. And ſo this Queſtion is now in peace, being adjudged in both Courts. Note Reader, The Caſe of the heir female doth differ much from the Caſe of the heir male. 1. Becauſe for the heir female the Gardian ſhall never have the forfeiture of Marriage; for at the Common Law the full age of the heir female was 14 years, as it is reſolved in 35 *H.* 6. 52. *Litt.* f. 22. *Stamf. prærog.* 13. *b. F. N. B.* 256. & 259. and many other Books: ſo that if ſhe be of the age of 14 years at the time of the death of her Anceſtor, ſhe ſhall be out of Ward, and if ſhe be within the age of 14 years, ſhe ſhall have livery by [b]

the Common Law at the age of fourteen years, for that was as to this purpose her full age. And at the Common Law there was not in any case any forfeiture of marriage, but only the single value, 16 E. 3. *Action sur le Stat.* 14. But the forfeiture of the marriage is given by the Statute of *Merton*, cap. 6. made 20 H. 3. the words of which Statute are, *De hærede autem cum sit quatuordecim annorum vel ultra usque ad plenam ætatem, si se maritaverit sine Licentia Domini sui, &c. Dominus suus tunc teneat terram ejus ultra terminum ætatis suæ, scil.* 21 *annorum per tantum tempus, &c.* which Act without question cannot extend to the heir female, for it extendeth only where such heir is 14 *annorum, vel ultra*, and the heir female at such age is out of Ward; also the Statute speaketh *ultra terminum ætatis suæ, scil.* 21 *annorum*, and that is the full age of the heir male as to Wardship, and not of the heir female. And *vide* the Statute of *West.* 1 *Cap.* 22. where the Statute of *Merton* is recited, and then it is purview'd as followeth. And of heirs females after they have accomplished the age of fourteen years, &c. as if it should say, The Statute of *Merton* hath provided for the heir male; and because no provision is yet made for heirs females, by the same Act it is provided, That the Lord shall not have or keep by reason of marriage, the Lands of such heirs females, more than two years after the said Term of fourteen years. And if the Lord within the two years do not marry them, then shall they have an Action to recover their Inheritance quite, without giving any thing for their Wardship, or their marriage; which two years is given by the said Statute for the benefit of the Lord, as it appeareth by 35 *H.* 6. 52. and *Litt.* f. 22. And if within these two years the Lord tendereth a Marriage unto the heir female, and she refuseth, and marrieth elsewhere within the two years, yet the Lord shall not have the forfeiture of the marriage, for the Statute gave that only to make a tender, and therewith agreeth the Book in 35 *H.* 6. *Gard.* 71. by the propositions of *Prison*, *Markham*, *Yelverton* and *Danby*. The second difference between the heir male and the heir female was, That at the Common Law, if the Guardian had not made tender to the heir female before fourteen years, the Lord could not have holden the Land of such heir, (as he might of the heir male) *Nomine pœnæ*, till the value were paid. For the Law did tender their speedy advancement, *quia maturiora sunt vota mulierum quam virorum.* And therefore the heir female might have entred into the Land presently after the age of fourteen years, for her better preferment in marriage; and therewith agreeth *Litt.* 22. expressly, and
[b] 35 *H.* 6. 52, 53. and yet in such case the Lord without any tender before fourteen years, shall recover the single value, for that *de mero jure pertinet.* 3. If the Lord hold the Land over fourteen years, during the two years by force of the Statute of *Westm.* 1: and within the two years maketh no tender, but taketh the profits of the Land, and so hinder her preferment in marriage by receiving all the profits of the Land, in this case, as the Statute is, if he doth not make (within these two years) any tender, then he shall lose by express provision the value of the marriage, and shall content himself with the profits for the two years for his value given to him in lieu thereof by the Statute; So that every Gardian who holdeth the Land in such case ought to take heed that he make tender within the two years, or else he shall lose the value; But if he will wave the benefit of the two years, or if he cannot hold the said two years, as Gardian of the body of the heir female only, he shall have the value of the marriage without any Tender. And to the Principal Case, *Coke* Chief Justice added this reason, That if the Common Law would have enforced the Lord to have made a tender to his Ward to have the single value, the Common Law would have given all necessary circumstances to the performance and accomplishment thereof, as to have appointed a certain place, &c. where the tender ought to be made, and not to leave the Lord who was the Superior, to seek the Ward who was the Inferior, and who might if he would take advantage of flight, or hiding of himself, when no Laches could be in the Lord,

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Pasch. 5 Jacobi, *in the Common Pleas.*

Burrel's Case.

[72] IN an *Ejectione firmæ* between *Thomas Burrel* Plaintiff, and *Seth Holmes* and *Robert Holmes* Defendants, of Lands in *Huntington* in the County of *York* upon a demise made by *Richard Burrel* and *William Allein*, to which Not guilty was pleaded, upon the Evidence the Case was such; Grandfather, Father and Son, the Grandfather upon the marriage of the Father, made the Fathers Wife a Joynture of other Lands, and at the same time, *scil.* 8 *Septemb.* 23 *Eliz.* Covenanted to demise the Tenements in which, &c. to the Father, and 10 *Septemb.* next following, according to the Covenant, the Grandfather by Indenture made a demise of the moity of the Tenements, in which, &c. to *Seth* the Father, to begin after the death of the Grandfather for a thousand years, and of the other moity for a thousand years to begin at a day to come, in both which demises were Provisoes, That if the Father should die without issue, or if he shall make any Lease upon which the antient Rent shall not be reserved, that the said Leases made to the Father should be void. The Father 10 *Feb.* 30 *Eliz.* assigned over the said Leases to the use of *Robert* his Son an Infant, to the end they might not be drowned by the descent of the Reversion; and with this colourable purpose and intent, that the Infant should pay his debts, and within a short time after the Grandfather died; The Father entred into the Lands, and took the profits, and made Leases, and did other things, as Owner of the Land, and neither the Assignees nor the Infant took any profits, nor paid any debts. Also in the said assignment of the said Leases divers persons of good Credit were named amongst others; but the assignment was delivered in secret manner to one person of

of mean quality; For which and other Circumſtances it was taken, that as well the ſaid firſt Leaſes (being of an unuſual form and making) as the aſſignment were fraudulent; and after the death of the Grandfather, the Father for a great ſumm of mony did bargain and ſell the Tenements, &c. by deed indented and enrolled, 2 *Septemb.* 45 *Eliz.* to *Richard Burrel* and *William Allen* and their heirs; in which the Father covenanteth with *Burrel* and *Allen*, that the Lands ſhall be clear of all Leaſes, &c. And if the ſaid original Leaſes, and Aſſignments ſhall be avoided by the purchaſors by the Statute of 27 *Eliz. cap.* 4. was moved and debated: And in this Caſe upon the Evidence given at the Bar of the Common Pleas, two points were Reſolved by *Coke* chief Juſtice, *Walmſley*, *Warberton* and *Daniel*, That where the words of the Statute of 27 *Eliz.* are (That all and every Conveyance, Grant, Charge, Leaſe, Incumbrance and Limitation of uſe, of, in or out of any Mannors, Lands, &c. for the intent and purpoſe to defraud and deceive ſuch perſon, &c. as have purchaſed or ſhall purchaſe, &c. the ſame lands, &c. ſhall be deemed, &c. only againſt ſuch purchaſor, &c. void, fruſtrate and of none effect.) 1. It was Reſolved; That if the Father maketh a Leaſe by fraud and covin of his Land to defraud others to whom he ſhall leaſe or ſell the ſame (as all fraudulent Leaſes are ſo intended) and before that the Father ſelleth or demiſeth it he dieth; and the Son knowing, or not knowing of the ſaid Leaſe, ſelleth the Land upon good Conſideration; in this Caſe the Vendee ſhall avoid that Leaſe by the ſaid Act: For in as much as it is intended and preſumed in Law, That every fraudulent Leaſe is made to the intent generally to defraud Purchaſers, Farmers, &c. within this generalty, every particular Purchaſer, Farmer, &c. is included; and the ſaid Act is very well penned, for the words of the Act are general; and it needeth not, that he who ſelleth the Land ſhould make the former fraudulent eſtate, or incumbrance, But be the eſtate fraudulent as above, whoſoever ſelleth it, the Purchaſor ſhall avoid ſuch fraudulent eſtate. And therefore in the Caſe at Bar, the ſaid Leaſe upon the Evidence being fraudulent, the Vendee of the Father and heir ſhall avoid them. 2. It was Reſolved, That although the Father had nothing in the Inheritance of the Land at the time of the aſſignment of his Term, but the whole eſtate of Inheritance was then in the Grandfather, yet when the Grandfather died, and the Father ſelleth the Land, his Vendee ſhall avoid the ſaid Term by the ſaid Act, (the ſaid Aſſignment upon the Evidence being taken fraudulent.) For if he had bargained and ſold the ſaid Term only, the ſaid bargainee ſhall avoid the ſaid fraudulent aſſignment, and by conſequence the Vendee of the whole Fee-ſimple ſhall avoid it. And it was ſaid by the Chief Juſtice, That that which is called truſt between the Father and the Son, is in Judgment of Law fraud as to a purchaſer. And I acquainted *Popham* Chief Juſtice with this Reſolution, and he allowed well of it, and ſaid, it was good to conſtrue that Act in ſuppreſſion of fraud; and (as he related to me,) it was adjudged before him and his Companions, Juſtices of the Kings Bench, That where a man in ſecret manner made an eſtate to the uſe of his Wife for her Joynture by fraud or covin to defraud a Purchaſer, to whom he meant to ſell the Land, that in ſuch caſe if the fraud be proved in Evidence, or confeſſed in pleading, the Purchaſer ſhall avoid ſuch eſtate.

[b] [a] [73]

Paſch. 5 Jacobi, *in the Court of Wards.*

Sir *Drue Drury's* Caſe.

THe Caſe between Sir *Drue Drury* Knight the Elder Plaintiff, and Sir *Drue Drury* the Younger Defendant, in the Court of Wards was ſuch. It was found by Inquiſition *virtute Brevis*, before the Eſcheator of the County of *Norfolk*, Anno 41 *Eliz.* that after the death of *Roger Drury* Eſquire, That the ſaid *Roger* was ſeiſed of a houſe in *Yarmouth* in the ſaid County, parcel of the diſſolved Monaſtery of Black-*fryers* in *Yarmouth*, and thereof died ſeiſed, the Defendant, being his Son and heir, and of the age of fourteen years and ſeven months, the ſaid Houſe at the time of his death was holden by Knights ſervice in *Capite*; And that the ſaid *Roger* was alſo ſeiſed of the Mannor of *Barking* in the County of *Norfolk*, holden of the King by Knights ſervice, and not in *Capite*: and after Office thereof found, Queen *Elizabeth* under the Great Seal granted the Cuſtody and Ward of the body of the Defendant to the Plaintiff; The Plaintiff made a Tender of a Marriage to the Defendant being within age, which he refuſed; And afterwards the King made him a Knight being then within age, and afterwards he married elſewhere within age. The ſaid *Roger* was a Free Burgeis of the ſaid Town of *Yarmouth*. King E. 1. made ſuch a Charter to the Burgeſſes of the ſaid Town in theſe words, *Conceſſimus etiam pro nobis & hæredibus noſtris, quantum in nobis eſt, Burgenſibus, & probis hominibus ſupradict. de Magna Jernemutha, quod omnes illi de villa præd. oriundi, licet ipſi terras & tenementa extra Libertatem villæ tenuerint per tale ſervitium per quod Maritagia eorum ratione minoris ætatis ipſorum ad nos vel hæredes noſtros pertinere deberent, ſecundum legem & conſuetud. Regni noſtri, nihilominus juxta Libertates villæ prædict. ſe maritare poſſint ſine occaſione aut impedimento noſtro vel hæredum noſtrorum in perpetuum. Salvo jure alterius cujuſlibet.* And in this Caſe two points were moved, 1. If the ſaid Charter hath diſcharged the Defendant from Wardſhip or not. And as to that, It was clearly reſolved by *Popham* and *Coke* Chief Juſtices, and *Fleming* Chief Baron, and the Court of Wards, that the ſaid Charter hath not diſcharged him for divers cauſes, 1. Becauſe it is not an abſolute diſcharge of it ſelf, but hath a Reference, *ſc. juxta libertates villæ præd.* which ought to be ſhewed. 2. It is not ſet forth in the Caſe that the ſaid *Roger* was born at *Yarmouth*, for the Charter is *de villa prædict. oriundi.* 3. The Tenure was created upon a grant made of the houſe after the diſſo-

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lution

lution of the Monaſtery, and the ſaid grant cannot extend to create a Tenure. The ſecond and great Queſtion was, If by the making of the Defendant Knight, he was diſcharged in Law of the value of the Marriage. And this Caſe was referred to the two Chief Juſtices and Chief Baron, who *Hill.* 4 *Jacobi* at Serjeants Inn heard the Caſe argued by *Topham* of Council with the Defendant, and *Francis Bacon* with the Plaintiff. And afterwards in *Eaſter* Term it was again argued by Serjeant *Hutton* for the Defendant, and Serjeant *Nichols* for the Plaintiff. After which the Judges had Conſideration of the Caſe, and upon Conference amongſt themſelves it was Reſolved, and ſo openly declared in the Court of Wards, in the preſence of *Robert* Earl of *Salisbury* Maſter of the Wards, That the Defendant ought to pay the value of his Marriage; and the making of him Knight did not diſcharge him thereof. And in this caſe theſe points were reſolved, 1. That the intent of the Law is, That the heir within age of twenty one years is not able to do Knights Service, till he be of the age of twenty one years, and therewith agreeth *Lit.* 22. but ſuch preſumption of Law giveth place to a Judgment and proof to the contrary, as it is ſaid *Stabitur præſumptio donec probetur in contrarium*; And therefore when the King who is Sovereign and the Supreme Judge of *Chivalry* hath dubbed him a Knight, he thereby doth adjudge him able to do Knights ſervice, and all are concluded to ſay the Contrary, and therefore ſuch heir made Knight ſhall be out of Ward. But if the King createth ſuch heir within age a Duke, or Marqueſs, or Earl, or Ba- [74] ron he ſhall not thereby be out of Ward. For in antient time every Baron, &c. held his Barony by Grand Serjeanty, as appeareth 18 *Aſſ. ult.* in *Clifford*'s Caſe, and the Lord *Cromwel*'s Caſe in the ſecond Report 80. which ſervice (as *Litt.* 35.) is called Grand Serjeanty, or *Magna Serjeantia*, as *Fleta* calleth it, *Lib.* 1. *cap.* 9. becauſe it is a greater and more worthy ſervice than Knights ſervice, as to bear the Kings Banner, or to be Marſhal, as *Littleton* ſaith, or to lead his hoſt, or to be High Steward of *England*, as 11 *Eliz. Dyer* 285. is; And the ſon and heir within age of a Duke, Marqueſs, Earl, &c. ſhall be in Ward notwithſtanding their dignities. 2. It was Reſolved, That when Tenant by Knights ſervice dieth his heir within age, preſently the value of the marriage as a Chattel is veſted in the Lord, 24 *E.* 3. 25. *Old N. B.* 27 *E.* 3. *acc.* Then when ſuch heir is made Knight he is to this purpoſe made of full age, and as much is done in Judgment of Law, as if he had attained to his full age of twenty one years; for at ſuch age the Law intendeth him able to do Knights ſervice. And now when the King maketh him Knight before ſuch age, the intendment and preſumption of Law doth give place to this Judgment and proof to the Contrary, and now he is to this purpoſe ſet and computed of full age. Then admit he hath accompliſhed his age of 21 years, without queſtion the Lord ſhall have the value of his [75] marriage: But at the Common Law it was taken, that by the making of him a Knight within age, (for as much as in Judgment of Law as to this purpoſe he was of full age for his ability to do Knights ſervice) preſently his land ſhall be out of Wardſhip. And therefore it was provided by the Statute of *Magna Charta*, *Cap.* 3. *Ita tamen quod ſi ipſe dum infra ætatem fuerit fiat Miles, nihilominus terra remaneat in Cuſtodia Dominorum ſuorum.* So that although ſuch heir within age be made Knight, and therefore to that purpoſe eſteemed of full age, yet the Lands ſhall remain in the Lords Cuſtody until his age of 21 years by the purview of the ſaid Act. And if the Law had not been clear for the value of the marriage, for the cauſe and reaſon aforeſaid, without doubt the makers of the ſaid Act would have made proviſion for the ſame, as well as for the Land. 3. It was Reſolved, That when the King maketh the heir apparent within age of a Tenant by Knights ſervice, a Knight, in the Life of his Anceſtor, and afterwards [b] the Anceſtor dieth, the ſaid heir within age, in this caſe he ſhall be out of Ward, and ſhall pay no value of them arriage, nor the Lord ſhall not have the cuſtody of the Land: for in ſuch caſe by the making of him Knight in the life of his Anceſtor, he hath made him of full age, ſo that when his Anceſtor dieth, no intereſt either in the body, or the Land ſhall ever veſt in the Lord. And the Statute of *Magna Chorta* for the Cuſtody of the Land doth not extend to the ſame: For the purview thereof extendeth only when the heir in Ward (*infra ætatem*) is made Knight, then *remaneat terra in Cuſtodia, &c.* but when the heir is made Knight in the life of his Anceſtor, then the Cuſtody cannot remain or continue, which never had any beginning or eſſence, and therewith agreeth *Ratcliff*'s Caſe in *Plow. Com.* 4. The Juſtices ſaid, they ought to have good Conſideration in all Caſes depending before them, not only to the antecedent (*ſc.* of the preſent caſe in Queſtion) but alſo of the Conſequent, *ſc.* what general prejudice will follow thereupon, either to the King, or Subject; and ſurely great prejudice would be to the King if the Law ſhould be otherwiſe in the principal Caſe; for it may be great prejudice to the King in his Wards, not only of Knights made by himſelf, but by his Lieutenants in *Ireland* and elſewhere. Alſo none will buy any Wardſhip of the King, when notwithſtanding they have paid the value thereof to the King, who hath paſſed the ſame under the great Seal, (as the Plt. hath in the Caſe at Bar) by the making of him a Knight ſhould bar him of the value of the marriage: for a man will give little or nothing for a thing which dependeth upon incertainty. Alſo it ſhall be very prejudicial to the Subjects, if after their Wards are lawfully veſted in them, they ſhall be deprived of them by making of them Knights, eſpecially when it appeareth by 7 *H.* 4. that a man may be made a Knight, ſo ſoon as he is baptized. 5. It was Reſolved, That when the heir within age is made Knight, after tender made to him, (as he was in the caſe at Bar) although that he within age marrieth elſewhere, yet he ſhall not pay the forfeiture of the marriage; for by the making of him Knight, he is out of the Wardſhip and Cuſtody of the Lord; For after he is Knight, he is *ſui juris*, and may employ himſelf in feats of Arms to defend the Realm, &c. and therefore ought not be within the Wardſhip or Cuſtody of any one; and none ſhall pay forfeiture, but when after refuſal he marrieth himſelf during the time he is in Ward to the Lord; and the ſame appeareth by the Statute of *Merton*, *Cap.* 6. *Si ſe maritaverit ſine licentia Domini ſui & ſi auferat maritagium ſuum, &c.* which words cannot be meant when he is out of Ward and Cuſtody, no more than when he is married after his age of 21 years; But as the Gardian hath ſome prejudice by the loſs of his forfeiture in ſuch caſe, by the making of his Ward a Knight, ſo he hath benefit alſo: For although the Gardian in Knights ſervice cannot have a Writ *De valore maritagii*: nor compel the heir to pay him the value of his marriage until his full.

full age; *ſc.* till his body be out of Cuſtody; and if ſuch heir dieth before ſuch age, the Lord ſhall loſe the value; yet in this Caſe preſently after the heir is made Knight, he may have a Writ *de valore maritagii*, becauſe he is out of the Ward and cuſtody of his Gardian. And the uſual Writ *de valore maritagii* when he accompliſheth his age of 21 years, is, *dum fuit infra in ætatem Cuſtodia, &c. Vide F. N. B.* 141. and *Regiſter*, and there ſhall be a ſpecial Count upon the Caſe; For note it is not *dum fuit infra ætatem* generally, but *dum fuit infra ætatem in Cuſtodia, &c.* which words well ſtand, for now he is out of Cuſtody. And two precedents were cited, one of the Earl of *Eſſex*, 29 *Eliz.* the other of *Ratcliff*, 1 *Jac.* both which were made Knights during the time they were in Ward, and were ordered by the Court of Wards to be diſcharged of the value of their Marriages. But upon good conſideration of the ſaid precedents it appeared, that they paſſed *ſub ſilentio*, without Argument or any Reſolution of any of the Juſtices at Law; and a great number of precedents were ſhewed, which agreed with the Reſolution of the Juſtices in this Caſe, *V.* 15 *E.* 4. 10. and *Br. Gard.* 2. *E.* 6. in the abridging of the Caſe of 15 *E.* 4. and *Ratcliffs* caſe, *Com.* 268. And the ſame was the laſt caſe that Sir *John Popham* Knight (the reverent and honourable Chief Juſtice of *England*, and Counſellor of State to Queen *Eliz.* and to our Lord the King that now is) reſolved, who was a moſt reverend Judge, of a ready apprehenſion, a profound Judgment, a moſt excellent underſtanding in the true reaſon of Law, and of univerſal and admirable experience and knowledge of all buſineſs which concerned the Commonwealth; accompanied with a moſt rare memory, with perpetual induſtry and labour for the maintenance of the peace of the Commonwealth, and in all things with great conſtancy, integrity and patience.

Paſch. 5 *Jacob. in the Court of Wards.*

Sir *George Curſon*'s Caſe.

IN the great Caſe in the Court of Wards this term, between Sir *George Curſon* Knight, and his wife Defendants, in an Information on the behalf of Sir *Jo. Leveſon* Knight, and between Sir *Jo. Leveſon* Plaintiff, and *Sackvile* Eſq; and *Mary* his wife Defendants, it was reſolved by the two Chief Juſtices, and Chief Baron, upon arguments, and view of Precedents, That where Sir *Walter Leveſon* was ſeiſed of a reverſion in fee holden *in capite expectant* upon an eſtate tail (which he had made to *Richard* his Son) he by Indenture in conſideration of blood did covenant to ſtand ſeiſed of the ſaid Reverſion, to the uſe of *Mary* his Niece, *ſc.* daughter and heir apparent to the Lady *Curſon*, Siſter of the ſaid Sir *Walter*; and afterwards Sir *Richard Leveſon* the ſon died without iſſue; That in this Caſe the King ſhall not have Primer ſeiſin by the Statute of 32 and 34 *H.* 8. and that depends upon conſideration and conſtruction of the words, and purview of the ſaid Statute, which in effect are, Every perſon having any Mannors, Lands &c. holden in *Capite*, &c. ſhall have full power and authority, to give, diſpoſe, will, or aſſign, by his laſt will in writing, or otherwiſe by any Act or Acts lawfully executed in his life two parts of the ſame Mannors, Lands, &c. in three parts to be divided, &c. to or for the advancement of his wife, preferment of his Children, and payment of his debts, or otherwiſe at his will and pleaſure; ſaving always and reſerving to the King our Soveraign Lord, the cuſtody, wardſhip, and primer ſeiſin of any of them, as the caſe ſhall require, of as much as ſhall amount to the clear yearly value of the third part, &c. Then it was in conſideration how the Law ſtood concerning Wardſhip and Primer ſeiſin in the caſe, before the Statutes of 32 and 34 *H.* 8. And, 1. It was reſolved, That by the Statute of *Marlbridge*, *De his qui primogenitos feoffare ſolent*, It was colluſion apparent to enfeoff his eldeſt ſon, for without queſtion every one would (to prevent the Lord of his ward) enfeoff his eldeſt Son, if the giving of his land to him, to whom the land ſhould deſcend by the Common Law, would ſerve in ſuch Caſe. The ſame Law, and for the ſame reaſon, if the Tenant enfeoff his collateral heir apparent, as it is alſo ſaid, and not denied in *Plow Com.* 81. in *Partridges* Caſe. Alſo proviſion was made when the Tenant doth enfeoff others upon colluſion, &c. which was averred, but it was doubted, if colluſion might be averred upon particular eſtates, as an eſtate for life, or in tail, And it was holden clearly that no colluſion can be averred, when upon an eſtate for life, or in tail: the remainder or reverſion was limited or left in another, 27 *H.* 8. 10. 33 *H.* 6. 14. So when a ſtranger was joyned with the heir, although that the inheritance was limited to the heirs of the heir, and that the ſtranger had but for term of life, as it is agreed in 31 *E.* 3. Colluſion 29 & 33 *H.* 6. 14. So it was taken, that if *Ceſtuy que uſe* had deviſed his uſe by his will, no colluſion could have been averred upon a will. For *Nemo præſumitur eſſe immemor ſuæ eternæ ſalutis, & maximè in articulo mortis, & omne Teſtamentum morte conſummatum eſt.* And therefore the Statute of 4 *H.* 7. *cap.* 10. which gave the wardſhip of *Ceſtuy que uſe*, made exception when a will is by him declared, *vide* 27 *H.* 8. 10. So if the father had enfeoffed another, either for the advancement of his daughter, or his younger Sons, or for payment of his debts; and afterwards to enfeoff the heir; it was not any Colluſion, for he was bound to provide for them, and therewith agreeth 33 *H.* 6. 14. 27 *H.* 3. 7. *vid. Mich.* 9. and 10 *Eliz. Dyer* 260. 2 and 3 *Eliz. Dyer* 193. 20 *Eliz. Dyer* 361. 19 *Eliz. Dyer* 276. 5 *Ma. Dyer* 158. Then ſecondly it was reſolved, That as the Statute of 32 *H.* 8. gave benefit to the Subject, to have power to deviſe his lands by his laſt will in writing; So by the ſaving it gave benefit to the King in the ſaid three Caſes, *ſc.* advancement of his Wife, preferment of his Children, and payment of his debts, that in none of thoſe Caſes the King (as it appeareth before) ſhould have benefit of ward, or Primer ſeiſin before

[b] [76]

fore this Statute. And it is to know, that theſe words in the ſaid purview of the Act (or otherwiſe at his will and pleaſure, any Law, Statute, Cuſtom, or other thing to the contrary thereof notwithſtanding) have reference and relation only to laſt wills, and not to acts executed, and that for two cauſes. 1. It was neceſſary to add thoſe words to wills, for otherwiſe none could have deviſed two parts, but only for the advancement of his wife, or preferment of his children, or payment of his debts, and that was not the intention of the act, but that he might deviſe two parts to whom he would, ſo that a third part deſcended. But it was in vain to refer thoſe words, (or otherwiſe, at his will and pleaſure) to acts exe-
[b] cuted, for he might do the ſame without any authority or power given him by that act. *Et quando diſpoſitio referri poteſt ad duas res, ita quod ſecundum relationem unam vitiatur, & ſecundum aliam nullo eſt, tunc facienda eſt relatio ad illam ut valeat diſpoſitio, & ſemper ita fiat relatio, ut valeat diſpoſitio.* Theſe latter words do illuſtrate it alſo, (*ſc.* any Law, Statute, Cuſtom, or other thing) for no Law did reſtrain a man by act executed, to convey his land to whom he would by act in his life. But the Law and general Cuſtom of the Realm did reſtrain men to deviſe their lands to any, if not, that it were by ſome ſpecial cuſtom, in ſome particular place; and that appeareth by ſundry Statutes and Acts of Parliament; ſo that the ſaid words (or otherwiſe) having ſuch concluſion, refer only to laſt wills. Alſo in the third Article of 34 & 35 *H.* 8. of explanation it is declared; That all perſons holding any lands in chief, &c. have, and by authority of this preſent Parliament, ſhall have full and free power, &c. to give, diſpoſe, &c. to any perſon, &c. by his laſt will, or otherwiſe, by any act lawfully executed in his life, two parts of his lands, &c. at his free will and pleaſure, omitting the words of 32 *H.* 8. *ſc.* advancement of his wife, preferment of his children, and payment of his debts. But that doth not take away the act of 32 *H.* 8. as to the ſaid three particular caſes, in which Ward and Peimer ſeiſin is given to the King: but all other caſes are explained notwithſtanding theſe words (or otherwiſe) by the ſaid act of 34 & 35 *H.* 8. 3. It was reſolved, that the ſaid ſaving of Ward and Primer ſeiſin in the ſaid act of 32 *H.* 8. ſhall have relation only to acts executed, and not to wills; for always in Statutes, relation ſhall be according to the matter precedent, for the act giveth to the owner of the land power by his will to diſpoſe but two parts, ſo that the third part ought of neceſſity to deſcend; and in ſuch caſe the King ſhall be aſſured of the wardſhip, or primer ſeiſin of a third part. But in the caſe of act executed, he may convey all, and therefore it was needful to add the ſaving, as to that: But the ſaving doth extend only to one of the ſaid three caſes before particularly named, which, (as hath been ſaid) gave great benefit to the King more than he had before, and ſo as to this purpoſe, to make acts executed in equipage with Wills. And it was great reaſon to provide for the ſaid three caſes, becauſe they were ordinary and uſual; and every man by the
[77] Law of God, of nature, and nations, was bound to provide a competent living for his wife, his children, and for the payment of his debts. And if the ſaid words (or otherwiſe) ſhall refer as well to acts executed, as to Wills, and ſhall give wardſhip and primer ſeiſin to the King, not only in the ſaid particular caſes, but in all others; then if any one conveyeth his lands to the uſe of his baſtard, or to a meer ſtranger, upon any conſideration whatſoever, it ſhall be within the ſaving, which hath oftentimes been reſolved and adjudged to the contrary. *Vide Mich.* 12. and 13 *Eliz. Dyer* 296. 14 *Eliz. Dyer* 313. and 18 *Eliz. Dyer* 345. And therefore the opinion in 2 *E.* 6. *Teſtament*, was utterly denied by all, if it be not intended that it was given to a ſtranger by act executed, to one of the ſaid three purpoſes, or upon colluſion. 4. It was reſolved, That if there be grandfather, father, and divers ſons, and the grandfather in the life of the father, conveyeth his lands to any of the ſons, it is out of the ſaid act of 32 *H.* 8. for it is not common nor uſual. *Et ad ea quæ frequentius accidunt jura adaptantur*; And the father ought to have an immediate care of his ſons and iſſue: but if the father be dead, then the care of them appertaineth to the grandfather, and then if he conveyeth any of his lands to any of the ſaid ſons, it is within the Statute. But it was reſolved clearly, That a voluntary conveyance to the uſe of any of his blood, who is not his heir apparent, is not within the ſaid act: for none would intend, that he would diſ-inherit his heir on purpoſe to take away the wardſhip from the King, when every one hopeth to live till the age of his heir, much leſs to defeat him of a Primer ſeiſin. And if other conſtruction ſhall be made, the ſaid three examples, and the naming of his children ſhall be vain, if the act ſhall extend to every other of the bloud. And according to this reſolution in the principal caſe, the experience of the Court of Wards hath always been: and a great number of ſubjects who are in peace, ſhall be vexed and troubled if the common received opinion ſhall be changed. And accordingly it was reſolved in the Court of Wards, in Sir *Rowland Hills* caſe, in *Matthew Drapers* caſe, *Mich.* 22 *Eliz.* and divers others. And ſo in the doubts in *Dyer* 2 *Eliz.* 181. in *Modies* caſe, and 8 *Eliz. Dyer* 252. in *Kniveton's* caſe, &c. are well reſolved.

Paſch.

Paſch. 5 Jacobi. *in the Common Pleas.*

Bullen's Caſe.

BEween *Robert Bullen* Plaintiff, and *Richard Godfrey* Eſquire Defendant, Lord of the Mannor of *Bale* in *Norfolk*, it was agreed, that the Lord of a Leet, may well have a certain ſumm, as 10 s. *pro certo Letæ*, of all the Reſiants within his Leet, called ſometimes *Capitagium*, &c. and ſometimes *Certum Letæ*, and by other names, and the ſame may have a reaſonable beginning, *ſcil.* When the Lord purchaſed and got the Leet for eaſe of the Reſiants therein, ſo that they need not go to the Sheriffs Torn, but to do their ſute real at the Lords Leet; alſo the Lord of a Leet was at every Eyre driven at his own coſts to claim this Franchiſe, *&c.* And in the caſe at barr the iſſue was, whether the Plaintiff at the Court Leet mentioned in the record, were a chief pledge of the ſame Court or not: and thereupon a ſpecial verdict was found, that the Plaintiff was reſiant, and that he was certified at the ſaid Leet, to be a chief pledge, by the chief pledges of the Leet; but he made default, and was amerced for his default 2 s. 6 d. ſo that he did not appear, nor was ſworn as chief pledge, *&c.* And it ſeemed to the Court, that they cannot adjudge him a chief pledge upon that verdict; for Leets were divided in *decuriis* or *decennas*, *unde dicitur decennarii* to this day: and out of every ten, (and one of them being pledge for the other, from whence the Court was called *Curia viſus franci plegii*) one was called *Capitalis plegius*, *ſeu Primarius fidei-juſſor*; and *in* ſome places at this day, he is called the *Tithingman*, an in *Yorkſhire Tenmantale*. And therewith agreeth *Lambert* in his book *de priſcis Anglorum legibus*, and *Fleta lib.* 2. *cap.* 45. and reaſon proveth it; [78] for he cannot be called capital pledge, but in reſpect that others are inferiour pledges. *Vide* the Statute of 28 *E.* 2. *de viſu franci pledg.* of chief pledges: and our books ſpeak of chief pledges, *Vide* 4 *E.* 3. 125. 126. and 4 *E.* 3. 30. 45 *E.* 3. 23. of the old impreſſion, 13 *H.* 4. 10. So that the retorn of the Conſtable, or the preſentment of the Jury in the Leet, doth not make a man chief pledge. And it appeareth by the ſaid act of 18 *E.* 2. that it ought to be enquired at the Leet, if all the chief pledges with their decenners, that is, the other nine, appears, by which it appeareth, that the tenth princial man was the chief pledge; *Sed tempora mutantur & nos mutamur in illis.* So that *vera inſtitutio hujus curiæ evanuit, & velut, umbra ejuſdem adhuc remanet.* And this caſe was very obſcure and doubtfull at the firſt, and afterwards, *materia iſta conſopita fuit in arbitrio.* *Vide* 30 *E.* 3. 23. of the Franckpledge of the Town, and his authority.

Paſch. 5 Jacobi, *in the Common Pleas.*

The Lord *Aburgaveni's* Caſe.

BEtween *Richard Michelborn* Plaintiff, and *George Overy* Defendant, in a Replevin which began *Trinit.* [b] 4 *Jac. Rot.* 1146. in the Common Pleas, the caſe was ſuch; *Margaret Pool*, and *Francis Pool* were Tenants for life of 12 acres of land in *Keym* in *Suſſex*, the reverſion to the Lord *Aburgavenie*. Afterwards, *ſcil.* 34 *Eliz.* *Richard Michelborn* the Plaintiff had Judgment in the Common Pleas againſt the ſaid *Margaret*, in an action of debt of 200 l. 24 *Maii*, 37 *Eliz.* the ſaid *Margaret* did releaſe to the ſaid *Francis Pool* all her eſtate and right in the ſaid land, and afterwards, *ſc.* 27 *Jun.* 37 *Eliz.* The Plaintiff ſued execution out of the ſaid Judgment, for the ſaid debt, by *Elegit*, and the ſaid 12 acres amongſt others, as one moity of the other lands, &c. were delivered to the Plaintiff, and the Plaintiff in barr of the avowry, (which was for damage feaſance in his freehold) averred the lives of the ſaid *Margaret* and *Francis*: The avowant pleaded, that *Francis* aſſigned his intereſt to the Lord *Buckhurſt*, who before the taking, had ſurrendred to the Lord *Aburgaveny*, and traverſed the life of *Francis*; upon which plea, the Plaintiff did demurr in Law, and after argument at barr and bench, Judgment was given for the Plaintiff, becauſe he had traverſed the life of *Francis*, which was not a thing material, nor iſſuable; for *non refert* whether ſhe were living or dead: and in this caſe theſe points were reſolved. 1. Where Judgment is [79] given againſt *Marget* one of the Joyntenants for life, in an action of debt, and afterwards ſhe releaſeth to her joynt companion before execution, although that *Francis* to whom the releaſe is made between them, is now in by the leſſor, and not by the ſaid *Margaret*, yet to as the Plaintiff who hath Judgment in the action of debt, (by which the moity of *Margaret* was charged to the Execution) ſhe by her own act ſhall not defeat the Plaintiff of his execution, but as to him the eſtate of *Margaret* hath continuance in Law, although in truth *Francis* after the releaſe made, had eſtate but for her own life: But if *Margaret* had died before execution, the ſurvivor ſhall hold it diſcharged of any execution to be ſued againſt her *Vid.* 13 *H.* 7. 22. 5 *H.* 5. 8. 10 *E.* 3. *charge* 13. 17 *E.* 2. *charge* 15. 18 *E.* 2. *Execution*, *Statham.* 10 *E.* 4. 3. 37 *H.* 8. *br. Alienation* 31. And upon all the ſaid books it was gathered for good Law, that if two Joyntenants be in fee, and one granteth a rent charge in fee, and afterwards releaſeth to the

other, in that caſe although to ſome intent, he to whom the releaſe is made, is in by the firſt feoffor, and no degree is made betwixt them, yet as to the grantee of the rent charge, he is in under the Joynt-tenant who releaſed; and he who ſurviveth, ſhall not avoid it after the death of him who releaſeth; for he who ſurviveth, by acceptance of the releaſe, had deprived himſelf of the means to avoid the charge; for *jus creſcendi, ſc.* the right of ſurvivorſhip was the ſole means to have avoided it, and the ſame is utterly taken away by the releaſe. So the doubt in 33 *H.* 6. 5. well reſolved. 2. It was reſolved, that when the releaſe is made to *Francis*, by which ſhe hath a ſole eſtate for life when ſhe dieth, and he in the reverſion entreth, he is in of his old eſtate, yet as to *Michelborn*, the eſtate of *Margaret* who is yet living, hath continuance. As if the husband ſeiſed of a rent, or Common in fee, and releaſeth to the Terre-Tenant, this rent is extinct, and yet having regard to the wife, it hath continuance, for ſhe ſhall be endowed of it, as it is adjudged in 5 *E.* 2. *Dower* 143. 10 *E.* 3. 27. 24 *E.* 3. 29. 34 *Aſſ.* 15. 22 *E.* 3. *Dower* 131. 44 *E.* 3. 32. *Vid.* 31 *E.* 3. *Aſſetts* 5. 11 *H.* 7. 12. Meſnalty deſcendeth to the tenant paravaile within age, 26 *Aſſ.* 60. the caſe of the *Honour of Pickering*.

Trin. 5 Jacobi, *in the Common Pleas.*

Sir *Edward Phitton's* Caſe.

[*b*] SIR *Edward Phitton* was outlawed at the ſute of *R.* after Judgment, before the general pardon 43 *El.* for 18 *l.* and after the pardon Sir *Edward* dyed, and now his Executors acknowledged ſatisfaction and without any proceſs, (for no proceſs can be awarded againſt them upon the outlawry) they pleaded the general pardon, and with averment, that they are not any perſons excepted, *&c.* and in this caſe theſe points were reſolved. 1. That the ſaid Executors ſhall take benefit of the ſaid general pardon, by which it is enacted, that all the Kings ſubjects, their heirs, ſucceſſors, executors, and adminiſtrators, ſhall be acquitted and pardoned, releaſed and diſcharged of all offences, contempts, and all other things, &c. and that it ſhall be expounded moſt beneficial and available for the ſubject, *&c.* and further giveth and granteth all goods, chattels, debts, &c. forfeited, and doth prohibit any Clerk to make out any writ, &c. Provided that every Clerk may make *Capias utlag.* at the Plaintiffs ſute againſt ſuch perſons outlawed, to the intent to compell the Defendant to anſwer: and that the party ſhall ſue a *Scire facias*, before the pardon in that behalf ſhall be allowed; which is as much as to ſay, having regard only to the Plaintiff, but having regard to the King, it is an abſolute pardon and grant of his goods, &c. Note this, Then cometh another *Proviſo*. That this act ſhall in no wiſe extend to any perſon outlawed upon any writ of *Capias ad ſatisficiendum*, untill ſuch time as the perſon ſo outlawed, ſhall ſatisfie, or otherwiſe agree with the party; and that is intended always as to the party Plaintiff, for, for him the proviſion is made. But againſt the King, he is a perſon able to take benefit of the pardon, and capable of
[80] his goods againſt the King: ſo note, he is a perſon able by the pardon, againſt the King, but not as to the party Plaintiff; as a Villain is diſabled againſt his Lord, not as to any other: and that appeareth by conſtruction upon the whole act. 2. It was reſolved, that although the words of this latter Proviſo are, (untill ſuch time as the perſon outlawed ſhall ſatisfie) that is, ſuch intereſt in the perſon outlawed, that although he dieth after the pardon, yet the Executors may ſatisfie, and have benefit of the pardon. 3. Foraſmuch as this caſe is no *Scire facias*, nor *Capias utlagatum*, nor other proceſs lyeth againſt the Executors, they may, (after ſatisfaction acknowledged) *gratis* come in, (for neceſſity without proceſs) and plead the general pardon, with averment, that they are not any perſons excepted. And ſee a clauſe in the beginning of the act, that every ſubject by himſelf, or his attorney, may plead this act for his or their diſcharge, &c. *Vide* 3 *Eliz. Dier* 201. upon the Statute of 23 *H.* 8. Executors ſhall have Attaint. 6 *E.* 6. *Bendloes*. Executors ſhall have reſtitution upon the Statute of 21 *H.* 8. Alſo Adminiſtrators ſhall have a writ of Error upon 27 *Eliz.* as it was adjudged *Mich.* 36 *Eliz.* in the Lord *Mordans* caſe in the Exchequer chamber; yet theſe Statutes ſpeak only of the party, and not of his Executors or Adminiſtrators, *Vide* 28 *Aſſ. p.* 7. 11 *E.* 3. Executors 77.

THE

THE REPORTS OF Sir Edward Coke Kt. &c.

PART VII.

Poſtnati.

Calvin's Caſe, Trin. 6 Jacobi Regis.

[1] *Jacobus Dei gratia Angliæ, Scotiæ, Franchiæ, & Hiberniæ Rex, fidei defenſor, &c Vic' Midd' Salut. Queſtus eſt nobis Robertus Calvin gener. quod Richardus Smith & Nicholaus Smith injuſte & ſine judicio diſſeiſ. eum de libero tenemento ſuo in Haggard, alias Haggerſton, alias Aggerſton, in paroch' Sancti Leonardi in Shorditch infra triginta annos jam ultim. elapſos. Et ideo tibi præcipimus quod ſi prædictus Robertus fecerit te ſecurum de clameo ſuo proſ. tunc fac' tenementum ill. reſeiſ. de catallis quæ in ipſo capt. fuerint, & ipſum tenementum cum catallis eſſe in pace uſque diem Jovis proxim. poſt quindena Sancti Martini proxim. futuri. Et interim fac' xij liber. & legal. homines de viſn. illo videre tenement. ill' & nomina eorum imbr. Et ſumm. eis per bonos ſumm. quod tunc ſint coram nobis ubicunque tunc fuerimus in Angl' parat. inde facere recognit. Et pone per vad' & ſalvos pleg' prædictos Richardum & Nicholaum vel ballivos ſuos ſi ipſi invent' non fuerint, quod tunc ſint ibi aud' ill' recognit'. Et habeas ibi ſumm' nomina pleg', & hoc breve. T. meipſo apud Weſtm. tertio die Novembris, Anno regni noſtri Angl'. Franc', & Hibern' quinto, & Scotiæ quadrageſimo primo.*

Pro quadragint. ſolid' ſolut' in Hanaperio.

Kindeſley.

Aſſiſa ven. recogn' ſi Richardus Smith & Nicholaus Smith injuſte & ſine judicio diſſeiſ. Robertum Calvin gener' de libero tenemento ſuo in Haggard, alias Haggerſton, alias Aggerſton in parochia Sancti Leonardi in Shorditch infra triginta annos jam ultimos elapſos: Et unde idem Robertus, qui infra ætatem vigint. & unius annor' exiſtit, per Johannem Parkinſon & Willihelm. Parkinſon gardianos ſuos per cur' domini regis hic ad hoc conjunctim & diviſim ſpecialiter admiſſ, queritur quod diſſeiſ, eum de uno meſſ. cum pertin', &c. Et prædicti Richardus & Nicholaus per Willihelm. Edwardus attornat. ſuum ven', & dicunt quod prædictus Robertus ad breve ſuum prædictum reſponderi non debet, quia dicunt, quod prædictus Robertus eſt alienigen. natus quinto die Novembris anno regni domini regis nunc Angliæ, Franciæ, & Hiberniæ tertio, & Scotiæ triceſſimo nono apud Edenborough infra regnum ſuum Scotiæ predict. ac infra ligeanc' dicti domini Regis dicti regni ſui Scotiæ, ac extra ligeanc' dicti domini Regis regni ſui Angliæ. Quodque tempore nativitatis prædicti Roberti Calvin ac diu antea

& continue postea prædictum regnum Scotiæ, *per jura, leges, & statuta ejusdem regni propria, & non per jura, leges, vel statuta hujus regni* Angliæ, *regulat. & gubernat. fuit et adhuc est. Et hoc parat' sunt verificare, unde pet. judicium si prædictus* Robertus *ad breve suum prædictum respondere debeat, &c. Et prædictus* Robertus Calvin *dicit, quod prædictum placitum per prædictos* Richardum & Nicholaum *superius placitat. minus sufficiens in lege existit ad ipsum* Robertum *a respons. ad breve suum prædictum habend. repellend. quodque ipse idem* Robertus *ad placit. ill' modo & forma prædict. placitat. necesse non habet nec per legem terræ tenetur respondere. Et hoc parat. est verificare, unde petit judicium: Et quod præd.* Richardus & Nicholaus *ad prædict. breve ipsius* Roberti *respondeant. Et prædicti* Richardus & Nicholaus, *ex quo ipsi sufficien. materiam in lege ad ipsum* Robertum *a respons. ad breve prædictum habend' repellend' superius allegaver. quam ipsi parat. sunt verificare; Quam quidem materiam prædictus* Robertus *non dedic', nec ad eam aliqualiter respondet, sed verificat. ill' penitus admittere omnino recusat ut prius pet. judicium si prædictus* Robertus *ad breve suum prædictum respondere debeat, &c. Et, quia cur' domini Regis hic de judicio suo de & super præmiss. reddendo nondum advisatur, dies inde dat. est partibus præd. coram domino Rege apud* Westmonaster. *usque diem Lunæ prox. post octab. Sancti Hillarii de judicio suo inde audiendo, eo quod cur. domini Regis hic inde nondum,* &c. *Et assisa præd' reman' capiend. coram eodem domino Rege usque eundem diem Lunæ ibidem* &c. *Et vicecom. distring' recogn. Assisæ præd'. Et interim fac' visum,* &c. *Ad quem diem coram domino Rege apud* Westmonaster' *ven. tam præd.* Robertus Calvin *per gardianos suos prædict. quam præd.* Richardus Smith & Nicholaus Smith *per attornat. suum præd'. Et quia cur' domini Regis hic*

[2] *de judicio suo inde & super præmissis reddendo nondum advisatur, dies inde dat. est partibus præd. coram domino Rege apud* Westm. *usque diem Lunæ prox. post crastin' ascensionis domini de judicio suo inde audiend' eo quod cur. domini Regis hic inde nondum,* &c. *Et assisa præd. reman. ulterius capiend' usque eundem diem Lunæ ibidem,* &c. *Et vicecom. sicut alias distring' recogn. assisæ præd. et interim fac' visum* &c. *Ad quem diem coram domino Rege apud* Westm. *ven. tam præd.* Rob. Calvin *per gardianos suos præd', quam præd.* Richardus Smith & Nicholaus Smith *per attornat. suum præd.* &c. *Et quia curia* &c.

The question.

How this case hath proceeded.

The question of this matter in Law was, whether *Robert Calvin* the Plaintiff (being born in *Scotland* since the Crown of *England* descended to his Majesty) be an alien born, and consequently disabled to bring any real or personal action for any lands within the Realm of *England*. After this case had been argued in the Court of the Kings Bench, at the barre, by the counsel learned of either party, the Judges of that court, upon conference and consideration of the weight and importance thereof, adjourned the same (according to the ancient and ordinary course and order of Law) into the Exchequer chamber, to be argued openly there; first by the counsel learned of either party, and then by all the Judges of *England*: where afterwards the case was argued by *Bacon* Sollicitor General, on the part of the Plaintiff, and by *Laur. Hide* for the Defendant: and afterward by *Hobart* Attorney General for the Plaintiff, and by Serjeant *Hutton* for the Defendant: and in *Easter* term last, the case was argued by *Heron* puisne Baron of the Exchequer, and *Foster* puisne Judge of the Court of Common Pleas: and on the second day appointed for this case, by *Crook* puisne Judge of the Kings Bench, and *Altham* Baron of the Exchequer: the third day by *Snigge* Baron of the Exchequer, and *Williams* one of the Judges of the Kings Bench: the fourth day by *Daniel* one of the Judges of the Court of Common Pleas, and by *Yelverton* one of the Judges of Kings Bench: And in Trinity Term following, by *Warberton* one of the Judges of the Common Pleas, and *Fenner* one of the Judges of the Kings Bench: and after by *Walmsley* one of the Judges of the Common Pleas, and *Tanfield* chief Baron: and at two several days in the same Term, *Coke* chief Justice of the Common Pleas, *Fleming* chief Justice of the Kings Bench, and Sir *Thomas Eggerton*, Lord *Ellesmere*, Lord Chanchellor of *England*, argued the case (the like plea

[b] in disability of *Robert Calvins* person being pleaded *mutatis mutandis* in the Chancery in a sute there for evidence concerning lands of inheritance, and by the Lord Chancellor adjorned also into the Exchequer chamber, to the end that one rule might over rule both the said cases.) And first (for that I intend to make as summary a Report as I can) I will at the first set down such arguments and objections as were made and drawn out of this short record against the Plaintiff, by those that argued for the Defendants. It was observed, that in this plea there were four Nouns, *quatuor nomina*, which were called *nomina operativa*, because from them all the said arguments and objections on the part of the Defendants were drawn: that is to say, 1. *Ligeantia* (which is twice repeated in the plea, for it is said, *Infra ligeantiam domini regis regni sui* Scotiæ, *et extra ligeantiam domini regis regni sui* Angliæ.) 2. *Regnum* (which also appeareth to be twice mentioned, *viz. regnum Angliæ*, and *regnum Scotiæ.*) 3. *Leges* (which are twice alledged, *viz. Leges Angliæ*, and *leges Scotæ*, two several and dinstinct Laws.) 4. *Alienigina* (which is the conclusion of all, *viz.* that *Robert Calvin* is *Alienigena.*) By the first it appeareth, that the Defendants do make two ligeances, one of *England*, and another of *Scotland*, and from these several ligeances two arguments were framed, which briefly may be concluded thus. Whosoever is born *infra ligeantiam*, within the ligeance of King *James* of his kingdom of *Scotland*, is *Alienigina*, an alien born, as to the kingdome of *England*: but *Robert Calvin* was born at *Edenborough*, within the ligeance of the King of his kingdom of *Scotland*; therefore *Robert Calvin* is *Alienigena*, an alien born, as to the kingdom of *England*. 2. Whosoever is born *extra ligeantiam*, out of the ligeance of King *James* of his kingdom of *England*, is an alien as to the kingdom of *England*: but the Plaintiff was born out of the ligeance of the King of his kingdom of *England*; therefore the Plaintiff is an alien, &c. Both these arguments are drawn from the very words of the Plea, *viz. Quod præd.* Robertus *est alienigena, natus* 5 *Novemb. anno regni domini Regis nunc* Angliæ, &c. *tertio apud* Edenborough *infra regnum* Scotiæ, *ac infra ligeantiam dicti domini Regis dicti regni sui* Scotiæ, *ac extra ligeantiam dicti domini regis regni sui* Angliæ. From the several kingdoms, *viz. regnum Angliæ* and *regnum Scotiæ*, three arguments were drawn: 1. *Quando duo jura (imo duo regna) concurrunt in una persona, æquum est ac si essent in diversis*: but in the Kings person there concur two distinct and several kingdoms; therefore it is all one as if

[3] they were in divers persons, and consequently the Plaintiff is an alien as all the *Antenati* be, for that they

The arguments and objections on the part of the defendant.

they were born under the ligeance of another King. 2. Whatſoever is due to the Kings ſeveral politique capacities of the ſeveral kingdoms is ſeveral and divided: but ligeance of each nation is due to the Kings ſeveral politique capacities of the ſeveral kingdoms; *Ergo*, The ligeance of each nation is ſeveral and divided, and conſequently the Plaintiff is an alien, for that they that be born under ſeveral ligeances are aliens one to another. 3. Where the King hath ſeveral kingdoms by ſeveral titles and deſcents; there alſo are the ligeances ſeveral: but the King hath theſe two kingdoms by ſeveral titles and deſcents; therefore the ligeances be ſeveral. Theſe 3. arguments are collected alſo from the words of the plea before remembred.

From the ſeveral and diſtinct Laws of either kingdom, they did reaſon thus; 1. Every Subject that is born out of the extent and reach of the Laws of *England*, cannot by judgment of thoſe Laws be a natural ſubject to the King, in reſpect of his kingdom of *England*: but the Plaintiff was born at *Edenborough*, out of the extent and reach of the Laws of *England*; therefore the Plaintiff by the judgment of the Laws of *England* cannot be a natural Subject to the King, as of his kingdom of *England*. 2. That Subject, that is not at the time and in the place of his birth inheritable to the Laws of *England*, cannot be inheritable or partaker of the benefits and priviledges given by the Laws of *England*: but the Plaintiff at the time, and in the place of his birth was not inheritable to the Laws of *England*, (but only to the Laws of *Scotland*;) therefore he is not inheritable or to be partaker of the benefits of priviledges of the Laws of *England*. 3. Whatſoever appeareth to be out of the juriſdiction of the Laws of *England*, cannot be tried by the ſame Laws: but the Plaintiffs birth at *Edenborough* is out of the juriſdiction of the Laws of *England*; therefore the ſame cannot be tried by the Laws of *England*. Which three arguments were drawn from theſe words of the plea, *viz.* *Quodque tempore nativitatis præd.* Roberti Calvin, *ac diu antea, et continue poſtea, prædictum regnum* Scotiæ *per jura, leges et ſtatuta ejuſdem regni propria, et non per jura, leges, ſeu ſtatuta hujus regni* Angliæ *regulat' et gubernat' fuit, et adhuc eſt*. From this word *Alienigena* they argued thus. Every Subject that is *alienæ gentis (i.e.) alienæ ligeantiæ, eſt alienigena*: but ſuch a one is the Plaintiff; therefore, &c. And to theſe nine arguments, all that was ſpoken learnedly and at large by thoſe that argued againſt the Plaintiff may be reduced.

But it was reſolved by the Lord Chanchellor and twelve Judges, *viz.* the two chief Juſtices, the chief Baron, Juſtice *Fenner*, *Warbarton*, *Yelverton*, *Daniel*, *Williams*, Baron *Snig*, Baron *Altham*, Juſtice *Crooke*, and Baron *Heron*, that the Plaintiff was no alien, and conſequently that the ought to be anſwered in this Aſſiſe by the Defendant. [b]

How this caſe was argued by the Lord Chancellor and the Judges

This caſe was as elaborately, ſubſtantially, and judicially argued by the Lord Chancellor, and by my brethren the Judges, as I ever read or heard of any; and ſo in mine opinion the weight and conſequence of the cauſe, both in *præſenti et perpetuis futuris temporibus* juſtly deſerved: for though it was one of the ſhorteſt and leaſt that ever we argued in this Court, yet was it the longeſt and weightieſt that ever was argued in any Court; the ſhorteſt in ſyllables, and the longeſt in ſubſtance; the leaſt for the value (and yet not tending to the right of that leaſt) but the weightieſt for the conſequent, both for the preſent, and for all poſterity, And therefore it was ſaid, that thoſe that had written *de foſſilibus* did obſerve, that gold hidden in the bowels of the earth, was in reſpect of the maſſe of the whole earth, *parvum in magno*: but of this ſhort plea it might be truly ſaid (which is more ſtrange) that here was *magnum in parvo*. And in the arguments of thoſe that argued for the Plaintiff I ſpecially noted, That albeit they ſpake according to their own heart, yet they ſpake not out of their own head and invention: Job 8. 8. wherein they followed the counſel given in Gods book, *Interroga priſtinam generationem* (for out of the old fields muſt come the new corn) *et diligenter inveſtiga patrum memoriam*, and diligently ſearch out the judgments of our forefathers: and that for divers reaſons. Firſt on our own part, *Heſterni enim ſumus et ignoramus, et vita noſtra ſicut umbra ſuper terram*: for we are but of yeſterday, (and therefore had need of the wiſdom of thoſe that were before us) and had been ignorant (if we had not received light and knowledge from our forefathers) and our days upon the earth are but as a ſhadow, in reſpect of the old ancient dayes and times paſt, wherein the Laws have been by the wiſdom of the moſt excellent men, in many ſucceſſions of ages, by long and continual experience (the trial of right and truth) fined and refined, which no one man (being of ſo ſhort a time) albeit he had in his head the wiſdom of all the men in the world, in any one age could never have effected or attainted unto. And therefore it is [4] *optima regula, qua nulla eſt verior aut firmior in jure, Neminem oportet eſſe ſapientiorem legibus*: no man ought to take upon him to be wiſer than the Laws. Secondly, in reſpect of our forefathers: *Iſti* (ſaith the text) *docebunt te, et loquentur tibi, et ex corde ſuo proferunt eloquia*, they ſhall teach thee, and tell thee, and ſhall utter the words of their heart, without all equivocation or mental reſervation, they (I ſay) that cannot be daunted with fear of any power above them, nor be dazled with the applauſe of the popular about them, nor fretted with any diſcontentment (the matter of oppoſition and contradiction) within them, but ſhall ſpeak the words of their heart, without all affection or infection whatſoever.

Alſo in their arguments of this cauſe concerning an alien, they told no ſtrange hiſtories, cited no forreign Laws, produced no alien preſidents, and that for two cauſes: the one, for that the Laws of *England* are ſo copious in this point, as God willing by the report of this caſe ſhall appear: the other, leſt their arguments concerning an alien born, ſhould become forreign, ſtrange, and an alien to the ſtate of the queſtion, which being *quæſtio juris*, concerning feeehold, and inheritance in *England*, is only to be decided by the Laws of this Realm. And albeit I concurred with thoſe that adjudged the Plaintiff to be no alien, yet do I find a meer ſtranger in this caſe, ſuch a one as the eye of the Law (our books and book caſes) never ſaw, as the ears of the Law (our Reporters never heard of, nor the mouth of the Law (for *Judex eſt lex loquens*) the Judges our forefathers of the Law never taſted: I ſay, ſuch a one, as the ſtomack of the Law, our exquiſite and perfect Records of pleadings, entries, and jugdments (that make equal and true diſtribution of all caſes in queſtion) never digeſted. In a word, this little plea is a great ſtranger to the Law of *England*, as ſhall manifeſtly appear by the reſolution of this caſe.

And

The method that the Reporter doth uſe.

And now that I have taken upon me to make a report of their arguments, I ought to do the ſame as truly, fully, and ſincerely, as poſſibly I can: howbeit, ſeeing that almoſt every Judge had in the courſe of his argument a peculiar method, and I muſt only hold my ſelf to one, I ſhall give no juſt offence to any, if I challenge that which of right is due to every Reporter, that is, to reduce the ſum and effect of all to ſuch a method, as upon conſideration had of all the arguments, the Reporter himſelf thinketh to be fitteſt and cleareſt for the right underſtanding of the true reaſons and cauſes of the judgment and reſolution of the caſe in queſtion.

In this caſe five things did fall into conſideration. 1. *Ligeantia.* 2. *Leges.* 3. *Regna.* 4. *Alienigena.* 5. What legal inconveniences would enſue on either ſide.

What things did fall into conſideration in this caſe.

1. Concerning ligeance: 1. It was reſolved what ligeance was: 2. How many kinds of ligeances there were: 3. Where ligeance was due: 4. To whom it was due: and laſtly, How it was due.

[b]

2. For the Laws: 1. That ligeance, or obedience of the ſubject to the Soveraign, is due by the Law of nature: 2. That this Law of nature is part of the Laws of *England*: 3. That the Law of nature was before any judicial or municipal Law in the world: 4. That the Law of nature is immutable and cannot be changed.

3. As touching the Kingdoms: How far forth by the act of Law the Union is already made, and wherein the Kingdoms do yet remain ſeparate and divided.

4. Of *Alienigena*, an alien born: 1. What an alien born is in Law: 2. The diviſion and diverſity of aliens. 3. Incidents to every alien. 4. Authorities in Law. 5. Demonſtrative concluſions upon the premiſſes, that the Plaintiff can be no alien.

5. Upon due conſideration had of the conſequent of this caſe: What inconveniencies legal ſhould follow on either party.

And theſe ſeveral parts I will in this Report purſue in ſuch order as they have been propounded: and firſt *de Ligeantia.*

The firſt general part What ligeance is.

1. Ligeance is a true and faithfull obedience of the ſubject due to his Soveraign. This ligeance and obedience is an incident inſeparable to every ſubject; for as ſoon as he is born he oweth by birth-right ligeance and obedience to his Soveraign. *Ligeantia eſt vinculum fidei*: and *Ligeantia eſt quaſi legis eſſentia. Ligeantia eſt ligamentum, quaſi ligatio mentium; quia ſicut ligamentum eſt connexio articulorum & junctuarum, &c.* As the ligatures or ſtrings do knit together the joints of all parts of the body, ſo doth ligeance joyn together the Soveraign and all his Subjects, *quaſi uno ligamine. Glanvil*, who wrote in the reign of *H.* 2. *lib.* 9. *cap.* 4. ſpeaking of the connexion which ought to be between the Lord and Tenant that holdeth by homage, ſaith, That *mutua debet eſſe domini & fidelitatis connexio, ita quod quantum debet domino ex homagio, tantum illi debet dominus ex dominio, præter ſolam reverentiam*, and the Lord (ſaith he) ought to defend his tenant. But between the Soveraign and the ſubject there is without compariſon a higher and greater connexion; for as the ſubject oweth to the King his true and faithful ligeance and obedience, ſo the Soveraign is to govern and protect his Subjects, *regere & protegere ſubditos ſuos*: ſo as betwen the Sove-

[5]

raign and ſubject there is *duplex & reciprocum ligamen: quia ſicut ſubditus regi tenetur ad obedientiam, ita rex ſubdito tenetur ad protectionem: merito igitur ligeantia dicitur a ligando, quia continet in ſe duplex ligamen.* And therefore it is holden in 20 *H.* 7, 8. that there is a liege or ligeance between the King and the ſubject. And *Forteſcue cap.* 13. *Rex ad tutelam legis, corporum & bonorum erectus eſt.* And in the Acts of Parliament of 10 *R.* 2. *cap.* 5. & 11 *R.* 2. *cap.* 1. 14 *H.* 8. *cap.* 2. &c. Subjects are called liege people: and in the acts of Parliament in 34 *H.* 8. *cap.* 1. & 35 *H.* 8. *cap.* 3. &c. the King is called the liege Lord of his Subjects. And with this agreeth M. *Skene* in his book *de expoſitione verborum* (which book was cited by one of the Judges which argued againſt the Plaintiff) Ligeance is the mutual bond and obligation between the King and his ſubjects, whereby ſubjects are called his liege ſubjects, becauſe they are bound to obey and ſerve him, and he is called their liege Lord, becauſe he ſhould maintain and defend them. Whereby it appeareth, that in this point the Law of *England*, and of *Scotland* is all one. Therefore it is truly ſaid that *protectio trahit ſubjectionem, & ſubjectio protectionem.* And hereby it plainly appeareth, that ligeance doth not begin by the oath in the Leet; for many men owe true ligeance that never were ſworn in a Leet, and the ſwearing in a Leet maketh no denization, as the book is adjudged in 14 *H.* 4. *fol.* 19. This word ligeance is well expreſſed by divers ſeveral names or *Synonymia* which we find in our books. Sometime it is called the obedience or obeyſance of the ſubject to the King, *obedientia regi*, 9 *E.* 4. 7. 9 *E.* 4. 6. 2 *R.* 3. 2. in the book of entries, *Ejectione firmæ* 7. 14 *H.* 8. *cap.* 2. 22 *H.* 8. *cap.* 2. 8. &c. Sometime he is called a natural liege man that is born under the power of the King, *ſub poteſtate regis*, 2 *H.* 3. tit. *Dower. V. le Statute de* 11 E. 3. *cap.* 2. Sometimes ligeance is called Faith, *Fides, ad fidem regis, &c. Bracton* who wrote in the reign of *H.* 3. *lib.* 5. *tractat. de exceptionibus.* cap. 24. fol. 427. *Eſt etiam alia exceptio quæ competit ex perſona quærentis, propter defectum nationis, ut ſi quis alienigena qui fuit ad fidem regis Franc. &c.* And *Fleta* (which book was made in the reign of E. 1.) agreeth therewith; for *lib.* 6. *c.* 47. *de exceptione ex omiſſione participis*, it is ſaid, *vel dicere potuit, quod nihil juris clamare poterit tanquam particeps eo quod eſt ad fidem regis* Franciæ, *quia alienigenæ repelli debent in* Anglia *ab agendo, donec fuerunt ad fidem regis* Angliæ. *Vide* 25 E. 3. *de natis ultra mare*, foy & ligeance del Roy Dengliterre: & *Litt. l.* 2. *c. Homage*, ſalve le foy, quod ieo doy a noſtre ſur le Roy: and *Glanvil, l.* 9. *c.* 1. *Salva fide debita domino Regi & hæredibus ſuis.* Sometimes ligeance is called ligealty, 22 *Aſſ. Pl.* 25. By all which it evidently appeareth, that they that are born under the obedience, power, faith, ligealty, or ligeance of the King, are natural ſubjects, and no aliens. So as, ſeeing now it doth appear what ligeance is, it followeth in order, that we ſpeak of the ſeveral kinds of ligeance. But herein we need to be very wary, for this caveat the law giveth *ubi lex non diſtinguit, nec nos diſtinguere debemus*: and certainly *lex non diſtinguit*, but where *omnia membra dividentia* are to be found out and proved by the law it ſelf.

How many kind of ligeances there be

2. There is found in the law four kinds of ligeances: the firſt is, *ligeantia naturalis, abſoluta, pura, & indefinita*: and this originally is due by nature and birthright, and is called *alta ligeantia*, and he that oweth

oweth this is called *ſubditus natus*. The ſecond is called *ligeantia acquiſita*, not by nature but by acquiſition or denization, being called a denizen, or rather donaizon, becauſe he is *ſubditus datus*. The third is *ligeantia localis*, wrought by the law, and that is when an alien that is in amity cometh into *England*, becauſe as long as he is within *England*, he is within the Kings protection; therefore ſo long as he is there, he oweth unto the King a local obedience or ligeance, for that the one (as it hath been ſaid draweth the other. The fourth is a legal obedience, or ligeance which is called legal, becauſe the municipal laws of this realm have preſcribed the order and form of it; and this to be done upon oath at the Torn or Leet. The firſt, that is, ligeance natural, &c. appeareth by the ſaid acts of Parliament, wherein the King is called natural liege Lord, and his people natural liege ſubjects; this alſo doth appear in the indictments of Treaſon which of all other things are the moſt curiouſly and certainly indited and penned:) for in the indictment of the Lord *Dacre*, in 26 *H.* 8. it is ſaid *prædictus dominus Dacre debitum fidei & ligeantiæ ſuæ quod præfato domino regi naturaliter & de jure impendere debuit, minime curans, &c.* And *Reginald Pool* was indicted in 30 *H.* 8. for committing treaſon *contra dominum regem ſupremum & naturalem dominum ſuum*. And to this end were cited the indictment of *Edward* Duke of *Somerſet* in 5 *E.* 6. and many others both of ancient and latter times. But in the indictment of Treaſon of *John Dethick* in 2 & 3 *Phil. & Mar.* it is ſaid, *quod prædict. Johannes machinans, &c. prædict. dominum Philippum & dominam Mariam ſupremos dominos ſuos*, and omitted *(naturales)* becauſe King *Philip* was not his natural liege Lord. And of this point more ſhall be ſaid when we ſpeak of local obedience. The ſecond is *ligeantia acquiſita*, or denization: and this in the books and records of the law appeareth to be threefold: 1. abſolute, as the common denizations be, to them and their heirs, without any limitation or reſtraint: 2. limited, as when the King doth grant letters of denization to an alien, and to the heirs males of his body, as it appeareth in 9 *E.* 4. *fol.* 7. in *Baggots* caſe; or to an alien for term of his life, as was granted *John Reynel*, 11 *H.* 6. 3. It may be granted upon condition; for *cujus eſt dare, ejus eſt diſponere*, whereof I have ſeen divers precedents. And this denization of an alien may be effected three manner of ways: by Parliament, as it was in 3 *H.* 6. 55. in *Dower*: by letters patents, as the uſual manner is: and by conqueſt, as if the King and his ſubjects ſhould conquer another Kingdom or Dominion, as well *Antenati* as *Poſtnati*, as well they which fought in the field, as they which remained at home for defence of their country, or imployed elſewhere, are all denizens of the Kingdom or dominion conquered. Of which point more ſhall be ſaid hereafter.

Ligeantia naturalis.

Ligeantia acquiſita.

[6]

3. Concerning the local obedience, it is obſervable, that as there is a local protection on the Kings part, ſo there is a local ligeance of the ſubjects part. And this appeareth in 4 *Mar. Br.* 32. & 3 & 4 *Phil. & Mar. Dyer* 144. *Sherley* a *French* man, being in amity with the King, came into *England*, and joyned with divers ſubjects of this realm in treaſon againſt the King and Queen, and the indictment concluded *contra ligeantiæ ſuæ debitum*; for he owed to the King a local obedience, that is, ſo long as he was within the Kings protection: which local obedience being but momentany and incertain, is ſtrong enough to make a natural ſubject; for if he hath iſſue here, that iſſue is a natural born ſubject: *a fortiori* he that is born under the natural and abſolute ligeance of the King (which as it hath been ſaid, is *alta ligeantia*) as the Plaintiff in the caſe in queſtion was, ought to be a natural born ſubject; for *localis ligeantia eſt ligeantia infima, & minima, & maxime incerta*. And it is to be obſerved, that it is *nec cœlum, nec ſolum*, neither the climate nor the ſoil, but *ligeantia* and *obedientia* that make the ſubject born: for if enemies ſhould come into the realm, and poſſeſs a town or fort, and have iſſue there, that iſſue is no ſubject to the King of *England*, though he be born upon his ſoil, and under his meridian, for that he was not born under the ligeance of a ſubject, nor under the protection of the King. And concerning this local obedience, a precedent was cited in *Hill.* 36 *Eliz.* when *Stephano Ferrara de Gama*, and *Emanuel Lewes Tinoco*, two *Portugals* born, coming into *England* under Queen *Elizabeths* ſafe conduct, and living here under her protection, joyned with Doctor *Lopez* in treaſon within this Realm againſt her Majeſty: and in this caſe two points were reſolved by the Judges. Firſt, that their indictment ought to begin, that they intended treaſon *contra dominam Reginam, &c.* omitting theſe words *(naturalem dominam ſuam)* and ought to conclude *contra ligeantiæ ſuæ debitum*. But if an alien enemy come to invade this realm, and be taken in war, he cannot be indicted of treaſon: for the indictment cannot conclude *contra ligeantiæ ſuæ debitum*, for he never was in the protection of the King, nor ever owed any manner of ligeance unto him, but malice and enmity, and therefore he ſhall be put to death by martial law. And ſo it was in *anno* 15 *H.* 7. in *Perkin Warbecks* caſe, who being an alien born in *Flanders*, feigned himſelf to be one of the ſons of *Edward* the fourth, and invaded this realm with great power, with an intent to take upon him the dignity royal: but being taken in the war, it was reſolved by the Juſtices, that he could not be puniſhed by the Common law, but before the Conſtable and Marſhal (who had ſpecial commiſſion under the great Seal to hear and determine the ſame according to martial law) he had ſentence to be drawn, hanged, and quartered, which was executed accordingly. And this appeareth in the book of *Griffeth* Attorney general, by an extract out of the book of *Hobart*, Attorney general to King *H.* 7.

Ligeantia localis.

[6]

4. Now are we to ſpeak of legal ligeance, which in our books, *viz.* 7 *E.* 2. *tit. Avowry* 211. 4 *E.* 3. *fol.* 42. 13 *E.* 3. *tit. Avowry* 120. &c. is called Sute Royall, becauſe that the ligeance of the ſubject is only due unto the King. This oath of ligeance appeareth in *Britton*, who wrote in *anno* 5 *E.* 1. *cap.* 29. (and is yet commonly in uſe to this day in every Leet) and in our books; the effect whereof is: *You ſhall ſwear, that from this day forward, you ſhall be true and faithfull to our Sovereign Lord King* James, *and his heirs, and truth and faith ſhall bear of life and member, and terrene honour, and you ſhall neither know nor hear of any ill or damage intended unto him, that you ſhall not defend. So help you Almighty God.* The ſubſtance and effect hereof is (as hath been ſaid) due by the law of nature, *ex inſtitutione naturæ*, as hereafter ſhall appear: the form and addition of the oath is, *ex proviſione hominis*. In this oath of ligeance five things were obſerved. 1. That for the time it is indefinite, and without limit, *from this day for-*

Ligeantia legalis.

forward; Secondly, Two excellent qualities are required, that is, to be *true and faithful*; 3. To whom, *to our Soveraign Lord the King and his heirs*: (And albeit *Britton* doth say, to the King of of *England*, that is spoken *propter excellentiam*, to design the person, and not to confine the ligeance; for a Subject doth not swear his ligeance to the King, only as King of *England*, and not to him as King of *Scotland*, or of *Ireland*, &c. but generally to the King;) 4. In what manner, *and faith and troth shall bear, &c. of life and member*; that is, untill the letting out of the last drop of our dearest heart blood. 5. Where, and in what places ought these things to be done, in all places whatsoever; for, *you shall neither know nor hear of any ill or damage*, &c. that you shall not defend, &c. so as natural ligeance is not circumscribed within place. It is holden 12 *H.* 7. 18. *b.* That he that is sworn in the Leet, is sworn to the King for his ligeance, that is, to be true and faithful to the King: and if he be once sworn for his ligeance, he shall not be sworn again during his life. And all Letters patents of denization be, that the Patentee shall behave himself *tanquam verus & fidelis ligeus domini Regis*. And this oath of Ligeance at the Tourne and Leet was first instituted by King *Arthur*; for so I read, *Inter leges sancti Edwardi Regis ante conquestum* 3. *cap.* 35. *Et quod omnes principes & comites, proceres, milites, & liberi homines debent jurare*, &c. *in Folkemote, & similiter omnes proceres regni, & milites, & liberi homines universi totius regni Britanniæ facere debent in plano Folkemote fidelitatem domino Regi*, &c. *Hanc legem invenit Arthurus qui quondam fuit inclitissimus Rex Britonum*, &c. *hujus legis authoritate expulit Arthurus Rex Saracenos & inimicos a regno*, &c. *& hujus legis authoritate Etheldredus Rex uno & eodem die per universum regnum Danos occidit. Vide Lambert inter Regis Edwardi*, &c. *fol.* 135 *&* 136. By this it appeareth, when and from whom this legal ligeance had his first institution within this realm. *Ligeantia* in the case in question is meant and intended of the first kind of ligeance, that is, of ligeance natural, absolute, &c. due by nature and birth-right. But if the Plaintiffs father be made a denizen, and purchase lands in *England* to him and his heirs, and die seised, this land shall never descend to the Plaintiff, for that the King by his Letters Patents may make a denizen but cannot naturalize him to all purposes, as an Act of Parliament may do; neither can Letters Patents make any inheritable in this case that by the common Law cannot inherit. And herewith agreeth 36 H. 8. *tit. Denizen. Br.* 9.

[7]

Homage is two fold.

[b]

Homage in our Books is twofold, that is to say, *Homagium Ligeum*, and that is as much as ligeance, of which *Bracton* speaketh *lib.* 2. *cap.* 35. *fol.* 79. *Soli Regi debetur sine dominio, seu servitio*: and there is *Homagium feudale*, which hath his original by tenure. In *Fit. Nat. Brev.* 269. there is a writ for respiting of this latter homage (which is due *ratione feodi sive tenuræ:*) *Sciatis quod respectuamus homagium nobis de terris & tenementis quæ tenentur de nobis in capite debit.* But *Homagium ligeum*, *i. Ligeantia*, is inherent and inseparable, and cannot be respited.

Where natural ligeance is due.

3. Now are we come unto (and almost past) the consideration of this circumstance, where natural ligeance should be due: For by that which hath been said it appeareth, that ligeance, and faith and truth which are her members and parts, are qualities of the mind and soul of man, and cannot be circumscribed within the predicament of *ubi*, for that were to confound predicaments, and to go about to drive the predicament of Quality into the predicament of *ubi*. *Non respondetur ad hanc quæstionem, ubi est? Verus & fidelis subditus est: sed ad hanc quæstionem, qualis est? recte & apte respondetur, verus & fidelis ligeus, &c. ut*, But yet for the greater illustration of the matter, this point was handled by it self, and that ligeance of the subject was of as great an extent and latitude, as the royal power and protection of the King, and e *converso*. It appeareth by the Statute of 11 *H.* 7. *cap.* 1. and 2 *E.* 6. *cap.* 2. that the subjects of *England* are bound by their ligeance to go with the King, &c. in his wars, as well within the Realm, &c. as without. And therefore we daily see, that when either *Ireland* or any other of his Majesties dominions be infested with invasion or insurrection, the King of *England* sendeth his subjects out of *England*, and his subjects out of *Scotland* also into *Ireland*, for the withstanding or suppressing of the same, to the end his rebels may feel the swords of either nation. And so may his subjects of *Gernsey*, *Jersey*, *Isle of man*, &c. be commanded to make their swords good against either rebel or enemy, as occasion shall be offered; whereas if natural ligeance of the subjects of *England* should be local, that is, confined within the realm of *England* or *Scotland*, &c. then were not they bound to go out of the continent of the realm of *England* or *Scotland*, &c. And the opinion of *Thirninge* in 7. *H.* 4. tit. *Protect.* 100. is thus to be understood, that an English subject is not compellable to go out of the realm without wages, according to the Statutes of 1 *E.* 3. c. 7. 18 *E.* 3. c. 8. 18 *H.* 6. c, 19 &c. 7 *H.* 7. c. 1. 3 *H.* 8. c. 5. &c. In *anno* 25 *E.* 1. *Bigot* Earl of *Norfolff* and *Suffolk*, and Earl Marshal of *England*, and *Bohun* Earl of *Hereford* and high Constable of *England*, did exhibit a petition to the King in *French*, (which I have seen antiently recorded) on the behalf of the Commons of *England*, concerning how and in what sort they were to imployed in his Majesties wars out of the Realm of *England*: and the Record saith, that, *post multas & varias altercationes*, it was resolved, they ought to go but in such manner and form as after was declared by the said Statutes, which seem to be but declarative of the common Law. And this doth plentifully and manifestly appear in our books, being truly and rightly understood. In 3 *H.* 6. *tit. Protection* 2. one had the benefit of a protection, for that he was sent into the Kings wars *in comitiva* of the protector: and it appeareth by the Record, and by the Chronicles also, that this imployment was into *France*; the greatest part thereof then being under the Kings actual obedience, so as the subjects of *England* were imployed into *France* for the defence and safety thereof: In which case it was observed, that seeing the protector, who was *Prorex*, went, the same was adjudged a voyage royal, 8 *H.* 6. *fol.* 16. the Lord *Talbot* went with a company of *Englishmen* into *France*, then also being for the greatest part under the actual obedience of the King, who had the benefit of their protections allowed unto them. And here were observed the words of the writ in the Register, *fol.* 88. where it appeareth that men were imployed in the Kings wars out of the realm *per præceptum nostrum*, and the usual words of the writ of protection be in *obsequio nostro*. 32 *H.* 6. *fol.* 4. it appeareth, that Englishmen were pressed into *Guyan*, 44 *E.* 3. 12. into *Gascoyne* with the Duke of *Lancaster*, 17 *H.* 6. tit.

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Protection.

Protection, into *Gaſcoyn* with the Earl of *Huntington*, ſteward of *Guyan*, 11 *H.* 4. 7. into *Ireland*, and out of this realm with the Duke of *Glouceſter* and the Lord *Knolles*: *Vide* 19 *H.* 6. 35. And it appeareth in 19 *Ed.* 2. *tit. Avowrie* 224. 26 *Aſſ.* 66. 7 *H.* 1. 19. &c. that there was *forinſecum ſervitium*, forreign ſervice, which *Bracton*, *fol.* 36. calleth *regale ſervitium*: and in *Fitz. N. B.* 28. that the King may ſend men to ſerve him in his wars beyond the ſea. But thus much (if it be not in ſo plain a caſe too much) ſhall ſuffice for this point for the Kings power, to command the ſervice of his Subjects in his wars out of the Realm, Whereupon it was concluded, That the ligeance of a natural born ſubject was not local, and confined only to *England*. Now let us ſee what the Law ſaith in time of peace, concerning the Kings protection and power of command, as well without the realm, as within, that his Subjects in all places may be protected from violence, and that juſtice may equally be adminiſtred to all his Subjects.

In the Regiſter fol. 25. b. *Rex univerſis et ſingulis admirallis, caſtellanis, cuſtodibus caſtrorum, villarum,* [b] *et aliorum fortaliciorum præpoſitis, vicecom. majoribus, cuſtumariis, cuſtodibus portuum, et aliorum locorum maritimorum ballivis, miniſtris, et aliis fidelibus ſuis, tam in tranſmarinis quam in ciſmarinis partibus, ad quos, &c. ſalutem. Sciatis, quod ſuſcepimus in protectionem et defenſionem noſtram, necnon ad ſalvam et ſecuram gardiam noſtram* W. *veniendo in regnum noſtrum Angl', et poteſtatem noſtram, tam per terram quam per mare cum uno valetto ſuo, ac res ac bona ſua quæcunque, ad tractand. cum dilecto noſtro et fideli* L. *pro redemptione priſonarii ipſius* L. *infra regnum et poteſtatem noſtram præd. per ſex menſes morando, et exinde ad propria redeundo. Et ideo &c. quod ipſum* W. *cum valetto, rebus et bonis ſuis præd' veniendo in regnum et poteſtatem noſtram præd. tam per terram quam per mare ibidem ut prædictum eſt ex cauſa antedicta morando, et exinde ad propria redeundo, manuteneatis, protegatis, et defendatis: non inferentes eis, &c. ſeu gravamen. Et ſi quid eis forisfactum, &c. reformari faciatis. In cujus &c. per ſex menſes duratur. T. &c.* In which writ 3. things are to be obſerved: 1. that the King hath *fidem et fideles in partibus tranſmarinis*: 2. that he hath *protectionem in partibus tranſmarinis*: 3. that he hath *poteſtatem in partibus tranſmarinis*. In the Regiſter fo. 26. *Rex univerſis et ſingulis admirallis, caſtellanis, cuſtodibus caſtrorum, villarum, et aliorum fortaliciorum præpoſitis, vicecom. majoribus, cuſtumariis, cuſtodibus portuum, et aliorum locorum maritimorum ballivis, miniſtris, et aliis fidelibus ſuis, tam in tranſmarinis quam in ciſmarinis partibus ad quos, &c. ſalutem. Sciatis quod ſuſcepimus in protectionem et defenſionem noſtram, necnon in ſalvum et ſecurum conductum noſtrum* I. *valettum* P. *et* L. *Burgenſium de Lyons obſidum noſtrorum, qui de licentia noſtra ad partes tranſmarinas profecturus eſt, pro finantia magiſtrorum ſuorum prædictorum obtinenda vel deferenda, eundo ad partes prædictas, ibidem morando, et exinde in Angl' redeundo. Et ideo vobis mandamus, quod eidem* I. *eundo ad partes præd. ibidem morando, et exinde in Angl' redeundo, ut præd. eſt, in perſona, bonis, aut rebus ſuis, non inferatis, ſeu quantum in vobis eſt ab aliis inferri permittatis injuriam moleſtiam, &c. aut gravamen. Sed eum potius ſalvum et ſecurum conductum, cum per loca, paſſus, ſeu diſtrictus veſtros tranſierit, et ſuper hoc requiſiti fueritis, ſuis ſumptibus habere faciatis. Et ſi quid eis forisfactum fuerit, &c. reformari faciatis. In cujus &c. per tres annos duratur.* T. &c. And certainly this was, when *Lyons* in *France* (bordering upon *Burgundy*, an antient friend to *England* was under the actual obedience of King *Henry* 6. For the King commanded *fidelibus ſuis*, his faithful Magiſtrates there, that if any injury were there done, it ſhould be by them reformed and redreſſed, and that they ſhould protect the party in his peſon and goods in peace. In the Regiſter, fol. 26. two other writs: *Rex omnibus ſeneſchallis, majoribus, juratis, paribus præpoſitis, ballivis et fidelibus ſuis in ducatu Aquitaniæ ad quos, &c. ſalutem. Quia dilecti nobis* T. & A. *cives civitatis Burdegaliæ coram nobis in Cancellaria noſtra Angliæ et Aquitaniæ jura ſua proſequentes, et metuente ſex veriſimilibus conjecturis per quoſdam ſibi comminantes tam in copore quam in rebus ſuis, ſibi poſſe grave damnum inferri, ſupplicaverunt nobis ſibi de protectione regia providere: nos volentes dictos* T. & A. *ab oppreſſionibus indebitis præſervare, ſuſcepimus ipſos* T. & A. *res ac juſtas poſſeſſiones et bona ſua quæcunque in protectionem et ſalvam gardiam noſtram ſpecialem. Et vobis et cuilibet veſtrum injungimus et mandamus, quod eidem ipſos* T. & A. *familias, res ac bona ſua quæcunque a violentiis et gravaminibus indebitis defendatis, et ipſos in juſtis poſſeſſionibus ſuis manuteneatis. Et ſi quid in præjudicium hujus protectionis ſalvæ gardiæ noſtræ attentatum inveneritis, ad ſtatum debitum reducatis. Et ne quis ſe poſſit per ignorantiam excuſare præſentem protectionem et ſalvam gardiam noſtram faciatis in locis de quibus requiſiti fueritis infra diſtrict' veſtrum publice intimari, inhibentes omnibus et ſingulis ſub pœnis gravibus, ne dictis* A. & T. *ſeu famulis ſuis in perſonis ſeu rebus ſuis, injuriam, moleſtiam, damnum aliquod inferant ſeu gravamen: et penocellas noſtras in locis et bonis ipſorum* T. & A. *in ſignum protectionis et ſalvæ gardiæ memoratæ, cum ſuper hoc requiſiti fueritis, apponeatis. In cujus, &c. Dat' in placito noſtro Weſtm' ſub magni ſigilli teſtimonio, ſexto die Auguſti anno* 44 E. 3. *Rex univerſis et ſingulis ſeneſchallis, conſtabulariis, caſtellanis, præpoſitis, miniſtris, et omnibus ballivis et fidelibus ſuis in dominio noſtro conſtitutis ad quos, &c. ſalutem. Volentes* G. & R. *uxorem ejus favore proſequi gratioſe: ipſos* G. & R. *homines familias ſuas, ac juſtas poſſeſſiones, et bona ſua quæcunque, ſuſcepimus in protectionem et defenſionem noſtram, necnon in ſalvam gardiam noſtram ſpecialem. Et ideo vobis et cuilibet veſtrum injungimus et mandamus, quod ipſos* G. & R. *eorum homines, familias ſuas, ac juſtas poſſeſſiones et bona ſua quæcunque manuteneatis, protegatis, et defendatis: non inferentes eis ſeu quantum in vobis eſt ab aliis inferri permittentes, injuriam, moleſtiam, damnum, violentiam, impedimentum aliquod ſeu gravamen. Et ſi quid eis forisfact', injuriatum vel contra eos indebite attentatum fuerit, id eis ſine dilatione corrigi, et ad ſtatum debitum reduci faciatis, prout ad vos et quemlibet veſtrum noveritis pertinere: penocellas ſuper domibus ſuis in ſignum præſentis ſalvis gardiæ noſtræ (prout moris erit facientes. In cujus, &c. per unum annum duratur.* T. &c. By all which it [b] is manifeſt, that the protection and government of the King is general over all his dominions and kingdoms, as well in time of peace by juſtice, as in time of war by the ſword, and that all be at his command, and under his obedience. Now ſeeing power and protection draweth ligeance, it followeth, that ſeeing the Kings power, command and protection, extendeth out of *England*, that ligeance cannot be local, or confined within the bounds thereof. He that is abjured the Realm, *Qui abjurat regnum amittit regnum, ſed non regem, amittit patriam, ſed non patrem patriæ*: for notwithſtanding the abjuration, he oweth

the King his ligeance, and he remaineth within the Kings Protection; for the King may pardon and reſtore him to his countrey again. So ſeeing that ligeance is a quality of the mind, and not confined within any place; it followeth, that the plea that doth confine the ligeance of the Plaintif to the kingdom of *Scotland*, *Infra ligeantiam regis regni ſui* Scotiæ, *et extra ligeantiam regis regni ſui* Angliæ, wherby the Defendants do make one local ligeance for the natural ſubjects of *England*, and another local ligeance for the natural ſubjects of *Scotland*, is utterly unſufficient, and againſt the nature and quality of natural ligeance, as often it hath been ſaid. And *Coke*, chief Juſtice of the Court of Common pleas, cited a ruled caſe out of *Hinghams* Reports, *Tempore* E.1. which in his argument he ſhewed in Court written in parchment, in an antient hand of that time. *Conſtance de* N. brought a writ of Ayel againſt *Roger de Cobledike*, and others, named in the writ, and counted that from the ſeiſin of *Roger* her grandfather it deſcended to *Gilbert* his ſon, and from *Gilbert* to *Conſtance*, as daughter and heir. Sutton *dit, Sir, el ne doit eſte reſponde, pur ceo que el eſt Froncois & nient de la ligeance ne a la foy Dengliterre, & demand. judgement ſi el doit action aver*: that is, ſhe is not to be anſwered, for that ſhe is a French woman, and not of the ligeance nor of the faith of *England*, and demand Judgment, if ſhe this action ought to have. *Bereford* (then chief Juſtice of the Court of Common pleas) by the rule of the Court diſalloweth the plea, for that it was too ſhort, in that it referred ligeance and faith to *England*, and not to the King: and thereupon *Sutton* ſaith as followeth; *Sir, nous voilomus averre que el ne eſt my de la ligeance Dengliterre, ne a la foy le Roy, & demaund. judgement, & ſi vous agardes que el doit eſte reſponde, nous dirromus aſſets*: that is, Sir, we will aver, that ſhe is not of the ligeance of *England*, nor of the faith of the King, and demand judgment, &c. Which latter words of the plea (*nor of the faith of the King*) referred faith to the King indefinitly and generally, and reſtrained not the ſame to *England* and thereupon the plea was allowed for good, according to the rule of the Court: for the book ſaith, that afterward the defendant deſired leave to depart from her writ. The rule of that caſe of *Cobledike* did (as *Coke* chief Juſtice ſaid) over-rule this caſe of *Calvin*, in the very point now in queſtion; for that the plea in this caſe doth not referre faith or ligeance to the King indefinitly and generally, but limiteth and reſtraineth faith and ligeance to the kingdom: *Extra ligeantiam regis regni ſui* Angliæ, out of the ligeance of the King of his kingdom of *England*: which afterwards the Lord Chancellor and the chief Juſtice of the kings Bench, having copies of the ſaid antient Report, affirmed in their arguments. So as this point was thus concluded, *Quod ligeantia naturalis nullis clauſtris coercetur, nullis metis refrænatur, nullis finibus premitur.*

Cobledike's caſe *in tempore* E. 1. reported by *Hingham.*

[10]

4. & 5. By that which hath been ſaid it appeareth, that this ligeance is due only to the King; ſo as therein the queſtion is not now, *cui, ſed quomodo debetur.* It is true, that the King hath two capacities in him: one a natural body, being deſcended of the blood royal of the Realm; and this body is of the creation of Almighty God, and is ſubject to to death, infirmity, and ſuch like; the other is a politique body or capacity, ſo called, becauſe it is framed by the policy of man (and in 21 E.4.39.b. is called a myſtical body;) and in this capacity the King is eſteemed to be immortal, inviſible, not ſubject to death infirmity, infancy, nonage, &c. *Vide Pl.Com. in le caſe de Seignior Barkley* 238. *et in le caſe del Dutchie* 213. *Vide* 6 E. 291. *et* 26 *Aſſ. pl.* 54. Now ſeeing the King hath but one perſon, and ſeveral capacities, and one politque capacitie for the Realm of *England*, and another for the Realm of *Scotland*, it is neceſſary to be conſidered, to which capacity ligeance is due. And it was reſolved, that it was due to the natural perſon of the King (which is ever accompanied with the poltique capacity, and the politique capacity as it were appropriated to the natural capacity) and it is not due to the politique capacity only, that is, to the crown or kingdom diſtinct from his natural capacity, and that for divers reaſons. Firſt, every ſubject (as it hath been affirmed by thoſe that argued againſt the Plaintiff) is preſumed by Law to be ſworn to the King, which is to his natural perſon, and likewiſe the King is ſworn to his ſubjects (as it appeareth in *Bracton lib.3. de actionibus, cap.9 fol.*107.) which oath he taketh in his natural perſon: for the politique capacity is inviſible and immortal; nay, the politique body hath no ſoul, for it is framed by the policy of man. 2. In all indictments of Treaſon, when any do intend or compaſs *mortem et deſtructionem domini Regis* (which muſt needs be underſtood of his natural body, for his politique body is immortal, and not ſubject to death) the indictment concludeth, *contra ligeantiæ ſuæ debitum*; *ergo*, the ligeance is due to the natural body. *Vid. Fit. Juſtice of peace* 53. *et Plo.Com.*384. *in the Earle of Leiceſters caſe.* 3. It is true, that the King *in genere* dieth not, but, no queſtion, *in individuo* he dieth: as for example, *H.*8. E.6. &c. and Queen *Elizabeth* died, otherwiſe you ſhould have many Kings at once. *In* 2 & 3 *Ph.& Mar. Dyer* 128. one *Conſtable* diſperſed divers bills in the ſtreets in the night, in which was written, that K. *E.6.* was alive and in *France*, &c. and in *Colman* ſtreet in *London* he pointed to a young man, and ſaid that he was K. *Ed.* the ſixt. And this being ſpoken *de individuo* (and accompanied with other circumſtances) was reſolved to be high Treaſon; for the which *Conſtable* was attained and executed. 4. A Bodie politque (being inviſible) can as a body politique neither make or take homage: *Vide* 33 *H.* 8. *tit. Fealty, Brook.* 5. *In fide*, in faith or ligeance nothing ought to be feigned, but ought to be *ex fide non ficta.* 6. The King holdeth the kingdom of *England* by birth right inherent, by deſcent from the blood royal, whereupon ſucceſſion doth attend; and therefore it is uſually ſaid, to the King, his heirs and ſucceſſors, wherein heirs is firſt named, and ſucceſſors attendant upon heirs. And yet in our antient books ſucceſſion and ſucceſſor are taken for hereditance and heirs. *Bracton lib.2. de acquirendo rerum domino, cap.29. Et ſciendum eſt, quod hæreditas eſt ſucceſſio in univerſum jus quod defunctus anteceſſor habuit, ex cauſa quacunque acquiſitionis vel ſucceſſionis, et alibi affinitatis jure nulla ſucceſſio permittitur.* But the title is by deſcent, by Queen *Elizabeths* death the crown and kingdom of *England* deſcended to his Majeſty, and he was fully and abſolutely thereby King, without any eſſential ceremony or act to be done *ex poſt facto*: for coronation is but a royal ornament and ſolemnization of the royal deſcent, but no part of the title. In the firſt year of his Majeſties reign, before his Majeſties coronation, *Watſon* and *Clerke*, Seminary prieſts, and others, were of opinion, that his Majeſty was no compleate and abſolute

To whom and how ligeance is due.

[b]

King

King before his coronation, but that coronation did add a confirmation and perfection to the deſcent; and therefore (obſerve their damnable damned conſequent) that they by ſtrength and power might [11] before his coronation take him and his royal iſſue into their poſſeſſion, keep him priſoner in the Tower, remove ſuch Counſellors and great officers as pleaſed them, and conſtitute others in their places, &c. And that theſe and others of like nature could not be Treaſon againſt his Majeſty, before he were a crowned King. But it was clearly reſolved by all the Judges of *England*, that preſently by the deſcent his Majeſty was completely and abſolutely King, without any eſſential ceremony or act to be done *ex poſt facto*, and that coronation was but an royal ornament, and outward ſolemnization of the deſcent. And this appeareth evidently by infinite Preſidents and book caſes, as (taking one example in a caſe ſo clear for all) King *Henry* the ſixt was not crowned until the eighth year of his reign, and yet divers men before his coronation were attainted of Treaſon, of Felony, &c. and he was as abſolute and compleate a King, both for matters of Judicature, as for grants, &c. before his coronation, as he was after, as it appeareth in the Reports of the 1, 2, 3, 4, 5, 6, and 7 years of the ſame King. And the like might be produced for many other Kings of this Realm, which for brevity in a caſe ſo clear I omit. By which it manifeſtly appeareth, that by the Laws of *England* there can be no *interregnum* within the ſame. If the King be ſeiſed of land by a diſeaſible title, and dieth ſeiſed, this deſcent ſhall tolle the entry of him that right hath, as it appeareth by 9 E. 4. 51. But if the next King hath it by ſucceſſion, that ſhould take away no entry, as it appeareth by *Littleton fol.* 97. If a diſſeiſor of an infant convey the land to the King, who dieth ſeiſed, this deſcent taketh away the entry of the Infant, as it is ſaid in 34 *H.* 6. *fol.* 34. 45. *lib. Aſſ. pl.* 6. *Plow. Com.* 234. where the caſe was, that King *H.* 3. gave a Mannor to his brother the Earl of *Cornwal* in tail (at what time the ſame was a fee ſimple conditional) King *H.* 3. dyed, the Earl before the Statute of *Donis conditional'* (having no iſſue) by deed exchanged the Mannor with warranty for other lands in fee, and dyed without iſſue, and the warranty and aſſets deſcended upon his nephew King *Edward* the firſt; and it was adjudged, that this warranty and aſſets, which deſcended upon the natural perſon of the King, barred him of the poſſibility of reverter. In the reign of *Edw.* 2. the *Spencers*, the father and the ſon, to cover the Treaſon hatched in their hearts, invented this damnable and damned opinion, That homage and oath of ligeance was more by reaſon of the Kings Crown (that is, of his politique capacity) than by reaſon of [b] the perſon of the King, upon which opinion they inferred execrable and deteſtable conſequents: 1. If the King do not demean himſelf by reaſon in the right of his Crown, his lieges be bound by oath to remove the King, 2. Seeing that the King could not be reformed by ſute of Law, that ought to be done *per effee*; 3. That his lieges be bound to govern in aid of him, and in default of him. All which were condemned by two Parliaments, one in the reign of *Edw.* 2. called *Exilium Hugonis le Spencer*, and the other in *Anno* 1 *Ed.* 3. *cap.* 1. *Bracton lib.* 2. *de acquirendo rerum dominio, cap.* 24. *fol.* 55. ſaith thus, *Eſt enim corona Regis facere juſticiam & judicium, & tenere pacem, & ſine quibus corona conſiſtere non poteſt nec tenere; hujuſmodi autem jura ſive juriſdictiones ad perſonas vel tenementa transferri non poterunt, nec a privata perſona poſſideri, nec uſus nec executio juris, niſi hoc datum fuit ei deſuper, ſicut juriſdictio delegata delegari non poterit quin ordinaria remaneat cum ipſo Rege. Et lib.* 3. *de actionibus, ca.* 9. *fol.* 107. *Seperare autem debet Rex, cum ſit Dei vicarius in terra, jus ab injuria, æquum ab iniquo, ut omnes ſibi ſubjecti honeſte vivant, & quod nullus alium lædat, & quod unicuique quod ſuum fuerit recta contributione reddatur.* In reſpect whereof one ſaith, That *Corona eſt quaſi cor ornans, cujus onementa ſunt miſericordia et juſticia.* And therefore a Kings Crown is an Hieroglyphick of the Laws, where Juſtice, &c. is adminiſtred; ſo ſaith *P. Val. lib.* 41. *pag.* 400. *Coronam dicimus legis judicium eſſe, propterea quod certis eſt vinculis complicata, quibus vita noſtra veluti religata coercetur.* Therefore if you take that which is ſignified by the Crown, that is, to do Juſtice and Judgment, to maintain the Peace of the Land, &c. to ſeperate right from wrong, and the good from the ill; that is to be underſtood of that capacity of the King, that *in rei veritate* hath capacity, and is adorned and indued with indowments as well of the Soul as of the body, and thereby able to do Juſtice and Judgment according to right and equity, and to maintain the peace, &c. and to find out and diſcern the truth, and not of the inviſible and immortal capacity that hath no ſuch indowments; for of it ſelf it hath neither ſoul nor body. And where divers Books and acts of Parliament ſpeak of the ligeance of *England*, as 31 *Ed.* 3. *tit. Coſinage* 5. 42 *Edw.* 32. 13 *E.* 3. *tit. Br.* 677. 25 *Edw.* 3. *Stat. de natis ultra mare.* All theſe and other ſpeaking briefly in a vulgar manner (for *loquendum ut vulgus*) and not pleading (for *ſentiendum ut docti*) are to be underſtood of the Ligeance due by the people of *England* to the King; for no man will affirm, that *England* itſelf, taking it for the Continent thereof, doth owe any ligeance or faith, or that any faith or [12] ligeance ſhould be due to it: but it manifeſtly appeareth, that the ligeance or faith of the Subject is *proprium quarto modo* to the King, *omni, ſoli, et ſemper.* And oftentimes in the Reports of our Book caſes, and in acts of Parliament alſo, the Crown or kingdome is taken for the King himſelf, as in *Fitzh. Natur. Brev. fol.* 5. Tenure *in capite* is a Tenure of the Crown, and is a Seigniorie in groſſe, that is of the perſon of the King: and ſo is 30 *Hen.* 8. *Dyer fol.* 44, 45. a Tenure in chief, as of the Crown, is meerly a Tenure of the perſon of the King, and therewith agreeth 28 *Hen.* 8. *tit. Tenure, Br.* 65. The Statute of 4 *Hen.* 5. *cap. ultimo* gave Priors aliens, which were conventual to the King and his heirs, by which gift ſaith 34 *H.* 6. 34. the ſame were annexed to the Crown. And in the ſaid Act of 25 *Edw.* 3. whereas it is ſaid in the beginning, within the ligeance of *England*, it is twice afterward ſaid in the ſame Act within the Ligeance of the King, and yet all one ligeance due to the King. So in 42 *Edw.* 3. *fol.* 2. where it is firſt ſaid, the Ligeance of *England*, it is afterwards in the ſame caſe called, the Ligeance of the King; wherein though they uſed ſeveral manner and phraſes of ſpeech, yet they intended one and the ſame Ligeance. So in our uſual Commiſſion of Aſſiſe, of Gaol delivery, of Oyer and Terminer, of the Peace, &c. power is given to execute Juſtice, *Secundum legem & conſuetudinem regni noſtri* Angliæ; and yet *Littleton lib.* 2. in his Chapter of Villenage *fol.* 43. in diſabling

of a man that is attainted in a Premunire saith, That the same is the Kings Law; and so doth the Register in the writ of *ad jura regia* style the same.

The reasons wherefore by the policy of the Law the King is a body politique, are three, *viz.* 1. *causa majestatis*, 2. *causa necessitatis*, and 3. *causa utilitatis*. First, *causa majestatis*, That the King cannot give or take but by the matter of Record for the dignity of his person. Secondly, *causa necessitatis*, as to avoid the attainder of him that hath right to the Crown, as it appeareth in 1 *H.*7.4. lest in the *interim* there should be *interregnum*, which the Law will not suffer. Also by force of this politique capacity, though the King be within age, yet may he make Leases and other Grants, and the same shall bind him; otherwise his Revenue should decay, and the King should not be able to reward service, &c. Lastly, *causa utilitatis*, as when lands and possessions descend from his collateral Ancestors, being Subjects, as from the Earl of *March*, &c. to the King, now is the King seised of the same *in jure coronæ*, in his politique capacity; for which cause the same shall go with the Crown; and therefore, albeit Queen *Eliz.* was of the half blood to Queen *Mary*, yet she in her body politique enjoyed all those fee simple lands, as by the Law she ought, and no collateral cosen of the whole blood to Queen *Mary* ought to have the same. And these are the causes wherefore by the policy of the Law the King is made a body politique: So as for these special purposes the Law makes him a body politique, immortal, and invisible, whereunto our ligeance cannot appertain. But to conclude this point; our ligeance is due to our natural liege Soveraign, descended of the blood Royal of the Kings of this Realm. And thus much of the first general part *de Ligeantia.*

The reasons wherefore the King by judgment of Law hath a politique capacity.

[*b*]

The second general part *De Legibus.*

Now followeth the second part, *de Legibus*, wherein these parts were considered: First, That the ligeance or faith of the Subject is due unto the King by the Law of Nature: Secondly, That the Law of Nature is part of the Law of *England*: Thirdly, That the Law of Nature was before any Judicial or Municipal Law: Fourthly, That the Law of Nature is immutable.

The Law of Nature.

The Law of Nature is that which God at the time of creation of the nature of man infused into his heart, for his preservation and direction; and this is *Lex æterna*, the Moral Law, called also the Law of Nature. And by this Law, written with the finger of God in the heart of Man, were the people of God a long time governed, before that Law was written by *Moses*, who was the first Reporter or Writer of the Law in the world. The Apostle in the second Chapter to the *Romans* saith, *Cum enim gentes quæ legem non habent naturaliter ea quæ legis sunt faciunt.* And this is within that command of the Moral Law, *Honora patrem*, which doubtless doth extend to him that is *pater patriæ.* And the Apostle saith, *Omnis anima potestatibus sublimioribus subdita sit.* And these be the words of the great Divine, *Hoc Deus in sacris Scripturis jubet, hoc lex Naturæ dictat, ut quilibet subditus obedist superiori.* And *Aristotle*, Natures Secretary *Lib.*5. *Æthic.* saith, That *jus naturale est, quod apud omnes homines eandem habet potentiam.* And herewith doth agree *Bracton lib.* 1. *cap.*5. and *Fortescue cap.* 8, 12, 13. & 16. *Doctor & Student cap.*2, & 4. And the reason hereof is, for that God and Nature is one to all, and therefore the Law of God and Nature is one to all. By this Law of Nature is the Faith, Ligeance, and Obedience of the Subject due to his Soveraign or Superiour. And *Aristotle* 1 *Politicorum* proveth, that to Command and to Obey is of Nature, and that Magistracy is of Nature: For whatsoever is necessary and profitable for the preservation of the society of man, is due by the Law of Nature: But Magistracy and Government are necessary and profitable for the preservation of the society of man; therefore Magistracy and Government are of Nature. And herewith accordeth *Tully lib.*3. *de Legibus*, *Sine imperio nec domus ulla, nec civitas, nec gens, nec hominum universum genus stare, nec ipse denique mundus potest.* This Law of Nature, which indeed is the eternal Law of the Creator, infused into the heart of the Creature at the time of his creation, was two thousand years before any Laws written, and before any Judicial or Municipal Laws. And certain it is, That before Judicial or Municipal Laws were made, Kings did decide causes according to natural equity, and were not tied to any rule or formality of Law, but did *dare jura.* And this appeareth by *Fortescue*, *cap.* 12, & 13. and by *Virgil* that Phylosophical Poet, 7 *Ænead.*

[13]

Hoc Priami gestamen erat, cum jura vocatis
More daret populis.

And 5 *Ænead.*

——— Gaudet regno Trojanus Acestes,
Indicitque forum & patribus dat jura vocatis.

And *Pomponius lib.*2. *cap. de origine juris*, affirmeth, that in *Tarquinius Superbus* time there was no Civil Law written, and that *Papirius* reduced certain observations into writing, which was called *Jus civile Papirianum.* Now the reason wherefore Laws were made and published, appeareth in *Fortescue cap.*13. and in *Tully lib.*2. *officiorum*: *At cum jus æquabile ab uno viro homines non consequerentur, inventæ sunt leges.* Now it appeareth by demonstrative reason, that Ligeance, Faith, and Obedience of the Subject to the Soveraign, was before any Municipal or Judicial Laws: 1. For that Government and Subjection were long before any Municipal or Judicial Laws: 2. For that it had been in vain to have prescribed Laws to any, but to such as ought Obedience, Faith, and Ligeance before, in respect whereof they were bound to obey and observe them: *Frustra enim feruntur leges nisi subditis & obedientibus.* Seeing then that Faith, Obedience, and Ligeance, are due by the Law of Nature, it followeth that the same cannot be changed or taken away; for albeit Judicial and Municipal Laws have inflicted and imposed in several places, or at several times, divers and several punishments and penalties for breach or not observance of the Law of Nature (for that Law only consisted in commanding or prohibiting, without any certain punishment or penalty) yet the very Law of Nature it self, never was nor could be altered or changed. And therefore it is certainly true, that *Jura naturalia sunt immutabilia.* And herewith agreeth *Bracton lib.*1. *cap.*5. and *Doctor and Student cap.* 5. & 6. And this appeareth plainly and plentifully in our Books.

[*b*]

If

If a man have a Ward by reason of a Seigniory, and is Outlawed, he forfeiteth the Wardship to the King: But if a man hath the Wardship of his own Son or Daughter, which is heir apparent, and is Outlawed, he doth not forfeit this Wardship; for nature hath annexed it to the person of the Father, as appeareth in 33 *H.* 6. 55. *Et bonus rex nihil a bono patre differt, & patria dicitur a patre, quia habet communem patrem, qui est pater patriæ.* In the same manner, *maris & fœminæ conjunctio est de jure naturæ*, as *Bracton* in the same book and chapter, and St. *Germin* in his book of the Doctor and Student, *cap.* 5. do hold. Now if he that is attainted of Treason or Felony, be slain by one that hath no authority, or executed by him that hath authority, but pursueth not his warrant, in this case his eldest son can have no appeal, for he must bring his appeal as heir, which being *ex provisione hominis*, he loseth it by the attainder of his Father: but his Wife (if any he have) shall have an appeal, because she is to have her appeal as Wife, which she remaineth notwithstanding the attainder, because *maris & fœminæ conjunctio* is *de jure naturæ*, and therefore (it being to be intended of true and right Matrimony) is indissoluble: and this is proved by the book in 33 *H.* 6. 57. So if there be Mother and Daughter, and the Daughter is attainted of felony, now cannot she be heir to her Mother for the cause aforesaid; yet after her attainder if she kill her Mother, this is Paricide and Petit-treason; for she remaineth her daughter, for this is of Nature, and herewith agreeth 21 *E.* 3. 17. *b.* If a man be attainted of Felony or Treason, he hath lost the Kings legal protection, for he is thereby utterly disabled to sue any action real or personal (which is a greater disability than an alien in league hath) and yet such a person so attainted hath not lost that protection which by the Law of Nature is given to the King; for that is *indelebilis & immutabilis*, and therefore the King may protect and pardon him, and if any man kill him [14] without warrant, he shall be punished by the Law as a Man-slayer; and thereunto accordeth 4 *Ed.* 4. and 35 *H.* 6. 57. 2 *Ass. pl.* 3. By the Statute of 25 *Ed.* 3. *cap.* 22. a man attainted in a *Præmunire*, is by expres words out of the Kings protection generally; and yet this extendeth only to legal protection, as it appeareth by *Littleton, fol.* 43. for the Parliament could not take away that protection which the Law of Nature giveth unto him; and therefore, notwithstanding that Statute, the King may protect and pardon him. And though by that Statute it was further enacted, That it should be done with him as with an Enemy, by which words any man might have slain such a person (as it is holden in 24 *H.* 8. *tit. Coron. Br.* 197.) until the statute made *anno* 5 *Eliz. cap.* 1. yet the King might protect and pardon him. A man Outlawed is out of the benefit of the Municipal Law; for so saith *Fitzh. Nat. Brev.* 161. *Utlagatus est quasi extra legem positus*: and *Bracton lib.* 3. *cap.* 11. saith, that *caput gerit lupinum*; yet is he not out either of his natural ligeance, or of the Kings natural protection; for neither of them are tyed to Municipal Laws, but is due by the Law of Nature, which (as hath been said) was long before any Judicial or Municipal Laws. And therefore if a man were Outlawed for Felony, yet was he within the Kings natural protection, for no man but the Sheriff could execute him, as it is adjudged in 2 *lib. Ass. pl.* 3. Every Subject is by his natural Ligeance bound to obey and serve his Soveraign, &c. It is enacted by the Parliament of 23 *H.* 6. that no man should serve the King as Sheriff of any County, above one year, and that, notwithstanding any clause of *non obstante* to the contrary, that is to say, notwithstanding that the King should expresly dispence with the said Statute: howbeit it is agreed in 2 *H.* 7. that against the expres purview of that act, the King may by a special *Non obstante* dispence with that act, for that the act could not bar the King of the service of his Subject, which the Law of Nature did give unto him. By these and many other cases that might be cited out of our books, it appeareth, how plentiful the authorities of our Laws be in this matter. Wherefore to conclude this point (and to exclude all that hath been or could be objected against it) if the obedience and ligeance of the Subject to his Soveraign, be due by the Law of Nature, if [b] that Law be parcel of the Laws as well of *England*, as of all other nations, and is immutable, and that *Postnati* and we of *England* are united by birthright in obedience and ligeance (which is the true cause of natural subjection) by the Law of Nature; It followeth, that *Calvin* the Plaintiff being born under one ligeance to one King, cannot be an alien born; And there is great reason, that the Law of Nature should direct this case, wherein five natural operations are remarkable; First, the King hath the Crown of *England* by birthright, being naturally procreated of the bloud royal of this Realm: Secondly, *Calvin* the Plaintiff naturalized by procreation and birthright, since the descent of the Crown of *England*, Thirdly, ligeance and obedience of the subject to the Soveraign, due by the Law of Nature; Fourthly, protection and government due by the Law of Nature; Fifthly, this case, in the opinion of divers, was more doubtfull in the beginning, but the further it proceeded, the cleerer and stronger it grew; and therefore the doubt grew from some violent passion, and not from any reason grounded upon the Law of Nature, *quia quanto magis violentus motus (qui fit contra naturam) appropinquat ad suum finem, tanto debiliores & tardiores sunt ejus motus; sed naturalis motus, quanto magis appropinquat ad suum finem, tanto fortiores & velociores sunt ejus motus.* Hereby it appeareth how weak the objection grounded upon the rule of *Quando duo jura concurrunt in una persona, &c.* is: For that rule holdeth not in personal things, that is, when two persons are necessarily and inevitably required by Law (as in the case of an alien born there is; and therefore no man will say, that now the King of *England* can make war or league with the King of *Scotland*, *& sic de cæteris*: And so in case of an alien born, you must of necessity have two several ligeances to two several persons. And to conclude this point concerning Laws, *Non adversatur diversitas regnorum sed regnantium, non patriarum sed patrum patriarum, non coronarum sed coronatorum, non legum municipalium sed regum majestatum.* And therefore thus were directly and clearly answered as well the objections drawn from the severalty of the Kingdoms, seeing there is but one head of both, and the *Postnati* and us joined in ligeance to that one head, which is *copula & tanquam oculus* of this case; as also the distinction of the Laws, seeing that ligeance of the Subjects of both Kingdoms, is due to their Soveraign by one Law, and that is the Law of Nature.

For

The third general part concerning both kingdoms.

For the third, It is first to be understood, that as the Law hath wrought four unions, so the law doth still make four seperations. The first union is of both kingdoms under one natural liege Soveraign King, and so acknowledged by the Act of Parliament of recognition. The second is an union of ligeance and obedience of the Subjects of both kingdoms, due by the law of nature to their Soveraign: [15] And this union doth suffice to rule and over-rule the case in question; and this in substance is but a uniting of the hearts of the Subjects of both kingdoms one to another, under one head and soveraign. The third union is an union of protection of both kingdoms, equally belonging to the subjects of either of them: And therefore the two first arguments or objections drawn from two supposed several ligeances, were fallacious, for they did *disjungere conjungenda*. The fourth union and conjunction is, of the three Lions of *England*, and that one of *Scotland*, united and quartered in one escucheon.

Concerning the seperations yet remaining: First, *England* and *Scotland* remain several and distinct kingdoms: 2. They are governed by several judicial or municipal Laws; 3. They have several distinct and separate Parliaments; 4. Each kingdom hath several Nobilities; For albeit a *Postnatus* in *Scotland*, or any of his posterity, be the heir of a Nobleman of *Scotland*, and by his birth legitimated in *England*, yet he is none of the Peers or Nobility of *England*: for his natural ligeance and obedience, due by the Law of nature, maketh him a Subject, and no alien within *England*: but that subjection maketh him not noble within *England*, for that Nobility had his original by the Kings creation, and not of nature. And this is manifested by expres authorities, grounded upon excellent reasons in our books. If a Baron, Vicount, Earl, Marques, or Duke of *England*, bring any action real or personal, and the defendant pleadeth in abatement of the writ, that he is no Baron, Vicount, Earl, &c. and thereupon the demandant or Plaintiff taketh issue; this issue shall not be tryed by Jury, but by the record of Parliament, whether he or his ancestor, whose heir he is, were called to serve there as a Peer, and one of the Nobility of the Realm. And so are our books adjudged in 22 *Ass.* 24. 48 *Edw.* 3. 30. 35 *H.* 6. 40. 20 *Eliz. Dyer* 360. *Vide in the 6. part of my Reports, in the Countes of Rutlands Case*, So as the man, that is not *de jure* a Peer, or one of the Nobility, to serve in the upper house of the Parliment of *England*, is not in the legal proceedings of Law accounted Noble within *England*. And therefore if a Countee of *France* or *Spain*, or any other foreign kingdom, should come into *England*, he should not here sue, or be sued, by the name of Countee, &c. for that he is none of the Nobles that are members of the [b] upper house of the Parliament of *England*: and herewith agreeth the Book cases of 20 *Edw.* 4. 6. and 11 *Edw.* 3. *tit. Bre.* 473. Like Law it is, and for the same reason, of an Earl or Baron of *Ireland*, he is not any Peer, or of the Nobility of this Realm: and herewith agreeth the Book in 8 *R.* 2. *tit. Proces pl. ultim.* where in an action of Debt proces of Outlawry was awarded against the Earl of *Ormond* in *Ireland*; which ought not to have been, if he had been noble here. *Vide Dyer* 20 *Eliz.* 360.

But yet there is a diversity in our books worthy of observation, for the highest and lowest dignities are universal; for if a King of a forreign nation come into *England*, by the leave of the King of this Realm (as it ought to be) in this case he shall sue and be sued by the name of a king: and herewith agreeth 11 *E.* 3. *tit. Br.* 473. where the case was, that *Alice*, which was the wife of *R. de O.* brought a writ of Dower against *John* Earl of *Richmond*, and the writ was, *Præcip. Johann. Comiti Richmondiæ cujus terræ et hæredis* of *William* the son of *R. de O.* the tenant pleaded, That he is Duke of *Britaine*, not named Duke, judgment of the writ? But it is ruled, that the writ was good, for that the Dukedom of *Brittain* was not within the Realm of *England*. But there it is said, that if a man bring a writ against *Edward Baliol*, and name him not King of *Scotland*, the writ shall abate for the cause afore said. And hereof there is a notable president in *Fleta lib.* 2. *cap.* 14. where treating of the jurisdiction of the Kings Court of Marshalsey it is said, *Et hæc omnia ex officio suo licite facere poterit, (sc. Seneschallus aulæ hospitii Regis) non obstante alicujus libertate, etiam in alieno regno dum tamen reus in hospitio Regis poterit inveniri, secundum quod contigit Paris. anno* 14 *Ed.* 1. *de Engelramo de Nogent capto in hospitio Regis* Angliæ *(ipso Rege tunc apud Parisiam existente) cum discis argenti furatis recenter super focis, Rege* Franciæ *tunc præsente, et unde licet curia Regis* Franciæ *de prædicto latrone per castellanum Paris. petita fuerit habitis hic et inde tractatibus, in consilio Regis* Franciæ *tandem consideratum fuit, quod Rex* Angliæ *illa regia prærogativa et hospitii sui privilegio uteretur et gauderet, qui, coram* Roberto Fitz-John *milite tunc hospitii Regis* Angliæ *Seneschallo de latrocinio convictus, per considerationem ejus Curiæ fuit suspensus in patibulo Sancti Germani de Pratis.* Which proveth, that though the King be in a forreign kingdom, yet he is judged in Law a King there. The other part of the said diversity, is proved by the book case in 20 *Ed.* 4. *fol.* 6. where, in a writ of debt brought by Sir *John Duglas* Knight, against *Elizab. Molford*, the defendant demanded judgment of the writ, for that the Plaintiff was an Earl [16] of *Scotland*, but not of *England*; and that our Soveraign Lord the King had granted unto him safe conduct, not named by his name of dignity, judgment of the writ, &c. And there Justice *Littleton* giveth the rule: the Plaintiff (saith he) is an Earl in *Scotland*, but not in *England*; and if our Soveraign Lord the King grant to a Duke of *France* a safe conduct to merchandise, and enter into his Realm, if the Duke commeth and bringeth merchandise into this land, and is to sue an action here, he ought not to name himself Duke, for he is not a Duke in this land, but only in *France*. And these be the very words of that book case: out of which I collect three things. First, that the Plaintiff was named by the name of a Knight, whersoever he received that degree of dignity, *Vide* 7 *H.* 6. 14. *accord.* 2. That an Earl of another kingdom or nation is no Earl (to be so named in legal proceedings) within this Realm: and herewith agreeth the book 11 *Ed.* 3. the Earl of *Richmonds* Case before recited. 3. That albeit the King by his Letters Patents of safe conduct do name him Duke, yet that appellation maketh him no Duke, to sue or to be sued by that name within *England*: So as the Law in these points apparent (in our books) being observed, and rightly understood it appeareth how causeless their fear was, that the adjudging of the Plaintiff to be no alien should make a confusion of the Nobilities of either kingdom.

Now

Now are we in order come to the fourth Noun (which is the 4. general part) *Alienigena*; wherein 6. things did fall into conſideration. 1. Who was *Alienigena*, an alien born born by the Laws of *England*. 2. How many kinds of aliens born there were. 3. What incidents belonged to an alien born. 4. The reaſon why an alien is not capable of inheritance or freehold within *England*. 5. Examples, reſolutions, and judgments, reported in our books in all ſucceſſion of ages, proving the Plaintiff to be no alien. 6. Demonſtrative concluſions upon the premiſſes, approving the ſame. The fourth general part De Alienigina.

1. An Alien is a ſubject that is born out of the ligeance of the King, and under the ligeance of another, and can have no real or perſonal action for or concerning land; but in every ſuch action the tenant or defendant may plead, that he was born in ſuch a Country which is not within the ligeance of the King, and demand if he ſhall be anſwered. And this is in effect the diſcription which *Littleton* himſelf maketh, *lib. 2. cap. Villen. fol.* 43. *Alienigena eſt alienæ gentis ſeu alienæ ligeantiæ, qui etiam dicitur peregrinus, alienus, exoticus, extraneus*, &c. *Extraneus eſt ſubditus, qui extra terram, i. poteſtatem Regis natus eſt.* And the uſual and right pleading of an alien born, doth lively and truly deſcribe and expreſs what he is. And therein two things are to be obſerved; 1. That the moſt uſual and beſt pleading in this caſe is, both excluſive and incluſive, *viz. extra ligeantiam domini Regis*, &c: *et infra ligeantiam alterius Regis*, as it appeareth in 9 *Ed.* 4. 7. *Book of Entries fol.* 244. &c. which cannot poſſibly be pleaded in this caſe, for two cauſes; Firſt, for that one King is Soveraign of both kingdoms; 2. One ligeance is due by both to one Soveraign, and in caſe of an alien, there muſt of neceſſity be ſeveral Kings and ſeveral liegeances. Secondly no pleading was ever *extra regnum*, or *extra legem*, which are circumſcribed to place, but *extra ligeantiam*, which (as it hath been ſaid) is not local or tied to any place. Who is an Alien. [b]

It appeareth by *Bracton lib.* 3. *tract.* 2. *c. p.* 15. *fol.* 134. that *Canutus* the *Daniſh* king, having ſetled himſelf in this kingdom in peace, kept notwithſtandſng (for the better continuance thereof) great Armies within this Realm. The Peers and Nobles of *England* diſtaſting this government, by armes and armies, (*Odimus accipitrem quia ſemper vivit in armis*) wiſely and politiquely perſwaded the king, that they would provide for the ſafety of him and his people, and yet his armies carrying with them many inconveniences, ſhould be withdrawn; And therefore offered, that they would conſent to a law, that whoſoever ſhould kill an alien, and be apprehended, and could not acquit himſelf, he ſhould be ſubject to juſtice: but if the manſlayer fled, and could not be taken, then the Town where the man was ſlain ſhould forfeit 66 marks unto the King: and if the Town were not able to pay it, then the Hundred ſhould forfeit and pay the ſame unto the Kings treaſure; whereunto the King aſſented. This Law was penned, *Quicunque occiderit Francigenam*, &c. not excluding other aliens, but putting *Francigena* a French man for example, that others muſt be like unto him, in owing ſeveral ligeance to a ſeveral Soverain, that is, to be *extra ligeantiam Regis* Angliæ, and *infra ligeantiam alterius Regis*. And it appeareth before out of *Bracton* and *Fleta*, that both of them uſe the ſame examples (in deſcribing of an alien) ad *fidem Regis* Franciæ. And it was holden, that except it could be proved, that the party ſlain was an Engliſh man, that he ſhould be taken for an alien; and this was called Engleſheire, *Engleſheria*, that is, a proof that the party ſlain was an Engliſh man. (Hereupon *Canutus* preſently withdrew his armies, and within a while after loſt his crown, and the ſame was reſtored to his right owner) The ſaid law of Engleſherie continued until 14 *Ed.* 3. *cap.* 4. and then ſame was by Act of Parliament ouſted and aboliſhed. So amongſt the laws of *William* the firſt, (publiſhed by Maſter *Lambert fol.* 125. *Omnis Francigena* (there put for example as before is ſaid, to expreſs what manner of perſon *alienigena* ſhould be) *qui tempore* Edwardi *propinqui noſtri fuit particeps legum et conſuetudinum Anglorum* (that is, made denizen) *quod dicunt ad Scot & lot perſolvat ſecundum legem Anglorum.* [17]

Every man is either *Alienigena*, an Alien born, or *ſubditus*, a Subject born. Every Alien is either a friend that is in league, &c. or an enemy that is in open war, &c. Every Alien enemy is either *pro tempore*, temporary for a time, or *perpetuus*, perpetual, or *ſpecialiter permiſſus*, permitted eſpecially. Every Subject is either *natus*, born, or *datus*, given or made: And of theſe briefly in their order. An Alien friend, as at this time, a German, a Frenchman, a Spaniard, &c. (all the Kings and Princes in Chriſtendom being now in league with our Soveraign, but a Scot being a Subject, cannot be ſaid to be a friend, nor *Scotland* to be *ſolum amici*) may by the Common Law have, acquire, and get within this Realm, by gift, trade, or other, lawfull means, any treaſure, or goods perſonal whatſoever, as well as an Engliſhman, and may maintain any action for the ſame: But Lands within this Realm, or houſes (but for their neceſſary habitation only) Alien friends cannot acquire, or get, nor maintain any action real or perſonal, for any land or houſe, unleſs the houſe be for their neceſſary habitation. For if they ſhould be diſabled to acquire and maintain theſe things, it were in effect to deny unto them trade and traffique, which is the life of every Iſland. But if this Alien become an enemy (as all Alien friends may) then he is utterly diſabled to maintain any action, or get any thing within this Realm. And this is to be underſtood of a temporary Alien, that being an enemy may be a friend, or being a freind may be an enemy. But a perpetual enemy (though there be no wars by fire and ſword between them) cannot maintain any action, or get any thing within this Realm. All infidels are in Law *perpetui inimici*, perpetual enemies (for the Law preſumes not that they will be converted, that being *remota potentia*, a remote poſſibility) for between them, as with the devils, whoſe ſubjects they be, and the Chriſtian, there is perpetual hoſtility, and can be no peace; for as the Apoſtle ſaith, 2 *Cor.* 6. 15. *Quæ autem conventio Chriſti ad Belial, aut quæ pars fideli cum infideli*, and the Law ſaith, *Judæo Chriſtianum nullum ſerviat mancipium, nefas enim eſt quem Chriſtus redemit blaſphemum Chriſti in ſervitutis vinculis detinere.* *Regiſter* 282. *Infideles ſunt Chriſti et Chriſtianorum inimici.* And herewith agreeth the Booke in 12 *Hen.* 8. *fol.* 4. where it is holden that a pagan cannot have or maintain any action at all. How many kind of Aliens there be. [c]

And

By what Laws kingdoms gotten by conqueſt, &c. ſhall be governed.

And upon this ground there is a diverſity between a conqueſt of a kingdom of a Chriſtian King, and the conqueſt of a kingdom of an Infidel; for if a King come to a Chriſtian kingdom by conqueſt, ſeeing that he hath *vitæ et necis poteſtatem*, he may at his pleaſure alter and change the Laws of that kingdom, but until he doth make an alteration of thoſe Laws, the antient Laws of that kingdom remain. But if a Chriſtian King ſhould conquer a kingdom of an Infidel, and bring them under his ſubjection, there *ipſo facto* the Laws of the Infidel are abrogated, for that they be not only againſt Chriſtianity, but againſt the Law of God and of Nature, contained in the Decalogue, and in that caſe, until certain Laws be eſtabliſhed amongſt them, the King by himſelf, and ſuch Judges as he ſhall appoint, ſhall judge them and their cauſes according to natural equity, in ſuch ſort as Kings in antient time did with their kingdoms, before any certain Municipal Laws were given, as before hath been ſaid. But if a King have a kingdom by title of deſcent, there, ſeeing by the Laws of that kingdom he doth inherit the kingdom, he cannot change thoſe Laws of himſelf, without conſent of Parliament. Alſo if a King have a Chriſtian kingdom by conqueſt, as King *Henry* the ſecond had *Ireland*, after King *John* had given unto them, being under his obedience and ſubjection, the Laws of *England* for the government of that Country, no ſucceeding King could alter the ſame without Parliament. And in this caſe whiles the Realm of *England* and that of *Ireland* were governed by ſeveral Laws, any that was born in *Ireland* was no Alien to the Realm of *England*. In which preſident of *Ireland* three things are to be obſerved: 1. That then there had been two diſcents, one from *Henry* the ſecond to King *Richard* the firſt, and from *Richard* to King *John*, before the alteration of the Laws. 2. That albeit *Ireland* was a diſtinct Dominion, yet the title thereof being by Conqueſt, the ſame by judgment of Law might by expreſs words be bound by act of the Parliament of *England*. 3. That albeit no reſervation were in King *Johns* Charter, yet by judgment of Law a Writ of *Error* did lie in the Kings Bench in *England* of an erroneous Judgment in the kings bench of *Ireland*. Furthermore, in the caſe of a conqueſt of a Chriſtian kingdom, as well thoſe that ſerved in Wars at the Conqueſt, as thoſe that remained at home for the ſafety and peace of their Country, and other the kings ſubjects, as well *Antenati* as *Poſtnati*, are capable of lands in the kingdom or country conquered, and may maintain any real action, and have the like priviledges and benefits there, as they may have in *England*.

Ireland.

[18]

The third kind of enemy is, *inimicus permiſſus*, an enemy that cometh into the Realm by the Kings ſafe conduct, of which you may read in the *Regiſter fol.* 25. *Book of Entries Ejectione firmæ* 7. 32 *H.* 6. 23. &c. Now what a Subject born is, appeareth at large by that which hath been ſaid *de ligeantia*; and ſo likewiſe *de ſubdito dato*, of a *donaiſon*; for that is the right name, ſo called, becauſe his legitimation is given unto him; for if you derive denizen from *deins nee*, one born within the obedience or liegeance of the King, then ſuch a one ſhould be all one with a natural born ſubject. And it appeareth before out of the Laws of King *W.* 1. of what antiquity the making of denizens by the King of *England* hath been.

Of the incidents to an Alien.

3. There be regulary (unleſs it be in ſpecial caſes) three incidents to a ſubject born. 1. That the parents be under the actual obedience of the King. 2. That the place of his birth be within the Kings dominion. And 3. the time of his birth is chiefly to be conſidered; for he cannot be a ſubject born of one kingdom that was born under the ligeance of a king of another kingdom, albeit afterwards one kingdom deſcend to the king of the other. For the firſt, it is termed actual obedience, becauſe though the King of *England* hath abſolute right to other kingdoms or dominions, as *France*, *Aquitain*, *Normandy*, &c. yet ſeeing the King is not in actual poſſeſſion thereof, none born there ſince the Crown of *England* was out of actual poſſeſſion thereof, are Sujects to the King of *England*. 2. The place is obſervable, but ſo as many times ligeance or obedience, without any place within the kings dominions may make a ſubject born, but any place within the Kings dominions without obedience can never produce a natural ſubject. And therefore if any of the kings Ambaſſadors in forreign Nations, have children there of their wives, being Engliſh women, by the Common Laws of *England* they are natural born ſubjects, and yet they are born out of the kings dominions. But if Enemies ſhould come

[*b*]

into any of the Kings dominions, and ſurpriſe any Caſtle or Fort, and poſſeſs the ſame by hoſtility, and have iſſue there, that iſſue is no ſubject to the King, though he be born within his dominions, for that he was not born under the kings ligeance or obedience. But the time of his birth is of the eſſence of a ſubject born; for he cannot be a ſubject to the king of *England*, unleſs at the time of his birth he was under the ligeance and obedience of the king. And that is the reaſon that *Antenati* in *Scotland* (for that at the time of their birth they were under the ligeance and obedience of another king) are Aliens born, in reſpect of the time of their birth.

Wherefore an Alien born is not capable of Lands.

4. It followeth next in courſe to ſet down the reaſons, wherefore an Alien born is not capable of inheritance within *England*, and that he is not for three reaſons. 1. The ſecrets of the Realm might thereby be diſcovered. 2. The revenues of the Realm (the ſinews of War, and Ornament of Peace) ſhould be taken and enjoyed by ſtrangers born. 3. It ſhould tend to the deſtruction of the Realm. Which three reaſons do appear in the Statutes of 2 *Hen.* 5. *cap.* and 4 *H. cap. ultimo.* But it may be demanded, Wherein doth that deſtruction conſiſt? Whereunto it it anſwered: Firſt, it tends to deſtruction *tempore belli*; for then ſtrangers might fortifie themſelves in the heart of the Realm, and be ready to ſet fire on the Commonwealth, as was excellently ſhadowed by the Trojan Horſe in *Virgils* ſecond Book of his *Eneads*, where a very few men in the heart of the City, did more miſchief in few hours, than ten thouſand men without the walls in ten years. Secondly, *tempore pacis*, for ſo might many Aliens born get a great part of the inheritance and freehold of the Realm, whereof there ſhall follow a failer of Juſtice (the ſupporter of the Commonwealth) for that Aliens born cannot be returned of Juries for the tryal of Iſſues between the king and the ſubject, or between ſubject and ſubject. And for this purpoſe, and many other, ſee a Charter (worthy of obſervation) of king *Edw.* 3. written to Pope *Clement*, *Datum apud* Weſtm. 26. *die Sept. ann. regni noſtri* Franciæ 4. *regni* Angliæ 17.

5. Now

5. Now are we come to the Examples, Reſolutions, and Judgments of former times; wherein two things are to be obſerved: Firſt, How many Caſes in our Books do over-rule this Caſe in queſtion (for *ubi eadem ratio ibi idem jus, & de ſimilibus idem eſt judicium.* 2. That for want of an expreſs Text of Law *in terminis terminantibus*, and of examples and preſidents in like caſes (as was objected by ſome) we are driven to determine the queſtion by natural reaſon: for it was ſaid, *Si ceſſet lex ſcripta id cuſtodiri oportet quod moribus & conſuetudine inductum eſt, & ſi qua in re hoc defecerit, recurrendum eſt ad rationem.* But that receiveth a threefold anſwer: Firſt, That there is no ſuch rule in the Common or Civil Law; but the true rule of the Civil Law is, *Lex ſcripta ſi ceſſet, id cuſtodiri oportet quod moribus & conſuetudine inductum eſt, & ſi qua in re hoc defecerit, tunc id quod proximum & conſequens ei eſt, & ſi id non appareat, tunc jus quo urbs* Romana *utitur, ſervari oportet.* Secondly, If the ſaid imaginative rule be rightly and legally underſtood, it may ſtand for truth: for if you intend *ratio* for the legal and profound reaſon of ſuch as by diligent ſtudy and long experience and obſervation are ſo learned in the Laws of this Realm, as out of the reaſon of the ſame they can rule the caſe in queſtion, in that ſenſe the ſaid rule is true: But if it be intended of the reaſon of the wiſeſt man that profeſſeth not the Laws of *England*, then (I ſay) the rule is abſurd and dangerous; for *cuilibet in ſua arte perito eſt credendum, & quod quiſque norit in hoc ſe exerceat. Et omnes prudentes illa admittere ſolent quæ probantur iis qui in ſua arte bene verſati ſunt. Ariſt. 1. Topicorum, cap. 6.* Thirdly, There be multitudes of Examples, Preſidents, Judgments, and Reſolutions in the Laws of *England*, the true and unſtrained reaſon whereof doth decide this queſtion; for example: The Dukedom of *Acquitain*, whereof *Gaſcoin* was parcel, and the Earldom of *Poytiers*, came to King *Henry* the Second by the marriage of *Elianor*, daughter and heir of *William* Duke of *Acquitain*, and Earl of *Poytiers*, which deſcended to *Rich. 1. Hen. 3. Ed. 1. Ed. 2. Ed. 3. &c.* In 27. *lib. Aſſ. pl.* 48. in one caſe there appear two Judgments and one Reſolution to be given by the Judges of both Benches in this Caſe following. The poſſeſſions of the Prior of *Chelſey* in time of War were ſeiſed into the Kings hands, for that the Prior was an alien born: The Prior by petition of right ſued to the King, and the effect of his Petition was, That before he came Prior of *Chelſey*, he was Prior of *Andover*, and whiles he was Prior there, his poſſeſſions of that Priory were likewiſe ſeiſed for the ſame cauſe, ſuppoſing that he was an alien born; whereupon he ſued a former petition, and alledged that he was born in *Gaſcoin* within the ligeance of the King: which point being put in Iſſue and found by Jury to be true, it was adjudged he ſhould have reſtitution of his poſſeſſions generally without mentioning of advowſons. After which reſtitution, one of the ſaid advowſons became void, the Prior preſented, againſt whom the King brought a *Quare Impedit*, wherein the King was barred, and all this was contained in the latter petition. And the Book ſaith, that the Earl of *Arundel*, and Sir *Guy de B.* came into the Court of *Common Pleas*, and demanded the opinion of the Judges of that Court concerning the ſaid Caſe, who reſolved, that upon the matter aforeſaid the King had no right to ſeize. In which caſe, amongſt many notable points, this one appeareth to be adjudged and reſolved, that a man born in *Gaſcoin* under the Kings ligeance, was no alien born, as to lands and poſſeſſions within the Realm of *England*, and yet *England* and *Gaſcoin* were ſeveral and diſtinct Countries. 2. Inherited by ſeveral and diſtinct titles. 3. Governed by ſeveral and diſtinct Municipal Laws, as it appeareth amongſt the Records in the Tower, *Rot. Vaſc.* 10 *Ed.* 1. *Num.* 7. 4. Out of the extent of the Great Seal of *England*, and the Juriſdiction of the *Chancery* of *England*. 5. The like Objection may be made for default of trial, as hath been made againſt the Plaintiff. And where it was ſaid that *Gaſcoin* was no Kingdom, and therefore it was not to be matched to the caſe in hand, it was anſwered, that this difference was not without a diverſity as to the caſe in queſtion; for if the plea in the Caſe at the Bar be good, then without queſtion the Prior had been an alien; for it might have been ſaid (as it is in the Caſe at Bar) that he who was born *extra ligeantiam Regis Regni ſui* Angliæ, *& infra ligeantiam Dominii ſui Vaſconiæ*, and that they were ſeveral Dominions, and governed by ſeveral Laws: But then ſuch a conceit was not hatched, that a King having ſeveral Dominions ſhould have ſeveral ligeances of his Subjects. Secondly, it was anſwered, That *Gaſcoin* was ſometime a Kingdom, as likewiſe *Millain*, *Burgundy*, *Bavair*, *Britain*, and others were, and now are become Dukedoms. *Caſtile*, *Arragon*, *Portugal*, *Barcelona*, *&c.* were ſometime Earldoms, afterwards Dukedoms, and now Kingdoms. *Bohemia* and *Polonia* were ſometimes Dukedoms, and now Kingdoms, and (omitting many other, and coming nearer home) *Ireland* was before 32 *H.* 8. a Lordſhip, and now is a Kingdom, and yet the King of *England* was as abſolute a Prince and Soveraign when he was Lord of *Ireland*, as now, when he is ſtiled King of the ſame. 10 *Ed.* 3. 41. an exchange was made between an *Engliſhman* and a *Gaſcoin*, of lands in *England* and in *Gaſcoin*; *Ergo* the *Gaſcoin* was no alien, for then had he not been capable of lands in *England*, 1 *H.* 4. 1. the King brought a Writ of right of Ward againſt one *Sybil*, whoſe husband was exiled into *Gaſcoin*; *Ergo Gaſcoin* is no parcel or member of *England*, for *exilium eſt patriæ privatio, natalis ſoli mutatio, legum nativarum amiſſio*, 4 E. 4. 10. the King directed his Writ out of the *Chancery* under the Great Seal of *England*, to the Mayor of *Burdeaux* (a City in *Gaſcoin*) then being under the Kings obedience, to certifie, whether one that was outlawed here in *England*, was at that time in the Kings ſervice under him *in obſequio Regis*: whereby it appeareth, that the Kings Writ did run into *Gaſcoin*, for it is the trial that the Common Law hath appointed in that caſe. But as to other caſes, it is to be underſtood, that there be two kind of Writs, *viz. Brevia mandatoria & remedialia, & brevia mandatoria & non remedialia: brevia mandatoria & remedialia*, as Writs of Right, of *Formedon*, *&c.* of Debt, Treſpaſs, &c. and ſhortly, all Writs real and perſonal, whereby the party wronged is to recover ſomewhat, and to be remedied for that wrong that was offered unto him, are returnable or determinable in ſome Court of Juſtice within *England*, and to be ſerved and executed by the Sheriffs, or other Miniſters of Juſtice within *England*, and theſe cannot by any means extend into any other Kingdom, Country or Nation, though that be under the Kings actual ligeance and obedience. But the other kind of Writs that are mandatory, and not remedial, are not tied to any place, but do follow ſubjection and ligeance; in

Examples and Authorities in Law.

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Gaſcoine. Vaſconia. Gaſconia.

[b]

Vaſconia appellata fuit tempore Caroli magni regnum de Vaſconia.

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what Country or Nation ſoever the Subject is, as the Kings Writ to command any of his Subjects reſiding in any forreign Country to return into any of the Kings own Dominions, *Sub fide & ligeantia quibus nobis tenemini.* And ſo are the aforeſaid mandatory Writs cited out of the *Regiſter* of Protection for ſafety of Body and Goods, and requiring, that if any injury be offered, that the ſame be redreſſed according to the Laws and Cuſtoms of that place. *Vide le Regiſter, fol. 26. Stamford Prærog. cap. 12. fol. 39.* ſaith, That men born in *Gaſcoin* are inheritable to lands in *England.* This doth alſo appear by divers Acts of Parliament: for by the whole Parliament, 39 E. 3. *cap.* 16. it is agreed, that the *Gaſcoins* are of the ligeance and ſubjection of the King. *Vide* 42 *Edw.* 3. *cap.* 2. & 28 *H.* 6. *cap.* 5. *&c.*

Guyen. Guienna.

Guyen was another part of *Aquitain*, and came by the ſame title: and thoſe of *Guyen* were by Act of Parliament in 13 *H.* 4. not imprinted, *ex Rott. Parliament. eodem anno*, adjudged and declared to be no aliens, but able to poſſeſs and purchaſe, &c. lands within this Realm. And ſo doth *Stamford* take the Law, *Prærog. c.* 12. *f.* 39. And thus much of the Dukedom of *Aquitaine*, which (together with the Earldom of *Poytiers*) came to King *Henry* the Second (as hath been ſaid) by marriage, and continued in the actual poſſeſſion of the Kings of *England* by ten deſcents, *viz.* from the firſt year of King *Henry* the Second, unto the two and thirtieth year of King *Henry* the Sixth, which was upon the very point of three hundred years, within which Dutchy there were (as ſome write) 4 Archbiſh. 24 Biſhop. 15 Earldoms, 202 Baronies, and above a thouſand Captainſhips and Bailiwicks: and in all this long time neither Book-Caſe nor Record can be found wherein any plea was offered to diſable any of them that were born there, by forreign Birth, but the contrary hereof directly appeareth by the ſaid Book-Caſe of 27 *lib. Aſſ.* 48.

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Normandy. Normannia. Normandia.

The Kings of *England* had ſometime *Normandy* under actual ligeance and obedience. The queſtion is then, whether men born in *Normandy*, after one King had them both, were inheritable to lands in *England*; and it is evident by our Books that they were: for ſo it appeareth by the declaratory Act of 17 E. 2. *de Prærogativa Regis, c.* 12. that they were inheritable to and capable of lands in *England*: for the purview of that Statute is, *Quod Rex habebit eſcaetas de terris* Normannorum, &c. *Ergo Normans* might have lands in *England*: *& hoc ſimiliter intelligendum eſt, ſi aliqua hæreditas deſcendat alicui nato in partibus tranſmarinis, &c.* Whereby it appeareth, that they were capable of lands within *England* by deſcent. And that this Act of 17 E. 2. was but a declaration of the Common Law, it appeareth both by *Bracton* who (as it hath been ſaid) wrote in the Reign of *Henry* the Third, *lib.* 3. *tract.* 2. *c.* 1. *f.* 116. and by *Britton* who wrote in 5 E. 1. *c.* 18. that all ſuch lands as any *Norman* had either by deſcent or purchaſe, eſcheated to the King for their treaſon, in revolting from their natural liege Lord and Soveraign. And therefore *Stamford Prærog. cap.* 12. *fol.* 39. expounding the ſaid Statute of 17 E. 2. *cap.* 12. concludeth, that by that Chapter it ſhould appear (as if he had ſaid, it is apparent without queſtion) that all men born in *Normandy*, *Gaſcoin*, *Guyan*, *Anjou*, and *Britain*, (whiles they were under actual obedience) were inheritable within this Realm as well as *Engliſh*-men. And the reaſon was, for that they were under one ligeance due to one Soveraign. And ſo much (omitting many other authorities) for *Normandy*: ſaving I cannot let paſs the Iſles of *Jernſey* and *Gerſey*, parts and parcels of the Dukedom of *Normandy*, yet remaining under the actual ligeance and obedience of the King. I think no man will doubt, but thoſe that are born in *Jernſey* and *Gerſey* (though thoſe Iſles are no parcel of the Realm of *England*, but ſeveral Dominions, enjoyed by ſeveral titles, governed by ſeveral Laws) are inheritable and capable of any lands within the Realm of *England*, 1 E. 3. *fol.* 7. Commiſſion to determine the title of lands within the ſaid Iſles, according to the Laws of the Iſles: and *Mich.* 41 E. 3. in the Treaſury, *Quia negotium prædictum nec aliqua alia negotia de inſula prædict. emergentia non debent terminari niſi ſecundum legem inſulæ prædict. &c.* And the *Regiſter, fol.* 22. *Rex fidelibus ſuis de Jerſey & Gerſey.* King *William* the Firſt brought this Dukedom of *Normandy* with him, which by five deſcents continued under the actual obedience of the Kings of *England*, and in or about the ſixth year of King *John*, the Crown of *England* loſt the actual poſſeſſion thereof, until King *Henry* the Fifth recovered it again, and left it to King *Henry* the Sixth, who loſt it in the 28*th* year of his Reign: wherein were (as ſome write) one Archbiſhoprick, and ſix Biſhopricks, and an hundred ſtrong Towns and Fortreſſes, beſides thoſe that were waſted in War. *Maud* the Empreſs, the only daughter and heir to *Henry* the Firſt, took to her ſecond husband *Jeffery Plantaginet*, Earl of *Anjou*, *Tourein*, and *Mayne*, who had iſſue King *H.* 2. to whom the ſaid Earldom by juſt title deſcended, who, and the Kings that ſucceeded him, ſtiled themſelves by the name of *Comes Andegaviæ, &c.* until King *E.* 3. became King of all *France*: and ſuch as were born within that Earldom, ſo long as it was under the actual obedience of the King of *England*, were no aliens, but natural born Subjects, and never any offer made that we can find to diſable them for forreign Birth.

Jernſey *and* Gerſey.

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Manne. Mannia.

But leave we *Normandy* and *Anjou*, and ſpeak we of the little, but yet ancient and abſolute Kingdom of the Iſle of *Man*, as it appeareth by divers ancient and authentick Records; as taking one for many. *Artold* King of *Man* ſued to King *H.* 3. to come into *England* to confer with him, and to perform certain things which were due to King *H.* 3. thereupon King *H.* 3. 28. *Decemb. ann. Regn. ſui* 34. at *Wincheſter* by his Letters Patents gave licence to *Artold* King of *Man* as followeth; *Rex omnibus ſalutem. Sciatis, quod licentiam dedimus, &c.* Artoldo *Regi de* Manne *veniendo ad nos in* Angliam *ad loquend' nobiſc', & ad faciend' nobis quod facere debet; & ideo vobis mandamus quod ei Regi in veniendo ad nos in* Angl', *vel ibi morando, vel inde redeundo nullum faciatis aut fieri permittatis damnum, injuriam, moleſtiam, aut gravamen, vel etiam hominibus ſuis quos ſecum ducet, & ſi aliquid eis forisfactum fuerit, id eis ſine dilatione faciatis emendari. In cujus, &c. duratur. uſq; ad feſtum Sancti* Michaelis. Wherein two things are to be obſerved; 1. That ſeeing that *Artold* King of *Man* ſued for a licence in this caſe to the King, it proveth him an abſolute King, for that a Monarch or an abſolute Prince cannot come into *England* without licence of the King, but a ſubject being in league, may come into this Realm without licence; 2. That the King in his licence doth ſtile him by the name of a King. It was reſolved in 11 *H.* 8. that where an office was found after the deceaſe of *Thomas* Earl of *Darby*, and that he died ſeiſed, &c. of the Iſle of *Man*, that

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that the ſaid office was utterly void, for that the Iſle of *Man*, *Normandy*, *Gaſcoin*, *&c.* were out of the power of the *Chancery*, and governed by ſeveral Laws; and yet none will doubt, but thoſe that are born within that Iſle, are capable and inheritable of lands within the Realm of *England*. *Wales* was ſometimes a Kingdom, as it appeareth by 19 *H.* 6. *fol.* 6. and by the Act of Parliament of 2 *H.* 5. *cap.* 6. but whiles it was a Kingdom, the ſame was holden, and within the fee, of the King of *England*: and this appeareth by our Books, *Fleta*, *lib.* 1. *cap.* 16. 1 *E.* 3. 14. 8 *E.* 3. 59. 13 *E.* 3. *tit. Juriſdict.* 10 *H.* 4. 6. *Plow. Com.* 368. And in this reſpect, in divers ancient Charters, Kings of old time ſtyled themſelves in ſeveral manners, as King *Edgar*, *Britanniæ* Βασιλεὺς, *Etheldrus*, *totius Albionis Dei providentia Imperator*, *Edredus magnæ Britaniæ Monarcha*, which among many other of like nature I have ſeen. But by the Statute of 12 *E.* 1. *Wales* was united and incorporated into *England*, and made parcel of *England* in poſſeſſion; and therefore it is ruled in 7 *H.* 4. *fol.* 14. that no protection doth lie *quia moratur in Wallia*, becauſe *Wales* is within the Realm of *England*. And where it is recited in the Act of 27 *H.* 8. that *Wales* was ever parcel of the Realm of *England*, it is true in this ſenſe, *viz.* that before 12 *E.* 1. it was parcel in tenure, and ſince it is parcel of the body of the Realm. And whoſoever is born within the fee of the King of *England*, though it be in another Kingdom, is a natural born Subject, and capable and inheritable of lands in *England*, as it appeareth in *Plow. Com.* 126. And therefore thoſe that were born in *Wales* before 12 *E.* 1. whiles it was only holden of *England*, were capable and inheritable of lands in *England*.

Wales. Cambria. Wallia.

Now come we to *France* and the members thereof, as *Callice*, *Guynes*, *Tournay*, *&c.* which deſcended to King *Ed.* the Third as ſon and heir to *Iſabel*, daughter and heir to *Philip le Beau*, King of *France*. Certain it is, whiles King *Henry* the Sixth had both *England*, and the heart and greateſt part of *France*, under his actual Ligeance and Obedience (for he was Crowned King of *France* in *Paris*) that they that were then born in thoſe parts of *France*, that were under actual Ligeance and Obedience, were no aliens, but capable of, and inheritable to lands in *England*. And that is proved by the Writs in the *Regiſter*, *fol.* 26. cited before. But in the inrolment of Letters Patents of Denization in the Exchequer *int. originalia*, *Anno* 11 *H.* 6. with the Lord Treaſurers Remembrancer, was ſtrongly urged and objected: for (it was ſaid) thereby it appeareth, that King *H.* 6. in *Anno* 11. of his Reign, did make denizen one *Reynel*, born in *France*: Wheunto it was anſwered, that it is proved by the ſaid Letters Patents, that he was born in *France* before King *Henry* the Sixth had the actual poſſeſſion of the Crown of *France*, ſo as he was *Antenatus*: and this appeareth by the ſaid Letters Patents, whereby the King granteth, that *Magiſter* Johannes Reynel *ſerviens noſter*, *&c. infra Regnum noſtrum* Franciæ *oriundus*, *pro termino vitæ ſuæ ſit ligeus noſter*, *& eodem modo teneatur ſicut verus & fidelis noſter infra Regnum* Angliæ *oriundus*, *ac quod ipſe terras infra Regnum noſtrum* Angliæ *ſeu alia Dominia noſtra perquirere poſſit & valeat*. Now if that *Reynel* had been born ſince *Henry* the Sixth had the quiet poſſeſſion of *France* (the King being Crowned King of *France* about one year before) of neceſſity he muſt be an Infant of very tender age, and then the King would never have called him his ſervant, nor made the Patent (as thereby may be collected) for his ſervice, nor called him by the name of *Magiſter Johannes Reynel*: But without queſtion he was *Antenatus*, born before the King had the actual and real poſſeſſion of that Crown.

France. Gallia. Francia. [22]

Callice is a part of the Kindgom of *France*, and never was parcel of the Kingdom of *England*, and the Kings of *England* enjoyed *Callice* in and from the Reign of King *Edward* the Third, until the loſs thereof in Queen *Maries* time, by the ſame title that they had to *France*. And it is evident by our Books, that thoſe that were born in *Callice*, were capable and inheritable to lands in *England*, 42 *E.* 3. *cap.* 10. *Vide* 21 *H.* 7. 33. 19 *H.* 6. 2 *E.* 4. 1. 39 *H.* 6. 39. 21 *E.* 4. 18. 28 *H.* 6. 3. *b.* By all which it is manifeſt, that *Callice* being parcel of *France*, was under the actual obedience and commandment of the King, and by conſequent thoſe that were born there, were natural born Subjects, and no Aliens. *Callice* from the Reign of King *Ed.* 3. until the fifth year of Queen *Mary*, remained under the actual obedience of the King of *England*. *Guines* alſo, another part of *France*, was under the like obedience to King *Henry* the Sixth, as appeareth by 31 *H.* 6. *fol.* 4. And *Tournay* was under the obedience of *Henry* the Eighth, as it appeareth by 5 *Eliz. Dier*, *fol.* 224. for there it is reſolved, that a baſtard born at *Tournay*, whiles it was under the obedience of *Henry* the Eighth, was a natural Subject, as an iſſue born within this Realm by Aliens. If then thoſe that were born at *Tournay*, *Callice*, *&c.* whiles they were under the obedience of the King were natural Subjects, and no Aliens, it followeth, that when the Kingdom of *France* (whereof thoſe were parcels) was under the Kings obedience, that thoſe that were then born there, were natural Subjects, and no Aliens.

Callice. Calecia. Caletum. [b] Guines. Tournay.

Next followeth *Ireland*, which originally came to the Kings of *England* by Conqueſt, but who was the firſt Conqueror thereof, hath been a queſtion. I have ſeen a Charter made by King *Edgar*, in theſe words: *Ego* Edgarus Anglorum Βασιλεὺς, *omniumq; inſularum Oceani*, *quæ* Britanniam *circumjacent*, *Imperator & Dominus*, *gratias ago ipſi Deo omnipotenti Regi meo*, *qui meum Imperium ſic ampliavit & exaltavit ſuper Regnum patrum meorum*, *&c. mihi conceſſit propitia divinitas*, *cum* Anglorum *Imperio omnia Regna inſularum Oceani*, *&c. cum ſuis ferociſſimis Regibus uſque Norvegiam*, *maximamque partem* Hiberniæ, *cum ſua nobiliſſima civitate de* Dublina, Anglorum *Regno ſubjugare*, *quapropter & ego Chriſti gloriam & laudem in Regno meo exaltare*, *& ejus ſervitium amplificare devotus diſpoſui*, *&c.* Yet for that it was wholly Conquered in the Reign of *Henry* the Second, the honour of the Conqueſt of *Ireland* is attributed to him, and his ſtile was, *Rex* Angliæ, *Dominus* Hiberniæ, *Dux* Normanniæ, *Dux* Aquitaniæ, *& comes* Andegaviæ, King of *England*, Lord of *Ireland*, Duke of *Normandy*, Duke of *Aquitain*, and Earl of *Anjou*. That *Ireland* is a Dominion ſeparate and divided from *England*, it is evident by our Books, 20 *H.* 6. 8. Sir *John Pilkington*'s Caſe, 32 *H.* 6. 26. 20 *Eliz. Dyer* 360. *Plow. Com.* 360. And 2 *R.* 3. 12. *Hibernia habet Parliamentum*, *& faciunt leges*, *& noſtra Statuta non ligant eos*, *quia non mittunt milites ad Parliamentum* (which is to be underſtood, unleſs they be eſpecially named) *ſed perſonæ eorum ſunt ſubjecti Regis*, *ſicut Inhabitantes in* Caleſia, Gaſconia *&* Guyan. Wherein it is to be obſerved, that the *Iriſh* man (as to his ſubjection)

Ireland. Hibernia.

ſubjection) is compared to men born in *Calice*, *Gaſcoin*, and *Guyan*. Concerning their Laws, *Ex rotulis patentium de Anno* 11 *Regis H.* 3. there is a Charter which that King made, beginning in theſe words:

[23] *Rex, &c. Baronibus, militibus & omnibus libere tenentibus* L. *ſalutem, ſatis ut credimus veſtra audivit diſcretio, quod quando bonæ memoriæ* Johannes *quondam Rex* Angliæ *pater noſter venit in* Hiberniam, *ipſe duxit ſecum viros diſcretos & legis peritos, quorum communi conſilio & ad inſtantiam* Hibernenſium *Statuit & præcepit leges* Anglicanas *in* Hibernia, *ita quod leges eaſdem in Scripturas redactas reliquit ſub ſigillo ſuo ad ſcaccarium* Dublin. So as now the Laws of *England* became the proper Laws of *Ireland*; and therefore, becauſe they have Parliaments holden there, whereat they have made divers particular Laws concerning that Dominion, as it appeareth in 20 *H.* 6. 8. & 20 *Eliz. Dyer* 360. and for that they retain unto this day divers of their ancient Cuſtoms, the Book in 20 *H.* 6. 8. holdeth, that *Ireland* is governed by Laws and Cuſtoms, ſeparate and divers from the Laws of *England*. A Voyage-Royal may be made into *Ireland*. *Vide* 11 *H.* 4. 7. & 7 *E.* 4. 27. which proveth it a diſtinct Dominion. And in *Anno* 33 *Reg. El.* it was reſolved by all the Judges of *England* in the caſe of *Orurke* an *Iriſh* man, who had committed High Treaſon in *Ireland*, that he by the Statute of 33 *H.* 8. *c.* 23. might be indicted, arraigned, and tried for the ſame in *England*, according to the purview of that Statute: the words of which Statute be, *That all Treaſons, &c. committed by any perſon out of the Realm of* England, *ſhall be from henceforth inquired of, &c.* And they all reſolved (as afterward they did alſo in Sir *John Perrot*'s Caſe) That *Ireland* was out of the Realm of *England*, and that Treaſons committed there, were to be tried within *England* by that Statute. In the Statute of 4 *H.* 7. *cap.* 24. of *Fines*, proviſion is made for them that be out of this land, and it is holden in *Plow. Com.* in *Stowel*'s Caſe 375. that he that is in *Ireland*, is out of this land, and conſequently within that proviſo. Might not then the like plea be deviſed as well againſt any perſon born in *Ireland*, as (this is againſt *Calvin* that is a *Poſt-natus*) in *Scotland*? For the *Iriſh* man is born *extra ligeantiam Regis Regni ſui* Angliæ, &c. which be *verba operativa* in the plea: But all men know, that they are natural born Subjects, and capable of and inheritable to lands in *England*. Laſtly, to

Scotland. Scotia. conclude this part with *Scotland* it ſelf; in ancient time part of *Scotland* (beſides *Berwick*) was within the power and ligeance of the King of *England*, as it appeareth by our Books 42 *E.* 3. 2. the Lord *Beaumount*'s Caſe, 11 *E.* 3. *c.* 2. *&c.* and by Preſidents hereafter mentioned; and that part (though it were under the King of *Englands* ligeance and obedience) yet was governed by the Laws of *England*. *Ex rot.* Scotiæ, *Anno* 11 *E.* 3. amongſt the Records in the Tower of *London*. *Rex, &c. Conſtituimus* Rich.

[b] Talebot *Juſticiarium noſtrum villæ* Berwici *ſuper* Twedam, *ac omnium aliarum terrarum noſtrarum in partibus* Scotiæ, *ad faciend' omnia & ſingula quæ ad officium Juſticiarii pertinent ſecundum legem & conſuetudinem Regni* Scotiæ. And after *Anno* 26 *E.* 3. *ex eodem rot. Rex* Henrico *de* Percey & Richardo *de* Nevil, &c. *volumus & vobis & alteri veſtrum tenore præſentium committimus & mandamus, quod homines noſtri de* Scotia *ad pacem & obedientiam noſtram exiſtentes, legibus, libertatibus, & liberis conſuetudinibus, quibus ipſi & anteceſſores ſui tempore celebr6 memoriæ* Alexandri *quondam Regis* Scotiæ *rationabiliter uſi fuerunt, uti & gaudere deberent, prout in quibuſdam Indenturis, &c. plenius dicitur contineri.* And there is a Writ in the *Regiſter* 295. *a. Dedimus poteſtatem recipiendi ad fidem & pacem noſtram homines de Galloway.* Now the Caſe in 42 *Edw.* 3. 2. (which was within ſixteen years of the ſaid grant, concerning the Laws in 26 *E.* 3.) ruleth it, That ſo many as were born in that part of *Scotland*, that was under the ligeance of the King, were no aliens, but inheritable to lands in *England*; yet was that part of *Scotland* in another Kingdom governed by ſeveral Laws, &c. And if they were natural Subjects in that caſe, when the King of *England* had but part of *Scotland*, what reaſon ſhould there be, why thoſe that are born there, when the King hath all *Scotland*, ſhould not be natural Subjects, and no Aliens? So likewiſe

Barwick. *Barwick* is no part of *England*, nor governed by the Laws of *England*; and yet they that have been born there, ſince they were under the obedience of one King, are natural born Subjects, and no Aliens, as it appeareth in 15 *R.* 2. *cap.* 7. *&c. Vide* 19 *H.* 6. 35. & 39 *H.* 6. 39. And yet in all theſe caſes and examples, if this new deviſed plea had been ſufficient, they ſhould have been all Aliens againſt ſo many judgments, reſolutions, authorities, and judicial Preſidents in all ſucceſſions of ages. There were ſometimes in *England*, whiles the Heptarchy laſted, ſeven ſeveral Crowned Kings of ſeveral and diſtinct Kingdoms, but in the end the *Weſt Saxons* got the Monarchy, and all the other Kings melted (as it were) their Crowns to make one Imperial Diadem for the King of the *Weſt Saxons* over all. Now when the whole was under the actual and real ligeance and obedience of one King, were any that were born in any of thoſe ſeveral and diſtinct Kingdoms, Aliens one to another? Certainly they being born under the obedience of one King and Soveraign, were all natural born Subjects, and capable of and inheritable unto any lands in any of the ſaid Kingdoms.

[24] In the holy Hiſtory reported by St. *Luke*, *Ex dictamine ſpiritus ſancti, cap.* 21. & 22. *Act. Apoſtolorum*, it is certain, that St. *Paul* was a *Jew*, born in *Tarſus*, a famous City of *Cilicia*: for it appeareth in the ſaid 21. Chapter, 39 verſe, by his own words: *Ego homo ſum quidem* Judæus *a Tarſo* Ciliciæ *non ignota civitatis municeps.* And in the 22. Chapter, 3. verſe, *Ego ſum vir* Judæus *natus Tarſo* Ciliciæ, &c. and then made that excellent Sermon there recorded, which when the *Jews* heard, the Text ſaith, verſe 22. *Levaverunt vocem ſuam dicentes, tolle de terra hujuſmodi, non enim fas eſt eum vivere: vociferantibus autem eis & projicientibus veſtimenta ſua, & pulverem jactantibus in aerem, Claudius Lyſias* the popular Tribune, to pleaſe this turbulent and prophane multitude (though it were utterly againſt juſtice and common reaſon) the Text ſaith, *Juſſit Tribunus induci eum in caſtra, 2. flagellis cædi, & 3. torqueri eum (quid ita?) ut ſciret & propter quam cauſam ſic acclamarent:* and when they had bound *Paul* with cords, ready to execute the Tribunes unjuſt commandment, the bleſſed Apoſtle (to avoid unlawful and ſharp puniſhment) took hold of the law of a Heathen Emperour, and ſaid to the Centurion ſtanding by him, *Si hominem* Romanum *& indemnatum licet vobis flagellare?* Which when the Centurion heard, he went to the Tribune, and ſaid, *Quid acturus es? Hic enim homo civis* Romanus *eſt.* Then came the Tribune to *Paul*, and ſaid unto him: *Dic mihi ſi tu* Romanus *es? at ille dixit, etiam.* And the Tribune anſwered, *Ego multis*

multa ſumma civitatem hanc conſequutus ſum. But *Paul* not meaning to conceal the dignity of his birth-right, ſaid, *Ego autem & natus ſum:* as if he ſhould have ſaid to the Tribune, you have your freedom by purchaſe of money, and I (by a more noble mean) by birth-right and inheritance. *Protinus ergo* (ſaith the Text) *diceſſerunt ab allo qui illum torturi erant, Tribunus quoque timuit poſtquam reſcivit, quia civis* Romanus *eſſet, & quia alligaſſet eum.* So as hereby it is manifeſt, that *Paul* was a *Jew*, born at *Tarſus* in *Cilicia*, in *Aſia Minor*, and yet being born under the obedience of the *Roman* Emperour, he was by birth a Citizen of *Rome* in *Europa*, that is, capable of and inheritable to all priviledges and immunities of that City. But ſuch a plea as is now imagined againſt *Calvin* might have made St. *Paul* an Alien to *Rome*. For if the Emperour of *Rome* had ſeveral ligeances for every ſeveral Kingdom and Country under his obedience, then might it have been ſaid againſt St. *Paul*, that he was *extra ligeantiam Imperatoris Regni ſui* Italiæ, *& infra ligeantiam Imperatoris Regni ſui* Ciliciæ, &c. But as St. *Paul* was *Judæus patria & Romanus privilegio*, Judæus *natione &* Romanus *jure nationum*; ſo may *Calvin* ſay, that he is *Scotus patria &* Anglus *privilegio*, Scotus *natione &* Anglus *jure nationum.* [b]

Samaria in *Syria* was the chief City of the ten Tribes; but it being uſurped by the King of *Syria*, and the *Jews* taken priſoners, and carried away in captivity, was after inhabited by the *Panyms*. Now albeit *Samaria* of right belonged to *Jury*, yet becauſe the people of *Samaria* were not under actual obedience, by the Judgment of the Chief Juſtice of the whole World they were adjudged *Alienigenæ*, Aliens: For in the Evangeliſt St. *Luke*, *c.* 17. when Chriſt had cleanſed the ten Leapers, *Unus autem ex illis* (ſaith the Text) *ut vidit quia mundatus eſſet, regreſſus eſt, cum magna voce magnificans Deum, & cecidit in faciem ante pedes ejus gratias agens, & hic erat* Samaritanus. *Et Jeſus reſpondens dixit, nonne decem mundati ſunt, & novem ubi ſunt? Non eſt inventus qui rediret & daret gloriam Deo niſi hic alienigena.* So as by his judgment this *Samaritan* was *Alienigena*, a Stranger born, becauſe he had the place, but wanted obedience. *Et ſi deſit obedientia non adjuvat locus.* And this agreeth with the Divine, who ſaith, *Si locus ſalvare potuiſſet, Satan de cœlo pro ſua inobedientia non cecidiſſet.* Adam *in Paradiſo non cecidiſſet*, Lot *in monte non cecidiſſet, ſed potius in* Sodom.

6. Now reſteth the ſixth part of this diviſion, that is to ſay, ſix demonſtrative illations, or concluſions, drawn plainly and expreſly from the premiſes.

1. Every one that is an Alien by birth, may be, or might have been an enemy by accident; but *Calvin* could never at any time be an enemy by any accident; *Ergo* he cannot be an alien by birth. *Vide* 33 H. 6. *fol.* 1. the difference between an alien enemy and a ſubject traytor. *Hoſtes ſunt qui nobis, vel quibus nos bellum decernimus, cæteri proditores, prædones, &c.* The *major* is apparent, and is proved by that which hath been ſaid. *Et vide Magna Charta, cap.* 30. 19 E. 4. 6. 9 E. 3. *c.* 1. 27 E. 3. *c.* 2. 4 H. 5. *c.* 7. 14 E. 2. *ſtat.* 2. *c.* 2. *&c.*

2. Whoſoever are born under one natural ligeance and obedience, due by the Law of Nature to one Soveraign, are natural born Subjects: But *Calvin* was born under one natural ligeance and obedience, due by the Law of Nature to one Soveraign; *Ergo* he is a natural born ſubject. [p]

3. Whoſoever is born within the Kings power or protection, is no Alien: But *Calvin* was born under the Kings power and protection; *Ergo* he is no Alien. [25]

4. Every ſtranger born muſt at his birth be either *amicus*, or *inimicus:* But *Calvin* at his birth could neither be *amicus* nor *inimicus*; *Ergo* he is no ſtranger born. *Inimicus* he cannot be, becauſe he is *ſubditus*, for that cauſe alſo he cannot be *amicus*; neither now can *Scotia* be ſaid to be *ſolum amici*, as hath been ſaid.

5. Whatſoever is due by the law or conſtitution of man, may be altered: But natural ligeance or obedience of the ſubject to the Soveraign cannot be altered; *Ergo* natural ligeance or obedience to the Soveraign is not due by the law or conſtitution of man. Again, whatſoever is due by the Law of Nature, cannot be altered: But ligeance and obedience of the ſubject to the Soveraign is due by the Law of Nature; *Ergo* it cannot be altered. It hath been proved before, that ligeance or obedience of the inferior to the ſuperior, of the ſubject to the Soveraign, was due by the Law of Nature many thouſand years before any Law of man was made: Which ligeance or obedience (being the only mark to diſtinguiſh a ſubject from an alien) could not be altered; therefore it remaineth ſtill due by the Law of Nature. For *Leges naturæ perfectiſſimæ ſunt & immutabiles, humani vero juris conditio ſemper in infinitum decurrit, & nihil eſt in eo quod perpetuo ſtare poſſit. Leges humanæ naſcuntur, vivunt, & moriuntur.*

Laſtly, whoſoever at his birth cannot be an alien to the King of *England*, cannot be an alien to any of his ſubjects of *England:* But the Plaintiff at his birth could be no alien to the King of *England*; *Ergo* the Plaintiff cannot be an alien to any of the ſubjects of *England.* The *major* and *minor* both be *propoſitiones perſpicuæ veræ.* For as to the *major* it is to be obſerved, that whoſoever is an alien born, is ſo accounted in Law in reſpect of the King: And that appeareth firſt by the pleading ſo often before remembred, that he muſt be *extra ligeantiam Regis*, without any mention making of the ſubject. 2. When an alien born purchaſeth any lands, the King only ſhall have them, though they be holden of a ſubject, in which caſe the ſubject loſeth his Seigniory. And as it is ſaid in our Books, an Alien may purchaſe *ad proficuum Regis*; but the act of Law giveth the alien nothing: And therefore if a woman alien marrieth a ſubject, ſhe ſhall not be endowed, neither ſhall an alien be tenant by the courteſie. *Vide* 3 H. 6. 55. 4 H. 3. 179. 3. The ſubject ſhall plead, that the Defendant is an alien born for the benefit of the King, that he upon office found may ſeize, and 2. that the Tenant may yield to the King the land, and not to the alien, becauſe the King hath beſt right thereunto. 4. Leagues between our Soveraign and others are the only means to make aliens friends, *& fœdera percutere*, to make Leagues, only and wholly pertaineth to the King. 5. Wars do make aliens enemies, and *bellum indicere* belongeth only and wholly to the King, and not to the ſubject, as appeareth in 19 Ed. 4. *fol.* 6. 6. The King only without the ſubject may make not only Letters of ſafe conduct, but Letters Patents of Denization, to whom, and how many he will, and enable them at his pleaſure to ſue any of his [b]

Subjects

Subjects in any action whatſoever, real or perſonal, which the King could not do without the ſubject, if the ſubject had any intereſt given unto him by the Law in any thing concerning an alien born. Nay, the Law is more preciſe herein than in a number of other caſes, of higher nature: for the King cannot grant to any other to make of ſtrangers born denizens, it is by the Law it ſelf ſo inſeparably and individually annexed to his Royal Perſon (as the Book is in 20 *H.* 7. *fol.* 8.) For the Law eſteemeth it a point of high Prerogative, *Jus Majeſtatis, & inter inſignia ſummæ poteſtatis*, to make aliens born ſubjects of the Realm, and capable of the lands and inheritances of *England*, in ſuch as any natural born ſubject is. And therefore by the Statute of 27 *H.* 8. *cap.* 24. many of the moſt ancient Prerogatives and royal Flowers of the Crown, as authority to pardon Treaſon, Murther, Manſlaughter, and Felony, power to make Juſtices in Eyre, Juſtices of Aſſiſe, Juſtices of Peace and Gaol-Delivery, and ſuch like, having been ſevered and divided from the Crown, were again reunited to the ſame: But authority to make Letters of Denization, was never mentioned therein to be reſumed, for that never any claimed the ſame by any pretext whatſoever, being a matter of ſo high a point of Prerogative. So as the pleading againſt an alien, the purchaſe by any alien, leagues and wars between aliens, denizations, and ſafe conducts of aliens, have aſpect only and wholly unto the King. It followeth therefore, that no man can be alien to the ſubject that is not an alien to the King, *Non poteſt eſſe alienigena corpori, qui non eſt capiti, non gregi qui non eſt Regi.*

a

The authorities of Law cited in this caſe for maintenance of the Judgment, 4 *H.* 3. *tit. Dower. Bracton, lib.* 5. *fol.* 427. *Fleta, lib.* 6. *cap.* 47. *In temps* E. 1. *Hingham's Report.* 17 *Ed.* 2. *cap.* 12. 11 *Ed.* 3. *cap.* 2. 14 *Ed.* 3. *Statut. de Francia.* 42 *Ed.* 3. *fol.* 2. 42 *Ed.* 3. *cap.* 10. 22 *Lib. Aſſ.* 25. 13 *Rich.* 2. *cap.* 2. 15 *Rich. cap.* 7. 11 *Hen. fol.* 19. 13 *H.* 4. *fol.* 26. 14 *Hen.* 4. *fol.* 19. 13 *Hen.* 4. *Statutum de Guyan.* 29 *Hen.* 6. *tit. Eſtoppel* 48. 28 *H.* 6. *cap.* 5. 32 *Hen.* 6. *fol.* 23. 32 *Hen.* 6. *fol.* 26. *Littl. tempt Ed.* 4. *lib.* 2. *cap. Villenage.* 15 *Ed.* 4. *fol.* 15. 19 *Ed.* 4. 6. 22 *Ed.* 4. *cap.* 8. 2 *Rich.* 3. 2. & 12. 6 *Hen.* 8. *fol.* 2. *Dyer.* 14 *H.* 8. *cap.* 2. No manner of ſtranger born out of the Kings Obeyſance, 22 *Hen.* 8. *cap.* 2. Every perſon born out of the Realm of *England*, out of the Kings Obeyſance, 32 *H.* 8. *cap.* 16. 25 *H.* 8. *cap.* 15. *&c.* 4 *Ed.* 6. *Plowd. Comment. fol.* 2. *Fogaſſa's* Caſe. 2 & 3 *Phil. & Mar. Dyer* 145. *Shirley's* Caſe. 5 *Eliz. Dyer* 224. 13 *Eliz. cap.* 7. *de Bankrupts.* All Commiſſions ancient and late, for the finding of Offices, to intitle the King to the lands of the Alienee: Alſo all Letters Patents of Denization of ancient and later times do prove, That he is no alien that is born under the Kings Obedience.

[26]

The 5. general part concerning Inconveniences.

Now are we come to conſider of legal inconveniences: And firſt of ſuch as have been objected againſt the Plaintiff, and ſecondly of ſuch as ſhould follow, if it had been adjudged againſt the Plaintiff.

Of ſuch inconveniences as were objected againſt the Plaintiff, there remain only four to be anſwered; for all the reſt are clearly and fully ſatisfied before: 1. That if *Poſtnati* ſhould be inheritable to our laws and inheritances, it were reaſon that they ſhould be bound by our Laws; but *Poſtnati* are not bound by our Statute or Common Laws; for they having (as it was objected) never ſo much Freehold or Inheritance, cannot be returned of Juries, nor ſubject to ſcot or lot, nor chargeable to Subſidies or Quinzimes, nor bound by any Act of Parliament made in *England*. 2. Whether one be born within the Kingdom of *Scotland*, or no, is not triable in *England*, for that it is a thing done out of this Realm, and no Jury can be returned for the tryal of any ſuch Iſſue: And what inconvenience ſhould thereof follow, if ſuch pleas that wanted tryal ſhould be allowed (for then all aliens might imagine the like plea) they that objected it, left it to the conſideration of others. 3. It was objected, that this Innovation was ſo dangerous, that the certain event thereof no man could foreſee, and therefore ſome thought it fit, that things ſhould ſtand and continue as they had been in former time, for fear of the worſt. 4. If *Poſtnati* were by Law legitimated in *England*, it was objected what inconvenience and confuſion ſhould follow, if (for the puniſhment of us all) the Kings Royal Iſſue ſhould fail, &c. whereby thoſe Kingdoms might again be divided. All the other arguments and objections that have been made, have been all anſwered before, and need not to be repeated again.

[b]

1. To the firſt it was reſolved, That the cauſe of this doubt was the miſtaking of the Law: For if a *Poſtnatus* do purchaſe any lands in *England*, he ſhall be ſubject in reſpect thereof, not only to the Laws of this Realm, but alſo to all ſervices and contributions, and to the payment of Subſidies, Taxes, and publique Charges, as any Denizen or *Engliſh* man ſhall be; nay, if he dwell in *England*, the King may command him by a Writ of *Ne exeat Regnum*, that he depart not out of *England*. But if a *Poſtnatus* dwell in *Scotland*, and have lands in *England*, he ſhall be chargeable for the ſame to all intents and purpoſes, as if an *Engliſh*-man were owner thereof, and dwelt in *Scotland*, *Ireland*, in the Iſles of *Man*, *Jernſey*, or *Gerſey*, or elſewhere. The ſame Law is of an *Iriſh*-man that dwels in *Ireland*, and hath land in *England*. But if *Poſtnati*, or *Iriſh*-men, men of the Iſles of *Man*, *Jernſey*, *Gerſey*, *&c.* have lands within *England*, and dwell here, they ſhall be ſubject to all ſervices and publique Charges within this Realm, as any *Engliſh*-man ſhall be. So as to ſervices and charges, the *Poſtnati* and *Engliſh*-men born are all in one predicament.

2. Concerning the trial, a threefold anſwer was thereunto made and reſolved: 1. That the like Objection might be made againſt *Iriſh*-men, *Gaſcoins*, *Normans*, men of the Iſles of *Man*, *Jernſey*, and *Gerſey*, of *Berwick*, *&c.* all which appear by the rule of our Books to be natural born ſubjects; and yet no Jury can come out of any of thoſe Countries and places, for trial of their Births there. 2. If the Demandant or Plaintiff in any action concerning lands be born in *Ireland*, *Jernſey*, *Gerſey*, *&c.* out of the Realm of *England*, if the Tenant or Defendant plead, that he was born out of the ligeance of the King, &c. the Demandant or Plaintiff may reply, that he was born under the ligeance of the King at ſuch place within *England*; and upon the evidence the place ſhall not be material, but only the Iſſue ſhall

ſhall be, whether the Demandant or Plaintiff were born under the ligeance of the King in any of his Kingdoms or Dominions ſoever: And in that caſe the Jury (if they will) may find the ſpecial matter, *viz.* the place where he was born, and leave it to the judgment of the Court; and that Jurors may take knowledge of things done out of the Realm in this and like caſes, *vide* 7 *H.* 7. 8. *b.* 20 *Ed.* 3. *Averment* 34. 5 *Rich.* 2. *tit. Trial* 54. 15 *Ed.* 4. 15. 32 *Hen.* 6. 25. *Fitz. Nat. Br.* 196. *Vive Dowdale's* Caſe, in the *Sixth part of my Reports, fol.* 47. and there divers others Judgments be vouched. 3. *Brown in Anno* 32 *Hen.* 6. reporteth a Judgment then lately given, that where the Defendant pleaded, that the Plaintiff was a Scot, born at St. *Johns* Town in *Scotland*, out of the ligeance of the King; whereupon they were at Iſſue, and that Iſſue was tried where the Writ was brought, and that appeareth alſo by 27 *Aſſ pl.* 24. that the Jury did find the Prior to be born in *Gaſcoin:* for ſo much is neceſſarily proved by the words *trove fuit.*) And 20 *Ed.* 3. *tit. Averment* 34. *in juris utrum*, the death of one of the Vouchees was alledged at ſuch a Caſtle in *Britain*, and this was inquired of by the Jury: And it is holden in 5 *Rich.* 2. *tit. Trial* 54. That if a man be adhering to the enemies of the King in *France*, his Land is forfeitable, and his adherency ſhall be tried where the land is, as oftentimes hath been done, as there it is ſaid by *Belknap:* And *Fitz. Nat. Bre.* 196. *in a Mortdauncſtor*, if the anceſtor died *in itinere peregrinationis ſuæ verſ. terram ſanctam*, the Jury ſhall inquire of it. But in the caſe at Bar, ſeeing the Defendant hath pleaded the truth of the caſe, and the Plaintiff hath not denied it, but demurred upon the ſame, and thereby confeſſed all matters of fact, the Court now ought to judge upon the eſpecial matter, even as if a Jury upon an Iſſue joyned in *England*, as is aforeſaid, had found the eſpecial matter, and left it to the Court. [27]

3. To the third it was anſwered and reſolved, That this judgment was rather a renovation of the judgments and cenſures of the reverend Judges and Sages of the Law in ſo many Ages paſt, than any Innovation, as appeareth by the Books and Book-caſes before cited: neither have Judges power to judge according to that which they think to be fit, but that which out of the Laws they know to be right and conſonant to Law. *Judex bonus nihil ex arbitrio ſuo faciat, nec propoſito domeſticæ voluntatis, ſed juxta leges & jura pronuntient.* And as for *timores*, fears grounded upon no juſt cauſe, *Qui non cadunt in conſtantem virum, vani timores æſtimandi ſunt.*

4. And as to the fourth, it is leſs than a dream of a ſhadow, or a ſhadow of a dream: for as it hath been often ſaid, Natural legitimation reſpecteth actual Obedience to the Soveraign at the time of the Birth: for as the *Antenati* remain aliens as to the Crown of *England*, becauſe they were born when there were ſeveral Kings of the ſeveral Kingdoms, and the uniting of the Kingdoms by deſcent ſubſequent, cannot make him a Subject to that Crown to which he was an alien at the time of his Birth: So albeit the Kingdoms (which Almighty God of his infinite goodneſs and mercy divert) ſhould by deſcent be divided, and governed by ſeveral Kings; yet was it reſolved, That all thoſe that were born under one natural Obedience, whiles the Realms were united under one Soveraign, ſhould remain natural born Subjects, and no Aliens; for that naturalization due and veſted by Birth-right, cannot by any ſeparation of the Crowns afterward be taken away: nor he that was by judgment of Law a natural Subject at the time of his Birth, become an Alien by ſuch a matter *ex poſt facto.* And in that caſe, upon ſuch an accident, our *Poſtnatus* may be *ad finem utriuſque Regis*, as *Bracton* ſaith in the afore-remembred place, *fol.* 427. *Sicut* Anglius *non auditur in placitando aliquem de terris & tenementis in* Francia, *ita nec debet* Francigena *& alienigena qui fuerit ad fidem Regis* Franciæ *audiri placitando in* Angliæ: *ſed tamen ſunt aliqui* Francigenæ *in* Francia, *qui ſunt ad fidem utriuſque, & ſemper fuerunt ante* Normanniam *deperditam & poſt, & qui placitant hic & ibi, ea ratione quæ ſunt ad fidem utriuſque, ſicut fuit* Willihelmus *comes marſchallus & manens in* Anglia, *&* M. *de* Gynes *manens in* Francia, *& alii plures.* Concerning the reaſon drawn from the Etymologies, it made againſt them, for that by their own delivation, *alienæ gentis* and *alienæ ligeantiæ* is all one: But arguments drawn from Etymologies are too weak and too light for Judges to build their judgments upon: for *Sæpenumero ubi proprietas verborum attenditur, ſenſus veritatis amittitur:* and yet when they agree with the Judgment of Law, Judges may uſe them for Ornaments. But on the other ſide, ſome inconveniences ſhould follow, if the plea againſt the Plaintiff ſhould be allowed: for firſt it maketh Ligeance local; *videlicet*, *Ligeantia Regis Regni ſui* Scotiæ, and *Ligeantia Regis Regni ſui* Angliæ: whereupon ſhould follow, Firſt, That faith or ligeance, which is univerſal, ſhould be confined within local limits and bounds: Secondly, That the Subject ſhould not be bound to ſerve the King in Peace or in War out of thoſe limits; Thirdly, It ſhould illegittimate many, and ſome of noble blood, which were born in *Gaſcoign, Guyan, Normandy, Callice, Tournay, France*, and divers other of his Majeſties Dominions, whiles the ſame were in actual obedience, and in *Berwick, Ireland, Jerſey*, and *Gerſey*, if this plea ſhould have been admitted for good. And thirdly, this ſtrange and new deviſed plea inclineth too much to countenance that dangerous and deſperate Error of the *Spencers*, touched before, to receive any allowance within *Weſtminſter-Hall.* [a] [b] [28]

In the proceeding of this caſe, theſe things were obſerved, and ſo did the Chief Juſtice of the *Common Pleas* publickly deliver in the end of his argument in the *Exchequer Chamber.* Firſt, That no commandment or meſſage by word or writing was ſent or delivered from any whatſoever to any of the Judges, to cauſe them to incline to any opinion in this caſe: which I remember, for that it is honourable for the State, and conſonant to the Laws and Statutes of this Realm. Secondly, There was obſerved, what a concurrence of Judgments, Reſolutions, and Rules there be in our Books in all ages concerning this caſe, as if they had been prepared for the deciding of the queſtion of this point: and that (which never fell out in any doubtful caſe) no one opinion in all our Books is againſt this Judgment. Thirdly, That the five Judges of the *Kings Bench*, who adjourned this caſe into the *Exchequer Chamber*, rather adjourned it for weight than for difficulty, for all they in their arguments *una voce* concurred with the Judgment. Fourthly, That never any caſe was adjudged in the *Exchequer Chamber* with greater concordance and leſs variety of opinions, the Lord Chancellor and twelve of the Judges concurring

in

in one opinion. Fifthly, That there was not in any remembrance ſo honourable, great, and intelligent an auditory at the hearing of the arguments of any *Exchequer Chamber* caſe, as was at this caſe now adjudged. Sixthly it appeareth, That *Juriſprudentia legis communis* Angliæ *eſt ſcientia ſocialis & copioſa*: ſociable, in that it agreeth with the principles and rules of other excellent Sciences, divine and humane; copious, for that *quamvis ad ea quæ frequentius accidunt jura adaptantur*, yet in a caſe ſo rare, and of ſuch a quality, that loſs is the aſſured end of the practice of it (for no alien can purchaſe lands, but he loſeth them, and *ipſo facto* the King is intituled thereunto, in reſpect whereof a man would think few men would attempt it) there ſhould be ſuch a multitude and *Farrago* of authorities in all ſucceſſions of Ages, in our Books and Book-Caſes, for the deciding of a point of ſo rare an accident. *Et ſic determinata & terminata eſt iſta quæſtio.*

[b] *Super quo viſis & cur' Domini Regis hic plenius intellect' omnibus & ſingulis præmiſſis, diligenterque inſpect' & examinat', maturaq; deliberatione inde habit', pro eo quod videtur cur' Domini Regis nunc hic quod placitum prædictum per prædictum* Richardum Smith & Nich. Smith *ſuperius placit' minus ſufficiens in lege exiſt. ad prædict'* Robertum Calvin *a reſponſ. ad breve ſuum prædictum habend', repellend'. Ideo conſiderat' eſt per cur. Domini Regis nunc hic, quod prædict.* Rchardus Smith & Nicholaus Smith *ad breve ipſius* Roberti *ulterius reſpond'.*

Mich. 26 & 27 Eliz.

Bulwer's Caſe.

[1] BUlwer of *Dalling* in *Norfolk* brought an Action upon his Caſe againſt *George Smith*, and declared How that one *Henry Heydon* Eſquire did recover 20 *l.* in the *Common Pleas* againſt the Plaintiff, and after Judgment, and before Execution, the ſaid *Henry Heydon* died, and afterwards the ſaid Defendant knowing thereof, at *W.* in the County of *Norfolk* to outlaw the Plaintiff upon the ſaid Judgment in the name of *Henry Heydon malitioſe & deceptive machinatus eſt*, in performance of which the Defendant *Trin.* 23 *Eliz.* at *Weſtminſter* in *Midd.* took forth a Writ of *Capias ad Satisfaciend'* in the name of the ſaid *Henry* upon the ſaid Judgment, directed to the Sheriffs of *London*, who by the procurement of the Defendant returned *Non eſt inventus*; whereupon the Defendant purchaſed a Writ of Exigent in the name of the ſaid *Henry*, which Writ the ſaid Sheriffs by the procurement of the ſaid Defendant returned, that at ſeveral Huſtings the now Plaintiff had been demanded, *Et ad* Huſtingum *de communibus placitis tent' in* Guildhalda *civitat. prædict. die Lunæ prox. poſt feſtum Apoſtol'* Simonis & Judæ, *Anno ſupradict. prad.* the now Plaintiff *quint. exactus fuit, &c. & ideo ipſe* the Plaintiff *utlagatus fuit:* And afterwards *Paſch.* 24 *Eliz.* the Defendant purchaſed out of the *Common Pleas* a Writ of *Capias utlagatum*, in the name of the ſaid *Henry*, directed to the Sheriff of *Norfolk* to arreſt his body, &c. which Writ did mention that the ſaid now Plaintiff was outlawed *die Lunæ prox. ante feſtum Apoſtolorum* Simonis & Judæ, &c. And the ſaid Writ the Defendant at *W.* aforeſaid in the ſaid County of *Norfolk*, did deliver to one *Robert Godfrey* then Deputy to the Sheriff of the ſaid County, to the intent that he ſhould execute the ſaid Writ; the which *Robert* by force of the ſaid Writ took and arreſted the now Plaintiff, and did impriſon him by the ſpace of two months, until the now Plaintiff purchaſed his Charter of pardon, by reaſon of which Outlawry he forfeited all his Goods and Chattels: And upon this Declaration the Defendant did demur in Law; And the principal cauſe of the Demurrer was, becauſe that this Action by the

[b] pretence of the Defendant, ought to have been brought in *Midd.* where the wrong began, for there (as it was ſaid) the Defendant took out as well the *Capias ad Satisfaciend.* as the *Exigent* and the *Capias Utlagatum* alſo. And although the *Capias Utlagat.* was executed in *Norfolk*, yet the Action ought to be brought where the wrong began; as in the caſe of *Conſpiracy* in 42 E. 3. 14. and divers other caſes were put; Alſo, by the Outlawry which was in *Lond.* all his Goods and Chattels were forfeited, where it is more reaſon to bring the Action, than in *Norff.* But it was anſwered and reſolved, That the Action was well brought in *Norfolk*, for it is a Maxim in Law, *Quod ibi ſemper debet fieri triato, ubi juratores meliorem poſſint habere notitiam.* And in *Norfolk* was the viſible wrong, for there the Plaintiff was impriſoned for the ſpace of two months, and therefore it is great reaſon the Plaintiff have his action there, and it doth not appear by the Record what Goods and Chattels the Plaintiff had at the time of the Outlawry, but for the aggravating of the damages, the Plaintiff may give in evidence what Goods and Chattels he hath forfeited by the Utlawry. And this action doth conſiſt upon two parts, one matter of record, and the other matter in fact; and none of the matters of record, but it is mixed with matter in fact, and there is no matter of fact, but it is mixt with matter of record: for the Writs and the Utlawry are matters of record, but mixed with matters in fact, *ſcil.* taking forth, and proſecution of them by the Defendant in the name of *Henry Heydon*, which are matters in fact: alſo the impriſonment is a matter in fact, but it is mixed with the Writ of *Capias utlagatum*, which is of record; *ſcil.* if the Plaintiff was arreſted by vertue thereof. And matters in fact are triable only by the Country, and not matters of record: and when one matter in one County is depending upon the matter in the other County, there the Plaintiff may chooſe in which County he will bring his action, (if not, that the Defendant upon the general Iſſue pleaded, ſhall be prejudiced in his trial, as he ſhall not be in this caſe;) as if two conſpire to endite a man in one County, and they by their malicious proſecution make

make the execution of their conſpiracy in another County, and there cauſe the party to be indicted, the Plaintiff may have his action of conſpiracy in which County he will, for they put their conſpiracy in one County, in execution in the other, and the matter of record of the Indictment is mixed with matter of fact. But if they conſpire in one County, by force of which conſpiracy, without any other act by them, he is indicted in another County, there the writ ought to be brought in the County where the conſpiracy was, for the Defendants have done nothing in the County where the Indictment was, nor were parties nor privies to the finding of the Indictment, but only by the conſpiracy in the other County. And the ſame appeareth in 14 *E.* 4. 3. *b.* and ſo the Books in 42 *E.* 3. 14. 20 *H.* 6. 10. *Fitz. N. B.* 116. *b.* and other Books are well reconciled. If a Manaſſe be made in *Eſſex* by which my Tenants do depart in *London*, I ſhall have my Action in *Eſſex*, and not in *London*; for in ſuch Caſe I have done nothing in *London*, 9 *H.* 6. 42. In all Caſes where the Action is founded upon two things, [2] and both are material, or traverſable, and the one without the other doth not maintain the Action, there the Plaintiff may chuſe to bring his action in which of the Counties he will; as if a Servant be retained in one County and departeth in another, and therewith agreeth 41 *E.* 3. 1. 34 *H.* 6. 18. 38 *H.* 6. 15. 14 *E.* 4. 6. 20 *H.* 6. 11. 29 *H.* 8. & 18. *Vide* 20 *E.* 3. 25. *&c.* So if a man be arreſted in execution in one County, and he eſcape into another, the Plaintiff may chooſe to bring his Action in which of the Counties he will, and therewith agreeth 14 *E.* 4. 3. 30 *H.* 6. 6. 11 *Eliz. Dyer* 278. So in a Writ of Annuity founded upon preſcription againſt a Man of Religion, or body politique, where the Church or houſe is in one County, and the ſeiſin is alledged in another County, the Plaintiff may chooſe in which County he will bring his Action, 48 *E.* 3. 26. 4 *H.* 4. 1. 4 *H.* 6. 5. *b.* 10 *H.* 6. 19. 39 *H.* 6. 15. 2 *E.* 4. 28. 4 *E.* 4. 26. *&c. F. N. B.* 152. Otherwiſe if the Annuity be granted in one County, to be paid in another, the action lieth where the grant was; and ſo is 8 *H.* 6. 23. So if a man cite one in one County to appear before the Admiral in another County, for a thing done in the body of the County, by force of which the party appeareth, he may have his action in the one County or the other at his pleaſure, 5 *Ma. Dyer* 159. *b. vide* 42 *E.* 3. 14. 44 *E.* 3. 31, 32. 46 *E.* 3. 8. 3 *H.* 4. 3. *a.* 38 *H.* 6. 14. 14 *E.* 4. 3. The ſame Law of the Spiritual Court. So if the Defendant call a protection in one County, and remaineth in another, he may bring his action in which of the Counties he pleaſeth, *vide* 20 *H.* 6. 10. So if a man hath a ſtroke in one County, and he dieth in another County, the appeal of Murder may be brought in the one or the other County, and yet the Defendant did nothing in the County where the party dieth, but the death which followeth the ſtroke maketh the Felony, 18 *E.* 3. 32. 9 *H.* 6. 63. 45 *Aſſ. pl.* 9. 43 *Ed.* 4. 3 *H.* 7. 12. 4 *H.* 7. 18. 6 *H.* 7. 10. 11 *H.* 4. 93. If a man commit Robbery in one County, and carrieth the goods into divers Counties, the party robbed may have an appeal of Felony in which of the Counties he will, but not an appeal of Robbery but only in the County where the Robbery was done; For it is felony in all the Counties where the goods are carried (for felony doth not deveſt property) but it is not Robbery (which ought to be done to the perſon of a man) but only in the County where the Robbery was done, *vide* 4 *H.* 7. 5. *b.* 29 *H.* 8. 39. 40, *Dyer*, 11 *H.* 4. 93. *Vide* 3 *E.* 3. *Aſſ.* 446. In Debt if a man diſtraineth upon a Leaſe for years in one County, of land in another County, he ought to bring his Action where the Leaſe was made, and not where the land lieth; for the action is grounded upon the contract made by the leaſe, 38 *H.* 6. 15. *acc. per Cur.* 8 *H.* 6. 23. *acc. vide* 4 *H.* 6. 18. 14 *E.* 4. 3. 29 *H.* 8. *Dyer* 40. So the Law well explained in [b] caſes in which are varieties of opinions in our Books. But if a leaſe be made in one County, and the land lieth in another, the Action of waſt ſhall be brought where the land lieth, and not where the Leaſe was made, although the term be paſſed, for the land and damages, or damages only for the waſt, ſhall be recovered, 14 *E.* 4. 3. *acc.* If a man promiſeth to cure one in one County, and miſ-doth in another, the Plaintiff hath his election to bring his action in which of the Counties he will, and therewith agreeth 11 *R.* 2. *Action ſur le Caſe* 37. If a man doth not repair a wall in *Eſſex* which he ought to repair, for which cauſe my land in *Midd.* is drowned, I may bring my action in *Eſſex*, for there is the Defendants fault, as it is adjudged in 7 *H.* 4. 8. or I may bring it in *Midd*, for there I have the damage, as it is proved by 11 *R.* 2. *Action ſur le Caſe* 3. So if one forgeth a Deed in one County, and proclaimeth it in another, the Plaintiff may chooſe in which County to bring his action, 29 *H.* 8. 38. *Vide* 22 *H.* 6 5. But when the Defendant upon pleading Not Guilty ſhall be prejudiced in his trial, there the Plaintiff hath not election to bring his Action in which County he will. *Vide* 29 *H.* 8. *Dyer* 38. where *Gawyn* ſued an appeal of Robbery in the County of *Wilts*, where the Robbery was done, againſt *Huſſey* and *Gibbs* as acceſſories; and declared that the principals named in the Writ, and who were attainted, did the Robbery in the County of *Wilts*, and that the Defendants feloniouſly at *London* before the Robbery done, did abbet them to do it; and it was adjudged, That although the Plaintiff cannot have but one appeal againſt the Principals and Acceſſories, and againſt the Principal of neceſſity it ought to be brought in the County of *Wilts*, yet becauſe that thoſe of the County of *Wilts* upon Not Guilty pleaded, and *London* cannot joyn, and thoſe in *Wilts* cannot enquire of a thing in *London*, although it be tranſitory (for in caſe of Felony which concerneth the life of a man, every act ſhall be tried in the proper County where the act was in truth done) the appeal againſt the ſaid Acceſſories did abate. *Vide* 43 *E.* 3. 17, 18, 19. And it is to be obſerved, that in all Real Actions, if any iſſue riſeth upon the Land, or in any action in which the poſſeſſion of the land or local thing, or which riſeth upon the land by reaſon thereof, is to be recovered, all theſe ſhall be brought in the County where the land lieth; As in a Writ of Right of Ward of Land, or writ of Entruſion of Ward, theſe ſhall be brought in the County where the land lieth, although that the refuſal were, or the Seignory be in another County, 29 *E.* 3. 3. 38 *H.* 6. 14. 22 *R.* 2. *bre.* 937. *acc.* So in a Writ of Right of Ward for the body only, it ſhall be brought in the County where the Land is, for that is in the right and favour of the land, 21 *E.* 3. 42. 30 *E.* 3. 25. 9 *E.* 3. 12, 13. 10 *E.* 3. 7. *acc.* and the reaſon of 45 *E.* 3. 6. agreeth with it, although the Judgment there is mentioned to be given contrary. But a Writ of Raviſhment of Ward ſhall be brought where the Raviſhment was,

and not where the Land is, or where the body is carried; for it is found upon the Raviſhment, 38 *Hen.* 6. 14. 22 *Rich.* 2. *Brev.* 937. & 12 *Eliz. Dyer* 289. And a Writ Forfeiture of Marriage ſhall be brought [3] where the land is, for the Writ doth ſuppoſe an intruſion into the land; and therewith agreeth the ſaid Book in 22 *R.* 2. & 38 *Hen.* 6. 15. And a Writ *de valore maritagii* ſhall be brought where the land is; for the Lord needeth not make any tender, but if he maketh tender, and the other refuſeth, and he alledge it in one County, then the Writ *de valore maritagii* lieth in the County where the refuſal was, 22 *Rich.* 2. *Brev.* 937. 38 *H.* 6. 15. Writs of *Quare Impedit*, and *Quare Incumbravit* ſhall be always brought where the Church is; for by the one the Plaintiff ſhall recover the preſentment, and by the other the Biſhops Clerk ſhall be removed, and the Plaintiffs Clerk admitted, 38 *Hen.* 6. 15. *accord. vide* 4 *Ed.* 3. 9. Otherwiſe it is in the Kings Caſe. But a *Quare non admiſit* ſhall be brought in the County where the refuſal was, and not in the County where the Church is, becauſe damages are only to be recovered, and the refuſal is the beginning of the wrong, and the ground of the Action; and ſo is the Book adjudged in 37 *Hen.* 6. 14. & 15. *F. N. B.* 47. And a *Quare Impedit* of a Prebend ſhall be brought in the County where the Cathedral Church is, and not in the County where the body of the Prebend is; for the Plaintiffs Clerk is to be inducted, and inſtalled in the Cathedral Church, and therewith agreeth 21 *Edw.* 3. 5. & 2 *Eliz. Dyer* 194. but 43 *Ed.* 3. 34. & 15 *Ed.* 3. *Br.* 335. ſeem contrary. *Vide* 27 *Ed.* 3. 37. And ſo the Law is well explained in a caſe in which there was different opinions in our Books. And if a man at the Common Law hath a Rent iſſuing out of two Counties, he cannot have an Aſſiſe in one County, becauſe every part of the Land in the two Counties is charged with Rent, and all ſhall be put in view, as it is agreed in 18 *Edw.* 2. *Aſſiſe* 380. 18 *Edw.* 3. 32. 10 *Ed.* 3. 21. 10 *Aſſ. p.* 4. & 18 *Aſſ. p.* 1. But if a man maketh a Leaſe *pur auter vie* of Land in two Counties, rendring Rent, and the Rent is behind, and *ceſtui que vie* dieth, the Leſſor ſhall have an Action of Debt in which of the Counties he will; for now it is changed into Debt; and in that caſe no Land ſhall be put in view, but the perſon of the Debtor ſhall be only charged by the Common Law. So if a Rent be iſſuing out of the Land of *B.* in two Counties, and the Rent is behind, and he who hath the Rent dieth, his Executors may have an Action of Debt againſt *B.* in which of the Counties they will, upon the Statute of 32 *Hen.* 8. for although he ought to bring his Action in one of the Counties, yet at the Common Law the perſon of the Defendant is chargeable in the Action of Debt, and not the Land. And before the Statute of *6 Rich.* 2. *cap.* 2. a Writ of Debt and Accompt againſt a Receiver, and ſuch Actions, muſt be brought in ſuch County where the party might be beſt brought in to anſwer, and the Plaintiff might count of a Contract or Receipt, &c. in any other County, *quia debitum & contractus, &c. ſunt nullius loci.* See for that 2 *Ed.* 3. 44. 6 *Ed.* 3. 266. & 275. 8 *E.* 3. 380. 10 *E.* 3. 7. 19 *E.* 3. *Juriſd.* 29. 29 *E.* 3. 26. 33 *E.* 3. *tit. Juriſd.* 37. 40 *E.* 3. 7. 3 *Hen.* 6. 15 *Ed.* 4. 10. 21 *Ed.* 4. 88.

[*b*] As in 22 *Hen.* 6. 9. & 10. where the King granted the Office of Surveyor of packing of all manner of Cloathes within *London* and the Liberties thereof, which are in two Counties, and the Aſſiſe was brought in *Middleſex*, and there *Newton* and *Paſton* ſaid, That there is a great difference between an Aſſiſe of a Rent, and that Aſſiſe: For where a Rent charge is going out of Lands in divers Counties, every parcel is chargeable with the whole, and all the Terr-Tenants ought to be named: But here the perſon is charged, and not the land, yet the Office for which the Aſſiſe was brought did extend in two Counties. And if a Fine, or Feoffment be made of Lands in two Counties with Warranty, the *Warrantia Chartæ* may be brought in any of the Counties, 29 *Ed.* 3. 3. It is purviewed by the Statute of 7 *Rich.* 2. *cap.* 10. That Aſſiſe of *Novel diſſeiſin* ſhall be granted and made of a Rent behind due of Tenants in divers Counties, to be holden *in conſinio comitat.* and thereupon the Aſſiſe ſhall be taken and tried by the people of the ſame Counties, in the ſame manner and form as it is done of a Common of Paſture in one County appendant to Tenements in another County: For at the Common Law, if a man had had Common of Land in one County appendant or appertenant to Land in another County, he ſhould have two ſeveral Writs to the Sheriffs of the ſeveral Counties: Or if the Land to which, &c. lay in one County, and the Lands in which lieth in another County, there he ſhall have a Writ of Aſſiſe to the Sheriff of the County where the Land to which, &c. lieth, and ſeveral Writs to the Sheriffs of the Counties where the lands in which, &c. lie; and all that appeareth in the *Regiſter*, and *Fitz. Nat. Brev.* 180. *a.* And the ſame Law is when a Nuſans is done in one County, and the land to which, &c. is in another County, as it appeareth alſo in the *Regiſter*, and *Fitz. Nat. Br.* 183. *k.* So if a man hath a Rent in three or four Counties, it ſeemeth that he who is diſſeiſed may have ſeveral Aſſiſes to be brought *in conſinio comitatuum:* for the Letter of the Statute of 7 *Rich.* 2. is general of Rent due of Tenements in ſeveral Counties. And although it hath a reference to the Caſe of Common of Paſture, &c. yet foraſmuch as in the Caſe of Common of Paſture, if the land in which, &c. lieth in ſeveral Counties, and the land to which, &c. lieth in another County, there ſhall be as many Writs as there are ſeveral Counties: thence it followeth, that ſuch ſhall he have who hath a Rent iſſuing out of lands in many Counties. Alſo the caſe of Common is put *exempli gratia & ſimilitudinarie, & nullum ſimile quatuor pedibus currit*; and it is not neceſſary that a ſimile agree in all points. And the Statute of 7 *Rich.* 2. was made to ſatisfie a doubt which was conceived before: for thereby it is enacted, That Writs in ſuch caſe ſhall be made in the *Chancery* without any manner of contradiction, as well of diſſeiſins before done, as after to be done. And the doubt was upon the Statute of *Magna Charta*, [4] *c.* 2. *Recognitiones de nova diſſeiſina, & de morte anteceſſor. non capiantur niſi in ſuis comitatibus.* And ſome hold that the ſame was not obſerved when the Juſtices of Aſſiſe did ſit *in conſinio comitatus*, and namely, when there are twenty Counties meſne between the two Counties, as it is in the Book in 5 *Ed.* 4. 2. But that doubt alſo might be conceived upon the ſaid Aſſiſe of *Novel diſſeiſin* of Common when the land in which, &c. is in one County, and the land to which, &c. in another County (which caſe without queſtion is not reſtrained by the ſaid Statute: For Aſſiſe of *Novel diſſeiſin* of Common Paſture lay at the Common Law, as by the Statute of *Weſtm.* 2. *cap.* 29. it appeareth) *Vide* 10 *Ed.* 3. 21. & 10 *Aſſ.*

& 10 *Aſſ. p.* 4. And if need were, the Statute of *Weſt.* 2. *cap.* 28. doth extend to the ſaid caſe of Rent, by which it is provided, *Quod quotieſcunque de cætero evenerit in Cancellaria, quod in uno caſu reperitur breve, & in conſimili caſu, cadente ſub eodem jure, & ſimili indigente remedio, non reperitur, concordent clerici in Cancellaria in brevi faciendo, &c. vel ad proximum Parliamentum de conſenſu Juriſperitorum fiat breve.* And the Statute concludeth with the effect of a Maxim of the Common Law, *Quod Curia Domini Regis non debet deficere conquerentibus in juſtitia perquirenda. Vide* 38 *Edw.* 3. 33. where the caſe was, That the King brought a Writ of Right of the fourth part of the Tythes and Offerings of the Church of St. *Dunſtan* in the Weſt, in *Fleetſtreet*, in the Suburbs of *London*, againſt the Prior of St. *Johns* of *Jeruſalem* in *England*: there *Candiſh* took exception to the Writ, becauſe that although this Writ was given by the Statute of *Weſt.* 2. *cap.* 5. towards the end, and *Artic. Cler. cap.* 2. which Statutes gave, that he ſhall have a Writ *Ad petendum advocationem decimarum petitar. &c.* And this Writ is brought of the fourth part of Tythes and Offerings, which is not warranted by the Statute, Judgment of the Writ, foraſmuch as the Statute doth not give any Writ of the fourth part of Tythes. *Thorpe* the Chief Juſtice, who gave the rule ſaid, Although the Statute doth not hint by expreſs words, but of Tythes, yet thoſe in the *Chancery* may make a Writ *in conſimili caſu*, and the Writ is good enough; wherefore anſwer. And in 18 *Ed.* 2. *brev.* 827. a Writ of Entry was brought in the County of *Suſſ.* the Tenant pleaded a Releaſe of the anceſter of the Plaintiff with Warranty, which was deemed, and found for the Plaintiff in *London* by a Jury of *Fridayſtreet*, *&c.* for which the demandant did recover; and the Tenant brought an attaint, and there Exception was taken, becauſe in the Writ is not compriſed to attach the party, Judgment, &c. And for the Plaintiff it was ſaid, That the Writ was granted to the Sheriffs of *London* to ſummon the four and twenty, and attach the twelve, and another Writ to the Sheriff of *Suſſ.* to attach the party where the land lieth; and both the Writs were read in Court. To which it was ſaid, That there was no ſpecial Law, that did maintain that Writ which is out of the common courſe. *Beresford* the Chief Juſtice, who gave the rule, ſaid, In a new caſe there is a new remedy, &c. wherefore anſwer. And therefore if there be Lord and Tenant, and the Tenancy doth extend into two Counties, in this caſe if the Rents and Services be behind, the Lord may have ſeveral Writs for Cuſtoms and Services, for every County one Writ, and ſhall have them returnable at one day in the *Common Pleas*, and then to count upon them as his caſe is, *quia aliter curia Regis deficeret conquerentibus in juſtitia perquirenda*, and therewith agreeth *Fitz. Nat. Brev.* 151. *b.* & 31 *Edw.* 1. *Droit pl. ultimo.* And the ſame is a good example, *pro quolibet conſimili caſu, &c. ſimili indigente remedio. Vide* 12 *Ed.* 1. *tit. Attaint* 71. a very good caſe; and the Reaſon and rule of the Book in 21 *Ed.* 3. 18. is to be obſerved, where the Caſe was, That a fine was levied of a Mannor in one County, and the Tenancy lay in another County; now where the *per quæ ſervitia* ſhould be brought was the queſtion; and it was adjudged, that it was well brought in the County where the Mannor was. And there *Stone* gave the rule of the Court in theſe words: He cannot have another Writ, for it behoveth that his Writ be brought according to the fine, and brought in the County where the Note is levied. *Vide* 11 *Rich.* 2. *tit. Action ſur le caſe* 36. 7 *H.* 4. 8. *Vide* 26 *Hen.* 6. *tit. Covenant* 9. 41 *Aſſ. pl.* 12. 9 *Hen.* 5. 6. 22 *Hen.* 6. 5. And in the principal caſe where it was objected, that the ſaid *Capias utlagatum* was erroneous; for it was *proximum ante feſtum*, where it ſhould be, *poſt feſtum*, *&c.* The Court took no regard to it; for the Error in the Writ which the Defendant himſelf hath wrongfully brought ſhall not advantage himſelf: for inaſmuch that he was impriſoned and troubled thereby, the ſame gave cauſe of action to the Plaintiff. Alſo the Court did not regard the clauſe that the Defendant at *W.* in the County of *Norff. &c. malitioſe & deceptive machinatus fuit*, *&c.* for the ſame is ſo ſecret and ſo uncertain, that it cannot be tried.

[b]

Hill. 27 Eliz. *in the Exchequer.*

Sir *Miles Corbet's* Caſe.

[5]

BEtween Sir *Edw. Clere*, and *Miles Corbert*, Eſq; now a Knight, it was reſolved in a Caſe concerning the Parſonage of *Marham* in the County of *Norff.* That where in the County of *Norff.* there is a ſpecial manner of Common called *Shacke* which is to be taken in Arable Land, after Harveſt until the land be ſowed again, &c. and that began in ancient time in this manner; The fields of Arable lands in this Country doth conſiſt of the Lands of divers ſeveral perſons lying intermixt in many ſeveral ſmall parcels, ſo that it is not poſſible for any of them without treſpaſs to others, that they can feed their cattel in their own land, and thefore every one doth put in their cattel to feed *promiſcue* in the open field. Theſe words, *To have Shacke*, is as much as to ſay to go at liberty, or at large: In which the policy of old times is to be obſerved, That the ſeverance of fields in ſuch ſmall parcels to ſo many ſeveral perſons, was to avoid Incloſure, and to maintain Tillage. But it is to be marked, That the ſaid Common called *Shacke*, which in the beginning was but in the nature of a feeding becauſe of Neighbourhood, for avoiding of ſute, within ſome places of that Country, is by cuſtom altered into the nature of a common appendant or appurtenant, and in ſome places it retaineth his original nature: and the rule to know it is the cuſtom and uſage of every ſeveral Town, or place; for *conſuetudo loci eſt obſervand.* And therefore if in the Town of *D. (exempli gratia)* one who hath purchaſed divers parcels together, in which the Inhabitants have uſed to have *Shacke*, and long time ſince have incloſed it, and

notwithſtanding alwaies after Harveſt, the Inhabitants have had *Shacke* there by paſſing into it by bars or gates with their cattel, there it ſhall be taken as Common appendant or appurtenant, and the owner cannot exclude them of common there, notwithſtanding that he will not common with them, but hold his own lands ſo incloſed in ſeveralty: and that is proved by the uſage, for notwithſtanding the ancient Incloſure, the Inhabitants have had common there. But if in the Town of *S.* the cuſtom and uſage hath been, That every owner of the ſame Town hath incloſed their own Lands from time to time, and ſo have held it in ſeveralty, there this uſage proveth, That it was but in the nature of *Shacke* originally, [b] for the cauſe of Neighbourhood, and ſo it continueth, and therefore there he may Incloſe and hold in ſeveralty, and exclude himſelf to have *Shacke* with the other. And although that in the ſaid Town of *D.* the uſage hath been, That notwithſtanding the Incloſure by divers Inhabitants of late times, the other Inhabitants have had *Shacke* there; yet if a man hath an ancient cloſe of ancient time taken out of the field, and he and all thoſe whoſe eſtate he hath, hath holden the ſame alwaies in ſeveralty, he may well keep the ſame incloſed: For as to ſuch parcel ſo anciently encloſed, the *Shacke* there doth retain his ancient and original nature. And he who claimeth *Shacke* there cannot preſcribe to have Common in it. Mark well this Reſolution, which ſtanding with reaſon, and no Inconvenience, Innovation, or cauſe of ſuits or trouble can thereupon ariſe, but quiet and repoſe ſhall be thereby in many caſes eſtabliſhed, which I thought fit to be Reported, becauſe it is a general caſe in the ſaid Country. And at the firſt the Court was utterly unknowing of the nature of this Common called *Shacke*. It was alſo reſolved at the ſame time, That if the Commons of the Town of *A.* and of the Town of *B.* are adjoyning, and that one ought to have Common with the other by the rule of Neighbourhood, and in the Town of *A.* there are fifty Acres of Common, and in *B.* there are an hundred Acres of Common; In that caſe the Inhabitants of the Town of *A.* cannot put more cattel into their Common of fifty Acres than the ſame will feed, without any reſpects to the Common within the Town of *B.* *nec e converſo*: for the original cauſe of this Common for cauſe of Neighbourhood, was not for profit but for preventing of Suits in a Champian Country; for the reciprocal eſcapes of the one Town in the other: And therefore if the Town of *A.* will feed fifty beaſts, it is no prejudice to the one or the other if the cattel of one Town eſcape and feed in the Common of the other Town reciprocally: for if all the cattel feed *promiſcue* together through the whole, there ſhall not be prejudice to one or the other.

Caſes upon the Statute of 13 Edw. 1. of *Wincheſter.*

[6] IT is enacted by the ſaid Act, *That from henceforth every County be ſo well kept, That immediately upon Robberies and Felonies committed, ſuch freſh ſute be made from Town to Town, and from County to County, &c.* And after the Felony or Robbery is done, the County ſhall have no longer ſpace than forty days, within which forty days it ſhall behove them to agree for the Robbery and Treſpaſs, or elſe that they anſwer for the bodies of the Offenders, &c. Upon which words divers Reſolutions have been.

Trinit. 27 Eliz. *in the Common Pleas.*

Sendhill's Caſe.

TRinit. 27 *Eliz.* it was holden by the whole Court of *Common Pleas*, in a Caſe which happened in *Harleſton* in the County of *Suff.* That if a man be robbed in his houſe, be it in the day or in the night, the Hundred in which the houſe is ſhall not be charged with it: For although the words of the ſaid Act are general, without ſpeaking of any place in ſpecial, yet ſuch Robbery is not within the ſaid Act, for three cauſes: 1. Becauſe every mans houſe is his Caſtle, which he ought to keep and defend at his peril; and if any one be robbed in his houſe, it ſhall be eſteemed his default and negligence. 2. It is not lawful for any other to enter into the houſe of another for the ſafeguard of it. 3. Such Robbery for which the Hundred ſhall anſwer by force of the ſaid Act, ought to be committed openly, ſo that the Country may take notice of it themſelves; for it was adjudged in *Aſhpole's* Caſe next following, that there needeth not to have Hue and Cry, or notice given to the Country, neither by the words of the ſaid Act of 13 *Edw.* 1. nor by the meaning thereof; for it may be that the party robbed was bound, or maihemed, &c. ſo that he cannot make Hue and Cry, or give notice to the Country; but when a Robbery is ſecretly done in a houſe they cannot take notice of it.

Trin. 28 Eliz. *in the Common Pleas.*

Aſhpole's Case.

BEtween *Aſhpole* and the Inhabitants of *Evenger*, it was reſolved by the whole Court, That although the Statute is general, and doth not make mention of any time, That the Robbery ought to be done in the day time, and out of the night; and there the caſe was, That a Robbery was done in *January* preſently after Sun-ſet, during day-light; and it was adjudged that the Hundred ſhould anſwer, becauſe it was convenient time for men to travel, or to be about their buſineſs or work; and therewith agreeth the Book in 3 *Ed.* 3. *Coron.* 293. That one killed another at the hour of evening, and eſcapeth, by the Common Law, the Town ſhall be amerced; for it is in Law accounted part of the day, and not of the night. [6]

Trinit. 29 Eliz. *in the Common Pleas*, Rot. 1027.

Milborne's Case.

BEtween *Milborn* and the Inhabitants of *Dunmow* in *Eſſex* it was adjudged, That for a Robbery done in the Morning, *ante lucem*, the Hundred ſhall not be charged, becauſe the Robbery was committed in the Night; and although that no time be ſpecified in the Statute, yet by good expoſition it doth not extend to a Robbery done in the night; for no laches or negligence can be imputed to the Hundred for default of well guarding the Country in the night; alſo in the night they cannot make purſuit after the Offenders, or enquire for them, and then to charge them when they are deprived of their convenient means ſhall be hard. And as it hath elſewhere been often ſaid, It is a good expoſition of a Statute to expound it according to the reaſon of the Common Law. And at the Common Law, if a man be killed in a Town by day, that is, ſo long as there is full day-light, and he who killeth eſcapeth, the Town where this Felony was done ſhall be amerced: And ſo it is holden in 21 *Ed.* 3. *Coron.* 238. *Dum quis felonice occiſus fuit per diem, niſi felo captus fuit, tota villa illa oneretur.* And therewith agreeth alſo the ſaid Book of 3 *Ed.* 3. But if ſuch Murder or Manſlaughter be done in the night, the Town ſhall not be amerced by the Common Law, becauſe (as it hath been ſaid) no laches or negligence can be imputed to the Inhabitants of the Town: and God hath appointed the day for men to labour, and travel about their buſineſs, and the night to take their repoſe and reſt, and therefore the Prophet ſaith, *Poſuiſti tenebras, & facta eſt nox, in qua pertranſeunt Beſtiæ ſylvæ, &c. ſol oritur, & congregati ſunt, exit homo ad opus & operationem, & redit veſpere:* So Savage beaſts paſs and repaſs in the night, and then men are at reſt, and in the day men apply themſelves to their labours and affairs, and then the Beaſts retire to their Dens. And the Poet ſaith, Pſal. 104.

Ut jugulent homines ſurgunt de nocte Latrones.

And the Common Law is, Men cannot diſtrain for rent or ſervice in the night, as it is adjudged in 12 E. 3. *Diſtreſs* 17. & 11 H. 7. 5. *acc.* But for damage-feazance, a man may diſtrain in the night for the neceſſity of the Caſe, for otherwiſe perhaps he ſhall not diſtrain at all, and therewith agreeth 10 *E.* 3. 21. And further it is acted by the ſaid Statute of *Wincheſter*, That in Cities and great Towns which are incloſed, the Gates ought to be ſhut from Sun-ſet, till Sun-riſing; After which Statute, if in ſuch City or Town incloſed any Murder or Manſlaughter be done in the day, or in the night, and the Offendor eſcapeth, ſuch City or Town ſhall be amerced. For now the Act hath changed the reaſon of the Law, and therefore the Law it ſelf is changed; For *Ratio eſt Legis anima, & mutata Legis ratione, mutatur & Lex.* For at the Common Law, if a Man be killed in the night, as it hath been ſaid, there was not any fault in the City or Town; but now if they do not keep their Gates ſhut according to the Statute, by which the Offendor eſcapeth, then there is fault and negligence in them; and therewith agreeth the Book in 3 *E.* 3. *Coron.* 299. where the Caſe is, It was preſented, That one killed another in the night; and it was asked, Where the Felon was? And they ſaid, That he is fled; and becauſe it was in the night, they ought not to be charged. *Lowther* Juſtice who gave the Rule, ſaid, That the Town ſhould be ſhut, by the Statute, from ſuch an hour; and becauſe the Townſmen of the Town took him not, all the Town was amerced: Alſo it was holden upon the ſaid Act of 13 E. 1. That if divers do commit a Robbery, thoſe of the Hundred ought to apprehend all the Felons; for although they apprehend ſome of them, it ſhall not be ſufficient for to excuſe them. For the words of the ſaid Act of 13 E. 1. are, That they anſwer for the bodies of the Offenders; which in conſtruction ſhall be taken for all the Offenders. But now by the Statute of 27 *Eliz. cap.* 13. a new Law is made, amongſt others, in theſe points following, *viz.* 1. That none ſhall have an action upon the ſaid Statute, if that [7]

the

the party robbed doth not, ſo ſoon as he can, give notice of the ſaid Felony to ſome of the Inhabitants of ſome Town, Village, or Hamlet, next adjoyning to the place where the Robbery was committed. 2. If they in the purſuit do apprehend any of the parties Offenders, the ſame ſhall excuſe them, although they do not apprehend them all. See the Act of 27 *Eliz. cap.* 13. which hath added to the ſaid Statute of *Winchester*, and altered the ſame in divers points.

Mich. 28 & 29 Eliz. *In the Court of Wards.*

The Earl of Bedford's Case.

[*b*] IN the Court of Wards, the Caſe was, That *Francis* Earl of *Bedford* being ſeiſed of certain houſes in the *Strand* in the County of *Midd.* in tail, *ſcil.* to him and the heirs of his body, and ſeiſed of other lands in Fee holden *in Capite*, by Deed indented made leaſes of the ſaid houſes, whereof he was ſeiſed in tail, for 21 years, rendring rent (which leaſes were not warranted by the Statute of 32 *H.* 8. but were voidable by the Iſſues in tail) and died; the Reverſion deſcended to the heirs general of the Earl, that is to ſay, to two daughters and heirs of *Henry* Lord *Ruſſel*, eldeſt ſon of the ſaid Earl, (which *Henry* died in the life of his Father) and it appeared that the ſaid Leaſes were to have continuance after the ſaid daughters ſhould be out of Ward: And by office after the death of the ſaid Earl it was found, That he died ſeiſed of the ſaid eſtate tail of the ſaid houſes, and that they deſcended to the ſaid heirs general, by force whereof the ſaid houſes were ſeiſed into the Queens hands. And in this caſe two points were reſolved: 1. That the King in privity and right of the heirs in tail, ſhall avoid the ſaid Leaſes during the time that they ſhall be in ward; as if a Biſhop maketh a Leaſe for years not warranted by the Statute, ſo that the Leaſe is voidable by the Succeſſor, and dieth, the King ſhall avoid the Leaſe during the vacation of the Biſhoprick, in privity and right of the Biſhoprick, for the King in none of the ſaid caſes is as ſtranger. The ſame Law is when a Subject is Gardian in Knights Service, he in the right of the heir, within age, and his Ward, ſhall avoid voidable Leaſes as to his own Intereſt, but it ſhall not prejudice the heir of his election at full age; For *cuſtos ſtatum hæredis in cuſtodia ſua exiſtentem, meliorem, non deteriorem facere poteſt.* So if the heir within age before the entry of the Gardian, or the anceſtor, being within age, maketh a Leaſe for years rendring rent, the Gardian may enter in the right of the heir, and ſhall avoid the Leaſe. But the Lord by eſcheat ſhall not avoid voidable eſtates made by

[8] his Tenant who was an Infant; for regularly, none ſhall avoid voidable eſtates for Infancy, but the Infant himſelf, or his heirs, but the Gardian ſhall avoid the ſaid voidable Leaſes in the right of the Infant himſelf, and ſo a difference: and the King in the caſe of a Biſhop, ſhall avoid the Leaſe in the right of the Biſhoprick, which continueth although the Biſhop be dead. And that was one of the points adjudged in the *Exchequer*, in the great Caſe between *Auſtine* and Sir *John Baker*, 2 *Mariæ*, which *I* have ſeen, and which ſhall be related more at large in the Reſolution of the ſecond point of this caſe. *Vide* 16 *Eliz. Dyer* 337. Patentee of Queen *Elizabeth* of lands given to a Parſon and his Succeſſors to ſuperſtitious Uſes, ſhall avoid after his death a Leaſe for life (which is voidable by the Succeſſor) made by the Parſon, by the intent of the Act of 1 *E.* 6. of Chantries, *vide* 7 *Eliz. Dyer* 239. *Hoskin's* Caſe. 2. It was Reſolved, That although the King in the right of the heir had avoided it for his time, yet it doth not avoid the Leaſes ſo abſolutely, that the heirs in tail after the Kings Intereſt determined, by the acceptance of the rent cannot make them good: For the Kings act cannot determine the power and election of the iſſues in tail, or of the Succeſſor of the Biſhop, in the caſe before put, to make the Leaſes good by acceptance of the rent. And when voidable Leaſes being void for a time ſhall be alwaies avoided, and when not, this difference was taken and Reſolved by the Court; *ſcil.* When the intereſt of him who maketh the avoidance is but for part of the Term, ſo that it appeareth that a reſidue remaineth; and when he who maketh the avoidance hath all the Intereſt, ſo that no reſidue remaineth: and becauſe in the caſe at Bar it appeareth, that after the Kings Intereſt determined, there remaineth a reſidue of the term, &c. But if the Patron of the Church of *D.* doth grant the next avoidance to another, and afterwards, and before the Statute of 13 *Eliz.* the Parſon, Patron, and Ordinary, make a Leaſe for years, rendring rent, and the Parſon dieth, the Grantee preſenteth, who is admitted, inſtituted, and inducted, and dieth, this Leaſe was avoided in all abſolutely, and therefore ſuch Leaſe cannot ſtand againſt the ſecond Succeſſor, 2 *E.* 3. 8. If an Advowſon of a Church by Licence be granted to a Prior and his Succeſſors, and afterwards the ſame Church is appropriated to him and his Succeſſors, ſo as they be perpetual Parſons imparſonees, in that caſe if the wife of the Grantor be endowed of the Advowſon, and preſenteth a Clerk, who is admitted, inſtituted, and inducted, the Appropriation is defeated for ever, for the whole eſtate of the Parſon imparſonee is avoided, and ſo it was adjudged as Sir *Jeffery Scrope* reporteth in 2 *E.* 3. 8. and in ſuch ſenſe is the Book to be underſtood. For although the wife was endowed of the Advowſon, yet if ſhe had died before any was admitted and inſtituted to the ſame Church at her preſentation, the Church had remained appropriated, and ſo the *Quære* in 6 *E.* 6. 72. *Dyer*, is well reſolved. So if a Feme covert (as a Feme ſole) levieth a fine by her ſelf of Land, whereof ſhe is

[*b*] ſeiſed in Fee to another and his heirs; in this caſe if the Husband doth not enter, that fine ſhall bind the Wife and her heirs for ever: and in the ſame caſe, if the Husband entreth and dieth, the Conuſee ſhall not have the land; for by the entry of the Husband the whole eſtate of the Conuſee was defeated, and the

the old estate of the Wife revested in her, and the Husband seised of the whole estate in the right of his Wife, and therewith agreeth 17 *E.* 3. 52. 17 *Ass. pla.* 17. 7 *H.* 4. 23. 2 *R.* 3. 20. 9 *H.* 6. 33. But when but part of the estate or Term is defeated, there it is otherwise, as in the said Case of *Austine* and Sir *John Baker*, it was adjudged, which Case as I have seen it in effect, was, Sir *Tho. Wyatt* was Tenant in tail of the Mannor of *East forleigh* in the County of *Kent*, *viz.* to him and to the heirs males of his body of the gift of *H.* 8. to hold of him *in Capite*, the reversion to the King, his heirs and successors. Sir *Tho. Wyatt* by Indenture demised the said Mannor to *Austine* for 26 years rendring 13 *l.* rent to the said Sir *Tho.* and his heirs, and afterwards Sir *Tho.* died, and all that was found by Office, and that Sir *Tho. Wyatt* was his son and heir male of full age, by which the King had Primer seisin of the land it self, and for his Interest did avoid the Lease, and afterwards Sir *Tho.* the son sued Livery and accepted of the rent of *Austine*, and afterwards committed High Treason, for which he was Attainted. In this case it was adjudged, that for as much as the King had avoided the Lease but as to his Primer seisin, that after livery made it is in the election and power of the issue in tail, by acceptance of the rent, to affirm the Lease; because the Lease was avoided by the King but for part of the Term. So if Tenant in tail taketh a wife, and maketh a lease for 30 or 40 years, rendring rent, which is avoidable by the issue in tail, and dieth, and afterwards the wife recovereth her Dower, in that case the wife shall avoid the Lease, and yet, if she dieth within the Term, the issue in tail at his election may either affirm or disaffirm the Lease. And it was said, That if the Tenant in tail maketh a Lease for 30 or 40 years, rendring rent, which is avoidable by the issue in tail, and afterwards Tenant in tail dieth without issue, his wife with child with a son, by which the Donor entreth, and as to him avoideth the Lease, and afterwards the son is born, the Lessee reentreth, the son at his full age by acceptance of the rent, may affirm the Lease; for the Lease was never absolutely void, nor *simpliciter*, but *secundum quid*, and upon the matter *ex post facto* was defeated but for a time. And although that *filius in utero matris, est pars viscerum matris, (vide 3 Ass. pl. 2. 22 Ass. pl. 94. 22 Edwardi tertii, Corone 120. Stamford 21.)* yet the Law in many Cases hath consideration of him in respect of apparent expectation of his birth. See the opinion of *Saunders* and *Browne* in *Stowel's* Case, *Plow. Com.* for avoiding of a fine, *vide temp. E.* 1. *Gard.* 1. 3. & 31 *E.* 1. *bre.* 873. for the wardship of him. *Vide* 38 *E.* 3. 7. & 41 *E.* 3. & 11 *E.* 3. *Voucher*, that [9] he shall be vouched in his Mothers belly, 11 *H.* 6. 13. a devise of Land (devisable by custom to one in his Mothers belly, 41 *E.* 3. deteinment of Charters for the heir in his Mothers belly, 3 *Eliz. Dyer* 186. An Adulterer doth counsel the woman to kill the child when he is born, who doth accordingly; the Adulterer is accessary, yet at the time of the counsel the child was in his Mothers belly. But it was said, That if Tenant in tail maketh a Lease for 30 or 40 years, rendring rent, and afterwards taketh a wife, and dieth without issue, his wife young with child, and afterwards the wife recovereth her Dower of the same Land; she before the sons birth shall not avoid the Lease, for her estate is *quodammodo* a continuance of part of the estate tail, and the same is proved 10 *E.* 3. 26. 34 *Ass. pl.* 15. & 23 *E.* 3. *Dower* 130. that she shall be attendant for a third part of the services that Tenant in tail did, which she should not be, if to all intents the estate tail were utterly extinct, and Tenant in Dower is in the *Per* by her husband, and in of his estate. *Vide Litt.* 93. *in Descents*, 38 *Ass.* 26. 7 *H.* 5. 2. 8 *E.* 2. *Entre* 75. *&c. Vide* 33 *H.* 8. *Dyer* 51. *b.* Tenant in tail before the Statute of 27 *H.* 8. of Uses, made a feoffment in fee to the use of him and his heirs; and also before the said Act, he and his Feoffees made a Lease for years, rendring rent, and died after the Statute, the Land descended to his issue, who before entry upon the Termor levied a fine to another, and by the better opinion of both the Benches, besides *Saunders*; the Alienee shall not avoid it; for although the sum were remitted, yet the Lease was not meerly void, without actual entry by the issue. *Vide Plow. Com.* 437.

Trin. 33 Eliz. *in the Common Pleas.*

Ughtred's Case.

HEnry *Ughtred* Esquire brought a Writ of Annuity against *William* Marquess of *Winchester*, son and [b] heir of *John* Marquess of *Winchester*, and declared, how that *John* Marquess of *Winton*, 20. *Decemb.* 17 *Eliz. tam pro bono & favorabili affectione & benevolentia quas gessit erga eundem* Henricum, *quam pro confidentia & fidelitate reposit. in eodem* Henrico, by his writing did constitute and authorise the said *Henry* to be Captain of the Fort or Bulwark of the Castle of *Netley*, alias *Letley*, in the County of *Southampton*, To have and exercise the said Office of Captain, during the life of the said *Henry*, and gave him authority during his life to nominate from time to time a Master Gunner, one Porter, and six Souldiers, &c. And further by the said writing the said *John* Marquess did grant, *pro consideratione prædicta, & pro meliore manutentione ipsius* Henrici *& magistri tormentor. & sex militum in defensione & tuitione castri prædicti*, for him and his heirs, to the said *Henry* during his life, an Annuity of 32 *l.* at the feasts of St. *Michael*, and the *Annunciation* of our Lady by equal portions, by force of which he was seised of the said Office, and of the said Annuity for his life; and afterwards 10. *Nov.* 18 *Eliz.* the said *John* Marquess died; and the Defendant his son and heir for 11 years before the Writ brought did withhold the Annuity, which in all amounted to 368 *l.* upon which declaration the Defendant did demur in Law; and according to the Statute did shew divers causes: 1. Because it doth not appear by the declaration, That the said

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John Lord Marques had power or interest to grant the said Office; and also, because the Plaintiff hath not averred, that he hath exercised the said Office, nor that he did appoint a Master Gunner, Porter, or the Souldiers, and divers other causes were shewed; but notwithstanding these, Judgment was given by the Justices of the *Common Pleas* for the Plaintiff; whereupon the Marques brought a Writ of Error, and divers Errors were assigned, but all were over-ruled by the Court but one. And that was, that the [10] Plaintiff in the writ of Annuity had not averred in his declaration, that he had exercised the said Office, &c. But after many arguments and consideration of all the Books, in which *prima facie* seemeth to be some difference in opinions. It was Resolved, that the declaration was good without such averment; and their reason was, That in all cases where an interest or estate doth commence upon a Condition precedent, be the Condition or thing to be performed by the Plaintiff or Defendant, or by any other; and be the Condition in the affirmative or negative, there the Plaintiff ought to shew it in his declaration, and to averr the performance thereof: for there the Interest or estate doth begin in him by the performance of the Condition, and is not in him till the condition be performed. But otherwise it is when the interest and estate passeth presently and vests in the Grantee, and is to be defeated by matter *ex post facto*, or condition subsequent, be the condition or thing to be performed by the Plaintiff or Defendant, or by any other, and be the condition in the affirmative or negative, there the Plaintiff may declare generally, without shewing the performance thereof, and the same shall be pleaded by him who will take advantage of the condition or matter *ex post facto*, for every one ought to alledge that which maketh for him, and which is for his avail; and none shall be forced to alledge that which is against himself. And it may well be, that the condition subsequent, or matter *ex post facto* stands upon many parts; (as in the case at Bar it happeneth) which would be tedious to rehearse all, when issue shall be taken but upon one of them, and the Defendants may plead any one of them which he pleaseth in bar of the action, and so the pleading shall be mort short and compendious, which is the most commendable, if it be sufficient. Here in the case at Bar, the condition was to be performed by the Plaintiff himself, and therefore the case is the stronger, but because that the Plaintiff by the said grant was presently seised of the said Office and Annuity for the term of his life, which ought to be defeated by the not using the said Office, or other subsequent matter: the subsequent matter maketh against him, and therefore shall be pleaded by the Defendant, and therewith agreeth 15 *H.* 7. 1. In a Writ of Annuity against the successor of a Prior upon a grant made by his predecessor until he was advanced to a Benefice of holy Church, and the Plaintiff declared generally, without saying that he is yet advanced: and for that cause exception was taken to it, and notwithstanding the declaration was adjudged good, because the condition went in defeasance of the annuity, which ought to be shewed on the Defendants part. And also this is an annuity which beginneth before the condition shall be performed, which performance shall wave on the part of the Grantor, and not like where the condition was, That if the Grantee doth such a thing that [b] then he shall have such an annuity, then if he will demand it, he ought to alledge *in facto*, that the condition is performed; for by the performance thereof the annuity doth begin. And so is the difference by all the Justices; and these are the words of the Book. And so it is said in *Colthirst's* Case, *Plow. Com.* 25. *b.* If I grant unto one that when he shall be promoted unto a Benefice, that he shall have an annuity; if he demand the annuity, he ought first to shew that he is promoted to a Benefice. But if an annuity be granted to one until he be promoted to a Benefice, there he shall have a Writ of Annuity, and shall not shew that he is not yet promoted to a Benefice, because the annuity doth precede, and the promotion is subsequent, and goes in defeasance of the annuity; and therefore it ought to be shewed on the contrary part. But when a man is not intitled but to an action, and the action lieth not, if the condition or consideration be not performed, then the Plaintiff in his declaration ought to shew the performance of it, for the same amounteth to a condition precedent, because the action beginneth upon the condition or consideration performed, as the Book is in 3 *Hen.* 6. 33. *b.* Put case that I retein a man to go with me to *Rome* for forty shillings, that by the going beginneth first the cause of the duty, in which case if he bringeth an action of debt for the same, in his declaration he ought to declare, that he was there, otherwise the declaration shall abate. So if I retein one to serve me for forty shillings by the year; for here by the consideration performed doth the duty begin, so that it is in the nature of an act precedent, and so was the opinion of all the Court in the said Book. But the case in 48 *Edw.* 3. 3. & 4. was affirmed for good Law, where it appeareth, That Indentures were made between Sir *Ralph Pool* Knight, of the one part, and Sir *Richard Tolcelser* of the other part, by which Sir *Ralph* did covenant with Sir *Richard* to serve him with three Esquires of Arms in the Wars of *France*, and Sir *Richard* did covenant therefore to pay him two and forty Marks: in that case each party had equal remedy, one for the service, and the other for the money, and therefore in debt for the two and forty Marks he may chuse either to declare in general, or specially at his pleasure, by the Rule of the Court. Also when an interest doth pass presently, and is to be defeated by matter *ex post facto*, yet if it appear to the Court by matter in Law, that the action shall not be maintenable without shewing the performance of the condition, or consideration, there the Plaintiff ought for to add the same for the maintenance of his action, as in 39 *Hen.* 6. 21, 22. the case was, *R.* Abbot of *Chester* granted to *John Brewin* Esq, by his Deed (without the consent of the Covent) a yearly rent of forty shillings out of his Monastry, *pro consilio suo eidem* R. *Abbati & conventui ejusdem loci impenso, & imposterum impendendo*; the said *R.* Abbot died, and *John Brewin* brought a Writ of Annuity against the Successor, and added, that he hath given to the said *R. nuper Abbati & conventui consilium suum apud* W. *in negotiis domus prædict.* [11] *agendis, ad proficuum domus*: And *Prisot* and all the whole Court held that the action was not maintenable against the Successor without such averrment. For the action is not maintenable against the Successor for no contract or grant made by the Abbot only without the Covent, if not that the effect or consideration thereof cometh to the profit of the House. And that such a general averrment was good, for it shall be too long to shew all the causes specially, and therefore against the Successor he ought

ought to take ſuch averrment. But in an action againſt the Abbot himſelf, who made the grant, it needeth not to make ſuch averrment, as it is agreed there by all the Court. And ſo for theſe differences: 1. Between an intereſt, or eſtate veſted, and which is to be deveſted by condition or matter ſubſequent, and a condition or matter which precedes the eſtate or intereſt. 2. Between a thing in action which in judgment of Law is to commence upon condition or conſideration precedent, and intereſts or eſtates which begin preſently. 3. When equal remedy is given to both by reciprocal covenants. 4. When by matter apparent the Plaintiffs action ſhall not be mainteined without averrment, although it be in the caſe of an eſtate or intereſt veſted, you will the better underſtand your Books, which ſeem *prima facie* to diſagree, 21 *Ed.* 4. 49. 22 *Ed.* 4. 43. 9 *Ed.* 4. 20. 37 *Hen.* 6. 8. 36 *Hen.* 6. 2. *Dyer*, 10 *Eliz.* 270. in Avowry, and 15 *Eliz. Dyer* 329. in Debt. And note, the ſaid *Ughtred* had Judgment in the *Common Pleas*, *Quod prædictus* Henricus *recuperet verſus præfatum nunc Marchionem, annuum redditum prædictum & arreragia ejuſdem, tamdiu ante diem impetrationis brevis original' ipſius* Henrici, *quam poſtea incurſa, & damna ſua occaſione ſubtractionis annui redditus prædict. ad decem libras, eidem* Henrico *ex aſſenſu ſuo per Curiam hic adjudicat. Quæ quidem arreragia & damna in toto ſe attingunt ad* 402. *libr. Et prædictus nunc Marchio in miſericordia.*

Mich. 33 & 34 Eliz. *in the Exchequer.*

Englefield's Caſe.

BEtween the Queen, and *Margaret Englefield*, *Francis Englefield*, and others, in an Information upon Intruſion in the *Exchequer*, which began *Trinit.* 32 *Eliz.* the caſe in effect was ſuch, Sir *Francis Englefield* ſeiſed of the Mannor of *Englefield* in the County of *Berks* in Fee, by Indenture dated 2. *Jan.* 18 *Eliz.* between him and the ſaid *Francis* his Nephew, covenanted for the advancement of his blood, &c. to ſtand ſeiſed to the uſe of himſelf for life, and afterwards to the uſe of his ſaid Nephew, and to the heirs males of his body, and afterwards to the right heirs of the Nephew. And it was further conteined in the ſame Indenture, That becauſe his Nephew was an Infant, ſo that his proof was not then ſeen, and becauſe the Uncle did not think convenient to ſettle the ſaid Inheritance in the Nephew abſolutely, ſo long as the Uncle ſhould live, without a bridle to retein him, if after he ſhould be prodigal, or ſhould be given to intollerable Vices; for this cauſe it was provided, That if the Uncle by himſelf, or by any other during his natural life, deliver or offer to the Nephew a Gold, Ring, to the intent to make void the uſes, that then all the uſes ſhall be void. *Hill.* 26 *Eliz.* Sir *Francis* was Indicted in the *Kings Bench* by a Jury of *Middleſex* for Treaſon done at *Nemures* in *Hanonia in partibus tranſmarinis*, 20. *Octob.* 18 *Eliz.* upon which Indictment he was Outlawed, and afterwards, 4. *Aug.* 28 *Eliz.* the Queen by Patent under the Great Seal did leaſe the Land to *Foſter* and *Fitton*, two of the Defendants, for forty years, and alſo demiſed to them for forty years, *omnes & ſingulos boſcos, ſubboſcos, arbores, & terras boſcales:* And afterwards at the Parliament 29. *Octob.* 28 *Eliz.* the attainder was confirmed. And further it was Enacted, That he ſhall be attainted of High Treaſon, and ſhall forfeit to the Queen all his Mannors, Lands, Tenements, &c. the day of the Treaſon committed, or at any time after, and that the ſame ſhall be in the actual poſſeſſion of the Queen without office. But further it was provided, by the ſaid Act, That nothing therein ſhould extend to make void any leaſe of Land, or any gift of Goods made by the Queen under the Great Seal, or Exchequer Seal, after the Treaſon committed, &c. And at the ſame Parliament another Act was made, by which it was enacted, *That every perſon and perſons which hath, or claimeth to have any eſtate or intereſt, of, in, or out of any land of any of the perſons attainted ſince* 18 Eliz. *not inrolled of Record, nor certified into the Exchequer, made ſince* 1 Eliz. *by any of the perſons attainted ſince* 18 Eliz. *of Treaſon, for conſpiring of the Queens death* (as the ſaid Treaſon of *Francis Englefield* was) *within two years after the laſt day of this Seſſion of Parliament, ſhall openly ſhew, and bring forth, into the Queens Majeſties Court of Exchequer, the ſame, his, or their grant, conveyance, and aſſurance, and there in the Term time, in open Court, the ſame ſhall offer and exhibit, upon his, or their Oath, affirming that they have not the ſame, nor can come by it, or that it was never put in writing, then the effect thereof to be entered and enrolled of Record. Or elſe every ſuch conveyance and aſſurance ſhould be void and of none effect to all intents and purpoſes: Saving to every perſon and perſons (other than parties and privies to ſuch conveyance, and ſuch as ſhall not exhibit the ſaid conveyance according to the true meaning of this Act all ſuch right, &c.* And afterwards, the 17. *Martii*, 31 *Eliz.* the Queen by her Letters Patents under the Great Seal, reciting the uſes, and proviſo of tendring of the Ring, and that the benefit and advantage of the ſaid condition is given to her by the Statutes of this Realm, doth depute, authorize, and in her place and perſon hath put, *Richard Broughton* and *Henry Bouchier*, joyntly and ſeverally to deliver or offer the Ring of Gold to *Englefield* the Nephew, to the intent to make void the uſes in the Indentures. *Broughton* and *Bouchier* 8. *Martii*, 31 *Eliz.* offer the Ring (and read to him the Patent) to the ſaid *Francis* the Nephew, which he refuſed: All which fact, with the Patent they certified into the *Exchequer* 19 *Martii* 31 *Eliz.* and the life of Sir *Francis Englefield* was averred. And the Defendants were charged for intruſion 20 *Martii*, 31 *Eliz.* and with the cutting of certain Trees of Elm, and Aſh, and certain Under-woods. And in this Caſe, after many arguments at Bar, and upon open argument at Bench, theſe points were reſolved: 1. The Queen was Tenant for *auter vie*, and made a

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[12]

Leaſe for forty years, although that the Queen (having an eſtate but for *auter vie*) cannot abſolutely contract for a Leaſe for forty years; yet without any recital, or mention of the eſtate for life, the Leaſe is good; for the Leaſe for years is in judgment of Law leſs than the Leaſe for *auter vie*, and the Queen doth not any wrong or prejudice to any by the demiſe, and is not deceived in her grant; for in Judgment of the Law it is a Leaſe for one and forty years, if *ceſtui que vie* ſhall ſo long live, but if the Queen had granted a greater eſtate than ſhe lawfully might, as an eſtate in tail, or in fee, there becauſe ſhe could not lawfully do it, ſhe was deceived, and by conſequence her grant void. See the caſe of *Alton* Woods, in the firſt part of my Reports. And it was ſaid, That if the Queen granteth *totum ſtatum ſuum* (having a term, or eſtate for life, extent, or other particular eſtate) it is good
[b] enough; for the Queen doth not grant more than ſhe may do by the Law, nor doth any wrong, or make alteration of any eſtate by her grant. And it was Objected, That this condition ſhall not be given to the Queen by the Statute of 33 *Hen.* 8. *cap.* 20. for three cauſes: 1. This condition is annexed to Sir *Francis* with ſuch inſeparable privity, that it cannot be given to another; for in this caſe, the ſubſtance of the condition is the intent and mind of Sir *Francis*, but becauſe his intent and mind cannot appear without open act, for this cauſe the Ring ſhall be tendred as a declaration of his intent, which was inward and ſecret to himſelf, ſo that the tender of the Ring is but the outward ceremony, but the ſubſtance of the condition is the mind and will of Sir *Francis*, which cannot be paſſed over to another. Alſo in this caſe Nature is made Judge; for the Uncle is to judge of the quality and diſpoſition of the Nephew, and whether he giveth cauſe to his Uncle to revoke and diſanul his eſtate; and therefore as natural love and affection cannot be transferred to another, ſo this conveyance, of which natural love and affection is the cauſe of the creation of it, and the judge of the determination of it, cannot be revoked or determined by any other; and all that agreeth with the reaſon of the Common Law; for the Wardſhip of the eldeſt Son which the Law of Nature giveth to the Father is inſeparable, and cannot be forfeited or transferred to another, as it is agreed in 33 *H.* 6. And Homage Anceſtrel is inſeparable, becauſe it is annexed to the blood of the Lord and the Tenant. 2. By the general words of the Act of 33 *Hen.* 8. conditions ſeparable, and which may be performed by others, and not inſeparable, are given to the King, as appeareth by divers caſes grounded upon divers Acts of Parliament here put, and after agreed. 3. It was Objected, That the ſame being a collateral condition, although that the condition be given to the King, *ſcil.* the benefit of it, if it be performed, yet the performance of it is not given to the King by the Act. And therefore Sir *Francis* ought for to tender the Ring, and not the Queen. And therefore put caſe, that the condition had been, if the Chief Juſtice of *England*, for the time being, ſhall tender a Ring after the attainder of Sir *Francis*, the Queen cannot tender it; and the reaſon of the ſaid Books in 12 *Hen.* 4. 2. & 9 *Hen.* 7. 17. & 20. 4 *Hen.* 8. *Dyer* 1. &c. was urged, where collateral conditions cannot be altered, and other things taken in ſatisfaction of them between the ſame parties; *a fortiori* here, for here the perſon who by expreſs words ought to perform the condition ſhall be changed. As to the firſt and ſecond Objection, *Manwood* Chief Baron, and the whole Court held, That all the force and effect of the condition in the caſe at Bar did conſiſt upon the tender of the Ring; and the other matter of reaſon and cauſe, which moved and induced him to leave the power and bridle in himſelf, was not any parcel of the proviſo, but a flouriſh (as he termed it) and preamble; and nothing is parcel of the con-
[13] dition but that which cometh after the proviſo, and that is the tender of the Ring. And as to that, the difference was taken and agreed by the whole Court, *ſcil.* Between conditions which are perſonal and individual, and cannot be performed by any other; and conditions which are not ſo inſeparably annexed to the perſon but that they may be performed by any other; as it was reſolved in the caſe of *Thomas* Duke of *Norfolk*, who in *Anno* 18 *Eliz.* conveyed his lands to the uſe of himſelf for life, and afterwards to the uſe of *Philip* Earl of *Arundel* his eldeſt Son in tail, with divers Remainders over, with proviſo, That if he ſhould be minded to alter, and revoke the ſaid uſes, and ſhould ſignifie his mind in Writing under his proper hand and Seal, and ſubſcribed by three credible witneſſes, that then, &c. And afterwards the ſaid Duke was attainted of High Treaſon, that this proviſo or condition was not given to the Queen by the ſaid Act of 33 *Hen.* 8. becauſe the performance of the ſame was perſonal and inſeparably annexed to his perſon, that is to ſay, to ſignifie his mind by writing under his own hand, which none could but the Duke himſelf: upon which point all the poſſeſſions of the Dukedom ſo conveyed were ſaved, and not forfeited by the attainder, 35 *Hen.* 6. 56. The Templers held divers of their poſſeſſions in Frankalmoign (which Tenure as *Littleton* ſaith, is annexed in privity to the blood of the Donor) and afterwards they were diſſolved, and by Parliament, *anno* 17 *Ed.* 2. their poſſeſſions were given to the Hoſpitalers, to hold them in the ſame manner as the Templers held, yet they by thoſe general words held not in Frankalmoign, becauſe the privity of the Tenure on the part of the Tenant doth not continue, and this privity being perſonal and inſeparable, by ſuch general words was not transferred to the Hoſpitalers. The ſame Law of the Impropriation of a Church, which alſo is an incident inſeparable to a Houſe of Religion to which the Church is impropriate. And therefore it is adjudged in *P.* 3 *Ed.* 3. that the Hoſpitalers by the ſaid Act of 17 *Ed.* 2. ſhould not have the Impropriation, for it was inſeparably annexed to the Corporation of Templers, which thing conſiſting in inſeparable privity by general words of an Act of Parliament, ſhall not be transferred to others. So was it adjudged *Trin.* 25 *Eliz.* in the Marqueſs of *Wincheſters* Caſe, which ſee in the Fourth Part of my Reports, That by general words of all Hereditaments, &c. a Writ of Error which a perſon attainted had was not given to the King; for a Writ of Error is a Writ which lieth in privity. And the Chief Baron ſaid, That he never ſaw in any Act of Parliament actions which belonged to the perſon attainted given to the King. In the time of *Hen.* 8. *Br. Corodie* 3. it is holden, That a Founderſhip, which alſo is a thing annexed inſeparably to the blood of the Founder, ſhall not be forfeited by attainder, *vide L.* 5. *Ed.* 4. But in the Caſe at Bar, the condition *ſcil.* the tender

tender of the Ring, is not annexed to the perſon of Sir *Francis*, but every one may do it as well as he. [b] The ſame Law of payment of money, delivery of gilt ſpurrs, or other like. As to the third Objection it was reſolved, That when the Statute giveth the condition to the Queen, that the performance thereof (which is not perſonal, and inſeparable) is alſo given to the Queen, as incident to it: For the performance is the ſubſtance and the effect of the condition; and the Statute putteth the King in the place of the perſon attainted, to do the ſame for the performance of the condition, which is feaſible, and which is not inſeparably annexed to the perſon of him who is attainted. 4. It was objected, That although the condition ſhall be given to the Queen, and the performance of it alſo, yet the leaſe ſhall not be void; for the eſtate for life of Sir *Francis* was not ſubject to the condition. For a uſe at the Common Law was a truſt and confidence repoſed in a perſon, that another perſon ſhould have the profits, ſo that there ought to be a ſeparation of the poſſeſſion from the uſe, either by Covenant, or Feoffment, Fine, or other Conveyance, by the which there is a tranſmutation of the poſſeſſion: But in our Caſe he himſelf ſtood ſeiſed to the uſe of himſelf for life, which could not be as an uſe, for he himſelf is Terr-Tenant and there is not any ſeparation of the poſſeſſion, and it is not any truſt or confidence, and he could not have a *Subpœna* againſt himſelf before the Statute; and the Statute of 27 *H.* 8. doth execute the poſſeſſion to him only who hath an uſe, and who hath not a poſſeſſion before; But Sir *Francis* in our caſe had the poſſeſſion before, and therefore the Statute cannot give a poſſeſſion to him, but his eſtate for life was parcel of his old eſtate. And note, The Statute of 27 *H.* 8. ſaith, To the uſe of another perſon, &c. ſo that another perſon ought to have the uſe, than he who hath the poſſeſſion. And *vide* 30 *H* 8. *Feoffments al uſes* 47. *Ceſtuy que uſe* in tail before the Statute was enfeoffed by the Feoffees; and after the Statute of 27 *H.* 8. was made, the Statute ſhall not give him a poſſeſſion in tail according to the uſe, becauſe he had the poſſeſſion before, becauſe there was not any ſeparation of the uſe and poſſeſſion at the time of the making of the Statute. And then if the eſtate for life be parcel of his old eſtate, it is not ſubject to the ſame Proviſo or Condition, and by conſequence by the performance of the Condition, the eſtate for life is not defeated, and then the leaſe for 40 years, which is derived out of the ſame, remaineth good. But it was Reſolved by the Court, That Sir *Francis* had an eſtate for life by the limitation of the uſe, and the operation of the Statute of 27 *H.* 8. And they much relied upon the reaſon and Rule of *Bainton*'s Caſe in *Plow. Com.* That a man for the advancement of his heirs males, may Covenant to ſtand ſeiſed to the uſe of himſelf and the heirs of his body, in that caſe there is no ſeparation of the poſſeſſion and uſe, and yet the Statute doth create an eſtate in tail in poſſeſſion in him, in which caſe all the eſtate tail is in himſelf: [14] but that is for the benefit of the heir male, although it is *in futuro*, and not *in præſenti*, for none can know who ſhall be his heir male, For *Solus Deus facit hæredes, non homo.* But in this caſe it is for the benefit of the Nephew *in præſenti* to have the uſes raiſed according to the Indentures. 4. It was objected, That although the eſtate for life be defeated by the Condition, yet the Queen ſhall not avoid her own leaſe; For when the Queen hath an eſtate for the life of another, and ſhe maketh a leaſe for years, although that the Queen doth perform the Condition, ſhe ſhall not avoid the leaſe. As if in ſuch caſe a common perſon had had an eſtate for life, and the Queen the Condition, and the common perſon had made a leaſe of the land, and the Queen had confirmed it, and afterwards the Condition is performed, yet the leaſe is good. And if a Mortgagee maketh a leaſe for years, and the Mortgagor confirmeth it, and afterwards the Condition is performed, the leaſe ſhall not be avoided. And *Arden*'s Caſe was cited. Tenant in tail maketh a leaſe for life, now he hath gained a new Fee by wrong, and afterwards he granteth a Rent-Charge, or maketh a leaſe for years, and afterwards Tenant for life dieth, he ſhall not avoid his charge or leaſe, although he be in of another eſtate, becauſe he had a deſeaſible poſſeſſion, and ancient Right, the which if they be in ſeveral hands, ſhould be good; as the leaſe of one, and the confirmation of the other, and being in one hand ſhall be as much in judgment of Law. Note the leaſe is the ſtronger caſe than the charge, 11 *H.* 7. 21. *Edrich* Tenant in tail made a feoffment to his uſe upon condition, and afterwards upon his Recognizance the land is extended by the Statute of 1 *R.* 3. and afterwards he performeth the condition, yet the intereſt of the Conuſee ſhall not be avoided, and yet the eſtate is charged *Cauſa qua ſupra.* And all that was affirmed by the Court. But as to that it was Reſolved, That the demiſe of the Queen ſhall not enure (to her ſpecial prejudice) to two intents, *ſcil.* to a demiſe of the land, and alſo a ſuſpenſion of her condition, by which ſhe may defeat the eſtate for life, and the other eſtates as it ſhall be in the caſe of a common perſon, either to a demiſe in reſpect of his preſent eſtate for the life of another, and alſo to a confirmation in reſpect of his condition; by which otherwiſe ſhe may diſpoſe all, as it ſhall be in the caſe of a common perſon. For the grant of the Queen ſhall be taken according to her expreſs intention comprehended in her grant, and ſhall not extend to any other thing by conſtruction or implication which doth not appear by her grant that her intent did extend to. And therefore in ſuch caſes the Queen ought to be truly informed, and ſhe ought to make a ſpecial and particular grant, which by expreſs words may enure to all ſuch ſeveral intents as are deſired; as 17 *E.* 3. 39. An advowſon holden of the King is aliened to an Abbot, now the King hath title to the advowſon for the Mortmain, and afterwards the King by his Letters Patents granteth to the Abbot that he may hold the advowſon to his own uſe, yet he ſhall not loſe the advantage of Mortmain, for when the King hath two rights in him, he cannot exclude himſelf of both without ſpecial words, *vide* 9 *H.* 7. 14. *Plow. Com.* 397. *&c.* And if in this caſe the demiſe of the Queen ſhall amount to a confirmation by force of her condition, or if the demiſe ſhall amount to a ſuſpenſion of the condition, then upon that it ſhould follow, that ſhe during the term could not perform the condition, which ſhould be very prejudicial to the Queen. 6. And as to the Tender by force of the ſaid Letters Patents, and the Certificate thereof into the *Exchequer*, It was objected, That the ſame ſhall not be ſufficient, but the Tender ought to be found by office, for although that the Letters Patents are of Record, yet the Tender it ſelf is matter in fact, which

ought to be found by Office; For the Certificate of the Bishop by force of the Kings Writ, or of the Marshal of the Kings Host, as in 2 *Ed.* 4. 1. which in the like cases are not traversable, but are trials in Law and shall bind parties. But in our case, if this Certificate which is not made upon any ordinary course of proceeding shall be good in Law, it shall be great prejudice to the party; for no Certificate which is allowed and warranted by the Common Law, is traversable; and then the matter may be false, and the party disinherited, and yet he shall not have any remedy, which shall be very inconvenient. But it was Resolved by the whole Court, That the Tender and Certificate in this case was good enough, and that the party grieved if it be false, may traverse the same, and shall not be concluded by it, for the same was not in nature of a trial, but of a Record to inform and satisfie the Queen of her title. Also they Resolved, That presently by the Tender of the Ring according to the Proviso, or Condition, the uses were determined, and void in Law, and by consequence the land vested in the Queen by force of the Attainder, and of the Act of 33 *H.* 8. 7. It was objected, That the said Conveyance was void by the Act of 28 *Eliz.* And then Sir *Francis*, at the time of his Treason com-
[b] mitted, and Attainder thereupon, seised of the said Lands in Fee which were forfeited to the Queen, and vested in her by the said act of 33 *H.* 8. and by consequence, the said Lease made by the Queen (being at the time thereof seised in Fee) is good. And to prove that the Conveyance was void by the Statute before the said tender of the Ring, so that the estate was not defeated by the Condition, but the Conveyance in which the Condition was contained was void by the act of 28 *Eliz.* before the said tender of the Ring, and before the Lease made; The words of the Statute are, That every person, &c. *within two years after the last day of that Session, shall openly shew and bring forth into the Exchequer his conveyance, and there in the Term time in open Court shall exhibit, &c. the same to be entred and inrolled of record, &c.* And the tender of the Ring was 18. *Mart.* before which day all the Terms in the two years were past; so that after *Hillary* Term past *Ann.* 31. it was not possible that the Conveyance should be enrolled within the two years in open Court in Term time. For the two years passed by effluxion of time before *Easter* Term; And therefore presently after *Hillary* Term passed, the Conveyance was void; and by consequence the Condition also. And thereupon the Case in *Temps E.* 1. *Covenant* 29. & *F. N. B.* was put. That although the Covenant be that he leave the wood in as good plight, &c. at the end of the Term, if the Lessee cutteth down the trees, he shall presently have an action of Covenant, for it is not possible that he leave the trees, &c. at the end of the Term, so that the impossibility of the act shall give a present action upon a future Covenant. But it was Resolved by the Court, That at the time of the tender of the Ring the said Conveyance, and by consequence the Condition was in force. And their reason was, because that the Statute doth not require that the enrolment of the Conveyance, which is the act of the Court, shall be within the two years; but the shewing and exhibiting thereof, which is the act of the party, ought to be within the two years: For as to the shewing and exhibiting of the Conveyance, the words are *(within two years, &c. shall, &c. there in the Term time in open Court exhibit the same)* then the words next following are, *(to be entred and enrolled of record)* so that no time is limited when it shall be enrolled; but if the words had been, *(and then and there shall be entred and enrolled of record)* then the Conveyance ought to have been enrolled within the two years: but as the words are, it may be enrolled after the two years, And this was the first case (that I know) that was argued and adjudged upon the same Act of 33 *H.* 8. which giveth Conditions of persons attainted of Treason to the King. And in the Argument of this case, the case of *Thomas Markenfield* Esq; *Anno* 19 *Eliz.* in the *Exchequer*, and divers other cases of persons attainted of Treason, who had power of Revocation, were cited: and upon consideration of them by the Barons, they resolved *ut supra*, and gave judgment for the Queen. But the Counsel of Sir *Francis Englefield* were not satisfied with the Judgment, and chiefly as to the principal point: For they conceived, that as the Case is, the Condition was so inseparably annexed to the person of Sir *Francis*, that the same was not given to the Queen by the said Act of 33 *H.* 8. And their advice was to bring a Writ of Error. But at the next Parliament, *scil.* 35 *Eliz.* a special Act of Parliament was made for to establish the forfeiture to the Queen.

Trin. 34 Eliz.

The Case of Swans.

BEtween the Queen, and the Lady *Joan Young*, late the wife of Sir *John Young* Knight, deceased, and *Thomas Saunger* Defendant, the Case was such; And Office was found at *W.* in the County of *Dorset*, 18. *Septemb. Ann.* 32 *Eliz.* before Sir *Matthew Arundel* and others Commissioners of the Queen under the Great Seal, *Quod villa de* Abbotsbury, *in prædict. Com.* Dorset. *usq; ad mare per insulam de* Portland *in eodem Com. est quædam æstuaria, Anglice* a Meere or Fleet, *in quam mare fluit & refluit, in qua quidem æstuaria sunt* 500 *cigni, quorum* 410. *sunt albi, &* 90 *cignetti, & quod omnes prædicti cigni & cignetti sunt in possessione* J. Young *&* Tho. Saunger, *& quod quilibet eorum est valoris* 2 s. 6 d. *quodque major pars tempore captionis dictæ inquisitionis minime fuer. signat.* which Office being certified into the *Exchequer*, a Writ was directed to the Sheriff of the same County to seise all the said white Swans not marked, by force whereof
[16] the Sheriff returned, that he had seised 400 white Swans, &c. To which afterwards, *Hil.* 34 *Eliz.* the said *Joan Young* and *Thomas Saunger* pleaded; *Quod prædict. æstuaria sive aqua, jacet in Parochia de* Abbotsbury

bury *in Com.* Dorset (and abutted it) and that before the Inquisition taken, The Abbot of *Abbotsbury* was seised *de prædict. æstuaria, & de ripis & solo ejusdem* in fee, and that at the time of the Inquisition, and time out of mind, &c. there was, and yet is, *quidem volatus cignorum & cignettorum ferorum*, called a Game of Wild Swans, *in æstuaria sive aqua illa, & ripis, & solo ejusdem nidificant. gignen' & frquentant. Anglice* haunting, *de quo quidem volatu cignorum & cignettorum, prædict. Abbas & omnes prædecessores sui Abbates Monasterii prædicti, per totum tempus prædict. habuere & gavisi fuerunt, & habere & gaudere consueverunt, tot. profic' & increment. omnium & singulorum cignorum & cignettorum ferorum in æstuaria prædicta nidificant. gignent. & frequnt. qui quidem cigni & cignetti per totum tempus prædict. fuerunt feræ naturæ, & infra idem tempus iidem cigni & cignetti seu eorum aliqui aliquo signo non usi fuissent, nec consuevissent signari, nisi quod prædict. nuper Abbas & prædecessores sui prædict. per totum tempus prædict. ad eorum libitum quosdam seu aliquos de minoribus cignettis annuatim pullulant. quos ad usum & culinæ & hospitalitatis suæ statuerunt expendend', in hunc modum annuatim signare consueverunt, & usi fuerunt*, viz. *amputare mediam juncturam unius alæ, Anglice*, to cut off the pinion of one wing, *cujuslibet talis cignetti, ea intentione, quod cignetti sic amputati minime valerent avolare.* And afterwards the Abbot surrendred the possessions to King *H.* 8. who *Anno* 35*th* of his Reign granted to *Giles Strangewaies* Esquire, by his Letters Patents *inter alia, totam illam liberam Piscariam nostram in aqua, vocat.* the Fleet of Abbotsbury *prædict. ac omnia mesuag. aquas, piscat. & cætera hæreditament. nostra quæcunq; in* Abbotsbury, *in dict. Com.* Dorset *nuper dict. Monasterio, &c. adeo plene & integre &c. & in tam amplis modo & forma, &c.* and that the said *Giles* died, and that the same descended to *Giles Strangwaies* his Cosin and heir, who demised to the Defendants the said Game of Swans for one year, and prayed *quod manus dictæ Dominæ Reginæ amoveantur.* Upon which the Queens Attorney did demur in Law.

1. It was Resolved, That all white Swans not marked, which have gained their natural liberty, and are swimming in an open and common River may be seised to the Kings use by his Prerogative, because that *Volatilia, (que sunt feræ naturæ) alia sunt regalia, alia communia:* and so *Aquatilium, alia sunt regalia, alia communia:* as a Swan is a Royal Fowl; and all those, the property whereof is not known, do belong to the King by his Prerogative: and so Whales and Sturgeons are Royal Fishes, and belong to the King by his Prerogative. And there hath been an ancient Officer of the Kings called *Magister deductus cignorum*, which continueth to this day. But it was Resolved also, That the Subject may [b] have property in white Swans not marked, as some may have Swans not marked in his private waters, the property of which belongeth to him, and not to the King; and if they go out of his private waters into an open and common River, he may bring them back and take them again. And therewith agreeth *Bracton, lib. 2. cap. 1. fol. 9. Si autem animalia fera facta fuerint mansueta, & ex consuetudine eunt, & redeunt, volant, & revolant, (ut sunt Cervi, Cigni, Pavones, & Columbæ, & hujusmodi) eo usque nostra intelliguntur, quamdiu habuerint animum revertendi.* But if they have gained their natural liberty, and are swimming in an open and common River, the Kings Officer may seise them in the open and common River for the King: For a white Swan without such pursuit as aforesaid cannot be known from another, and when the property of the Swan cannot be known, the same being of its nature a Fowl Royal, doth belong to the King; and in this case the Book of 7 *H.* 6. 27. was vouched, where Sir *John Tiptoft* brought an action of Trespas for wrongful taking of his Swans; the Defendant pleaded that he was seised of the Lordship of *S.* within which Lordship, all those whose estate he hath in the said Lordship, had had time out of mind, &c. all estraies within the said Mannor; and we say that the said Swans were estraying at the time in the place where, &c. and that we as Lords did seise and make proclamations in Fairs and Markets, and so soon as we had notice that they were your Swans, we delivered them to you at such a place. The Plaintiff replies, That he was seised of the Mannor of *B.* joyning to the Lordship of *S.* and we say, that we and our Ancestors, and all those, &c. have used time out of mind, &c. to have Swans swimming through all the Lordship of *S.* and we say, that long time before the taking we put them in there, and gave notice of them to the Defendant that they were our Swans; and prayed his Damages. And the opinion of *Strange* there was well approved by the Court, That the Replication was good: For when the Plaintiff may lawfully put his Swans there, they cannot be estraies, no more than the Cattel of any can be estraies in such a place where they ought to have Common; because they are there where the Owner hath an interest to put them, and in which place they may be without negligence or lacheſs of the Owner. Out of which Case, these points were observed concerning Swans: 1. That every one who hath Swans within his Mannor, that is to say, within his private waters, hath a property in them, for the Writ of Trespas was of wrongful taking his Swans; *scil. Quare cignos suos, &c.* 2. That one may prescribe to have a Game of Swans within his Mannor, as well as a Warren, or Park. 3. That he who hath such a Game of Swans may prescribe, [17] that his Swans may swim within the Mannor of another. 4. That a Swan may be an Estray, and so cannot any other Fowl be that I have ever read in any Book. In 2 *R.* 3. 15, & 16. The Lord *Strange* and Sir *John Charleton* brought an Action of Trespas against three, because the Defendants had taken and carried away 40 Cignets of the Plaintiffs in the County of *Bucks*, to his damages of 10 *l.* One of the Defendants pleaded, That the water of *Thamise* doth run through the whole Realm, and that the County of *Buckingham* is adjoyning to the *Thamise*, and that the Custom of the said County of *Buckingham* is, and hath been time out of mind, &c. That every Swan (for Cignet in the Book is taken for a Swan) which hath course in any water, which water runs to the *Thamise* within the same County, That if any Swan cometh upon the land of any man, and there buildeth, and hath Cignets upon the same land, that then he who hath the property of the Swan shall have two of the Cignets, and he who hath the land shall have the third Cignet, which shall be of less value than the other two: and that was adjudged a good custom, because the possessor of the land doth suffer them to build there, where he may drive them off. And by this Judgment it also appeareth, That a man may alledge a Custom or Prescribe in Swans or Cignets. And in the same Case it is said, That the truth of the matter was, that the Lord *Strange* had certain Swans which were Cocks, and Sir *John Charleton* certain Swans which were Hens,

and

and they had Cignets between them; and for these Cignets the owners did joyn in one Action; for in such case by general custom of the Realm, which is the Common Law in such case, the Cignets do belong to both the owners in common equally, *scil.* to the owner of the Cock, and the owner of the Hen; and the Cignets shall be divided betwixt them. And the Law thereof is grounded upon a reason in nature; for the Cock Swan is an emblem or representation of an affectionate and true Husband to his Wife above all other Fowl; for the Cock Swan holdeth himself to one female only; and for this cause nature hath conferred upon him a gift beyond all others; that is, to die so joyfully, that he singeth sweetly when he dieth; upon which the Poet saith;

Dulcia defectu modulatur carmina linguæ,
Cantator, cygnus, funeris ipse sui, &c.

And therefore this case of the Swan doth differ from the case of Kine, or other bruit beasts. *Vide* 7 *Hen.* 4. 9. And it was agreed, That none can have a Swan-mark, which in *Latin* is called (*cigninota*) if it be not by the grant of the King, or of his Officers authorised thereto, or by prescription. And if he hath a lawful Swan-mark, and hath Swans swimming in open and common Rivers, lawfully marked therewith, they belong to him *ratione privilegii.* But none shall have a Swan-mark, or Game of Swans, if he hath not Lands or Tenements of an Estate of Freehold of the yearly value of five Marks, above all charges, upon pain of forfeiture of his Swans: And that is by the Statute of 22 *Ed.* 4. *cap.* 6. And he who hath such a Swan-mark may grant it over. And therefore I have seen a notable president in the time of *Hen.* 6. which is such, *Notum sit omnibus præsentibus & futuris, quod ego* Johannes Steward *Miles,*
[b] *dedi & concessi* Thomæ *filio meo primogenito, & hæredibus suis, cigninotam meam, armorum meorum, prout in margine laterali pingitur, quæ mihi juræ hæreditario descendebat, post mortem* Johan. Steward *militis patris mei: Habend. sibi & hæredibus suis, una cum omnibus cignis & cigniculis, cum dicta nota baculi nodati signat', sub conditione quod quilibet feria solis durante vita, a gula* Augusti, *usque ad* Canisprivium *apud domum meam de* Darford, *unum cigniculum bene signatum mihi aut meis deliberet, quod si defecerit, tunc volo, quod hoc præsens chirographum cassetur penitus, & pro nihilo habeatur. In cujus rei testimonium, ad instantiam* Matildæ *uxoris meæ, meum sigillum secretum Christi crucifixi presentibus feci apponi. Hiis testibus,* Rob. Clerico, Johan. *de* Conyers, *Alano Fabro, & al'. Dat. apud domum meam mansionalem de* Darf. *in vigilia S.* Dunst. *Ep. anno Regni Regis* Henrici *post conquestum* Angliæ *sexti* 14. And in the Margent was painted a little ragged staff. And in this case it was Resolved, That in some of them which are *feræ naturæ*, a man hath *jus proprietatis*, a right of property, and in some of them a man hath *jus privilegii*, a right of priviledge. And there are three manner of rights of Property, *scil.* Property absolute, Property qualified, and Property possessory. A man hath not absolute property in any thing which is *feræ naturæ*, but in those which are *domitæ naturæ.* Property qualified and possessory a man may have in those which are *feræ naturæ*, and to such property a man may attain by two ways, by industry, or *ratione impotentiæ & loci*, by industry, as by taking of them, or by making of them tame, *mansueta*, i. e. *manui assueta*, or *domestica*, i. e. *domi assueta:* But in those which are *feræ naturæ*, and by industry made tame, a man hath but a qualified property in them, *scil.* so long as they remain tame, for if they do attain to their natural liberty, and have not *animum revertendi*, the property is lost, *ratione impotentiæ & loci:* As if a man have young Shovelers or Goshawks, or the like, which are *feræ naturæ*, and build in my land, I have possessory property in them, for if one taketh them when they cannot fly, the owner of the soil shall have an action of Trespass, *Quare boscum suum fregit, & tres pullos esperuorum suorum*, or *ardearum suarum, precii tantum, nuper in eodem bosco nidificant', cepit & asportavit*; and therewith agreeth the *Register*, and Fitz. *Nat. Brev.* 86. *b.* & 98. *b.* 10 *Ed.* 4. 14. 18 *Ed.* 4. 8. 14 *Hen.* 8. 1. *b. Stamford* 25. *b. &c. Vide* 12 *Hen.* 8. 4. & 18 *Hen.* 8. 2. But when a man hath savage Beasts *ratione privilegii*, as by reason of a Park, Warren, &c. he hath not any property in the Deer, or Conies, or Pheasants, or Partridges; and therefore in an action, *Quare Parcum, Warrennam, &c. fregit & intravit, & 3. damas, lepores, cuniculos, phasianos, perdices, &c. cepit & asportavit*, he shall not say (*suos*) for he hath not property in them, but they do belong to him *ratione privilegii*, for his game and pleasure, so long as they remain in the priviledged place: for if the owner of the Park dieth, his heir shall have them, and not his Executors or Administrators, because without them the Park which is an Inheritance is not compleat; nor shall
[18] Felony be committed of them, But of those which are made tame, in which a man by his industry hath any property, Felony may be committed of them. And therewith agreeth the rule in 3 *Hen.* 6. 55 *b.* 8 *Ed.* 4. 5. *b.* 22 *Hen.* 6. 59. which is ill reported, and 43 *Ed.* 3. 24. *vide* 22 *Ass.* 12 *Hen.* 8. 3. 13 *Eliz. Dyer* 306. 38 *Edw.* 3. 10. *Vide* 2 *Ed.* 2. *tit. Distress*, 2 *Ed.* 2. *Avowry* 182. But a man may have property in some things which are of so base nature, that no Felony can be committed of them, and no man shall lose life or member for them, as of a Blood-hound, or Mastiff, *molossus*, 12 *Hen.* 8. 3. *Vide* 18 *Hen.* 8. 2. But he who stealeth the Eggs of Swans out of the Nest, shall be imprisoned for a year and a day, and fined to the King, one moity to the King, the other to the owner of the land where the Eggs were taken, and that by the Statute of 11 *Hen.* 7. *cap.* 17. And it hath been said of old time, That he who stealeth a Swan in an open and common River, lawfully marked, the same Swan (if it may be) shall be hung in a house by the beak, and he who stole it, shall in recompence thereof, give to the owner so much Wheat that may cover all the Swan, by putting and turning the Wheat upon the head of the Swan, until the head of the Swan be covered with the Weat. And it was Resolved, That in the principal case the prescription was insufficient; for the effect of the prescription is to have all wild Swans, which are *feræ naturæ*, and not marked, *nidificant', gignent', & frequentant'*, within the said Creek. And such prescription for a Warren shall be insufficient, *scil.* to have all Pheasants and Partridges, *nidificantes, gignentes*, and frequenting within his Mannor. But he ought to say, to have free Warren of them within his Mannor: For although they are *nidificantes, gignentes*, and

and frequenting within the Mannor, he cannot have them *jure privilegii*, but ſo long as they are within the place. But it was Reſolved, That if the Defendants had alledged, that within the ſaid Creek there had been time out of mind, &c. a game of wild Swans not marked, building and breeding; and then have preſcribed, that ſuch Abbot and all his Predeceſſors, &c. had uſed at all times to have and take to their uſe ſome of the ſaid Game of wild Swans and their Cignets within the ſaid Creek, the ſame had been good; for although that Swans are Royal Fowls, yet in ſuch a manner a man may preſcribe in them; for that may have a lawful beginning by the Kings grant: For in *Rot. Parliam.* 16 *Rich.*2.*part.*1. *numero* 39. like grant was of wild Swans unmarked in the County of *Cambridge*, to *B. Bereford* Knight. The like grant in *Rot. Parl. ann.* 30 *Edw.* 3. *part.* 2. *num.* 20. the King granted to *C. W.* all his wild Swans unmarked between *Oxford* and *London* for ſeven years. In *Rot. Parl. an.* 1 *Hen.* 4. *part.* 6. *num.* 14. A grant was made to *John Fenne*, to ſurvey and keep all wild Swans unmarked, *ita quod de proficuo reſpondeat ad Scaccarium.* By which it appeareth, that the King may grant wild Swans unmarked; and by conſequence a man may preſcribe in them within a certain place, becauſe it may have a lawful beginning. And a man may preſcribe to have Royal Fiſh within his Mannor, as is holden in 39 *Ed.* 3. 35. for the reaſon aforeſaid. And yet without preſcription they do belong to the King by his Prerogative. [b]

Mich. 39 & 40 Eliz. *in the Exchequer.*

Sir *Thomas Cecil's* Caſe.

Sir *Thomas Cecil* being ſeiſed of the Mannor of *Strickſton* in the County of *North.* did enter into communication with one *Foſter* to exchange divers parcels thereof with him for certain Lands which the ſaid *Foſter* had in the ſame Town; and before any exchange perfected, Sir *Thomas* did convey the ſaid Mannor, and the ſaid land of the ſaid *Foſter* by the ſpecial name of *Foſter*, by Deed indented and inrolled, to Queen *Elizabeth*, her heirs and ſucceſſors, and covenanted with the Queen that he was ſeiſed as well of the ſaid Mannor as of the ſaid land late *Foſters*, of a good eſtate in Fee-ſimple; and the ſaid Sir *Thomas* was bound unto the Queen in an Obligation of ten thouſand pound to perform the ſaid Covenant amongſt others. And the ſaid Sir *Thomas* had before that time exhibited an *Engliſh* Bill into the *Exchequer Chamber*, containing the matter aforeſaid; and that the ſaid lands, parcel of the ſaid Mannor intended to be given in exchange to *Foſter*, were of greater value than the land of the ſaid *Foſter*, ſo that the Queen was deceived in the value; which lands parcel of the Mannor paſſed to the King by the Conveyance of the Mannor, and not leſs, the Covenant and Obligation of the ſaid Sir *Thomas* as to that was broken and forfeited by the rigour of Law. But the ſaid Sir *Thomas* in his Bill did relie upon the Statute of 33 *Hen.* 8. *cap.* 39. by which it is enacted, That if any perſon to whom any ſuch debt, or duty is, or at any time hereafter ſhall be demanded, alledge, plead, declare, or ſhew in any of the ſaid Courts, good, perfect, and ſufficient cauſe, and matter in Law, reaſon, or good conſcience, in bar or diſcharge of the ſaid Debt, or duty, or why ſuch perſon or perſons ought not to be charged or chargeable to, or with the ſame, and the ſame cauſe or matter ſufficiently prove in ſuch one of the ſaid Courts as he or they ſhall be impleaded, ſued, vexed, or troubled for the ſame; That then the ſaid Court, and every of them, ſhall have full power and authority to accept, judge, and allow of the ſame proof, and wholly and clearly to acquit and diſcharge all, and every perſon and perſons that ſhall be ſo pleaded, vexed, ſued, or troubled for the ſame, any thing in this preſent Act mentioned to the contrary notwithſtanding, &c. And that Proceſs was ſued againſt him upon the ſaid Bond out of the Court of *Exchequer*. Upon which Act of Parliament, and the matter aforeſaid (being as he ſuppoſed good, perfect, and ſufficient cauſe and matter in reaſon, and good conſcience within the ſaid Act to diſcharge him of the ſaid Bond) The ſaid Sir *Thomas* by his ſaid Bill prayed to be relieved, and thereupon he had a Commiſſion to examine Witneſſes, to prove the matter of his Bill to be true; which was returned, and publiſhed. And upon the hearing of the cauſe in the *Exchequer Chamber*, it appeared by teſtimony of divers witneſſes, That the Plaintiff had made direct proof of all the parts of his Bill, And now in this Term, 39 & 40 *Eliz.* divers Queſtions were moved touching that matter. The firſt and the principal was, If the branch of the ſaid Act doth extend to any Debt mentioned in the ſaid Act, for which the King hath remedy by the Common Law, or in ſuch debts, or ſuch caſes only for which the ſaid Act giveth remedy to the King which he had not before. 2. If the Court may make a diſcharge by decree upon that *Engliſh* Bill within the intention of the Act. And as to the firſt, It is to know, that divers branches of the Act are to be conſidered: 1. The Act maketh all Obligations to the King in nature of a Statute Staple. 2. Another branch giveth there ſuit to the King, although the Obligation had been made to another to the uſe of the King. 3. That the King upon ſuit upon every Obligation made, or to be made, ſhall recover damages and coſts. 4. The Statute giveth remedy to the King for recovery of his debt or duty, &c. by *Capias*, *Extend' fac.* *Subpœna*, *Attachment*, and *Proclamation of Allegiance* (if need be) or otherwiſe as to any of the Courts ſhall be by their diſcretions thought expedient for the ſpeedy recovery of the Kings Debts. 5. There is a clauſe, That the King ſhall be preferred in his execution before common perſons. 6. The heir who claimeth by the gift of his Anceſtor ſhall be bound to pay the Debt to the King (due before or after the gift) by Judgment, Recognizance, Obligation, or other ſpecialty, and ſhall bind the [19] [b]

the land alſo to the Kings debts againſt the iſſue in tail; then cometh the ſaid Proviſo whereof the Queſtion doth ariſe. *Provided always, and be it enacted, That if any perſon, &c.* And it was Objected, That it ſhall extend only in ſuch caſes in which remedy given to the King by this Statute; as where a Bond was made to the uſe of the King, or in charging the iſſue in tail, or in charging the heir who claimeth by gift before the debt accrued, &c. there becauſe the Statute giveth the King remedy which he had not before, this branch giveth to the party ſo charged by this Act, a plea to diſcharge him, either by matter of bar in Law, or in good Conſcience. And that was ſtrongly enforced by the Concluſion of this Proviſo: for the concluſion is, (as it appeareth before) *any thing in this Act before mentioned to the contrary notwithſtanding*; So that the ſence was, That the party might take any matter in Law or good Conſcience, notwithſtanding any thing contained in this Act; which is as much as to ſay, that this Act ſhall be no impediment to it. But in our Caſe, the King hath remedy by the Common Law, and therefore this Proviſo ſhall not help him. As to that it was anſwered and reſolved by the Court, That the ſaid Sir *Thomas Cecil* upon the matter aforeſaid was to be relieved by the Aid of this Proviſo. For the ſaid Act of 33 *H.* 8. hath given benefit and advantage to the King: 1. In making every Bond made to the King in nature of a Statute Staple. 2. In giving remedy to the King himſelf for Obligations made to others to his uſe. 3. To recover coſts and damages. 4. In ſuing of execution for all his debts. 5. In charging the iſſue in tail, and the heir who hath the land of the gift of his anceſtor: and therefore it was the intent of the Act to gratifie the ſubject, that where new proviſion was made for the levying of the Kings debt in more ſpeedy and beneficial manner, than the King had before, the ſubject alſo ſhould have ſome new benefit which he had not before, and that was to diſcharge himſelf by matter alledged to be a diſcharge in good Conſcience: Alſo this Proviſo giveth not benefit only to him who hath matter in good Conſcience, but alſo to him who hath *good, perfect, and ſufficient cauſe and matter in Law, reaſon*, (and then cometh) *good conſcience*: And without queſtion the firſt words, *(cauſe and matter in Law)* ſhall extend to all the Kings debts and proceſs thereupon, as well at the Common Law, as upon this Act. And the Concluſion of the ſaid branch maketh not againſt it, for the ſence of that was, that he plead matter in Law or good Conſcience, and that
[20] nothing contained in the ſaid Act ſhall be an impediment to it. And ſo was it holden in the like caſe upon other words, in the ſecond Saving of 27 *H.* 8. *cap.* 10. of Uſes, in *Cheinie's* Caſe, where the Proviſo ſaveth the right, &c. of &c. as if the Act had not been made; and there the caſe was, That the Leſſor did enfeoff the Leſſee to the uſe of others, in which caſe, if the Statute had never been made, the term had been drowned at the Common Law. But *Trin.* 27 *Eliz.* it was Reſolved, That the Term was ſaved, and the ſame expoſition made of the words as before. Alſo theſe notable preſidents were cited, which were Reſolved in the *Exchequer* by the Barons upon Conference had with the two chief Juſtices; one in the caſe of Sir *William Herbert*, in *Trin.* 37 *Eliz.* who was relieved upon the ſaid branch of the ſaid Act by matter in Equity, becauſe in *Scire facias* againſt him as heir to *Matthew Herbert* his Father, the Sheriff returned *Scire feci*, and upon his default Judgment was given, as you may ſee in *Matthew Herbert's* Caſe, in the Third Part of my Reports. And becauſe in truth he was never ſummoned, and had good matter, if he had notice thereof, to plead in diſcharge of the ſaid Recognizance, becauſe he had no land by deſcent from his Father, nor any land from him after the Recognizance acknowledged, all which he ſhewed in Certain in an *Engliſh* bill in the *Exchequer Chamber*: upon which, upon Conference had by Sir *Roger Manwood* and the other Barons with the two chief Juſtices, by decree he was diſcharged of the ſaid Recognizance. The other caſe cited was, *Thomas* Duke of *Norfolk* was attainted by Parliament, *Anno* 38 *H.* 8. And King *E.* 6. ſold to Sir *Edw. Rous* divers Timber trees growing upon the poſſeſſions of the ſaid Duke in *Suffolk*, and Sir *Edward* was bounden in an Obligation to King *Ed.* 6. for payment of certain money, and before the ſaid Sir *Edw.* cut down any of the ſaid Trees, *Edw.* the Sixth died. And at a Parliament holden 1 *Mariæ*, it was declared by Parliament, that the ſaid Attainder of the ſaid Duke of *Norfolk* was void; for which cauſe the ſaid Sir *Edw.* could never enjoy the ſaid Trees according to his bargain: And in a *Scire facias* in the *Exchequer* upon the ſaid Obligation againſt the heir and Terr-Tenant of Sir *Edw. anno* 27 *Eliz.* they appeared, and pleaded all the matter in Equity in bar and diſcharge of the ſaid Obligation as a *Latin* plea in the *Exchequer*. And upon good Conſideration of the Statute of 33 *H.* 8. by the Barons, and of the ſaid plea, at laſt (after the ſame had depended long) it was Reſolved by the Barons, that the Defendants were to be relieved within the ſaid Act; and that the Defendants might well plead the ſame in Bar. And thereupon *Popham* the Attorney-General ſeeing the opinion of the Court, *ulterius proſequi non vult*. Both which preſidents I ſhewed to the Juſtices; and accordingly it was reſolved by all the Juſtices of *England*, (who met together to give their opinions in the ſaid Caſe) That Sir *Thomas Cecil*
[b] was to be relieved upon the ſaid matter in Equity, within the purview of the ſaid branch of 33 *H.* 8. And ſecondly, That the Court of *Exchequer Chamber* might well upon the ſaid *Engliſh* Bill (although that the ſuit was by proceſs at the Common Law in the Court of *Exchequer* before the Barons) make a decree in the caſe; for to this purpoſe they are but one Court. Then it was moved, If the Proviſo next following after the branch concerning the equal charging of land liable to the Kings debt in the hands of every owner and poſſeſſor, that any of them ſhall not be charged only, but all entirely, if the ſame extendeth to all the Kings debts; and to all executions, for the levying of them as well at the Common Law, as upon the ſaid Act. And it was Reſolved by them, That the ſaid branch did extend to all Executions for the Kings debts, as well at the Common Law, as upon the ſaid Act; and that all ſhould be equally extended by force of that branch according to the purview of that Act. It was alſo Reſolved, That although the Obligation made were for performance of Covenants, Yet after that it was broken, (as it was in the caſe at Bar at the time of ſealing and delivery thereof) That the ſame was a debt to the King by Obligation within the Act.

Trin.

Trin. 41 Eliz. *in the Exchequer.*

The Lord *Anderſon's* Caſe.

BEtween the Lord *Anderſon* Chief Juſtice of the Court of *Common Pleas*, and *Sibthorpe* of the *Middle-Temple*, a Queſtion was moved upon the branch of the Act of 33 *H.* 8. *cap.* 30. That is to ſay, *That all Mannors, Lands, &c. which now be, or that hereafter ſhall come, or be in, or to the poſſeſſion or ſeiſin of any perſon to whom the ſaid Mannors, Lands, &c. have heretofore or hereafter ſhall deſcend, &c. in fee-ſimple, or fee-tail, &c. by, or after the deceaſe of his or their anceſtor or anceſtors as heir, or by gift of his anceſtor, whoſe heir he is, which ſaid anceſtor or anceſtors was, is, or ſhall be indebted to the King, or to any other perſon to his uſe, by judgment, recognizance, obligation, or other ſpecialty; That then, in every ſuch caſe, the ſame Mannors, Lands, &c. ſhall be and ſtand by authority of this Act from henceforth charged and chargeable, to and for the payment of the ſame debt.* If Tenant in tail of the Mannor of *D.* be bound in a Recognizance to *J. S.* which Recognizance afterwards cometh to the King, by by the Attainder of *J. S.* of High Treaſon, and afterwards Tenant in tail dieth, and the iſſue in tail alieneth the Land *bona fide*, If the Queen may extend the Mannor of *D.* in the hands of the alienee. And in this caſe four points were Reſolved by the Barons upon Conference had with *Popham* Chief Juſtice, and divers other Juſtices: 1. It was Reſolved, that before the ſaid Statute of 33 *H.* 8. If Tenant in tail of Lands came endebted to the King by Judgment, Recognizance, Obligation, or otherwiſe, and dieth, the King ſhall not extend the Land in the ſeiſin of the iſſue in tail; For the King is bound by the Statute of *Donis Conditionalibus*, as it is adjudged in *Plowden's Commentaries* in the Lord *Berkley's* Caſe 22. in the principal Caſe; And therewith agreeth, as to the point in Queſtion, the Reſolution of the *Exchequer*, and of the Court of Surveyors in the Caſe of *Brown*, Father of Juſtice *Brown*, as it is reported in *Plowden's Commentaries* 249. *b.* So one point well reſolved, in which there was variety of opinions in our Books. *Vide 39 Aſſ. p.* 18. 47 E. 3. 8. *Regiſter* 143, 144. *F. N. B.* 217. *a. & b.* 2. It was Reſolved, That if Tenant in tail becometh indebted to the King by the Receipt of the Kings money, or otherwiſe, if it be not by Judgment, Recognizance, Obligation, or other ſpecialty, and dieth, the Land in the ſeiſin of the iſſue in tail by force of the ſaid Act of 33 *H.* 8. ſhall not be extended for the Kings debt, for the Statute of 33 *H.* 8. extendeth only to the ſaid four Caſes; and all other debts remain at the Common Law. 3. It was Reſolved, That if Tenant in tail becometh indebted to the King by any of the four ways mentioned in the ſaid Act, and dieth, and before any proceſs or extent the iſſue in tail *bona fide* alieneth the Land in tail, that now this Land ſhall not be extended by force of the ſaid Act of 33 *H.* 8. for as it appeareth by the words of the ſaid branch, it maketh the Land in the poſſeſſion or ſeiſin of the heir in tail only liable againſt the iſſue in tail, and not the alienee. For the effect of the Proviſo as to that purpoſe is, *That all lands which ſhall be in the poſſeſſion or ſeiſin of any perſon, to whom the ſame ſhall deſcend in fee tail as heir, whoſe anceſtor was indebted to the King, &c. That then, in every ſuch caſe, the ſame land ſhall be charged with the Kings debt:* So that by expreſs purview of the Act, the Land ſhall be only extended ſo long as it is in the poſſeſſion or ſeiſin of the heir in tail; for the Act ſaith, *That in every ſuch caſe the land ſhall be charged*, and for as much as the Land againſt the iſſue in tail was not extendable before the ſaid Act, the King had benefit to extend the ſame in the poſſeſſion of the heir in tail, which he could not before, but the King cannot extend the ſame in the hands of the alienee, for that the Statute doth not extend unto it: and the makers of the Act had reaſon to favour the Purchaſor, Farmor, &c. of the heir in tail, more than the heir himſelf, for that they are ſtrangers to the debts of the Tenant in tail, and they come to the land *bona fide*, and upon good conſideration. And there is another clauſe next following to the ſaid branch, the effect of which is, *That our Soveraign Lord, his heirs or ſucceſſors, ſhall not be barred, delayed, &c. to demand and receive their juſt, &c. debts againſt any of his ſubjects, as heir or heirs, &c. if any ſuch perſon or perſons ſhall ſay or alledge, that they have no lands, &c. but only intailed or given to them by any their anceſtors to whom they be heirs:* So that by this clauſe alſo the intent of the makers of the Act appeareth, that the heir in tail ſhall be only charged with the Kings debt. But lands in Fee ſimple were extendable by the Common Law in whoſe hands ſoever they came, and there as to them the Statute was but *declarativum antiqui juris*; but as to eſtates in tail, it was *introductivum novi juris* againſt the iſſue in tail, and that in the caſe at Bar maketh the difference of the ſaid Caſes, although that both be joyned together in the ſame ſentence. And *Popham* Chief Juſtice ſaid, That ſo it hath been reſolved in the *Exchequer* before that time, in the Caſe of Serjeants *Nicholls* Father of the Serjeant that now is, That the Lands in the hands of the Purchaſor of the iſſue in tail ſhall not be extended by the ſaid Act of 33 *H.* 8. for the debt that the Father of the iſſue in tail owed to the King (by one of the four ways mentioned in the Act) but was diſcharged by the opinion of the Court of *Exchequer*. 4. It was Reſolved, That for as much as the ſaid debt in the Caſe at Bar was originally due to a Subject, that ſuch debt is not within the ſaid Act to charge the land in the poſſeſſion or ſeiſin of the heir in tail: For the ſaid Act, as to charge Lands intailed againſt the iſſue, extendeth only to debts originally and immediately due to the King by Judgment, Recognizance, Obligation, or other ſpecialty; For the words are, (*indebted to the King, or any other to his uſe by judgment, &c.*) which is intended to be an immediate debt, and not to debts which were due to ſubjects, and did belong or occur to the King by Attainder, Utlary, Forfeiture, gift of the party, or by any other collatteral way or means, for which the Statute of 33 *Hen.* 8. hath a Clauſe a little before the ſaid branch, for the ſhort and general manner and form of pleading in ſuch caſes (for the recovery of them in the Courts mention'd in the ſaid act) on the Kings part, *ſcil. That*

[21] [b] [22]

the party ſuch a year and day did give the ſame debt to the King, or was attainted, outlawed, or other offence, forfeiture, deed, act or thing committed or done, by reaſon whereof the ſaid debts did accrue and ought to remain, come, and be to the King. So that the ſeveral manners of penning of theſe two branches manifeſt the intention of the makers of the Act, to prefer immediate debts due to the King by Judgment, &c. before debts of Subjects, which accrued to the King by Aſſignment, Attainder, Utlary, &c. and the reaſon was, becauſe that debts due immediately to the King by Judgment, Recognizance, Obligation, or other ſpecialty, are in their nature higher, and better known, and found upon Search, than debts due to Subjects. Alſo when *J. N.* is endebted to *J. S.* by Judgment, Recognizance, Obligation, or other ſpecialty, and afterwards *J. S.* is Outlawed, &c. by which the debt cometh to the King by the Outlawry, &c. it cannot be properly ſaid, that *J. N.* is endebted to the King by Judgment, Recognizance, Obligation, or other ſpecialty; for by them he was endebted to *J. S.* and *J. S.* by his Outlawry (which is the Kings title) hath forfeited them to the King. So that by force of the Judgment, &c. and Outlawry, the debt doth belong to the King. And the words of the Act are *(indebted to the King, or any other to his uſe by Judgment, &c.)* ſo that they ought immediately be due to the King himſelf; or if it be to any other than the [b] King, it ought to be originally to the uſe of the King, and that it is not when the debt is originally due to a Subject to his own uſe, and forfeited to the King by a ſubſequent act. And ſo it was reſolved, That for ſuch debt the King ſhall not extend either againſt the Alienee of the heir in tail, or againſt the heir in tail himſelf; for ſuch debts are not within the Act of 33 *H.* 8. as to charge the heir in tail; and ſo remain at the Common Law as debts immediately due to the King, which are not due by Judgment, Recognizance, Obligation, or other ſpecialty, as before hath ſaid.

Trinit. 42 Eliz *in the Common Pleas.*

Butt's Caſe.

IN a Replevin between *Fiſh* and *But*, the Caſe in effect was, One ſeiſed of *Black Acre* in fee, and alſo poſſeſſed of *White Acre* for years, by Deed granted a Rent out of both to *A.* to have and perceive to him for the term of his life, with clauſe of diſtreſs in both: And for Rent behind *A.* doth diſtrein in *White Acre*, and if the diſtreſs were good or not, was the Queſtion. And it was agreed by [23] the whole Court, That the diſtreſs was well taken. And in that Caſe theſe points were reſolved: 1. That if Leſſee for years of a Carve of Land, granteth to another a Rent out of the ſaid Carve for the life of the Grantee, that it is a good charge during the term, if the Grantee ſo long liveth; for the grant ſhall be taken ſtrong againſt the grantor, and ſhall not be void, when by any conſtruction it may be made good *(Vide Plow. Comment.* in *Welchden's* Caſe) that in ſuch caſe the Grantee hath but a Chattel. So if the Leſſee for years granteth the Carve of Land to another, for the term of his life, he hath the whole term if he live ſo long, as well as in the caſe of a Deviſe. 2. It was Reſolved, That when a Rent is granted out of Land in fee, and out of a term for years, to have and perceive to the Grantee for the term of his life, that that, as an eſtate of Freehold, according to the purport of the Deed, cannot iſſue out of the term for years, but out of the Land which the Grantor hath in Fee-ſimple only, becauſe the Freehold of the Rent may go out thereof, and not out of a Chattel. And one entire Rent cannot be a Freehold out of *Black Acre*, and a Chattel out of *White Acre*. And to make two Rents where one only is granted by one to another, ſhall be in that caſe injurious, and the pact and agreement of the parties cannot charge ſuch thing with Rent, which is not chargeable by the Law, as out of a Hundred, or Advowſon 30 *Lib. Aſſiſarum pla.* 5. out of a Fair, 14 *E.* 3. *Scire facias* 122. the Earl of [b] *Kents* Caſe; Nor a Rent can be granted or reſerved of any eſtate of Freehold out of any other Hereditament which is not Manurable, or in poſſeſſion, reverſion, or by poſſibility, but is *hæreditamentum incoporeum*; for *privata non derogant juri communi:* And in an Aſſiſe they cannot be put in view, or any diſtreſs can be taken in them. But in the Caſe at Bar, *White Acre* is *hæreditamentum corporeum*, and Manurable; but for the exility and incapacity of intereſt that the Grantor hath in it, this Rent of Freehold cannot iſſue thereout, but ſhall go only out of the Land in Fee-ſimple. And in the Caſe at Bar, in an Aſſiſe brought of this Rent, the Land in fee ſhall only be put in view, and if the Grantee accept a Leaſe, or grant of *White Acre*, it ſhall not ſuſpend his Rent. 3. It was Reſolved, That *White Acre* ſhall be during the term ſubject to the diſtreſs of the Grantee for the Rent during the years, although the Rent doth not iſſue thereout, as in 46 *Edw.* 3. 14. when land is charged with a Rent in fee, goods and chattels may be bound to the diſtreſs. And it was ſaid, foraſmuch as *White Acre* is only charged with diſtreſs, if the Grantee taketh a Leaſe of any part thereof, that it is no ſuſpenſion of the diſtreſs, but that he may diſtrein in the reſidue; for it is not going out of the Land, but to be taken upon the Land: as if I have Warren in anothers land, and take a Leaſe of parcel of the Land, although the Land be charged with Warren, yet foraſmuch as it doth not iſſue out of the Land it is not any ſuſpenſion. *Vide* 35 *Hen.* 4. 6. 56. 14 *Hen.* 4. 6. *&c.* for a man may have a Warren in his own lands: So he may in many Caſes diſtrein in his own poſſeſſions, as in 31 *E.* 3. *Diſtreſs* 64. *&* 7 *H.* 6. 3. *per Curiam*, one Tenant in common may diſtrein the cattel of the other in the land which they have in common: and 26 *Hen.* 8. 5. he may preſcribe to diſtrein in his own land, but not to have a Rent out of his own land. If a man by Deed granteth a Rent of 40 *s.* to another out of his Mannor of *D.* to have and perceive

perceive to him and his heirs; and granteth further by the ſame Deed, that if the Rent be behind, the Grantee ſhall diſtrein in the Mannor of *S.* be the Mannor of *S.* (in the ſame County or in another, and be it granted by one or divers Deeds) the rent is only iſſuing out of the Mannor of *D.* and it is but a pein that he may diſtrein the Mannor of *S.* but both the Mannors are charged, one with the Rent, the other with the diſtreſs for the Rent, one iſſuing out of the land, the other to be taken upon the land. And if I grant unto you, that you and your heirs ſhall diſtrein for a Rent of forty ſhillings within my Mannor of *S.* the ſame by conſtruction in Law ſhall amount to a grant of a Rent out of my Mannor of *S.* for if it ſhall not amount to a grant of a Rent, the grant ſhall be of little or no effect, if the Grantee ſhall have only a bare diſtreſs, and no rent in him; for then he ſhall never have an Aſſiſe thereof; and that is the reaſon, That it is often ruled and reſolved, that it ſhall amount unto a grant of a rent by conſtruction of Law, *ut res magis valeat*, 3 *Edw.* 3. 12. 3 *Aſſ. pl.* 7. 14 *Aſſ. pl.* 14. 16 *Edw.* 3. *tit. Grants* 64. 18 *Edw.* 3. 32. 26 *Aſſ. pl.* 38. 30 *Aſſ. pl.* 12. 46 *Edw.* 3. 18. 32. 8 *Hen.* 4. 19. 9 *Hen.* 6. 9. 22 *Hen.* 6. 11. *Littl.* 48. *b.* And in ſuch caſe the Grantee ſhall not have a Writ of Annuity. But when one granteth a Rent out of the Mannor of *D.* and further granteth, that if the Rent be behind, the Grantee ſhall diſtrein for the ſame Rent in the Mannor of *S.* it is but a penalty in the Mannor of *S.* for three cauſes: 1. The Law needeth not make conſtruction that it ſhall amount to a grant of a Rent; for here a Rent is expreſſly granted to be iſſuing out of the Mannor of *D.* and the parties have expreſly limited out of what land the Rent ſhall go, and in what land the diſtreſs ſhall be taken, and the Law ſhall not make an expoſition againſt the expreſs words and intent of the parties, when it may ſtand with the rule of Law; *Quoties in verbis nulla eſt ambiguitas, ibi nulla expoſitio contra verba expreſſa fienda eſt.* 2. If in that caſe it ſhall amount to a grant a Rent out of the Mannor of *S.* then the Grantor ſhall be twice charged; for if the Grantee bringeth a Writ of Annuity, it ſhall extend only to the Mannor of *D.* for upon the grant of a diſtreſs in the Mannor of *S.* no Writ of Annuity lieth, becauſe the Mannor of *S.* is only charged and not the perſon of the Grantor, as to that; ſo for this caſe the bringing of the Writ of Annuity cannot diſcharge the Mannor of *S.* of any Rent; and ſo the Law, by conſtruction againſt the words and intention of the parties, ſhould do injury to the Grantor to charge him twice. 3. If in ſuch caſe the Mannor of *S.* in which the diſtreſs is only appointed, ſhall be in another County, then it hath been often adjudged, that the Rent ſhall not iſſue out of it, but the diſtreſs ſhall be as a means and remedy to compel the Tenant of the Land to pay the Rent. And it was ſaid, That there was not any difference in reaſon, that the Law in conſtruction ſhould make the Rent to be iſſuing out of it, when it lieth in the ſame County, and not when it lieth in ſeveral Counties, for the words in both Caſes are all one, and it is not any reaſon to ſay, that he ſhall fail of recovery by Aſſiſe.. *Vide ſupra* in *Bulwer's* Caſe, and the Books in 1 *Aſſ. pl.* 10. 1 *Ed.* 3. 21. and other Books, do not ſay that the Rent iſſueth in ſuch caſe out of both, but that the Land in which the diſtreſs ſhall be taken is charged; and that is true; for it is charged with diſtreſs: and foraſmuch as it was charged with diſtreſs, their opinion was, that the Tenants of both ſhould be named in the Aſſiſe. See the Books in 9 *Ed.* 3. 13. 31 *Aſſ. pl.* 27. 17 *Ed.* 4. 16. 10 *Aſſ. pl.* 4. 10 *Ed.* 3. 18. 2 *Ed.* 2. *Aſſ.* 360. 1 *Aſſ.* 10. 3 *Aſſ.* 32 *Hen.* 6. 27. 22 *Aſſ. pl.* 66. 31 *Aſſ. pl.* 27. 29 *Edw.* 3. *Aſſ.* 366. And the opinion of *Finchden* in 41 *Edw.* 3. 15. was affirmed for good Law, That if the Mannor of *D.* out of which rent is granted, be recovered by eigne title, that all the rent is extinct. But if the Mannor of *S.* in which the diſtreſs is limited, be evicted, yet the whole rent remaineth. So if the Grantee purchaſeth parcel of the Mannor of *S.* the rent is not extinct, becauſe the rent goeth only out of the Mannor of *D.* *Vide* 17 *Edw.* 4. 7. the like caſe. And it was ſaid, That if a man granteth a rent out of three Acres, and further granteth, that if the rent be behind, that he ſhall diſtrein for the rent in one of the Acres, the rent is entire, and cannot be a Rent ſeck out of two Acres, and a Rent charge out of the third Acre, but it is for the whole a Rent ſeck; and yet he ſhall diſtrein for it in third Acre. So if a rent be granted to Two and their heirs out of one Acre of Land, and that it ſhall be lawful for one of them and his heirs to diſtrein in the ſame Acre, for the ſame it is a rent ſeck, for as much as they ſtand joyntly ſeiſed of one entire rent, it cannot be as to one a rent ſeck, and to the other a rent charge, and that diſtreſs is as appurtenant to the rent; and therefore if he who hath the rent dieth, the ſurvivor ſhall diſtrein; and if both grant over the rent he ſhall diſtrein for it. But if a man granteth a rent out of *Bl. Acre* to one and his heirs, and granteth to him that he may diſtrein for it in the ſame Acre for the term of his life, the ſame is a rent charge for life, and a rent ſeck after *diverſis temporibus*. Otherwiſe is it if the diſtreſs be limited for years in the ſame land, there it wholly remaineth a rent ſeck, becauſe the Fee and Freehold are ſeck in ſuch caſe. But it was adjudged in the Caſe at Bar, that the Avowry was inſufficient for divers cauſes: 1. Becauſe in the Avowry no mention was of any land but of the land in which he had but a leaſe for years, *ſc. quod conceſſit extra terram illam inter alia quendam reddit', &c.* Whereas in his Avowry he ought to have derived the rent out of the land in Fee-ſimple only, for out of the ſame only in judgment of Law, the rent for life was iſſuing: And although that the Plaintiff in bar to the Avowry hath diſcloſed all the truth of the ſpecial matter which in judgment of the Law maketh for the Avowant, and he hath made his caſe better for him than the Avowant hath made it for himſelf, yet the ſame doth not make the Avowry, which wanteth ſubſtance, good; for the Avowry which is in the nature of a Count, ought to contain ſufficient matter upon which he may have judgment to have a return of the cattel. But if the Avowry or other Count or Replication, &c. wanteth form, or omitteth circumſtance of time, place, &c. there the plea of the other party may have ſuch imperfections, but cannot ſupply the defect of matter of ſubſtance. *Vide* 6 *Ed.* 4. 2. *b.* 6 *H.* 7. 10. 18 *Ed.* 4. 16. 18 *Ed.* 3. 34. *Plow. Com. Barkley's* Caſe 230. 38 *H.* 6. 17, 18, & 19. 22 *E.* 4. 2. 5 *H.* 7. 13. 7 *H.* 6. 6. *b. &c.* 2. The Avowant pleaded the grant out of the term for years only, and concluded, *virtute cujus*, he was ſeiſed *in Dominico ſuo ut de libero tenemento pro termino vitæ ſuæ*, which is repugnant to have a Freehold out of a term for years. And ſo Judgment was given againſt the Avowant for inſufficient pleading.

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Caſes of *Quare Impedit.*

Paſch. 31 Eliz. *in the Common Pleas.*

Hall's Caſe.

[*b*] *John Hall* brought a *Quare Impedit* againſt the Biſhop of *Bath* and *Wells*, and *Thomas Maunton* Clerk, Defendants, for diſturbing him to preſent to the Vicaridge of *Wollauington* appendant to the Mannor of *Wollauington*, whereof the Dean of *Windſor* was ſeiſed in his demeſne as of Fee in right of the Deanery, and preſented *Robert Pitman* his Clerk, who was inſtituted and inducted, and conveyed that Mannor to the Earl of *Leiceſter* by Leaſe for years, who aſſigned all his intereſt to *George Sidenham* Knight, who granted the ſame to *Chriſtopher Roll*; and during his poſſeſſion the Vicaridge became void by the death of *Robert Pitman*; and that the ſaid *Chriſtopher Roll* preſented one *John Davies* his Clerk to the ſaid Vicaridge, who was admitted, &c. And afterwards the ſaid *Chriſtopher Roll* did grant his intereſt in the ſaid Leaſe to the Plaintiff. And afterwards the Vicaridge became void by the deprivation of the ſaid *John Davies*, for which it did belong to the Plaintiff to preſent, and the Defendants did diſturb him to his damages, &c. To which the Biſhop pleaded, that he claimed nothing but as Ordinary, and demanded Judgment, if without ſpecial diſturbance, &c. And *Thomas Maunton* ſaid, That he claimed nothing in the ſaid Vicaridge, but that he is Vicar of the Church of the preſentation of the ſaid *George Sidenham*, who is yet alive, not named in the Writ, and demanded Judgment of the Writ. The Plaintiff to the Biſhops plea prayed Judgment, for as much as he claimed nothing in the Vicaridge, and it was granted, but *ceſſet executio* until, &c. And as to the plea of *Thomas Maunton* he did demur in Law. And the ſole queſtion of the Caſe is, If the *Quare Impedit* lieth againſt the Biſhop and the Incumbent without naming the Patron. And it was reſolved, That the Writ ſhould abate, and that the Patron ought to be named

[26] in the Writ, and that for divers cauſes, 1. Becauſe in this caſe the Patronage ſhall be recovered againſt him who hath nothing in the Patronage. And it is not reaſon that he who is Patron ſhall be diſpoſſeſſed and ouſted of his Patronage, when he is a ſtranger, and not party to the Writ, and eſpecially in this caſe, when he may be made party to the Writ. 2. At the Common Law the Incumbent ſhall not plead any plea which doth concern the right of Patronage, and therefore it ſhall be againſt reaſon that he ſhall be only named in the Writ, who at the Common Law cannot defend the Patronage, and he who hath the Patronage, and who may plead to the right of it ſhall be omitted in the Writ: For at the Common Law every one ſhall plead that plea which is fit for him, and pertinent to his Caſe: as in Aſſiſe againſt Diſſeiſor and Tenant, the Tenant ſhall plead a plea which concerneth the Tenancy, and not the Diſſeiſin. And the Incumbent at the Common Law ſhall not plead to the right of the Patronage in which he hath nothing, but the Patron ſhall plead to that. And the miſchief was, that by faint pleading and confeſſion of the Patron in a *Quare Impedit* the Incumbent was without remidy, as the Book is adjudged in 18 *Ed.* 3. 23. which was before the Statute of 25 *Ed.* 3. *Vide* 22 *Hen.* 6. 28. 9 *Hen.* 6. 30, 31. *&c.* But the Statute of 25 *Ed.* 3. *cap.* 7. doth enable the poſſeſſor, &c. (which is as much to ſay as the Incumbent after induction, as it is holden in 4 *Hen.* 8. *Dyer* 1. to counterplead the title of the King, and to have his anſwer, and to ſhew, and defend his right upon the matter, although he claim nothing in the Patronage, and by equity he ſhall plead againſt all common perſons, as the Books are in 9 *Hen.* 6. 30, 31. *&* 22 *Hen.* 6. 28. 13 *Hen.* 8. 13. 14 *Hen.* 8. 29. *Vide* 39 *Ed.* 3. 30. 27 *Ed.* 3. 81. 46 *Edw.* 3. 13. 19. 47 *Ed.* 3. 11. 2 *Rich.* 2. *Incumbent* 4. 8 *Hen.* 5 9. 7 *Hen.* 4. 34. 13 *Hen* 4. 7. 22 *Hen.* 6. 26. 16 *Edw.* 4. 11. 2 *Hen.* 7. 14. 10 *Hen.* 6. 4. *Statham.* And it is to be obſerved, that alwaies when the Incumbent pleads in bar, he firſt ſaith, that he is, *perſona imperſonata Eccleſiæ præd. &c.* by which it is implied, that he is admitted, inſtituted, and able to plead in bar, *ſcil.* againſt the King, that he is admitted, inſtituted, and inducted; and againſt a common perſon, that he is admitted and inſtituted, for then is *Eccleſia plena & conſulta*, againſt a common perſon as it is holden in 9 *H.* 6. 31. 22 *H.* 6. 27. 21 *E.* 4. 34. *b.* 24 *E.* 3. 30. 25 *E.* 3. 47. 38 *E.* 3. 9. *a.* 44 *E.* 3. 3. But this difference in the caſe at Bar was taken and agreed; That when by the Judgment in the *Quare Impedit*, the Inheritance, eſtate, or intereſt of the Patron in the Patronage is to be deveſted by the Judgment in the *Quare Impedit* brought by *J. S.* there *J. N.* who preſented, (and his Clerk received) ought to be named in the Writ; but when the Inheritance, eſtate or intereſt of the Patron ſhall not be deveſted by the Judgment, then, if another diſturber be named in the Writ, it is not needful to name the Rightful Patron in the Writ, and with this difference agree our Books. For in 42 *E.* 3. 7. One brought a *Quare Impedit* againſt an other; the Defendant ſaid, that he claimed nothing in the Patronage, but ſaid, that the Biſhop did preſent him by Lapſe, Judgment if, &c. and there *Belkyap* prayed a Writ to the Biſhop, becauſe that he hath diſclaimed in the Patronage; and the Court would not grant it, becauſe, that in as much as neither the Patron, nor the Biſhop (who in the ſame caſe was in the place of the Patron) were not named

[*b*] in the Writ, It was adjudged that the Writ ſhould abate; and if ſuch Writ ſhall be maintenable, every Patron by Covin between a ſtranger and the Incumbent may be ouſted of his Advowſon; and therewith agree 9 *H.* 6. 30, 31. 3 *H.* 4. 2, *&* 3. 13 *H.* 8. 13. But in 7 *H.* 4. 25, 37. there in a *Quare Impedit*, becauſe that the preſentation was only recovered, and not the Advowſon, nor the Patron put out of poſſeſſion, the Writ was adjudged good, without naming of the Patron. If a *Quare Impedit* be brought againſt the Patron and the Incumbent, and the Patron dieth pendant the Writ, the death of the

the Patron ſhall not abate the Writ,as it is adjudged in 9 *H.6.31.* For there are two miſchiefs,one if the Writ ſhall abate the diſturbance ſhall be unpuniſhed; and although that the Writ was well brought,yet the Plaintiff ſhall be without remedy, becauſe there wanteth a diſturber: And of the other part the other miſchief is,That if the Writ ſhall not abate,but the Plaintiff ſhall procced to Judgment and execution, the very Patron ſhall be out of poſſeſſion: And for as much as in the one caſe, if the Rightful Patron ſhall be out of poſſeſſion, he hath remedy by a Writ of Right to recontinue the Advowſon; and in the other caſe, if the Writ ſhall abate, the Plaintiff ſhall be without remedy, which ſhall be the greater miſchief, for this cauſe the Writ ſhall ſtand good, and ſhall not abate: and therewith agree 7 *H.* 4. 26. *b.* 13 *H.* 8. 13. 9 *H.* 6. 57. And a *Quare Impedit* well brought by divers, as Coperceners, or Joynt-tenants,&c. ſhall not abate by the death of one of them; Nor a *Quare Impedit* brought by the Husband and Wife ſhall not abate by the death of the Wife, becauſe that otherwiſe the Plaintiff (if the ſix months be paſt) ſhall be without remedy,as the Books are in *F. N. B.* 35.*b.* 38 *E.* 3. 43. 37 *H.* 6. 11. 7 *H.* 4. 19. 14 *H.*4.12. 9 *H.* 6. 30. 37. 1 *H.* 5. 13. 17 *E.* 3. 11. 17 *E.* 3. 304. But if the King preſenteth, and his Clerk is admitted and inſtituted, &c. there the *Quare Impedit* may be brought for neceſſity againſt the Biſhop or Incumbent, for it doth not lie againſt the King; So of the Pope if he uſurp, 12 *H.*8.12. 4 *H.*7.15. *&c. Vide* 47 *E.* 3. 11. The King brought a *Quare Impedit* againſt *Walter Dawtree* of the Church of *Retfield*, and made his title, for as much as *Hamond* Biſhop of *Rocheſter* had preſented to the ſaid Church by uſurpation being void (the Advowſon of which of right did appertain to three daughters and heirs) his Clerk, who was admitted, inſtituted and inducted, and he died,by which it belonged to the King to preſent, for as much as the Biſhop had gained that Advowſon to him and his Succeſſors without Licence, by which the Advowſon was become in *Mortmain*. The Defendant pleaded, That he is Parſon of the Preſentment of *William Wycleſey* Predeceſſor of the Biſhop that now is, *Thomas* by name, ſo that the Patronage is in *Thomas*; who we conceive ought to be named in the Writ; by which we conceive that our Lord the King, to this Writ, in which the Patron is not named, ought not to be anſwered; For we conceive, That a *Quare Impedit* doth not lie againſt the Incumbent alone, without naming the Patron, where it is expreſly ſhewed that there is a Patron, who may plead in bar of the Plaintiff or other thing to ouſt the King of the Action, which lieth not in the knowledge of the Incumbent to plead. And it was adjudged, That the Kings Writ was good againſt the Incumbent alone, becauſe he may give by the Statute what anſwer he will alone in maintenance of his poſſeſſion of his Church; and the now Biſhop who is Succeſſor, is no diſturber, for the Defendant came in by the Predeceſſor; and therefore ſhall not be charged with damages or coſts. And afterwards *John Hall* perceiving in the principal Caſe, the Reſolution of the Court, diſcontinued his ſuit, and loſt his preſentation, *illa vice.* [27]

Paſch. 40 Eliz.

Sir *Hugh Portman's* Caſe.

IN a *Quare Impedit* by Sir *Hugh Portman* againſt the Biſhop of *Canterbury*, and *Montgomery* Clerk, *ad Eccleſiam de Chelſey* in the County of *Somerſet*, and made his title by reaſon of a grant of the next Avoidance *unica vice*, divers points were reſolved: 1. If the Plaintiff in a *Quare Impedit* be Nonſuit after appearance, the ſame is peremptory, and a good bar in another *Quare Impedit*, although it be brought within the ſix months; and the reaſon thereof is, becauſe the Defendant (upon title made by which he is become actor) ſhall have a Writ to the Biſhop to admit,&c. his Clerk into the ſame Church,&c. which is a good bar in another *Quare Impedit* and therewith agreeth 19 *E.* 4. 9. 22 *H.* 6. 44. 33 *H.* 6. 1. 55. 20 *E.*4. 14. 21 *E.* 4. 2. *b. F. N. B.* 38. *b.* The ſame Law if the Plaintiff in the *Quare Impedit* diſcontinueth his ſuit, the Defendant upon title made, ſhall have a Writ to the Biſhop, and by conſequence the ſame is peremptory, and therewith agreeth 31 *H.* 6. 15. But if the Writ of *Quare Impedit* within the ſix months abateth for falſe *Latin*, or inſufficiency of form, the ſame is the fault of the Clerk, and ſhall not be peremptory to the Plaintiff, nor the Defendant thereupon ſhall have a Writ to the Biſhop, but the Plaintiff may have a new Writ of *Quare Impedit*, and therewith agreeth 3 *H.* 6. 3. 31 *H.* 6. 15. *F.N.B.* 38. *b. vide* 34 *Aſſ. pl.* 9. the like. So if the Writ abate for Miſnoſmer of the Plaintiff or Defendant, if the Plaintiff confeſſeth it, the Defendant ſhall not have a Writ to the Biſhop, for it may be the fault of the Clerk in the writing of it. And therewith agreeth *F. N. B.* 38. *vide* 31 *H.* 6. 15. But if the Plaintiff be made a Knight hanging the Writ, the Writ ſhall abate, and the Defendant ſhall have a Writ to the Biſhop, and by conſequence the ſame is peremptory; for (as we ſee by common experience in theſe times) the ſame is the Plaintiffs act, and none is forced or compelled to it. [b]

Trin. 27 Eliz. *in the Common Pleas*, Rott. 320.

Baskervile's Case.

[28] IN a *Quare Impedit* in the *Common Pleas*, the Case was, That 1 *Mariæ* title to present by Lapse was come to the Queen to the Church of *Cusep* in the County of *Hereford*. Sir *Nicholas Arnold* the Patron presented one *Evans*, who was thereto admitted, instituted and inducted, and died, and if the Queen hath lost her title to present by Lapse, or not, was the Question; And it was adjudged, that the Queen hath lost it. For the Queen had but *unam & unicam præsentationem hac vice*, which cannot be extended to the second Avoidance; For negligence to present, shall lose the subject one presentment only by Lapse, and not divers; and if the Queen hath *primam & proximam præsentationem* granted to her, she cannot take the second. And otherwise great inconvenience would follow to the Patron; For the Queen may forbear to present, and suffer divers to present by usurpation one after the other, and take her turn when she would, and the Patron might be in a manner thereby disinherited. And the Statute of *Prærogativa Regis*, *quod nullum tempus occurrit Regi*, is to be intended when the King hath an estate or interest certain or permanent, and not when his interest is specially limited, when and how he shall take, and not otherwise; for the time is the substance of his title, and in such case of time, *occurrit Regi*. And so was it at another time adjudged, *Pasch.* 28 *Eliz. Rot.* 412. in the *Common Pleas*, between *Beverley* Plaintiff, and the Bishop of *Canterbury* and *Gabriel Cornwall* Defendants for the Church of *Somby* in the County of *Lincoln*.

Hill. 43 Eliz. *in the Common Pleas*, Rott. 1108.

Maund's Case.

[b] IN a *Replevin* between *Maunde* and *Gregory*, the Defendant shewed, That a Rent-charge out of a house and certain lands was granted by Deed to one and his assigns, for his life, *pro consilio impendendo*, payable yearly at four Feasts, and for default of payment, if it be demanded, that it shall be lawful for the Grantee and his assigns to distrein, the Grantee assigned the rent to the Avowant, the Tenant attorned, the Assignee upon the land demanded the rent after the day, and for default of payment did distrain and avow, upon which the Plaintiff did demur in Law. In that case it was Resolved, 1. That a rent granted to one and his assigns, *pro consilio impendendo*, may be assigned over by the express words of the Grantor, who granted the same to him and his assigns; for *modus & conventio vincunt legem*. 2. That in that case the Assignee needeth not demand the rent at the day, as he ought to do in case of reentry, (for there all the interest or estate shall be defeated) or when any sum *nomine pœnæ* shall be forfeited, in both these cases demand ought to be precisely at the day a convenient time before Sun-set, in the one case in respect of the Condition, and in the other in respect of the penalty. But in the case of distress, he who hath the rent may demand it at what time he will, for no loss or penalty shall follow upon it: and so was it adjudged in the *Common Pleas*, *Mich.* 40 & 41 *Eliz.* between *Stanley* and *Read*, where the case was, That a Rent-charge was granted payable at a certain day, and if it be behind and demanded, that it should be lawful for the Grantee to distrein. The Avowant shewed, how that he made a demand at the day; The Plaintiff traversed that he did not demand it the same day, (intending to make the day part of the issue) upon which the Plaintiff did demur; And it was adjudged against the Plaintiff; For if the demand were at any time after the day, and before the distress, it is sufficient. 3. It was Resolved, That if a
[29] man hath a rent-seck, payable yearly at the Feast of *Easter*, and hath once seisin of the rent, and *Easter* passeth, and no tender or demand made of the rent, he may, although it be after the day of payment, come to the Land and there demand the rent, and although the Tenant of the Land be not there, yet upon such demand, if none be there ready to pay the rent, it is a denying of the rent, upon which he who hath the rent shall have an Assise, for as much as no penalty shall follow thereon, but only to have remedy to recover his rent and the arrerages, with costs and damages, and therewith agreeth *Litt.* 51. and the Book of *Entries*, *fol.* 79. *b.* 29 *Ass. p.* 52. But in the same Case, if the Tenant at the last instant of the Feast of *Easter* be ready upon the Land to pay the rent, and he who hath the rent, or any for him cometh to demand or receive the rent, there he who hath the rent cannot come in the absence of him who is Tenant of the Land, and demand it, and so make him a disseisor, and render damages and costs, without any default in him. But in such Case, he who hath the rent, because the default was in him, ought to make a demand of the rent of the person upon the Land, and if he cannot find him upon any part of the Land out of which the Rent is issuing, then in such case he ought to demand the rent at the next Feast of *Easter*, with all the arrerages, and although it be in the absence of the Tenant, yet it shall amount to a disseisin of the rent; and thereupon he who hath the rent shall recover all the arrerages, with damages and costs.

Discon-

Diſcontinuance of Proceſs, by the Death of the Queen.

Trin. 1 Jacobi.

THe Reſolution of the Juſtices after the death of Queen *Elizabeth*, concerning Diſcontinuance of Proceſs, &c. There are two manners of Re-ſummons and Reattachments, the one general, the other ſpecial. The effect of the general is, That the King doth direct a Writ *(exempli gratia)* to the *Kings Bench* in this form; *Mandamus vobis, quod ad ſectam noſtram omniumque ligeorum populi noſtri, qui proſequi voluerint extra & ſuper omnia ſive aliqua recorda, placita, brevia, præcepta, proceſſus, billas loquelas, appella, fines, & alia memoranda quæcunq; in curia noſtra coram nobis exiſten. vel in poſterum coram nobis proventur. omnimoda brevia reſummonit. reattachiament. & omnium aliorum proceſſuum pro nobis & dictis ligeis populi noſtri in hac parte habend. ſecundum bonas intentiones & propoſita ſubſcript. mutatis mutandis prout caſus requirit, ſecundum diſcretiones veſtras adjudicetis.* Special Reſummons is in ſuch form, *Rex, vic. Salut. Reſummoneas per bonos ſummonitores* A. B. *quod ſit coram nobis in craſtino, &c. ubicunq; tunc fuer. in* Anglia, *audit' record' & judicium ſuum de loquela quæ fuit in Cur. Dom.* Hen. *nuper Regis* Angliæ, &c. *ita quod loquela illa tunc ſit in eodem ſtatu quo fuit in priſtina curia prædicti nuper Regis in Octabis, &c. ultim. præterit', de quo die loquela prædicta adjornat. fuit uſq; &c. tunc proxim. ſequent. ante quem diem loquela prædicta remanſit ſine die, eo quod prædict. nuper Rex diem ſuum clauſit extremum.* And note, upon the general Reſummons the Original and the iſſue (if any be joyned) is revived, for the ſame is a full Record, and ought to be entred, but the proceſs before the iſſue joyned, nor the voucher, nor the garniſhment, &c. ſhall not be revived without a ſpecial Writ reciting all the ſpecial proceeding, 5 *H.* 7. 40. 9 *H.* 6. 41. 13 *E.* 4. 1. 1 *E.* 5. 2. And it appeareth by the Book of *Entries*, *tit. Reattachment* 499. that if iſſue be joyned, and the Jury returned, and day given for trial, before which day the King dieth, yet by ſpecial Reſummons all ſhall be revived, for the Jury was returned of Record, and the Record thereof was made full and perfect; and therewith agreeth 1 *Ma.* 118. *Vide* 21 *E.* 3. 44. contrary in the caſe of Aid preyer, for there the Jury is not revived as it is there holden: but a *Venire facias de novo* ſhall be awarded. And it is to know, That the Defendant ſhall never have a Reſummons or Reattachment, becauſe he had not nor could have any Summons or Attachment; and therefore at the Common Law, if a Verdict had paſſed for the Defendant, and before the day in bank the King died, in that caſe the plea is diſcontinued, and the Defendant might by *Certiorari* remove the Record, and although that the parties ſhall never plead any plea, yet the Defendant ought to ſue forth a *Scire facias*, and thereupon have Judgment, but without a *Scire facias* he ſhall not have Judgment; becauſe that the parties have no day in Court, and the *Scire facias* ſhall revive the Record, and give day to the parties, againſt the opinion of *Littleton*, 10 E. 4. 13. although that he ſaith that it was ſo adjudged, that the Defendant in ſuch caſe ſhould preſently have Judgment. But at the Common Law by the demiſe of the King the plea was diſcontinued, and the proceſs which was awarded and not returned before the Kings death, was loſt: For by the Writ of the Predeceſſor nothing can be executed in the time of a new King, if it be not in ſpecial caſes: For by the demiſe of the King not only the Juſtices of the one Bench, and of the other, and the Barons of the *Exchequer*, but the Sheriffs alſo, and Eſcheators, and all Commiſſions of Oyer and Terminer, Gaol-delivery, and Juſtices of Peace are determined by the death of the Predeceſſor, who made them. And for the remedy thereof was the Statute of 1 *Edw. 6. cap.* 7. made, which provideth, That by the demiſe of the King, any action, ſuit, bill, or plaint, *that ſhall depend between party and party, in any of the Kings Courts, and other Courts of Record, ſhall not in any wiſe be diſcontinued, or put without day, but that the Proceſs, Pleas, Demurrers, and Continuances ſhall ſtand good and effectual, and be proſecuted forth in ſuch manner and form, and in the ſame eſtate, condition, and order, as if the ſame King had lived.* So that now, If any Judicial Writ or Proceſs in any Court of Record were awarded in the time of the Predeceſſor, it may now be executed in the time of the Succeſſor, 1 *Elizab. Dyer* 165. *accord.* But yet that Act hath not provided remedy for all the miſchiefs. 1. For if the Original be not returned before the Kings death, the ſame is loſt; for the words are depending in any Court: But in appeal of death, if the Writ be delivered to the Sheriff within the year, and before the return thereof; or that the Sheriff hath done any thing, the King dieth, and the year expireth before the day of the return, in that caſe the Common Law giveth remedy to the Plaintiff, *ſcil.* a *Certiorari* to the Sheriff, returnable in the *Kings Bench*; and thereupon the Plaintiff ſhall have a Re-attachment, although he cometh not in by the return of the Sheriff, but by *Certiorari*; and the reaſon is, for the neceſſity of the matter, for otherwiſe the Plaintiff who lawfully brought his Writ within the year, without any fault in him, ſhall loſe his appeal, the year being now paſt. And therefore foraſmuch as by the act of Law the Writ is diſcontinued, the Law ſhall give a mean to revive it, to the end the party ſhall not be without remedy. So if a man bring a *Formedon* againſt a Pernor of the profit within the year after title accrued, and before the return of the Writ the King dieth, the Writ ſhall be removed in the *Common Pleas* by *Certiorari*, and thereupon he ſhall have Reſummons for the miſchief, as it is holden in 10 *Ed.* 4. 13. & 14. *a.* 2. By the demiſe of the King all Offices of Sheriffs are determined; and therefore till new Patents of their Offices nothing can be done. But in *London*, and other places, where there are Sheriffs of Inheritance by Charter, there they may execute any Proceſs, or Judicial Writ awarded in the time of the Predeceſſor. 3. In the County Court, and the like Courts which are not Courts of Record it remaineth

[b] [30] [b]

as

as it was at the Common Law; for the words of the Act are (*in any of the Kings Courts, or other Court of Record.*) Alſo the Statute extendeth only to Actions, Suits, &c. between party and party; and therefore it ſhall not extend to caſes where the King is party; and therewith agreeth *Stamford* 98. *b.* And therefore it is needful to know what the Common Law is in ſuch caſes. If an Information of Intruſion, or other Information be preferred, either meerly for the King, or *tam pro Domino Rege quam pro ſeipſo*, and the Defendant pleadeth to Iſſue, or a demurrer be joyned, and afterwards the King dieth, all is abated and loſt, but only the Information, and the ſame ſhall ſtand; for the entry in the Exchequer is (ſhewing the continuance and death of the King *Hen.* 8.) *per quod loquela remanſit ſine die, & Dominus* Edwardus *ipſum nuper Regem in regimine hujus Regni ſucceſſit, ac regimen ejuſdem Regni ſuper ſe aſſumpſit, ſuper quo concordatum, quod prædict' Defendens attachietur de novo ad reſpondend' dicto Domino Regi nunc*, and thereupon an Attachment is awarded, upon the return of which the Defendant ſhall appear and plead *de novo*; For although that it is true, that the King *in genere* doth not die (for there is no *interregnum*) yet in this individual, *Henry* the King, and *Edward* the King, &c. dieth. And that appeareth by Record, *Hill. anno 6 Ed. 6. Rot.* 50. an information of Intruſion was preferred againſt *John Schrymſal* Eſq; for intruding into the Mannor of *Offeley*, in the County of *Stafford*. The like Record *Mich. anno 6 Ed. 6. Rot.* 15. an Information preferred by the Kings Attorney, for the King only, againſt *Michael Harecourt* upon the Statute of Maintenance, *Hill.* 5 *Ed. 6. Rot.* 22. In the *Exchequer* in an Information upon the Stat. 32 *Hen.* 8. for buying of Titles, *tam pro Domino Rege quam pro ſeipſo*,
[31] after Iſſue joyned the King died, the Defendant appeared upon the Attachment, and pleaded *de novo*. The like by the ſame Record, *Rot.* 24. The like by the ſame Record, *Rot.* 54. The like *Mich.* 1 & 2 *Phil. & Mar.* in the *Exchequer*, *Rot.* 131. in an Information of Intruſion againſt *Richard Alford*, who appeared and pleaded a ſpecial plea; upon which there was a demurrer in Law, and the demurrer entred; and afterwards Queen *Mary* died, and upon that a *Subpœna* iſſued to appear *de novo*, returnable *Hill.* 1 *Eliz.* which is in *ligula brevium ibidem*; and thereupon the Defendant pleaded another ſpecial Plea, upon which Iſſue was taken. And note, That to ſuch effect as the preſidents are in the *Exchequer*, ſo they are alſo in the *Kings Bench* as to all manners of Informations. The like *Paſch.* 5 *Ed. 6. Rot.* 38. where in a Popular Action the King died after demurrer upon the Evidence, and before Judgment, and the Defendant pleaded *de novo*. Upon which Records the Law appeareth to be, That in all the ſaid Caſes the King being meerly party, or when the Information is *tam pro Domino Rege quam pro ſeipſo*, when the King dieth before Judgment, all the proceeding upon the Information is utterly abated and loſt, *quia Rex* Henricus, &c. *fuit pars qui mortuus eſt.* But the Information or Indictment which is recorded for the King ſhall ſtand, and the ſaid Defendant ſhall be driven to anſwer it *de novo*, and nothing ſhall ſtand but the Information; for the ſame is a Record, and cannot abate. And the Law hath great reaſon in it; for upon many penal Statutes the Suit is to be commenced within a certain time, and therefore if the Information or Indictment ſhall not continue in force after the Kings death, by the Kings death, which is the act of God, the offence ſhould be unpuniſhed. But if the King bringeth an original Writ, as *Quare Impedit*, &c. there by the Kings death the Writ ſhall abate, becauſe the King, for whom Judgment ſhould be given, is dead, and after the death of the King, who is party, no Proceſs can be awarded upon the original, as it may be upon an Information or Indictment. *Vide Mich.* 3 & 4 *Eliz. Dyer* 206. *vide* 4 *Edw.* 4. 43. & 44. *Br. Offices* 25. If one be indicted in the time of one King, and pleadeth to Iſſue, and afterwards the King dieth, he ſhall plead *de novo*, as you may ſee in the Caſe of *Edward Smith*, who pleaded to Iſſue upon an Indictment of Felony in *Midd.* in 3 & 4 *Phil. & Mar.* in the *Kings Bench*, and after the death of Queen *Mary* repleaded in 3 & 4 *Eliz.* and was acquitted. So *Clement Palmer* being arraigned in the *Kings Bench* upon a Non-ſuit in an Appeal, at the Suit of the Queen, *Trin.* 4 & 5 *Phil. & Mar.* and pleaded to Iſſue, Queen *Mary* died, and *Mich.* 1 & 2 *Eliz.* he repleaded. And *Paſch.* 1 *Edw.* 5. Traverſe of an Office in *Chancery*, and the Record ſent into the *Kings Bench*, and afterwards the King died. And by the ſaid Statute of 1 *Edw. 6.* it is enacted, *That in all Caſes, where any perſon or perſons heretofore have been, or hereafter ſhall be found guilty of any manner of Treaſon, Murder, Manſlaughter,*
[b] *Rape, or other Felony whatſoever, for the which judgment of death ſhall, or may enſue, and ſhall be repried to priſon without Judgment, &c. That the Juſtices of Gaol-delivery ſhall have full power and authority to give Judgment of death againſt ſuch perſon ſo found guilty, and repried, &c.* Before that Act at the Common Law, if a man had been indicted and convicted by verdict or confeſſion before any Commiſſioners, and before Judgment the King died, in that caſe no Judgment could have been given; for the King, for whom the Judgment ſhould be given, is dead; and the authority of the Judges which ſhould give Judgment is determined: And this Act doth remedy thoſe ſpecial Caſes. But all the Kings Suits by Original, Bill, Information, or Indictment, or for any other offence, do remain at the Common Law.

Mich.

Mich. 2 Jacobi.

The Case of Fine levied by the King Tenant in tail, *&c.*

THe King was informed, That divers Mannors and Lands were intailed to *Gilbert de Clare* Earl of *Gloucester*, and the King who now is, is heir of the body of the said *Gilbert* inheritable to the said Land; Some of which Mannors, the King and others his Progenitors for good consideration have granted to divers Subjects; all which grants (as was pretended) was in respect of the said ancient intail utterly void. The King that now is, of grace and good will to his Subjects, for their quiet and repose, required *Popham* chief Justice, and *Coke* Attorney General, to consider how by Law he might establish the estate of the said Patentees and others claiming under them, against the said estate tail. Whereupon, they severally in the Vacation time did consider upon that point; and afterwards upon conference they agreed in one, That the King being Tenant in tail, by a gift made to some of his Ancestors being Subjects (and the question is moved) may by fine levied upon a grant and render bar the Estate tail, and that for divers reasons. 1. For as much as the King is bound by the Statute of *donis conditionalibus*, as it is adjudged in the Lord *Barkley*'s Case, *Plow. Com.* 240. By which Act the King is restrained of alienation; for it is enacted by the said Act, *quod finis ipso jure sit nullus*; reason is, that the King shall take benefit of the Acts of 4 *H.* 7. *&* 32 *H.* 8. which enableth Tenant in tail to bar his issues: For it is agreed in all our Books, that the King shall take benefit of any Act, although that he be not named, 12 *H.* 7. 21. 35 *H.* 6. 60. the Lord *Barkley*'s Case, *Plow. Com.* 240. And it shall be hard, that the King being issue in tail of a gift made to a Subject, shall be in worse condition than if he had not been King. 2. There is a great difference when the King claimeth in respect of his natural capacity, as heir of the body, *per formam doni*, as heir of the body of a Subject; for there he shall be bound by an Act of Parliament (and that was the principal reason of the Judgment in the said Lord *Barkley*'s Case, where the gift was to King *H.* 7. and to the heirs of his body) and when the King claimeth a thing in respect of his Royal and politick capacity, there a general Act shall not bind him, if he be not especially named, if it be not in special Cases. 3. In the Case at Bar, The Bar which the Statute of *donis conditionalibus* doth work, is against the Issues in tail; for the Tenant in tail himself, without any help of the Act might bar himself (and so might the King also by special grant.) There the issues in tail at the time of the Fine levied by the King are but Subjects, who are bound by the said Acts, and the Estate tail barred by the Fine and Proclamations. And note, that the Act of 32 *H.* 8. doth recite, that (for the avoiding of all strifes and controversies) which general word (*all*) includeth also the Case of the King. And it was observed that the Statute of *Donis*, *&c.* which bindeth the King saith, *quod dominus Rex perpendens, quod necessarium est in casibus prædictis ponere remedium, statuit, quod voluntas donatoris*, *&c.* And the Statute of 4 *H.* 7. which giveth power to cut off the estate tail, saith, *The King considereth that Fines ought to be of greatest strength to avoid strifes and debates, and to be a final end and conclusion: It is enacted that after the Fine engrossed and proclaimed, &c. the same Fine shall conclude privies, &c.* Within which words the Kings Issues are included. Also the Statute of 32 *H.* 8. Enacteth, *That all Fines levied of any Lands intailed to the person so levying the same Fine, or to any of his Ancestors, &c.* And *Gilbert de Clare* was in propriety of speech the Kings Ancestor, and so within the express Letter of the Act. But it seemed to them, that after the Render made it is needful to have Letters Patents, to grant to the Conusee by express words, that he may enter into the Lands; For otherwise the Fine being executory upon Grant and Render, it may be doubted if the Conusee, without such grant may enter upon the King. And afterwards, *Mich.* 5. *Jacobi*, after the death of Justice *Popham*, this opinion upon consideration and conference had with *Fleming* and *Coke*, chief Justices, and with *Tanfield*, chief Baron, was affirmed for good Law for the reasons and causes before given. And divers Fines have been since levied by the King according to that Resolution. [32] [b]

Mich. 2 Jacobi.

Nevil's Case.

IN this Term, this Case by the Command of the King was propounded to all the Judges. In the 21. year of *Richard* the Second, *Ralph Nevil*, Lord of *Raby*, was by Letters Patents under the Great Seal created Earl of *Westmerland*, to him, and the heirs males of his body; which *Ralph*, by *Margaret Stafford* his first Wife had Issue, *Ralph* Earl of *Westmerland*, to whom *Charles* late Earl of *Westmerland* was lineal heir Male of the body of the said *Ralph* the first Donee; and the said *Ralph* the first Donee, by *Joan*, daughter of *John* of *Gaunt*, Duke of *Lancaster*, had Issue, *George* Lord *Latimer* (for all his elder Brothers were dead without Issue Male) from whom is lineally descended *Edward Nevil*, who [33]

now is the next Issue Male of the first Donee; and afterwards *Charles* Earl of *Westmerland* was attainted by Outlawry, and by Parliament, of High Treason, and died without Issue Male; and now the said *Edward Nevil* claimed to be Earl of *Westmerland*. And in this case three questions were moved to all the Judges of *England*. 1. If the said limitation of the said dignity to the said *Ralph* and the heirs Males of his body be within the Statute of *Donis conditionalibus*, or a Fee-simple conditional at the Common Law. 2. Admitting that it was an Estate tail within the said Statute, if by the attainder of Treason the Estate tail were forfeited by a condition in Law *tacite* annexed to the state of the dignity. 3. If the estate of the dignity were forfeited by the Act of 26 *H.* 8. *cap.* 13. Or that the said *Edward Nevil* as heir Male of the first Donee ought to be heir of *Westmerland*. And these points were argued and debated at Serjeants Inn in *Fleetstreet* by the Kings Attorny General, and by the Council of the said *Edward Nevil*. And as to the first, it was objected, That the said Dignity was not within the Statute of *Donis*, *&c.* for divers causes. 1. Because the same was a great Dignity derived from the King, as the Fountain of all Dignity, and therefore it is not within the said Act, which speaketh only *de tenementis, quæ multotiens dantur sub conditione, viz. cum aliquis terram suam dat alicui viro, &c.* So that this Dignity cannot be [b] within this word *Tenements*, or *Land*. 2. The Statute saith, *in omnibus prædict. casibus post prolem suscitat. hujusmodi feoffati habuer. potestat. alienandi, &c.* But the dignity was adherent to the Blood of the Donee, and cannot be aliened nor granted, neither after nor before Issue; and therefore such Cases of Dignities were out of the mischief, the words and the intents of the makers of the Act of *Donis*, *&c.* And the opinion in *Manxel's* Case in *Plowd. Comm.* the grant of a thing which doth not concern Land or Tenements, nor exercisable in Lands or Tenements, as an Annuity which is personal, is not within the Statute of *Donis*. And it was said, this Dignity was personal, and annexed to the blood of the Donee, and by consequence cannot be intailed within the said Act. But it was resolved by all the Judges of *England*, That a name of Dignity may be intailed within the said Act: For in the Case at Bar the same doth concern Land; for he was made by the said Letters Patents Earl of *Westmerland*, which by the Common Law is the great Conservator of the Peace; and Sheriffs are called *Vicecomites*, because in ancient times they were Deputies to Earls, though now the same is changed. And therefore such Offices of Dignity of any place doth concern Land, and therefore may be intailed within the said Statute, as it is said in *Plowd. Comm.* in *Manxel's* Case. The office of Steward, Receivor, or Bayliff of such a Mannor may be intailed within the said Statute, because it is exercisable within Lands, 5 E. 4. The office of the Marshal of *England* was intailed, 1 *H.* 7. 28. An estate tail may be of a Forrestership, 18 E. 3. 27. The office of Serjeancy, or custody of the Church of *Lincoln* was intailed. 32 *H.* 8. 28. The Earldom of *Shrewsbury* was intailed to *John Talbot*, Knight, and the heirs males of his body. And I have seen a Parliament Writ in *Anno* 27 *H.* 6. by which *Bromflet* was summoned to the Parliament by the name of the Lord *Vesey*, with limitation in the Writ, to him and the heirs males of his body. And it is to know, that as in ancient time the Senators of *Rome* were elected *a censu*, of their revenues; so here in ancient times in conferring of Nobility, respect was had to their revenues, by which their Dignity and Nobility might be supported and maintained. And therefore a Knight ought to have twenty pound *per annum*, a Baron thirteen Knights fees and a quarter, an Earl twenty Knights fees (for there was not any Duke within *England* from the time of the Conquest until 11 E. 3. and the Duke of *Cornwall* was the first Duke after the Conquest within *England*.) And that appeareth by the Statute of *Magna Charta*, *cap.* 2. For always the fourth part of such Revenue, which is requisite by the Law to the Dignity shall be paid to the King for a Relief as the Relief of a Knight is five pound, which is the fourth part of twenty pound, which is a Knights Revenue; and the Relief of a Baron is an hundred Marks, which is the fourth part of his revenue, four hundred Marks, and includeth thirteen Knights Fees and a quarter; and the Relief of an Earl is an hundred pound, which is the fourth part of four hundred pound, the revenue of an Earl. And it appeareth by the Records of the Exchequer, that the Relief of a Duke shall amount to two hundred pound, and by consequence his revenue ought to be eight hundred pound *per annum*; and that is the reason in our Books, that every one of the Nobility is presumed in Law to have sufficient Freehold *ad sustinendum nomen & onus*. *Vide* 3 *H.* 6. 48. 11 *H.* 4. 15. 14 *H.* 6. 2. See the Countess of *Rutland's* Case in the sixth part of my *Reports*. *Vide Cambden fol.* 107. *Necdum hæreditaria fuit hæc dignitas (scil. Comitis) verum cum Gulielmus Normanus, jam victor, summam rerum in hoc regno administraret, comites creati sunt feudales, hæreditarii, & patrimoniales, ut in antiquis cartis videre est, de tertio denario comitatus, i. qui de placitis proven. in eodem comitatu.* And every Baron and other of Nobility is always created of some place: and now to what value the said old Rents in the time of *H.* 3. & E. 1. at this day do amount unto, every one knoweth. And so it was clearly resolved, that the Dignity in the Case in question was within the Statute of *Donis conditionalibus*; and with this Resolution agree divers Presidents, and practice always in use; for the Earldom of *Northumberland* was intailed by Queen *Mary* to *Thomas Percy* and the heirs males of his body; and for default of such Issue, that *Henry* his Son should be Earl, to him and the heirs males of his body: and in such case by the attainder of *Thomas* of Treason, *Henry* was after his death Earl of *Northumberland*, by force of his Remainder, and his Issue doth enjoy the same at this day. So *Ambrose Dudley* was by Queen *Elizabeth* created Earl of *Warwick*, to him and the heirs males of his body, and for default of such Issue, that *Robert* his Brother shall be Earl, to him and the heirs males of his body: And *Robert* was created Earl of *Leicester* in tail, with such limitation to his Brother *Ambrose*; and many other presidents are to the same effect. As to the second point it was resolved, That although this Dignity be within the Statute of *Donis conditionalibus*, yet by the attainder of Treason (if the Statute of 26 *H.* 8. had not been made) this Dignity had been forfeited by force of a condition in Law *tacite* annexed to the estate of the Dignity: For those who are Earls have an office of great trust and confidence, and are created to two purposes; 1. *Ad consulendum regi tempore pacis.* 2. *Ad defendendum regem & patriam tempore belli:* and therefore Antiquity hath given them two Ensigns to resemble

these

these two duties: For first, their head is adorned with a Cap of Honour and Coronet, and their body with a Robe in resemblance of Counsel. 2. They are girt with a Sword, in resemblance that they should be faithful and loyal to defend their Prince and Country. And of both these *Bracton* speaketh, *Lib.* 1. *cap.* 8. *Comites, viz. sive a comitat. sive a societat. nomen sumpser', qui etiam dici possunt consules a consulendo; reges enim tales sibi associat, ad consulendum & regend' populum Dei, ordinantes eos in magno honore & potestate, & nomine, quando accingunt gladiis, i. ringis gladiorum.* By which it appeareth these two ends, Counsel and Defence. Then when such person against the duty and end of his dignity, taketh not only Counsel, but Arms also against the King to destroy him, and thereof is attainted by due Course of Law, by that he hath forfeited his dignity by a Condition *tacite* annexed to the estate of the dignity; in the same manner, as if Tenant in tail of an office of trust misuse it, or use it not, these are forfeitures of such Officers for ever by force of a condition in Law *tacite* annexed to their estates, as it is holden in 11 *E.* 4. 1. 20 *E.* 4. 5, 6. 39 *H.* 6. 32. 22 *Ass.* 34. 8 *H.* 4. 18. 2 *H.* 7. 11. 14 *H.* 7. 1. *Plow. Com.* 370. *Nevil's* Case. As to the third point, it was Resolved by all the Justices, that if the same had not been forfeited by the Common Law, that by the Statute of 26 *H.* 8. *cap.* 13. the said *Charles* hath forfeited the Dignity. For the words of the Act are, *shall lose and forfeit to the Kings Highness, his heirs and successors, all such Lands, Tenements and Hereditaments which any such offender shall have any estate of Inheritance in use or possession, by any right, title or means:* And this Dignity was an Hereditament, and therein the said *Charles* had an estate of Inheritance. And where the Statute saith *(in use or possession)* that was to express, that all manner of Inheritances were either in use, or in possession, (for that Act doth not extend to rights or titles) and it was necessary to add this word *Use*, for by the Common Law an Use, which was but a Trust and Confidence, was not forfeited by Attainder of Treason. And when an Use was expressed, then the addition of possession was necessary; for otherwise nothing but Uses should be given to the King. And therefore it was Resolved, That an Annuity of an Inheritance shall be forfeited by force of this Act by Attainder of Treason, for the same is an hereditament; and that was the first general Act by which an Estate tail was forfeited to the King for Treason. At the Common Law before the Statute of *Donis Conditionalibus*, If lands had been given to one and the heirs males of his body, in that case as well the Donor as the Donee had a possibility: the Donor of a Reverter if the Donee died without issue male, and the Donee to have power to alien if he had issue male. For if the Donee had issue a Son, now to some intent the Condition was performed, For *post prolem suscitatam*, he had *potestatem alienandi*; and the reason thereof was, because that he having a Fee simple, and having issue, his issue could not avoid the alienation, because he claimed Fee simple, whereof the Father might bar him. And although that the Donee and his issue also after such alienation died without issue, yet the Donor, who had but a possibility or a condition in Law, and no Reversion or Estate in him, could not have recovered the Land against the Alienee; for by the having of issue the Condition was performed as to this intent, *scil.* to make any alienation. But in the same Case at the Common Law if the Donee had issue a Son and dieth, yet the Son had not an absolute Fee simple in him, but only the same power which his Father had, *sc.* to Alien; and if such issue died without issue, and without making of any Alienation, the Land did revert to the Donor, as *Brian* holdeth, 12 *E.* 4. 3. & 18 *E.* 3. 46. by *Huse.* For a Collateral heir who is not heir of the body of the Donee is not within the form of the gift, the limitation being to the heirs males of the body of the Donee; which limitation of heirs males of the body, doth exclude all Collateral heirs for ever to inherit: But the policy of the Law was, to give power after issue to alien for two causes; one, that an estate of a Purchaser should not be avoided by a Remote possibility, *sc.* if the Donee and his issue should die without issue: 2. If he having a Fee simple should not have power to alien after issue, it should be in a manner a perpetuity, and a restraint of Alienation for ever, which the Common Law for many causes would not suffer, and in 4 *H.* 3. *Formedon* 64. it is adjudged, That where Lands were given in Frank marriage, and the Donees had issue and died, and afterwards the issue died without issue; that his Collateral heir should not inherit; for the Donor recovered the Land in a *Formedon* in the *Reverter:* and in the said Case if the Donee had issue two Sons, and dieth, and the eldest Son hath issue a daughter, and dieth without issue male, the younger Son shall inherit a Fee-simple, *per formam doni* at the Common Law: So if Lands were given to one, and to his heirs females of his body, and he hath issue a Son and a Daughter, and dieth, the Daughter shall inherit an Estate in Fee-simple *per formam doni.* And mark well, the Statute of *Donis, &c.* doth not create an Estate tail, but of such Estate was Fee-simple Conditional, and descendable in such form at the Common Law, as now by the Statute the Land shall descend; And the only mischief was, that the Donee after issue had power to alien in dishinherison of his issues, and bar of the Reversion: but it doth not appear by the said Act, that although that the Donee had issue, yet he had not an absolute fee, so that the Collateral heir of the issue should inherit; for the words of the Act are, *Et præterea cum deficiente exitu de hujusmodi feoffatis; tenementum sic datum ad donatorem vel ad ejus hæredes reverti debuit, per formam in Carta de dono hujusmodi expressam, licet exitus, si quis fuerit, obiisset, per factum tamen & feoffamentum, &c. excluſi fuerunt hucusque de reversione, &c.* by which it appeareth, that if the heir in tail dieth without issue, and without any alienation made, that the Land shall revert, and by consequence shall not descend to the Collateral heir. 30 *E.* 1. *Formedon* 65. If the donee in tail alieneth before the Statute, and afterwards hath issue, and then the issue dieth without issue, the Land shall revert: For he had not power to alien at the time of the alienation, but such alienation shall bar the issue, as it is adjudged in 19 *E.* 2. *Formedon* 61. because that he claimeth Fee simple. Note, these Rules yet hold place in case of a grant of an Annuity, to one and the heirs males of his body, and all other Inheritances which are not within the Statute *de Donis Conditionalibus.*

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Hill. 2 Jacobi.

Penal Statutes.

[b] THis Term upon Letters directed to the Judges to have their Reſolution concerning the validity of a Grant made by Queen *Elizabeth*, under the great Seal, of the penalty and benefit of a penal Statute, and to make a Warrant to the Lord Chancellor, or Keeper of the great Seal, to make as many diſpenſations, and to whom he pleaſed; And upon great conſideraton and deliberation by all the Judges of *England*, It was Reſolved, That the ſaid grant was utterly againſt Law. And in that caſe theſe points were Reſolved, 1. That when a Statute is made by Parliament for the good of the Commonwealth, the King cannot give the penalty, benefit and diſpenſation of any ſuch Act to any ſubject; Or give power to any Subject to diſpenſe with it, and to make a Warrant to the great Seal for Licenſes in ſuch caſe to be made: For when a Statute is made *pro bono publico*, and the King (as the head of the Commonwealth, and the Fountain of Juſtice and Mercy) truſted by the whole Realm with it, this confidence and truth is ſo inſeparably joyned and annexed to the perſon of the King in ſo high a point of Sovereignty, that he cannot transfer the ſame to the diſpoſition or power of any private perſon, or to any private uſe; for it was committed to the King by all his Subjects for the good of the Commonwealth. And if he may grant the penalty of one Act, he may grant the penalty of Two, and ſo *in infinitum*. And ſuch grant of a penalty was never ſeen in our Books. But it is true, the King may (upon any cauſe moving him in reſpect of time, place, or perſon, &c.) make a *Non Obſtante* to diſpenſe with any particular perſon, that he ſhall not incurr the penalty of the Sta-
[37] tute, and therewith agree our Books. But the King cannot commit the Sword of Juſtice, or the Scale of his Mercy concerning any penal Statute, to any Subject, as is aforeſaid. 2. It was Reſolved, That the penalty of an Act of Parliament cannot be levied by any grant of the King, but only according to the purport and purview of the Act: for the Act which giveth the penalty ought to be followed only in the proſecution and levying thereof; and great inconveniences would follow, if penal Laws ſhould be transferred to Subjects. 1. Juſtice thereby ſhould be ſcandalized; for when ſuch Forfeitures are granted, or promiſed to be granted before that they are recovered, the ſame is the cauſe of a more violent and undue proceeding. 2. When it is publickly known that the Forfeiture and penalty of an Act of Parliament is granted, it is a great cauſe that the Act it ſelf is not executed; for the Judge and Jurors, and every other is thereby diſcouraged. 3. Thereupon will follow, That no penalty ſhould by any Act of Parliament be given to the King, but limited to ſuch uſes with which the King could not diſpence. And hereupon divers who had ſued to have benefit of certain penal Laws, were upon this Reſolution denied. And the Certificate of all the Judges of *England* concerning ſuch grants of penal Laws and Statutes, was in theſe words. *May it pleaſe your Lordſhips, we have (as we are required by your honourable Letters of the 21 of October laſt) conferred and conſidered amongſt our ſelves (calling to us His Majeſties Council learned) of ſuch matters as were thereby referred unto us, and have thereupon with one conſent reſolved for Law and conveniency as followeth. Firſt, That the proſecution and execution of any penal Statute cannot be granted to any, for that the Act being made by the policy and wiſdom of the Parliament for the general good of the whole Realm, and of truſt committed to the King, as to the head of Juſtice, and of the weal publick, the ſame cannot by Law be transferred over to any ſubject; neither can any penal Statute be proſecuted, or executed, by his Majeſties grant, in other manner or order of proceeding, than by the Act it ſelf is provided and preſcribed: Neither do we find any ſuch grants in any former ages: And of late years: upon doubt conceived, that penal Laws might be ſought to be granted over, ſome Parliaments have forborn to give forfeitures to the Crown, and have diſpoſed thereof to the relief of the Poor, and other charitable uſes, which cannot be granted or imployed otherwiſe. We are alſo of opinion, That it is inconvenient, that the Forfeitures upon penal Laws ſhould be granted to any other, before*
[b] *the ſame be recovered or veſted in his Majeſty by due and lawful proceeding: for that in our experience it maketh the more violent and undue proceeding againſt the Subject, to the ſcandal of Juſtice, and the offence of many. But if by the induſtry or diligence of any, there accreweth any benefit to his Majeſty, after the recovery, ſuch have been rewarded out of the ſame at the Kings good pleaſure, &c. Dated 8. Novembr. 1604.* And to this Letter all the Judges of *England* ſet their hands.

Mich.

Mich. 5 Jacobi.

Lillingſton's Caſe.

John Duncomb brought an Action of Debt againſt *Thomas Lillingſton*, (which began in the Common Pleas, *Paſch.* 4. *Jacobi, rot.*) 704. for 195 l. and declared, That one *Fauſtine Dixwell*, and *Mary* his Wife, and the ſaid *Thomas Lillingſton*, and *Mary* his Wife, were ſeiſed of the Rectory of *Lillingſton* in the County of *Bedford* in Fee, and *Mich.* 31 *Eliz.* thereof levied a fine to *Papworth* and *Chambers*, and the heirs of *Papworth*, who granted and rendred a Rent-charge of 30 l. out of the ſaid Rectory to the ſaid *Fauſtine* for his life, to begin after the death of *Mary* his Wife, the rent yearly to be paid at the Feaſts of St. *Michael* the *Archangel*, and the *Annunciation: Proviſo ſemper, quod prædict. Conceſſio prædict. annualis redditus* 30 *l. non aliqualit. ſe extendat ad onerand. dict. Papworth & Chambers ſed tantummodo ad onerand. dict. Rectoriam tota vita ipſius Fauſtini*; and rendred the ſaid Rectory to *Fauſtine* and *Mary* during the life of *Mary*, the remainder to *Thomas Lillingſton* and *Mary* his Wife in tail, the remainder to the right heirs of *Lillingſton*. 2 *Octob.* 33 *Eliz.* the ſaid *Fauſtine* before Sir *Chriſtopher Wray*, chief Juſtice, acknowledged a Recogniſance of 500 l. in the nature of a Statute ſtaple, according to the Statute of 23 *H.* 8. to *Duncomb* now Plaintiff: 20 *Aug.* 39 *Eliz. Mary* the Wife of *Fauſtine* died, after whoſe death *Lillingſton* and *Mary* his Wife entred into the Rectory, and were thereof ſeiſed in tail, the remainder in fee to *Lillingſton*. The ſaid *Fauſtine* 15 *Aprilis* 40 *Eliz.* by his deed releaſed to the ſaid *Lillingſton* and his heirs the ſaid Rent of 30 l. *per annum*. The Plaintiff 21 *Aprilis* 40 *Eliz.* ſued out of the Chancery a *Certiorari* to the Clerk of the Statutes, &c. whereupon the ſaid Recogniſance in the nature of a Statute ſtaple was certified; and ſued forth an *Extent*, by which the ſaid Rent was extended, and upon *Liberate* delivered to the Plaintiff, the Plaintiff, for ſix years and a half ending at the Feaſt of Saint *Michael* the *Archangel*, *Anno* 2 *Jacobi*, brought the action of Debt againſt *Lillingſton*, who all that time was Tenant of the Land, and averred the life of *Fauſtine*. And upon all this Caſe two points were moved; 1. If this Rent of 30 l. *per annum* being extinct by the ſaid Releaſe, hath ſuch eſſence as to the Plaintiff the Conuſee, that it may be extended and delivered to the Plaintiff. 2. Admitting that it may be extended and delivered to the Plaintiff, if the Plaintiff as this caſe is, may maintain an Action of debt. As to the firſt it was objected, That this Recognizance is in the nature of a Statute ſtaple, and the Statute of 27 *E.* 3. *cap.* 9. to which the Statute of 23 *H.* 8. *cap.* 6. referreth, giveth power to the Maiors of the Staple to take Recognizance of Debts, &c. and that upon Certificate of ſuch Recognizance in the Chancery, a Writ be ſent to arreſt the bodies of the Debtors, without letting them to bail, and to ſeiſe their lands and Tenements, goods and chattels, and that the Writ be returned into the Chancery with the Certificate of the value of the ſaid Lands and Tenements, Goods and Chattels, and that execution be made from time to time in the ſame manner as is contained in the Statute Merchant: Upon which words it was urged, That the rent extinct before execution was not within the ſaid words, *ſcil.* of ſeiſure the Lands and Tenements of the ſaid Debtors. For at the time of the execution ſued the Debtor had not the Rent, but it was utterly extinct, and gone by the Releaſe. 2. The Writ of *Extent* is to extend *omnes terras & catalla ipſius Fauſtini, & in manus dict. nuper Reginæ ſeiſiri faceret, & ea præfat. Johanni liberari faciat*; and for as much as the Rent was extinct before the Writ of *Extent*, it is not in being, or to be extended, or taken into the Kings hands, or to be delivered to the Plaintiff. 3. It ſhall be againſt reaſon, that the Free-hold of the Rent being extinct, the Plaintiff ſhould have Execution of it, and thereby to have but a Chattel: and the opinion of 3 & 4 *Phil. & Mar. Dyer*, was cited, where the opinion is, That a Rent extinct cannot be extended. To which it was Anſwered and Reſolved, That to ſome purpoſes by the Common Law a rent extinct ſhall be ſaid in *eſſe* as to a ſtranger; and therefore, if the Husband ſeiſed of a Rent in fee, releaſeth the Rent to the Tenant of the Land, and afterwards the Husband dieth, now the Wife ſhall be endowed of this Rent ſo extinct, and ſhall have a *Writ of Dower*. The words of which Writ are, *Præcipe A. quod juſte reddat B. tertiam partem* 30 *libr. reddit'*: and the *Writ of Dower, Unde nihil habet* is, *Præcipe quod juſte reddat B. &c. rationabilem dotem ſuam quæ ei contingit de libero tenemento quod fuit, &c.* and ſhe ſhall have Grand *Cape*, or a Petit *Cape*, as her Caſe requireth, to ſeiſe the Rent into the Kings hand; For *quoad perentem*, it is in being, although in truth the Rent be extinct: and ſee in the Lord of *Aburgaveny's* Caſe in the ſixth part of my *Reports*, many Caſes where a thing extinct ſhall be ſaid *in eſſe* for the benefit of a ſtranger. 2. It was obſerved, That the ſaid Act of 23 *H.* 8. *cap.* 6. (by force of which the ſaid Recognizance in the Caſe at Bar was taken) for the execution referreth to the Statute Staple and Statute Merchant. *ſcil.* the ſaid Act of 27 *E.* 3. referreth to Statute Merchant, *de Anno* 13 *E.* 1. The words of which Statute are, (*And when the Lands of the Debtors be delivered to the Merchant, he ſhall have ſeiſin of all the Lands that were in the hands of the Debtor, the day of the Recognizance made, in whoſe hands ſoever that they come afterwards, by Feoffment or otherwiſe.*) Then preſently by the Recognizance acknowledged, the Rent was bound, and ſhall be extended by the expreſs purview of the Statute, in whoſe hand ſoever that it cometh, and no more than the Releaſe of *Fauſtine* ſhall hurt after Execution had by the Conuſee, no more ſhall it do before Execution, for the Rent was liable to Execution preſently, by the acknowledging of the Recognizance. So if a Man hath Judgment to recover debt or damages, the Rent which he hath of any Eſtate of Free-hold is thereby lyable to it; and therefore although that after Judgment he releaſeth it, the Plaintiff ſhall have Execution of a moity by *Elegit*, which is given by the Statute of *Weſt.* 2. *cap.* 18. the words of which Statute are;

[38] [b] [39]

That

That they deliver to him the moyety of the lands of the debtor; which by Conſtruction of Law, is of all which he had at the time of the Judgment given, or at any time after. And in *Cheny's* Caſe, 27 *Eliz.* in the Court of Wards it was Reſolved, That where he in the Reverſion did enfeoff Leſſee for years to the uſe of another, that although the Leaſe ſhall be ſurrendred and extinct by the Common Law, yet by the ſaving of the Statute of 27 *H.* 8. for Uſes, the term of the Feoffee was ſaved. Alſo in the ſame Court 28 *Eliz.* in one *Iſed's* Caſe it was Reſolved, That where the Lord did enfeoff his Copyholder to the uſe of others, that the Copy-hold eſtate by the ſaving of the ſaid Act was preſerved. So in the Caſe at Bar, by the Act of *Mercatoribus*, all the lands (which includeth all hereditaments extendable) which the debtor had at the day of the Recognizance acknowledged, ſhall be delivered; which Act doth preſerve the Rent in being as to the execution of the Conuſee. And the Caſe in 21 *E.* 3. 18. and *F. N. B.* 223. If Lord and Tenant Abbot be, and the Lord releaſeth to the Abbot his Seigniory, the ſame is *Mortmain* by the Statute *de Religioſis*, and the Lord paramount ſhall have it by force of the ſaid Act, and yet the words of the Act are *Dominus feodi taliter alienati*, ſhall have it, and by Releaſe the ſame is extinct, and yet as to the Lord paramount it is in conſtruction of Law *in eſſe*, and he ſhall have it. 3. It ſhall be hard, That the Conuſor by his own Act ſhall bar the Conuſee, who is a ſtranger to the Releaſe, of his execution of the Rent, which perhaps was a chief cauſe of taking of the ſaid Recognizance, to have execution of it; and it is more reaſon to relieve the Conuſee in whom there is no fault, than the Tenant of the Land, who ought not to be miſconuſant of all Charges upon the Lands which are of Record. 4. Every Execution hath in judgment of Law relation and retroſpect to the Judgment, as it appeareth in *Shelly's* Caſe in the firſt part of my *Reports*. And the ſaid Caſe of *Dower*, and the *Grand Cape*, and *Petit Cape* thereupon, and [b] the Statute of *Mercatoribus*, which bindeth all the Land which the Conuſor had the day of the Recognizance acknowledged in whoſe hands ſoever it cometh, doth give full and ſufficient anſwer to all the ſaid Objections. And the opinion of one Serjeant *Obiter* in 3 & 4 *Mar.* was utterly denied. As to the ſecond point, it was Reſolved by the whole Court, That the Action of debt lieth not ſo long as the *Extent* endureth, for ſo long hath the Rent continuance, although the Free-hold thereof be determined. And all that, as to this point which was reſolved in *Ognel's* Caſe in the fourth part of my *Reports*, was affirmed to be good Law: and 9 *H.* 7. 17. That if the Lord granteth his Seignory for years; the grantee during the years ſhall not have an Action of Debt. And it was alſo Reſolved, That although there is an expreſs *Proviſo*, that the perſon ſhall not be charged in a Writ of *Annuity*, yet in ſuch Caſe after the Annuity or Rent determined, the perſon of the Tenant of the land ſhall be charged in Debt for the arrearages, becauſe the Annuity is determined, and he hath no other Remedy, as it is holden in *Ognel's* Caſe, and 6 *Eliz. Dyer* 227. there cited. It was alſo Reſolved, That if a Man granteth a Rent-charge for life out of his Land, and the Rent is behind; and the grantor doth enfeoff *A.* and the Rent is behind in his time; and afterwards *A.* enfeoffeth *B.* and the Rent is behind in his time, and afterwards the grantee dieth, his Executors ſhall have an Action of Debt againſt each of them, for the Rent behind in his time. For *Qui ſentit commodum ſentire debet & onus*, as it is alſo holden in *Ognel's* Caſe.

Mich.

Mich. 5 Jacobi.

Bedell's Caſe.

Hill. 1 *Jacobi Rot.* 375. in the Kings Bench. Between *Eliz. Bedell* Plaintiff in Debt, and *Michael Bedell* Defendant, the Caſe was ſuch. *Robert Bedell* ſeiſed of a Meſſuage, &c. in *Iver* and *Langley* in the County of *Bucks* in Fee, by the ſaid *Elizabeth* his Wife had iſſue three Sons; *James* was the ſecond Son, and *Michael* the Defendant the third. The ſaid *Robert* by Indenture Tripartite, between him and his Wife of the firſt part; the ſaid *James* his ſecond Son of the ſecond part; and the ſaid *Michael* his third Son on the third part, In conſideration of natural love and affection which he hath to the ſaid *James* and *Michael*, and for their better preferment and advancement, and to the intent that the ſame Tenements ſhould continue in his name and blood, Covenanted by the ſaid Indentures, that he and his heirs would ſtand ſeiſed of the ſaid Tenements to the uſe of himſelf for life; and after his deceaſe to the uſe of the ſaid *Elizabeth* his Wife for life, and after their deceaſes, of one moity to the uſe of the ſaid *James* in tail, and of the other moity to the uſe of the ſaid *Michael* in tail, &c. and afterwards *Robert* died, and all this matter was found by ſpecial verdict. And the ſole queſtion was, if (as this Caſe is) any Uſe ſhould ariſe to *Elizabeth* his Wife or not. And it was objected, that the Wife was not within the conſiderations which were expreſſed in the Indentures, and no other conſideration can be added than is contained in the deed, and all ought to appear therein, and nothing is left to the word or averment of the parties. To which it was anſwered and reſolved, That a conſideration which ſtandeth with the deed, and is not repugnant to it, may be well averred, as it is adjudged in 3 & 4 *Phil. & Mar. Dyer* 146. in *Viller's* Caſe; which ſee in the firſt part of my *Reports* in *Mildmay's* Caſe, 176. 2. Admit that other conſideration than what is expreſſed in the deed could not be added, yet in this Caſe there is an expreſs conſideration: For when he limiteth the ſame to the uſe of his Wife for term of life, it importeth ſufficient conſideration in it ſelf; and there needeth not any averment; for *manifeſta probatione non indigent*, as in 13 *H.* 4. 17. where the Statute of *Weſtm.* 1. *cap.* 38. ordaineth, That the Writ of Aſſiſe of *Mortdaunceſter* have the term of Limitation from the Coronation of King *H.* 3. there it is holden, That if an Infant bringeth an Aſſiſe of *Mortdaunceſter* of the poſſeſſion of his Mother or Father, he needeth not allege, that it was after the Coronation of King *H.* 3. for the ſame appeareth. So if the Father, Tenant by Knight's Service enfeoffeth his Son and Heir Apparent within age, it needeth not be averred that the ſame was by colluſion, for the ſame is apparent. *Wimbiſh's* Caſe in *Plow. Com.* and 27 *H.* 8. *Dacres* Caſe. 33 *H.* 6. 14. 35 *H.* 6. 32. *& quædam tacita habentur pro expreſſis.* So if I covenant in conſideration of Fatherly love and affection to my eldeſt Son, to ſtand ſeiſed to the uſe of my eldeſt Son for life, in tail, and after to the uſe of my ſecond Son in tail, and after to the uſe of ſuch one my Couſin in fee, although the conſideration expreſſed in words reſpects only my eldeſt Son, yet the conſideration apparent in the deed, in limiting the uſe to my ſecond Son, or my Couſin, is a conſideration ſufficient to raiſe the uſe. So if I covenant to ſtand ſeiſed to the uſe of my Wife, Son, or Couſin, it ſhall well raiſe an uſe without any expreſs words of conſideration: For ſufficient conſideration appeareth, and fatherly love or affection appear. But if the Father by deed indented, in conſideration of a hundred pound payed by the Son, covenanteth to ſtand ſeiſed to the uſe of his Son, there no uſe ſhall be raiſed to the Son, if the deed be not enrolled, by the Statute of 26 *H.* 8. *cap.* 10. For the ſame is in the nature of a Bargain and Sale, and there *expreſſum facit ceſſare tacitum.* And after this Judgment a Writ of Error was brought the ſame Term upon the new Statute, and by all the Juſtices of the Common Pleas, and Barons of the Exchequer, the Judgment was affirmed. Note it well.

[40] [ ] [b]

Mich. 5 Jacobi.

Beresford's Caſe.

[41] IN the Court of Wards between *James Beresford* Relator, and *Thomas Beresford*, and others Defendants, the caſe was ſuch; *Aden Beresford* being ſeiſed of the Mannors of *Fennibently*, *Bircham*, and other Lands in Fee, by his deed, 14 *Junii*, 40 *Eliz.* did enfeoff *William Fleetwood*, and others in Fee to the uſes of certain Indentures bearing date the 20th of *Novemb.* 34 *Eliz. ſcil.* to the uſe of the ſaid *Aden* the Father, *for term of his life, and after his deceaſe to the uſe of* George Beresford, *ſon and heir apparent of the ſaid* Aden, *and the heirs males of his body lawfully begotten; and for default of ſuch iſſue to the uſe of* Aden Beresford, *ſon of* James Beresford, *and of the heirs males of the ſaid* Aden, *ſon of the ſaid* James, *lawfully begotten; and for default of ſuch iſſue to the uſe of the heirs Male of the body of the ſaid* James Beresford *lawfully begotten; and for default of ſuch iſſue, to the uſe of* Thomas Beresford, *third ſon of the ſaid* Aden, *and of the heirs males of the body of the ſaid* Thomas, *lawfully begotten; and for default of ſuch iſſue, to the uſe of* Humphrey Beresford, *fourth ſon of the ſaid* Aden, *and of the heirs males of his body, lawfully begotten, with divers remainders over, and with remainder to the heirs females of the body of* George, *and ſo of* Aden, *the ſon of* James, *lawfully begotten, with the remainder to the right heirs of* Aden *the Father for ever.* And the only queſtion of the Caſe was, What eſtate *Aden* the ſon of *James* had: and in this Caſe two points were argued before the two Chief Juſtices, and chief Baron, at *Serjeants Inn.* And it was objected, That *Aden* the ſon of *James* had not fee-tail but fee-ſimple; for the limitation to him is, *To the uſe of* Aden, *and of the heirs males of the ſaid* Aden *lawfully begotten*; and here wanteth theſe words (*of the body*) ſo that now the limitation is not but in effect, *to the uſe of* Aden, *and the heirs males of the ſaid* Aden, for theſe ſubſequent words [b] (*lawfully begotten*) are implied; for every heir ought to be lawfully begotten. And limitation to one, and to his heirs males, is without queſtion a Fee-ſimple. And a Judgment in the Kings Bench between *Abraham* and *Trigg*, *Hill.* 38 *Eliz. Rot.* 739. was ſtrongly urged, where a Feoffment was made to the uſe of certain Indentures (as this Caſe is) where one limitation was, *ad opus & uſum Gabrielis Dormer & hæredum maſculorum ſuorum legitime procreatorum, & pro defectu talis exitus*, to the uſe of divers others in tail in remainder: and upon argument at the Bar and Bench, it was adjudged, That *Gabriel* had a Fee ſimple; for it is not limited of what body the heirs males ſhall be begotten, but his intent was, *quod ſinguli hæredes ſui maſculi* ſhould inherit, which intent did not ſtand with the Rule of Law; and although a Remainder be limitted over, which could not be upon a Fee-ſimple, yet the ſame cannot againſt the Rule of Law make words of Fee-ſimple to be converted to an eſtate in tail. And they concluded with *Littleton fol. 6. b.* that the reaſon wherefore when Lands are given to one and his heirs males or females, it is a Fee-ſimple, is, becauſe it is not limitted by the gift of what body the Iſſue male or female ſhall be begotten, and ſo cannot in any manner be taken by equity of the Statute of *Donis conditionalibus*, and therefore it is a Fee-ſimple. So in the caſe at bar; and therewith agreeth 8 E. 3. 49. where lands were given to one, *& hæredibus ſuis legitimis*, the ſame is Fee-ſimple, which is all one with a limitation to one, *& hæredibus ſuis legitime procreatis.* But it was anſwered and reſolved by the ſaid Juſtices and chief Baron, that all the Remainders over were lawfully veſted: For it was agreed that to an eſtate in tail is requiſite in all gifts and limitations of uſes, that the heirs be limitted to be procreated or begotten on ſome body certain, either by expreſs words, or by words which do amount to ſo much: for theſe preciſe words (*de corpore*) are not neceſſary to the creation of an eſtate tail, ſo long as there are words which do amount to ſo much; as in 5 *H.* 5. 6, where the gift was *Dedi unum meſuag. R. & K. uxori ejus & hæredibus eorum, & aliis hæredibus dict. R. ſi dict. hæredes de R. & K. exeuntes obierint ſine hæredibus de ſe.* In this caſe theſe words (*de corpore*) are omitted, and yet it was adjudged a good eſtate in tail, for there are words which do amount to as much; for the gift in effect is, to the Husband and Wife, and to the heirs of the Husband and Wife begotten, or of the ſaid *R. & K. exeunt.* or *hæredibus de ſe*, and all is by force of this preposition (*de*) [42] and (iſſuing.) And in 12 *H.* 4. *Brev.* Land was given to one, *& hæredibus quos ſibi contigerit habere de uxore ſua*, there wanted words (*de corpore*) yet becauſe it doth amount to as much, it is adjudged a good eſtate tail. And 3 *E.* 3. *Brev.* 743. Land is given to one, *& hæredibus quos ſibi contigerit habere de uxore ſua*, there wanted words (*de corpore*) yet becauſe it doth amount to as much, it is adjudged a good eſtate tail. And 3 *E.* 3. *Brev.* 743. Land is given to one, *& hæredibus ſuis de prima uxore ſua*, the ſame is a good eſtate tail. And it was reſolved, if Land be given to one, *& hæredibus de ſe exeuntibus*, that the ſame is a good eſtate tail. And in theſe Caſes, the principal cauſe is by force of the preposition (*de.*) And divers other caſes were put, for which cauſe it was concluded, That either words (*de corpore*) or which do amount to ſo much, are requiſite to the Creation of an eſtate tail. And it was reſolved in that Caſe at Bar, there were words which did amount to as much; for by the Statute *de donis conditionalibus, voluntas donatoris in charta doni ſui manifeſte expreſſa de cetero obſervetur*; and therefore in this Caſe ſuch conſtruction ſhall be made that ſhall produce three effects. 1. To ſtand with the Rule of Law. 2. With the intent of the Donor. 3, That all the parts of the Indenture may ſtand together. And therefore tranſlate the ſaid Limitation to *Aden* in Latin, and then the Limitation is, *ad uſum Adeni & hæredum maſculorum de dicto Adeno ligitime procreatorum*, or

&

& hæred. maſculorum legitime procreatorum de dicto Adeno, which is as much as if he had ſaid, By the ſaid *Aden* lawfully begotten; for all is one in effect: For this word *(de)* or *(ex)* coupled with the word ſubſequent *procreat'* doth appropriate the heirs males to be of the body of *Aden*; for *de Adeno*, or *ex Adeno*, and *de corpore Adeni*, are all one. And the ſame is directly proved by the Judgment in the Caſe of 5 *H.* 5. 6. For there was *(de)* and *(exeunt.)* and here is *(de)* and *(procreat.)* which are all one in effect. And in the ſaid Caſe of *Abraham* and *Trigge* there wanted *(de)*. And as to that which was objected, That the Limitation in Latin might well be, *ad uſum dicti Adeni, & hæredum maſculorum dicti Adeni* (in the Genetive caſe) *legitime procreat.* and not *(de dicto Adeno)* or if the Limitation be not certain to make the eſtate tail, theſe are words certain enough to make it a Fee-ſimple. To that it was anſwered and reſolved: 1. It ought to be, *de dicto Adeno*; for otherwiſe it ſhall be againſt the meaning of the giver, and all the words of Remainder ſhall be void; and always ſuch conſtruction ſhall be made, that all the parts of the deed may ſtand together, if it may ſtand with the Rule of Law. 2. The ſubſequent clauſe is *(and for the default of ſuch Iſſue)* and Iſſue cannot be of *Aden*, if the words be not *(ex Adeno)* and therefore the one clauſe doth well explain the other. And according to this Reſolution the Caſe was decreed accordingly. *Vide* 35 *Aſſiſe pla.* 14. 37 *Aſſiſe pla.* 14. 39 *Aſſiſe pla.* 24 *Edw.* 3. 28. 18 *Edw.* 2. *Br.* 836.

Mich. 5 Jacobi, *in the Courts of Wards.*

Kenne's Caſe.

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IN the Court of Wards, between *Thomas Robertſon*, and *Elizabeth* his Wife, Plaintiff, and *Florence* Lady *Stallenge* defendant, the Caſe was ſuch; *Chriſtopher Kenne* Eſquire was ſeiſed of the Mannor of *Kenne* in the County of *Somerſet*, holden by Knights ſervice *in capite*, and 37 *Hen.* 8. *de facto* took to Wife *Elizabeth Stowel*, and afterwards the ſaid *Elizabeth Stowel* had iſſue *Martha*, mother of *Elizabeth*, now one of the Plaintiffs: and afterwards 1 & 2 *Phil. & Mar.* in the Court of Audience, between the ſaid *Chriſtopher Kenne*, Plaintiff, and *Elizabeth Kenne*, Defendant, the Judge there gave ſentence in theſe words; *Prætenſ. tractat. contract. ſponſalia, & matrimonium, quin verius effigiem matrimonii inter Chriſtopherum Kenne, & Elizab. Stowel in minore & ſua impubertatis ætate eorundem aut eorum alterius de facti', habit. contracti', & celebrat. fuiſſe & eſſe, eoſdemque Chriſtopherum & Elizab. tam tempore contractus, & ſolemnizationis dicti' prætenſ. matrimonii, quam etiam continuo poſtea eidem matrimonio prætenſ. & ſolemnizationi ejuſdem, diſſenſiſſe, contraveniſſe, reclamaſſe, & reluctaſſe, adeo prætextu hujuſmodi prætenſ. tractat', contract', ſponſalia, & matrimonium de jure nullum & nulla, irritum & irrita, caſſum & caſſa, invalidum & invalida, & minus efficax & inefficatia, fuiſſe & eſſe, viribuſque juris caruiſſe, carere, & carere debere; necnon antedictos Chriſtopherum Kenne & Eliz. Stowel, quatenus de facto fuer. ad invicem matrimon. ut prædicitur copulat', ab invicem ſeperand' & divorciand' fore debere pronunciamus, decernimus, & declaramus, eoſque ſeparamus, & divorciamus, eiſdemque Chriſtophero & Elizab. licentiam & libertatem ad alia vota convolanda concedimus, tribuimus, & impertimur per hanc ſententiam noſtram definitivam, ſive hoc finale noſtrum decretum, quam ſive quod ferimus & promulgamus in hiis ſcriptis, &c.* And after the ſaid Divorce the ſaid *Chriſtopher Kenne* married and took to wife *Elizabeth Beckwith*. And afterwards, *anno* 5 *Eliz.* before the Commiſſioners Eccleaſtical, the ſaid *Elizabeth Beckwith* did libel againſt the ſaid *Chriſtopher Kenne*, that he (before the marriage contracted betwixt them) had married with the ſaid *Elizabeth Stowel*, whereupon Proceſs was awarded againſt the ſaid *Elizabeth* to appear, and upon due examination the cauſe was ſentenced, That the marriage betwixt the ſaid *Chriſtopher Kenne* and *Elizabeth Beckwith* was lawful, and ſentenced them *ad exequenda conjugalia obſequia, &c.* And that the ſaid *Chriſtopher Kenne* was never lawfully married to the ſaid *Elizabeth Stowel*; and afterwards the ſaid *Elizabeth Beckwith* died, after whoſe death the ſaid *Chriſtopher Kenne* married the ſaid *Florence*, by whom he had iſſue the ſaid *Elizabeth*, and died: and *anno* 36 *Eliz.* it was found by office in the County of *Somerſet*, by force of a *Mandamus*, after the death of the ſaid *Chriſtopher Kenne*, that the ſaid *Elizabeth Kenne* was his daughter and heir, and that ſhe was within age, *ſc.* of the age of ten months. The Wardſhip of the Cuſtody of whom the Queen granted to Sir *Nicholas Stallenge*, and the ſaid *Florence* then his Wife: Whereupon the ſaid *Martha* pretending her ſelf to be daughter and heir to the ſaid *Chriſtopher Kenne*, with her Husband *Silveſter Williams* exhibited their Bill into the Court of Wards againſt the ſaid Sir *Nicholas* and *Florence*, ſurmiſing that the ſaid *Martha* was daughter and heir of the ſaid *Chriſtopher Kenne* on the body of *Elizabeth Stowel* his lawful Wife (as ſhe pretended) alledging that they at the time of their marriage, in *anno* 37 *H.* 8. were above the age of conſent, and that they did cohabit together nine or ten years before the ſaid ſuppoſed Divorce, during which cohabitation the ſaid *Martha* was gotten betwixt them, and prayed leave that the ſaid *Silveſter* and *Martha* might traverſe the ſaid Office. To which the ſaid Sir *Nicholas* and *Florence* anſwered, and the Plaintiffs examined divers witneſſes, and before Prohibition Sir *Nicholas* died; and thereupon the ſaid *Silveſter* and *Martha* exhibited a Bill of Reverter againſt the ſaid *Florence*; and afterwards the ſaid *Martha* having iſſue *Elizabeth*, the woman now Plaintiff, died. After

whose death the said *Robertson* and *Elizabeth* his Wife brought a new Bill of reviver to review the former Sute, in which the Witnesses were examined. And this case was referred to *Fleming* and *Coke* chief Justices, and to *Tanfield* chief Baron, and to *Yelverton* and *Williams* Justices, and *Snigg* and *Altham* Barons of the Exchequer. And in this Case three questions were moved. 1. If against the first Divorce the Plaintiffs shall be received to averr, that they did agree and consent to the Marriage; or that they shall be concluded by the said sentence of Divorce. 2. The second question was, if they shall have a Traverse of the said Office before an Office found for them. 3. If they shall have a Bill of Reviver upon a Bill of Reviver, as this Case is. And as to the first it was objected, that it appeareth by *Littleton*, *Lib.* 2. *fol.* 22. That by the Statute of *Merton*, *cap.* 6. and 35 *H.* 6. 40. *&c.* That the Common Law and Parliaments have taken notice of the age of consent of the Male to be fourteen, and of the Female to be twelve years; and therefore the same is triable at the Common Law. And if in truth the Husband and Wife are of age of consent at the time of the Marriage, no Divorce after pretending that they were within age of consent shall conclude the parties or their heirs, but they may prove the contrary at the Common Law, and chiefly in the Case at Bar, because the same concerneth Inheritance, and the true descent thereof; *& sententia contra matrimonium nunquam transit in rem judicatam.* 2. Admitting that they were within age of consent, if they be together, and have issue, although that a Divorce for impuberty and minority of years be had, yet it is but evidence, and shall not conclude the parties in any Action at the Common Law to prove their assent, for as much as the Divorce is had for that Case, and the cause is triable at the Common Law, the Divorce shall not conclude them. And 11 *H.* 7. 27. was cited, That he who pleadeth a Divorce ought to shew the cause of the Divorce; and if the cause be triable at the Common Law (as it is in the Case at Bar) there it shall not conclude; but if it be a thing not tryable at the Common Law, as a precontract, profession, &c. there it is otherwise. But as to that it was resolved by all the Justices and Barons, that the said sentence should conclude as long as it remained in force, and that for divers causes. 1. The Ecclesiastical Judge hath sentenced the contract and marriage to be void and of no effect, and although that they were of the age of consent, yet if the original contract was void and of no effect, then there was just cause of Divorce. 2. There were words of Divorce and separation, *eosdem divorciamus & separamus*; and giveth to each of them liberty *ad alia vota convolanda.* 3. If the marriage had been *infra annos nubiles*, the Ecclesiastical Judge is Judge as well of the assent as of the first Contract, and what shall be a sufficient assent, or not; and although the Ecclesiastical Judge sheweth cause of his sentence, yet for as much as he is Judge of the original matter, *scil.* of the Loyalty of the Matrimony, we shall never examine the Cause whether it be true or not; For of things, (the Cognizance whereof belongeth to the Ecclesiastical Court,) we must give credit to their sentences, as they give to the Judgments in our Courts. Also the Rule of their Law is, *Quod masculi quidem puberes, feminæ viri potentes matrimonio consentiri possunt:* and the determination thereof doth belong to their Cognizance. And as to the Case of 11 *H.* 7. 29. it is true, That the cause of the divorce ought to be shewed, because that some divorce doth dissolve the Marriage, *scil. a vinculo matrimonii*, Bastardeth the issue, and barreth the Wife of her Dower, and some *a Mensa & Thoro*, and doth not dissolve the Marriage, nor bar the wife of Dower, nor bastardize the issue; But in the case of Deprivation, there the cause needeth not be shewed; for be it right or wrongful, upon cause or without cause, it standeth, and every deprivation doth disable and remove the party deprived, as well for one cause as for another, as long as the deprivation standeth in force. *Vide* 8 *Ass.* 9 *E.* 4. 24. 7 *E.* 4. 32. 3 *H.* 6. 12 *H.* 8. 5. And *Coke* chief Justice cited the case in 22 *E.* 4. *tit. Consultation* 5. *Corbett*'s Case, where the Case was. That Sir *Richard Corbett* had issue by *Elizabeth* his Wife, two Sons, *Robert* the eldest, and *Roger* the younger, and died; *Robert* the eldest being within the age of fourteen years took one *Maud* to Wife, and at full age they cohabited together, *& habuerunt carnalem copulam, & cogniti & reputati pro viro & uxore palam*; and afterwards the said *Robert* put away his Wife, having no Issue by her, and married one *Lettice*, *&c.* living the said *Maud*, and had issue *Robert* by her; and afterwards *Robert* who so married *Lettice*, died, and *Lettice* openly told, that she was the lawful Wife of *Robert*, and her Son a Mulier, for which *Roger* the Son of the said *Robert Corbett* sued in the Spiritual Court to reverse the marriage between *Robert* his Brother and *Lettice*, and that *Lettice* be put to silence; for which cause *Lettice* sued a Prohibition. And in that Case three points were resolved, 1. That if *Robert* and *Maud* had had Issue, and had been unjustly divorced, and afterwards *Robert* had married *Lettice*, and had issue and died, the issue of *Robert* and *Maud* might sue in the Ecclesiastical Court to avoid the divorce; for so long as the divorce stood in force (the Common Law giveth so great credit to it) the Issue could not have remedy by the Common Law. And note in the Case no cause of the divorce doth appear, but because the marriage was had betwixt them when the parties were *infra annos nubiles:* and in the said Case of Divorce, the issue shall have his sute originally to reverse it in the Spiritual Court, for a divorce is a Spiritual judgment, and ought to be reversed in the Spiritual Court. But in the Case of *Corbett* there is no divorce, nor any other Spiritual Judgment that should disable the said *Roger*; and therefore he ought originally to begin at the Common Law as heir, and he shall have all Actions in the Temporal Court as heir, and all benefits as heir against the issue of *Lettice*, notwithstanding the second marriage; for they are void in all Law, Temporal and Spiritual, and the action and original to bastardize any, shall not be moved originally in the Spiritual Court, when no Spiritual sentence doth disable him, but he shall begin in the Temporal Court, and then if need be, they shall write to the Spiritual Judge if general bastardy be alledged: and the reason thereof is, because a man may be a Bastard in the Temporal Law, and Mulier in the Spiritual Law, and *e converso.* For a man who is begotten in Adultery during the Coverture is Mulier by the Temporal Law, and Bastard by the Spiritual Law. If a man beateth a Clark, if he sueth in the Spiritual Court to excommunicate him for the offence, it is well; but if he sueth there to have amends, a Prohibition lieth. 2. It was resolved in the said Case of *Corbett*, That when the Spiritual Court shall have Jurisdiction, it behoveth, that

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that the whole Caſe be Spiritual; as if a Parſon libelleth againſt a Lay-man for taking away his Tithes, the Temporal Court ſhall have Juriſdiction, for it is mixt with the Temporalty: And in the ſame caſe the matter is mixt (by conſequence) with the Temporalty, *ſcil.* that the one is heir, and that the other is a Baſtard; But if the ſaid Caſe of Tithes be between Parſon and Parſon, or between a Parſon and a Lay-man, if the right of the Tithes cometh in Queſtion, the Spiritual Court ſhall have the Juriſdiction. See the Statute *de circumſpecte agatis*, where it is ſaid, That *mere ſpiritualia*, do belong to the Eccleſiaſtical Cognizance. And *Linwood, cap. de foro competent. fo.* 7. ſaith, *mere ſpiritualia ſic dicta, quia non habent mixturam temporalium:* and where the ſaid Act ſaith, *de mortali peccato, Linwood* expoundeth it, and ſaith, *Non intelligas de omni peccato mortali, ſed a tali cujus punitio de ſua natura ſpectat ad forum eccleſiaſticum: nam ſi de ratione cujuſlibet peccati mortalis cognoſceret Eccleſia, ſic periret temporalis gladii juriſdictio, cum vix eſſet dare cauſam quin ratione peccati poſſit deferri ad Eccleſiam.* 3. It was Reſolved in the ſaid Caſe of *Corbett*, That when all the cauſe is originally ſpiritual; yet if after in the Spiritual Court they are to try a Temporal thing, a Prohibition ſhall lie: as if one Parſon ſaith, That the place is within his Pariſh, and the other contrary, after ſuch matter ſhewed, a Prohibtion ſhall lie, and therewith agree 29 *E.* 3. 23. & 5 *H.* 5. 10. Note Reader, a good difference between a Repeal of a ſentence of divorce given in the life of the parties, and a ſentence of divorce after the death of the parties. For it appeareth by the ſaid Caſe of 22 *E.* 4. That a ſentence of divorce may be repealed in the Spiritual Court by a ſute there after the death of the parties; but if any of the parties be dead before any divorce ſentenced in the Eccleſiaſtical Court, there they cannot ſue in the Spiritual Court to declare the marriage void, and to baſtardize the iſſue. For the trial doth originally belong to the Kings Court, and no diſability is by the ſentence in the Spiritual Court, and therewith agree 39 *Aſſ. p.* 10. 39 *E.* 3. 31. and 24 *H.* 8. *title Baſtardy* 44. *b.* That a divorce after the death of any of the parties, or a ſentence declaratory that the marriage was void after the death of any of the parties, ſhall not bind them; for it is but in effect to baſtardize the iſſue, of which they have not originally cognizance, as before hath been ſaid. *Vide* 19 *Aſſ. p.* 2. 2. If two be married *infra annos nubiles*, and afterwards at full age a divorce be betwixt them, it diſſolveth the Marriage, for there the Wife brought an Aſſiſe againſt her husband. See *Burie's* Caſe in the fifth part of my Reports, *fol.* 98. and ſee *Cawdrie's* Caſe in the ſame Book; and ſee *Bunting's* Caſe in the fourth part of my Reports, *fol.* 28. & 11 *H.* 7. 9. 34 *H.* 6. 14. 12 *H.* 8. 5. As to the ſecond point it was objected that the party ſhall have traverſe without any Office found for him; For when a direct and ſufficient Office is found in one County by force of *Diem clauſit extremum*, or *Mandamus*, after the death of the Anceſtor, there ſhall never Office again be found for the ſame Land, as long as it ſtandeth in force; for otherwiſe the Law ſhall never have an end; and threwith agree 4 *H.* 7. 15. 14. *E.* 4. 5. 15 *E.* 4. 11. 2 *H.* 7. 12, 18. and therefore it ſhall be hard for him to find an Office for him, before he may traverſe; where by the Law he cannot find in ſuch Caſe any Office. 2. It was Objected, That the Statute of 2 *E.* 6. *cap.* 8. hath remedied it if any Office were requiſite by the Common Law, the words of which Act are. *And whereas one perſon or more is or ſhall be found heir to the Kings Tenant by Office where any other perſon is or ſhall be heir, or if one perſon or more be or ſhall be found heir by office in one County, and another perſon or perſons is or ſhall be found heir to the ſame party in another County, &c. Be it enacted, that every perſon grieved by any ſuch Office ſhall and may have his or their traverſe to the ſame immediately, or after, at his or their pleaſure, and proceed and have like trial and advantage, as in other caſes of traverſe.* By which it appeareth, that the party grieved ſhall have Traverſe (without ſpeaking of any Office) and proceed and have ſuch advantage as in other caſe of Traverſe; and in other caſes of Traverſe there needeth not any Office. But it was Reſolved, That as the Caſe at Bar is, the Plaintiff ought to have an Office found before he can traverſe. And as to the firſt Objection it was Anſwered and Reſolved, that in ſuch ſpecial Caſe of finding of an heir, he who is right heir and grieved by the office, ſhall have a new Writ of *Diem clauſit extremum*, or *Mandamus*. For he is a ſtranger to the ſaid Office, and therefore the Office ſhall not conclude him. And the ſaid Rule, and the Books are to be intended, That the ſame perſon ſhall not have a new *Diem clauſit extremum*, or *Mandamus*, after an Office once duly found; but another perſon ſhall have one in that Caſe to prove himſelf heir, and therewith agree 30 *Aſſ. p.* 28. *F. N. B.* 261, 262. 4 *H.* 7. 15. 12 *R.* 2. *Livery* 28. *Stamf. prærog.* 52. *b.* And that there ought to be an Office before he traverſe, the Common Law therein hath great reaſon; for when the King is ſure of Wardſhip, or Primer ſeiſin by Office, it is not reaſon that any one who pretendeth himſelf heir ſhould traverſe the Office that the other is not heir, until the King be ſure to have profit by him, either by Wardſhip or Primer ſeiſin; for then after the firſt Office avoided by traverſe, he might ſhew matter to bar the King of Wardſhip or Primer ſeiſin, which ſhall not be reaſonable. Alſo at the Common Law Enterpleader lyeth, where by two ſeveral Offices in one and the ſame County ſeveral perſons are ſeverally found heirs to one perſon, to one and the ſame Land; *Ergo*, the party grieved may have a Writ to find an Office for him; for otherwiſe no Enterpleader can be: for the heir who was firſt found heir ſhall have a *Scire facias* in the Chancery, againſt him who is found heir by the ſecond Office, (becauſe the King is in doubt to whom to make Livery) upon which if he appear, and juſtifie the ſecond Office, for the tryal of the privity of the blood, then he ought to traverſe the firſt Office, (for all the enterpleading ſhall be thereupon) and upon the tryal thereof, he who is found heir ſhall have Livery. So that it clearly appeareth, that he who traverſeth the Office in ſuch Caſe ought to have an Office found for him by the Common Law; and therewith agreeth 36 *E.* 3. *Traverſ.* 44. 16 *E.* 4. 4. *F. N. B.* 162. For he who ought to ſue Livery, ought to have an Office before that he traverſeth. Otherwiſe is it of a ſtranger who deſtroyeth the Kings Title, *Vide* 36 *E.* 3. *Traverſ.* 44. 12 *E.* 4. 18. 16 *E.* 4. 4. 43 *Aſſ. p.* 20. 9 *H.* 7. 24. 5 *E.* 4, 5. 12 *H.* 6. 46 *E.* 3. *bre.* 618. As to the ſecond Objection, it was Anſwered and Reſolved, That the ſaid Act of 2 *E.* 6. giveth not traverſe to him who pretendeth himſelf to be heir againſt an Office found for another heir, without an Office found for him: for

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for that is incident to it, which is not taken away by the general words of the Act, for then all Enterpleaders ſhall be thereby alſo taken away, which never was the intention of the Act; But the intent of the makers of the Act was, to take away a great doubt at the Common Law, which was, if one be found heir within age by one Office, and afterwards another is found heir in the ſame County of full age, if any traverſe and Enterpleader ſhall be immediately, or if traverſe and enterpleading ſhall ſtay until the full age of the Infant, was *vexata quæſtio*, as it appeareth in our Books, *ſcil.* 36 E. 3. *Traverſe* 44. 5 E. 4. 4. 1 H. 7. 14. *F. N. B.* 162. And therefore to oust that doubt was the Statute of 2 E. 6. made, by which it is enacted, *That the party grieved ſhall have traverſe immediately*, which word (*immediately*) proveth the Intention of the ſaid Act to provide for the ſaid doubt, and to give him who was grieved in ſuch Caſe a Traverſe preſently; but not to alter the foundation of the Traverſe, *ſcil.* Office, which ought to be found for the party grieved before that he can traverſe: And where the Statute ſaith, That he ſhall have a Traverſe preſently, it is to be intended that he ought to obſerve all Incidents to a Traverſe: For the Office is the ground and foundation of his Traverſe. As to the 3. point, It was Reſolved by the greater part, That a Bill of Reviver upon a Bil of Reviver ſhall not be admitted, for the infiniteneſs: For *infinitum in jure reprobatur*; And no Wri of Journeys Accompts ſhall be brought upon Journeys Accompts. But it was Reſolved by all, that as this Caſe is, the laſt Bill of Reviver was abſurd, For the ſame prayeth that the former Bill be revived; and the firſt Bill prayeth, That *Martha* may Traverſe, and *Martha* is dead. And ſo firſt the divorce ſo long as it doth remain in force doth bind the Right; 2. The not finding of the Office doth diſable the Plaintiff to traverſe the Office: And laſtly, The Bill of Reviver upon the Bill of Reviver as this Caſe is, is not maintenable.

THE

THE REPORTS OF Sir Edward Coke Kt, &c.

PART VIII.

Hill. 3 Jacobi.

The Case of the Prince.

THE King, at the supplication of the most Noble Prince *HENRY*, his first begotten Son, Duke of *Cornwall*, brought a *Scire facias* against *Henry Lindley*, Knight, and Serjeant *Hele*, to repeal Letters Patents of Queen *Elizabeth*, bearing date the second of *May*, in the thirty seventh year of her Reign, by which the Queen granted to the said *Henry Lindley*, and to one *Gelly Merick* (now dead) and their heirs, the Manors of West *Taunton*, *Trelowie* and *Landulph*, in the County of *Cornwall*, to the end the King might make Livery of them to the said Duke, as members and parts of the [14] Dutchy aforesaid, and that by force of three Acts of Parliament, two in 11 *Edw.* 3. whereof the [b] one is in form of a Charter by authority of Parliament, by which the Prince was created Duke of *Cornwall*, and the possessions of the Dukedome of *Cornwall* thereby given to him, with special limitation, and the possessions annexed to the said Dutchy, so as they shall not be severed, with special cause of Revivification, although that the special limitation at any time should cease, &c. And of the Act of 32 *Hen.* 8. by which the three Manors are made parcels of the said Dutchy to all intents and purposes, &c. Sir *Henry Lindley*, and Serjeant *Hele*, and one *Warwick Hele*, Knight, Ten-tenants of the said three Manors were summoned; and, after three imparlances, the said Sir *Henry Lindley* as to the said two several Acts of Parliament, *anno* 11 *Edw.* 3. severally pleaded *Nul tiel record*. Serjeant *Hele*, and the said *Warwick*, pleaded the said Letters Patents of Queen *Elizabeth*, with a *non obstante* the said Act of 32 *H.* 8. and conveyed to them a joynt estate, to them, and to the heirs of the Serjeant; and further pleaded the Act of Confirmation of Letters Patents at [15] the Parliament holden 43 *Elizab.* And as to the Pleas of the said Sir *Henry Lindley*, the King's Attorney pleaded and shewed an Exemplification by *Inspeximus* of the said Charter of 11 *Edw.* 3. under the Great Seal (as in the Record where it is entered *in hæc verba*) and demanded Judgement if against the same he should be admitted to plead *Nul tiel record*. And demurred in Law upon the Plea of Serjeant *Hele* and *Warwick*, who joyned with him. And further, *ut amici Curiæ*, and and to inform the Court of the truth of the state which the King, that now is, hath in the residue of the said Manors, parcel of the said Dutchy, they repeated to the Court part of the Act of 1 *Hen.* 7. concerning the Dutchy of *Cornwall*. And *Henry Lindley* demurred in Law upon the Replication of the Attorney General, with whom the Attorney joined. The cause that I have made an abstract of the Case so compendious is, that I have added the whole Record at length, and if the Case should be also put at large, it would extend this Case to an unnecessary prolixity. In this Case four Questions were thought worthy of consideration. 1. If the Instrument of 17. *Martii*, *anno* 11 *Edw.* 3. to Prince *Edward*, be a Charter made in time of Parliament, or a Charter established by authority of Parliament, and the same is the principal and fundamental point upon which the whole doth

[b] depend. 2. If there were any other Act but the said Charter; and if there be any other Act, if the King's Writ be good which alleges another Act. 3. Admitting that the Prince shall be Duke of *Cornwall*, what estate Prince *Edward* shall have in the Honour and Dukedome of *Cornwall*, and how he hath it, by descent, or purchase: For if the Prince hath but a particular estate, then, after the particular estate ended, the said Serjeant *Hele* and his heirs shall have the said Manor until, &c. And then a special Judgement ought to be given, with a *Quoad*, &c. and no general Judgement that the Letters Patents shall be void, nor the inrollment cancelled. 4. If against such Act of Parliament *Nul tiel record* may be pleaded. And the Lord Chancellor, because that the Cause was of great importance and consequence, assisted himself with one Judge of each of the Courts at *Westminster*, *sc. Coke* chief Justice of the Common Pleas, *Fleming* chief Baron of the Exchequer, and *Williams* one of the Judges of King's Bench, (for Sir *John Popham*, Knight, late chief Justice of the King's Bench, who was called to it, and heard some of the Arguments at the Barr, dyed depending the
[16] Plea.) And this Case was strongly argued at the Barr, by *Stephens* the Prince's Attorney, for the King, and by Serjeant *Heron* for the Defendants. And at another day by *Doddridge* the King's Solicitour, and by Serjeant *Houghton* for the Defendans. And lastly, by *Hobart* the King's Attorney General. And afterwards, the same Terme, the Case was argued by *Williams* and the chief Baron in one day; and at another by the chief Justice of the Common Pleas and the Lord Chancellour. And as to the first point it was resolved by the Lord Chancellour and the said Justices, That the said Charter was made by Authority of Parliament. And because that *Duo sunt instrumenta ad omnes res, aut confirmandas, aut impugnandas, Ratio & Authoritas*; They confirmed their opinions, 1. by Reason; and then by Authorities in Law. For the first they gave two Reasons, *ex visceribus causæ*,

First, *Ex impossibili*; and that for three Causes: 1. It should be impossible if the said Charter was not established by Parliament, that the estate, either of the Honour to be Duke of *Cornwall*, or of the possessions thereof being limited in such special manner as it is, should be sufficient in Law. For
[b] the limitation of both is, *Habendum & tenendum eidem Duci, & ipsius & hæredum suorum Regum Angliæ filiis primogenitis & dicti loci Ducibus, in regno Angliæ hæreditariè successuris.* So that he who ought to inherit by force of this Grant, ought to be the first begotten Son and Heir apparent of the King of *England*, and of such King as is Heir to Prince *Edward*, and that such first begotten Son and Heir apparent of the Crown shall inherit the Dukedom in the life time of his Father. So that if there be King Grandfather, Father and Son, now the Father being the first begotten Son of the Grandfather is Duke of *Cornwall* in the life of the King, and the same instant that the Grandfather dieth, the Father is King, and the same instant also the Son is Duke of *Cornwall*; which course of Inheritance being against the Rules of the Common Law, cannot be created by Charter without the force and strength of an Act of Parliament. And in this Case the eldest Son of the King hath this Dignity by right of Inheritance, in like manner as the eldest Son of Grandees and Peers of the Realm which have supereminent Dignities in them, have in appellation and courtesie onely; as if the Grandfather be a Baron, Father and Son are, and the King createth the Grandfather an Earl, *eo instante* the Father is a Baron in appellation and courtesie, and *eo instante* that the Grand-
[17] father dieth, the Father is Earl, and the Son Baron by courtesie. 2. It shall be impossible that the possessions of the Dutchy shall be so annexed by Charter in the same manner as the Charter doth purport; For the Clause of annexation is, *Quæ quidem omnia Castra, Burg', Vill', Maneria, &c. put' Ducatui præsenti Charta nostra pro nobis & hæredibus nostris annectimus & unimus eidem imperpetuum remansur', ita quod ab eodem Ducatu aliquo modo nullatenus separentur, nec alicui seu aliquibus alii, quam dicti loci Ducibus per nos vel hæredes nostros donentur, seu quomodolibet concedantur*; Which indissoluble and inseperable annexation cannot be made in such manner by Charter onely, without Act of Parliament. 3. It shall be impossible by the Rule of Law, That an estate in Land should cease, and revive again, as by the Clause of Revivification is intended by Charter onely; the which Clause is, *Ita quod præfat' Duci, seu aliis ejusdem loci Ducibus decedent, & filio seu filiis, ad quos dictus Ducatus prætextu Doni & Concessionis nostrorum prædictorum spectare dignoscitur, tunc non apparentibus, idem Ducatus cum Castris, Burg', Villis, &c. ad nos vel hæredes nostros Reges Angliæ revertatur,*
[b] *in manibus nostris & ipsorum hæredum nostrorum Regum Angliæ retinend', quousque de hujusmodi filio seu filiis in dicto regno Angliæ hæreditate succes'jur' appareat, ut dictum est, quibus tamen successive Ducatum illum cum pertinentiis, pro nobis & hæredibus nostris concedimus & volumus liberari, tunc prout superius est expressum.* For although that a Rent newly created (to which no man may have an antient Right) may cease for a time, and revive again, yet Land which is of a more solid nature, and to which another may have an antient right, cannot so doe, as it is resolved in *Corbet's* Case in the First Part of my Reports.

The second Reason was, *ex absurdo*, That six others being created Earls at the same time for the Honour of the Prince, all their Creations and Donations shall be firm and good in Law to some of them, and the heirs of their bodies; and to others in Fee-simple, and that the Creation of the Prince himself, and of such a most noble Prince, and the Grant to him of the said Castles, Manors, &c. shall be either void in Law, or but an Estate at will; and especially in such a time when there were Judges (who alwaies attended the Parliament) well learned and understanding the Law.

Then it is to see what Authorities and Precedents there are to prove the said Charter hath the force
[18] of an Act of Parliament. And the same was proved four manner of waies. 1. Out of the Charter it self, and Authorities in Law agreeing to it. 2. By Grants and Estates by the Prince, and by Letters Patents of Kings. 3. By Judgements given according to the ordinary course of Law, and Resolutions of the Judges in all the King's Courts. 4. By Resolutions in Parliaments by the King and the whole Body of the Realm.

1. In

1. In the Charter it self made to the Prince two Clauses were observed, which prove, that it hath the force of an Act of Parliament. 1. In the beginning of the Charter it is said, *Considerationis nostræ intuitus ad personam dilecti & fidelis nostri Edwardi, Comitis Cestriæ, filii nostri primogeniti, intimos convertentes, volentésque ejusdem personam honorari, eidem filio nostro nomen & honorem Ducis Cornubiæ de communi consensu Prælatorum, Comitum, Baronum, & aliorum de Consilio nostro in præsenti Parliamento convocat. existent. Dedimus*, &c. By which it appeareth, that the Charter was made by Authority of Parliament. And it was resolved, that this Clause doth extend to all the parts of the Charter, which Clause of it self had been sufficient. 2. In the close and end of the Charter, which is parcel of the Record, it is said, *Dat. per manum nostram apud Westm. 17 die Martii, anno regni nostri 11. Per ipsum Regem & totum Consilium in Parliamento.* Which Clause also proveth that it [b] was made by Authority of Parliament. And it was more for the Honour of the King that the Creation and Donation should be in the form of a Charter, and that Witnesses should be called unto it, so that nothing should be omitted which belonged to a compleat Charter, and so principally to proceed from the King, as the Fountain of all Honour and Dignity; then if the Creation and Donation had been onely by Act of Parliament; in which all should be Donours. Note Reader, If Letters Patents pass by Bill signed without Privy Seal, the Patent is subscribed, *per ipsum Regem*, (and then the Bill signed doth remain with the Chancellour for his Warrant:) and when it passeth by Bill signed, and Privy Seal also, then the Privy Seal, and it signed remaineth with the Clerk of the Signet, and the Lord Privy Seal hath an Extract thereof to make the Privy Seal, and then the Letters Patents are subscribed, *per Breve de Privato Sigillo:* and if *authoritate Parliamenti* be added, then it passeth according to the Act of 27 *Hen.* 8. *cap.* 11. And when the King signeth the Patent it self in the upper part, and the Signature and Great Seal go together, then it is subscribed, *Per ipsum Regem manu sua propria.* And when it is made by Authority and Consent of [19] Parliament, then it is subscribed, *Per ipsum Regem, & totum Consilium in Parliamento*, or to the like effect. And it is to know, That in ancient times, as well when any Land, Franchise, or Hereditament, did pass from the King of any Estate of Inheritance, as in the Creation of any to Honour or Dignity by Letters Patents, the Conclusion was with *His testibus:* but of long time for Lands, Franchises or Hereditaments, this form hath been discontinued, and now is, and so it hath been of long time, the Patent concludes, *Teste meipso*, &c. But in all Creations to Honour and Dignity by Letters Patents the ancient form of Conclusion of *His testibus* is continued to this day; And that Acts of Parliament do goe in the form of the King's Charter, we have many Examples in Law. 1. *Magna Charta*, made 9 *Hen.* 3. which beginneth, *Imprimis, Concessimus Deo, & hac præsenti Charta nostra confirmavimus pro nobis & hæredibus nostris imperpetuum*, &c. and the Charter concludes with *His testibus*, and *Datum per manum nostram*, as ours doth: And although it doth not appear in the Charter it self by expres words, that the same was by Authority of Parliament, yet because that all parts of it cross and change the Common Law, which a Charter in it self cannot doe, and it appeareth by the last Chapter, That for the said Grand Charter, *Archiepiscopi, Episcopi, Abbates, Priores, Comites, Barones, Milites, liberi tenentes*, [b] *& omnes de regno nostro dederunt nobis quintodecimam partem omnium mobilium suorum:* this Clause in the Conclusion of the Charter proveth the same by implication to be an Act in form of a Charter. And lastly, the same hath alwaies had the allowance of an Act of Parliament, and therefore ought to be so taken; which is a stronger Case then ours is, for here are full and expres words; and *Anno* 21 *Edw.* 3. *brev.* 881. in the Earl of *Chester*'s Case the 11. Chapter of *Magna Charta*, *Quod Communia Placita non sequant. Curiam nostram*, is cited to take away the Jurisdiction of the King's Bench; And this Grand Charter hath been allowed and confirmed above thirty times. So the Act of 21 *H.* 3. *de anno Bissextili*, the same beginneth, *Rex Justiciariis suis de Banco*, &c. in the forme of a Patent or Writ. The Statute of *Protections*, *Anno* 33 E. 1. *de conjunctim feoffatis*, *Anno* 34 E. 1. which beginneth, *Rex omnibus ad quos*, &c. and concludes, *In cujus rei testimonium has Literas nostras fieri fecimus Patentes. Teste*, &c. So the Statute of *Articuli Cleri* beginneth, *Edw. Dei gratia, Omnibus ad quos*, &c. and concludes, *In cujus*, &c. *Teste*, &c. Two Statutes made *Anno* 14 E. 3. one *pro Clero*, and the other concerning *England*, that it shall not be in the subjection of *France*, [20] and many other Acts of Parliament are made in the form of the King's Charter. And it was resolved, that these words in an Act or Charter, (*By Authority of Parliament*) are sufficient to make the same an Act of Parliament. *Bracton* calleth the Court of Parliament, *Magna Curia, Magnum Consilium*, and *Commune Consilium regni*. The said Statute *de anno Bissextili: Rex per Consilium fidelium subditorum:* The Statute of Bigamie, *Anno* 4 E. 1. *In præsentia venerabilium patrum quorundam Episcoporum Angliæ, & aliorum de Consilio Regis.* 7 E. 1. *De Religiosis, De Concilio Prælatorum, Comitum, Baronum, & aliorum fidelium regni nostri, de Consilio nostro existentium, providimus, statuimus, ordinavimus:* And in the beginning of the Act, *Dominus Rex in Parliamento suo Statuta edidit*, 13 E. 1. The Statute of *Winchester*, in the purview of the Act it is said, Our Lord the King, to abate the power of Felons, hath established a pein in this case, &c. And in the end of the said Act the King commands and forbids, That from thenceforth neither Fair nor Market be holden in Churchyards, &c. 20 E. 1. the Statute *De vocat. ad Warrant. Dominus Rex de Communi Consilio suo statuit.* The Statute of *Appellatis* 28 E. 1. *Dominus Rex in Parliamento statuit* 27 *Edw.* 3. *cap.* 1. *Staple*, the Court of Parliament is called the Great Council: and many Acts to this purpose were cited, to shew the variety of penning of Acts of Parliament: and the original Writs which are founded upon any Statute say, *Quare de Communi Consilio regni nostri Angliæ provisum sit*, &c. and the Writ upon the Statute of Labourers saith, *Cum per Consilium nostrum de communi utilitate regni ordinatum sit*, 11 *H.* 7. 27. If an Act of Parliament be penned by assent of the King and of the Lords spiritual and temporal, and of the Commons; Or it is enacted by Authority of Parliament,

it is a good Act; but the most usual way is, That it is enacted by the King, by the assent of the Lords Spiritual and Temporal, and of the Commons, 7 *Hen.* 7. 14. & 34 *Edw.* 3. 12. *acc.* and there it is said, that there are many Statutes which are indited, *Quod Dominus Rex statuit*: yet if they be entred in the Parliament Roll, and alwaies allowed for Acts of Parliament, it shall be intended that it was by Authority of Parliament: But if an Act be penned, that the King with the assent of the Lords, or with the assent of the Commons, it is no Act of Parliament; for three ought to assent to it, *sc.* the King, the Lords and the Commons, or otherwise it is not an Act of Parliament; and the Record of the Act doth expres against which of them gave their assent, the same
[21] excludeth all other intendments that any other gave their assent: and so it is the difference between a general and particular penning of an Act of Parliament. *Vide* 8 *H.* 6. *cap.* 29. and 5 *R.* 2. *cap.* 2. of Fugitives: 21 *E.* 3. 60. The Bishop of *Norwich* his Case. And at this very Parliament of 11 *E.* 3. *Henry*, son of *Henry* Earl of *Lancaster*, was created by Charter, *ad requisitionem Prælatorum, & Procerum & Commnnitatis regni nostri in instante Parliamento nostro apud* Westm. *convocat.* to be Earl of *Derby*, to him and the heirs males of his body. Also by onother Charter, the King created *William de Bohun, de communi assensu Prælat', Comit', Baronum, & aliorum de Consilio nostro in præsenti Parliamento nostro*, Earl of *Northampton*, to him and the heirs of his body. And at the same Parliament by Charter created *Hugh de Audley* Earl of *Glouceſter, de definito dict. Parliam. nostri Consilio*, &c. And by Charter with the like words the King at the same Parliament created *Will. de Clynton* Earl of *Huntingdon* in tail; *Robert de Ufford* Earl of *Suffolk* in Fee-simple; *Will. de Monte acuto* Earl of *Salisbury* in Fee-simple; and all these were Creations with Donations, *ad sustinend. nomen & onus*, by Authority of Parliament, in form of the King's Charter, with *Hiis testibus*, and some with such subscription, *Per Regem & Consil. in Parliamento*; and some, *Per Regem & Consilium in*
[b] *pleno Parliamento*; and others, *Per ipsum Regem & totum Consilium in Parliamento*; all which are of one effect. And those were the Proofs collected out of the Charter it self, and other Acts of Parliament which are penned in the form of the King's Charter.

2. The same is proved by Letters Patents, as *Ex rotul. Patentium de anno* 14 *E.* 3. *num.* 18. which was within three years after the Charter; The King granted to the Prince, by the name of *Edward* Duke of *Cornwall*, &c. to be Lieutenant of the Realm so long as the King shall be beyond the Sea. In *anno* 21 *E.* 3. *ex rot. patent. in Turre*, The said Prince (within ten years after his Creation) for the fine of a thousand Marks did demise to *Tideman de Limbergh, Cunagium Stannariæ totius Ducatus Cornubiæ pro tribus annis, necnon emptionem Stanni tam infra dictum Ducatum Cornubiæ quam Com. Devon. fossi & fodiendi quod vendi debet, Reddendo annuatim* three thousand Marks; which the Prince could not have done, if he had but an Estate at will, as at the first he had not, if the said Charter had not the force of an Act of Parliament. Other Letters Patents were cited in 5 *H.* 4. *ex rot. patent. ibidem. Rex*, &c. *Sciatis quod Regnum Angl. primogeniti filii in Ducatum Cornub. hereditariè successur'*. And divers other Patents were cited to the same effect.

3. The same is proved by Judgements and Resolutions of Judges; In 18 *Ass. pl.* 5. *Thorp* saith,
[22] That it was adjudged in Parliament, that if a gift be made to one and to his heirs males, that his Sisters and other heirs collateral, as well as heirs males, shall be inheritable, because upon such gift he had Fee-simple; and it was inferred, that such Resolution might well be at the Parliament 11 *Edw.* 3. where the said Creation of the Prince, and annexation of the said Lands, were in consideration: And because the same could not take effect by gift or grant, it was advised that it should be by Act of Parliament, because there was not any such descent or course of Inheritance by the Common Law, 21 *Edw.* 3. 41. where the Manor of *Berkhamsted* was by the said Charter annexed to the said Dutchy, the Judges there allowed the gift of the said Manor to be good to the Prince, which could not be, as it hath been often said, if it had not the force of an Act of Parliament. 39. *Edw.* 3. 12. The King, *anno* 11. of his Reign, at his Parliament holden at *Westminster*, made the Prince Duke of *Cornwall*, and many others Earls of this Realm, amongst which was *Will. de Monte acuto*, Earl of *Salisbury*. And in 43 *Ass. pl.* 15. & 45 *Ass. pl.* 6. the gift and annexation of the possessions of the said Dukedome granted by the said Charter unto the Prince was allowed to
[b] be good. 50 *E.* 3. *inter record.* in the Tower in the same year. *Johann.* the Wife of the said Prince was by order of Law endowed in Chancery of the possessions granted by the said Charter to the Prince her Husband; *ergo*, the Charter did convey an Estate of Inheritance to the said Prince. *Anno* 5 *H.* 4. *ex Rot. Parl.* the same year a Petition in Parliament was exhibited by the Commons, for the Resumption of all Grants and Letters Patents before made of the Lands of the said Dutchy of *Cornwall*, to which the King and the Lords with great Gravity and Justice, knowing the danger such private Bills would introduce, although the same doth concern the King's eldest Son (an excellent Precedent to give a Caveat to pass few or no private Bills between subject and subject, but to referre them either to the Courts of Equity, or of Law, where the Cause may be duly examined, and upon deliberation discerned and adjudged) gave such answer, It is agreed by the King and the Lords in Parliament, that the said Lord the Prince have Writs of *Scire facias*, or other recovery, the best he may have by the Statutes and Laws of the Kingdom, according as the Case doth require. And thereupon a *Scire facias* was brought in the name of the King at the Petition of the Prince, *Trinit.* 5 *Hen.* 4. in the Chancery, to repeal a Grant which *Rich.* 2. made (and which was
[23] confirmed by King *Henry* the Fourth) of the Manor of *Risberghe*, parcel of the said Dutchy, to Sir *Lewis Clifford*, and his heirs, who was returned, summoned, and made default; *Per quod de advisament' Justiciariorum*, &c. *consideratum fuit tunc & ibidem, quod Literæ prædict' præfat. Ludovico ut præfertur factæ revocentur & adnullentur*, &c. Another *Scire facias* was brought *anno* 6 *Hen.* 4. in the name of the King, at the Petition of the Prince, in the Chancery, to repeal a Grant made by King *Richard* the Second, and confirmed by King *Henry* the Fourth, of the Manor of *Helesion*,

Helesion, in *Kerier* in the County of *Cornwall*, to *Nicholas Sarnfield*, Knight, and *Margaret* his Wife, for their lives: And at the Returne of the *Scire facias*, *sc. Octab. Hill.* The Prince by *Thomas Beston* his Atturney appeared, and the said *Margaret* also, her Husband being dead. *Et prædictus Princeps petit quod Literæ prædict. in forma prædicta facti. revocentur & adnihilentur, & quod prædictum manerium*, &c. *in manus Domini Regis seisiatur, & eidem Principi tanquam membrum & parcell' Ducatus prædicti juxta formam & effectum dictorum doni & concessionis, & unionis præfati avi Domini Regis, habendum & tenendum, liberetur.* And that Record was delivered by the Chancellour in the King's Bench (*Gascoigne* being then chief Justice) and thereupon *Margaret* pleaded the Grant of King *Richard* the Second to her for life, and prayed in aid of the King, and had it, and the Court gave day, *&c.* And the Prince at the day brought a *Procedendo in loquela, dum tamen ad judicium reddendum Domino Rege inconsulto nullatenus procederetur:* and thereupon *Margaret* made default, and thereupon day is given to the Prince, *&c.* At which day the Prince brought a *Procedendo ad judicium*, upon which the Court gave Judgement as followeth: *Consideratum est, quod Literæ præd' in forma præd' factæ revocentur & adnullentur, & quod dictum manerium*, &c. *in manus Domini Regis*, &c. *seisiatur, & eidem Principi tanquam membrum & parcell' Ducatus prædicti juxta formam & effectum dictorum doni, concessionis & unionis præfati avi dicti Regis, habendum & tenendum liberetur.* And in *Mich.* 30 *Hen.* 8. *in memorandis Scaccar. Rot.* 16. the Record saith, *Ad Parliament.* 11 E. 3. *tent. inter alia ordinatum & inactitatum fuit, quod Comit' Cornubiæ imperpetuum moraretur ut Ducatus fil' senior. Regum Angliæ qui essent Reges propinquiores Reg. absque aliquo modo donari*, &c. And there is no opinion in Law against it; for the Case in 1 *Mar.* 94. *Dyer* is such (the Record of which I have seen, which is entred *Trin.* 7 E. 6. *Rot.* 303. In a Replevin by *Thomas Chafine*, Esq. against the Lord *Stourton*, for taking, *&c.* at *Meere* in the County of *Wilts*, the Defendant did avow for damage fesant; and because the place where doth contain two hundred acres of Land, whereof King *H.* 8. was seised in fee; and 35 *Hen.* 8. demised the same to one *Pyster* for years, who granted the same to the Lord *Sturton*, and in barr of which avowrie, the Defendant *Chafin* pleaded, *Quod Dom. Rex Edw. quondam Rex Angl. tertius, progenitor dom. Reg. nunc, fuit sesit. de manerio de Mere in Com. præd. unde*, &c. *in dominico suo ut de feodo in jure Coron. suæ Angl. & sic inde seisitus existens, ad Parliament. suum tent. apud Westmonast. in Comitatu Midd. die Lunæ proim. post festum Sancti Matth. Apostoli anno regni sui undecimo, inter cætera, per assens. omnium tam Prælat', Comitum, Baron', & aliorum, quam genitum de communitate, accordatum fuit, Quod pro honore dicti nuper Regis & terræ suæ, & ad fortificationem ejusdem, & pro eo quod ex antiquo esset Dux Cornubiæ, quod dict' quondam Rex præficeret Dominum Edw. filium suum tunc Comit' Cestriæ, Ducem Cornub. & quod filius senior regn. Angl.* viz. *illi qui essent prox. hæred. de regno Angl', essent Duces Cornub. & quod dict. Comitatus esset dict. dom. Edw. in nomine Ducatus, & quod dict. Comit. Cornub. imperpetuum moraretur ut Ducatus filiorum seniorum reg. Angl. qui essent prox. hæredes regni absque alit' donat. existen', prout in eodem actu, inter alia, plenius continetur. Posteaque præd. nuper Rex Edwardus tertius seisitus existens de præd' Maner. de Mere cum pertinentiis unde*, &c. *in dominico suo ut de feodo & jure, ut de jure coron. suæ Angliæ, per Literas suas patentes, quarum dat' est apud Westm. xvij. die Martii, anno regni sui undecimo, & in Curia hic prolat', recitans per easdem, quod cum nuper personam dilecti & fidelis ipsius nuper Regis Edw. tunc Comitis Cestriæ filii sui primogeniti honorare volens: Eidem filio suo nomen & honorem Ducis Cornubiæ dederit, ipsumque in Ducem Cornub. præfecerit, & gladio cinxerit, ut decerit, Dederit & concesserit, & per easdem Literas suas Patentes, pro se & hæredibus suis confirmaverit eidem filio suo sub nomine & honore Ducis dict. loci, inter alia, præd. manerium de Mere, cum pertinent': Habendum & tenendum eidem nuper Duci & ipsius & hæredum suorum Regum Angl. filiis primogenitis, dicti loci Ducibus, in regno Angliæ hæreditariè successuris, quod quidem Manerium cum pertinentiis, idem nuper Rex Edw. 3. prædict. Ducatui pro se & hæredibus suis per prædict' Literas Patentes, inter alia, annexit & univit eidem in perpetuum remansur', ita quod*, &c. And further pleaded the Clause of Revivification, as in the Charter. By force of which Act, and of the said Letters Patents, the said *Edward* the Prince *fuit seisitus de Manerio prædicto, inter alia, eidem Ducatui unit' & annexo & ejusdem Ducatus parcell. in dominico suo, ut de feodo & jure:* And afterwards the said Prince *Edward* died, by which King *Edw.* 3. was seised of the said Manor in fee, and then he died, and the same descended to King *Henry* the Eighth, *ut consanguineo & hæredi ipsius Edw.* 3. and afterwards King *Hen.* 8. had issue *Edw.* 6. his first begotten Son, by which he was Duke of *Cornwall*, &c. And afterwards King *Hen.* 8. made the Lease to *Pistor, prout*, &c. And afterwards King *Ed.* 6. *anno* 4. demised the said two hundred acres to *Chafine* for one and twenty years, upon which it was demurred in Law. And because the said Charter of King *Edw.* 3. was pleaded (without authority or force of Parliament) there it seemed,

First, that the Prince had but an Estate at will.

Secondly, that the King could not unite and annex the said Manour to the said Dutchy by his said Letters Patents without Authority of Parliament, and make it parcell of the Dutchy, and to alter the form and course of the Dutchy.

Thirdly, *per mortem Ducis Cornubiæ*, the Manour came to the King as an Escheat for want of a Duke and first begotten Son, and was then knit and rejoyned to the Crown in lieu of the Seigniory, and by the birth of any other Son it could not be severed, *&c.* And although that all that was but the motion of the Chancellour; for the Book saith, *Quod Justiciarii noluerunt arguere istum casum, ut credo, propter pregnantiam Mariæ Reginæ.* But if the same opinion should be admitted, yet it proveth nothing against this Resolution; for by the said Act mentioned in the Plea, nothing passeth, but the Charter ought to pass the said Manour, and the same cannot pass in such manner without Authority of Parliament, nor the Charter alone could not annex the said Manour to be parcell of the Dutchy, and the Charter was not pleaded to be made by Authority of Parliament. And for the

[b] [24] [b] [25] [b]

opinion in *Altonwood*'s Case, in the First Part of my Reports, it is there also admitted, that the said Grant was onely by Charter.

4. It is proved by Judgements and Resolutions of the Judges in Parliament, That the said Charter hath the authority and force of Parliament; 1. *ex Rot. Parliam. anno* 5 *Hen.* 4. a Judgement given in Parliament against Sir *John Cornwall* and his Wife Countess of *Huntingdon*, for certain Manours which she had of the Dutchy of *Cornwall*, and which were annexed to it: also by the Act of 33 *Hen.* 6. which see *inter originalia de* 35 *Hen.* 6. *rot.* 29. *ex remem. Thesaurar. in Scaccario: Et ex Rot. Parliamenti de* 9 *H.* 5. where it is resolved and affirmed by both Acts of Parliament, that the said King *Edw.* 3. by his Charter 17 *Martii anno* 11. of the common assent and counsell of the Prelates, Earls, Barons, of others of council in his Parliament, gave, &c. as in the Charter. And it is provided by the same Act of 9 *Hen.* 5. That the Manour of *Istelworth* which was annexed by the said Charter, &c. should be several and disannexed; in which two things were observed.

[26] 1. That the said Charter of King *Edw.* 3. hath the authority and force of Parliament.

2. That the said Manour of *Istelworth* was so annexed that it could not be severed and disannexed but by Act of Parliament: and all the same is affirmed also by another Act of Parliament, *anno* 38 *Hen.* 6. *ex Rot. Parliament. Vide* the Act of 3 *Edw.* 4. *ex Rot. Parl.* and the Act of 32 *Edw.* 4. *ex eodem Rot.* of a very long exchange between the King and the Earl of *Huntingdon*, which Act is revoked by an Act made 11 *H.* 7. And see the Act of 1 *H.* 7. *ex Rot. Parliament.* of the same year, (part of which is pleaded by Serjeant *Hele* and *Warwick Hele*,) by which it is enacted that *Hen.* 7. should have and hold the Dukedome of *Cornwall*, &c. to him and to his heirs, in as large and ample manner and form, &c. as the Kings *H.* 6. and *Edw.* 4. or any of them enjoyed the same Manour, &c. But they omitted this subsequent Clause, *&c. And be it also ordained and established by the same Authority, that whensoever our Sovereign Lord by the grace of God have first a Son of his body lawfully begotten, and that the same Son and Prince have and enjoy the said Dutchy of Cornwall*, &c. *in as ample and large form and manner as any Prince, first begotten Son of any King, hath had or enjoyed before*

[b] *this Act.* And all that which hath been said, is resolved and affirmed by Authority in Parliament, *anno* 32 *H.* 8. mentioned in the *Scire facias*; for which it was resolved by the Lord Chancellour and the said Justices, That the said Charter hath the authority and force of an Act of Parliament.

As to the second Point it was resolved, That the Charter having the authority and force of Parliament, is sufficient in it self, without any other Act; and if the King's *Scire facias* hath sufficient matter it shall never abate for surplusage not material. *Vide* 4 *Hen.* 6. 16. 45 *Edw.* 3. 6. *a.* 49 *Ass. pl.* 26. *Vide* the Act of 9 *Hen.* 5. For there it is affirmed by the whole Parliament, That at the Parliament holden at *Westminster* the Monday next after the Feast of Saint *Matthew* the Apostle in the 11. year of the reign of King *Edward* the Third, amongst other things, it was agreed, That the eldest Sons of the Kings of *England*, *&c.* those who shall be next heirs to the Realm of *England*, were Dukes of *Cornwall*, and that the County of *Cornwall* shall alwaies remain as Dutchy to the eldest Sons of the Kings of *England*, which shall be next heirs to the said Realm, without be-

[27] ing given elsewhere. And thereupon King *Edward* by his Charter 17 *Martii* then next following, of common assent and counsel of the Prelates, Earls, Barons, and other of his Council being, the said Parliament gave, &c. but the Court did relie upon the King's Charter, with the authority and assent of Parliament.

As to the third Point it was resolved, That the Prince hath an Estate in Fee-simple in the said Dukedom: for every Estate of Inheritance is either Fee-simple or Fee-tail, and the same is not an Estate tail, for it is not limited or restrained either by express words or by any that do amount to so much, to the heirs of the body of the Prince; for the Gift is not to the said Prince, *& ipsius & hered. suorum Regum Angliæ filiis primogenitis.* So that he who ought to inherit ought to be first begotten Son of the heirs of the Black Prince, be it heir lineal or collateral; but such heir ought to be King of *England.* Which manner of limitation was short, excellent, and curious; for to raise an Estate of Inheritance these essential words (*his heirs*) were not omitted, although that afterwards they were qualified, as by the limitation appeareth. And that the same was an Estate of Inheritance is proved by the said Record of 50 *Edw.* 3. by which it appeareth, That the Wife of the Black Prince was endowed. And it appeareth by the Book of 21 *Edw.* 3. 41. that the said Prince

[b] in the said Manour of *Berkhamsted* (parcell of the said Dutchy of *Cornwall*) had Fee. And the said Judgements in 5 and 6 *H.* 4. prove it; for there Judgement generally is given, That the Letters Patents should be revoked and made void, &c. which Judgement could not have been given, if any Estate, or Reversion, or Possibility did remain in the Patentee, for then the Letters Patents shall not be made void, but the Judgement should be that the Letters Patents should be made void and annulled as to the Estate of the Prince. Also it appeareth by the Law *de* 33 *H.* 6. *ex Rot. Parl.* and by the Act of Parliament 38 *H.* 6. out of the same Roll, that *Edward*, eldest Son of *H.* 6. had his Livery as inheritable by descent due to him by birth-right; and so had *Edward*, the first begotten Son of *Edw.* 4. and *Arthur*, the first begotten Son of *Hen.* 7. to whom Livery was made of the said Dutchy which belonged to them *jure hæreditario.* *In anno* 22 *E.* 4. *ex Rot. Parliament.* in the said long Exchange between the King and the Earl of *Huntingdon*, there the Prince is adjudged to be seised of the Dutchy of *Cornwall* in Fee-simple; and it was unanimously resolved by the Lord Chancellour and the said Justices, That the Prince hath a Fee-simple by descent in the Honour and Possessions of the said Dutchy.

[28] As to the fourth Point it was resolved, That against a general Act of Parl. or such Act whereof the Judges *ex officio* ought to take notice, the other party cannot plead *Nul tiel record*; For of such Act the Judges ought to take notice: But if it be misrecited, the party ought to demur in Law upon it. And in that case the Law is grounded upon great reason; for God defend if the Record

of

of such Acts shall be lost, or burnt by Fire, or other means, that the same should be to the general prejudice of the Commonwealth, but although that it be lost or burnt, the Judges by Printing, or by the Record in which it was pleaded, or by other means, may inform themselves of it. See *Partridge* and *Croker*'s Case, &c. *Plowd. Com. fol.* 78.

And it was resolved, that this Act, which concerneth the King, and the Prince which shall be the first begotton Son of the King and heir apparent to the Crown for the time being, *perpetuis futuris temporibus*, is such an Act whereof the Judges and all the Kingdom ought to take notice: For every subject hath an interest in the King and none of his subjects who is under his Laws are divided from him, being their Head and Sovereign, so that the business and things of the King doth touch the whole Kingdom, and especially when the same concerneth the Prince, the first begotten Son of the [b] King, and heir apparent to the Crown, *Coruscat enim Princeps radiis Regis patris sui, & censetur una persona cum ipso Rege*, as it is said in the Act of Parliament of 38 *Hen.* 6. And therefore if any one intend the Death of the Prince, and declare the same by open act, the same is Treason, by the ancient Common Laws of *England*, and so declared by the Statutes of 25 *Edw.* 3. 1 *Hen.* 5. 7. If the Prince, as Prince of *Wales*, hath Judgement to recover, and afterwards the Crown descendeth unto him, he as King shall sue execution. And with the reason of this Resolution in this Point agreeth the Rule of the Court in *Plowd. Com.* in the Lord *Berkley*'s Case, 231. That the Act of 35 *Hen.* 8. which concerneth the capacity of the Queen, was such an Act whereof the Judges ought to take knowledge, because the same concerneth the King's Wife, and by the same reason in this Case of the Prince. And it was agreed, That if *Nul tiel record* shall be admitted to be pleaded in this Case, that the substance and effect of the Record is sufficient to maintain the said *Scire facias*, doth appear in the Record exemplified under the Great Seal. It was also resolved, that the Act of 43 *Eliz.* of Confirmations of Letters Patents pleaded by Serjeant *Hele* and *Warwick*, *Hele* do not extend to this Case for two manifest Reasons.

1. Because the Act doth supply onely certain particular defects, as Misnosmer of the Manors, &c. [29] Misrecital or non-recital of Leases and other special Imperfections mentioned in the Act.

2. The Act maketh the Letters Patents good onely against the King, his heirs and successors, with a saving to all others, and therefore without question the Right of the Prince cannot be bound thereby: And that the Act of 1 *Hen.* 7. which the said Serjeant *Hele* and *Warwick*, pleaded, as *amici Curiæ* to inform the Court of the truth, helped them not; for by the same it is enacted, That King *Hen.* 7. shall have to him and his heirs the said Dutchy in as ample and large manner as *H.* 6. or *E.* 4. had it; which words of reference preserve the Dutchy of *Cornwall* according to the Limitation of Creation by the Charter of 11 *E.* 3. But in truth the Serjeant and his Son have not performed the office of a good friend; for they have omitted one Clause in the same Act which expresly concerneth the preservation of the said Dutchy of *Cornwall* to the first begotten Son of the King, &c. and therefore they have endeavoured to deceive the Court and to suppress the truth. And lastly it was resolved that in such *Scire facias* brought by the King to repeal Letters Patents made of any parcel of the Dutchy, to the end that the King may make Livery to the Prince, that the King or [b] the Prince may reply to any Barr pleaded by the Defendants; and both waies are good in Law; but the best form is that the King's Attorney till Livery be sued do reply, as he did in this Case at Barr. And as to the Clause of *Non obstante* in the Letters Patents of Queen *Elizabeth*, it was resolved, that the same cannot take away the force of the said Acts of Parliament nor prejudice the Prince that now is of his Right in the Dukedom.

And in this Case divers things were observed:

1. That the eldest Son of every King, after the said Creation, was Duke of *Cornwall*, and so allowed; as *Henry* of *Monmouth* first begotten Son of *Hen.* 4. and *Henry* of *Windsor*, first begotten Son of *Hen.* 5. and *Edward* of *Westminster*, the first begotten Son of *Hen.* 6. and *Edward* of *Westminster*, the first begotten Son of *Edw.* 4. and *Arthur* of *Winchester*, the first begotten Son of *Hen.* 7. and *Edward* of *Hampton*, the first begotten Son of *Hen.* 8. And all these have enjoyed the style, honour and possessions of the said Dutchy of *Cornwall*, so that the possession hath been alwaies without interruption with the first begotten Sons of the Kings at all times after the said creation in 11 *Edw.* 3. which is about three hundred years: So that after the creation there was never any first begotten Son of any King but he was Duke of *Cornwall*. [30]

2. That *Richard de Burdeaux*, who was Son of the black Prince, was not Duke of *Cornwall* by force of the said Creation; for although that after the death of his Father he was heir apparent to the Crown, yet because he was not the first begotten Son of any King of *England* (for his Father died in the life time of King *Edw.* 3.) the said *Richard* was not in the limitation of 11 *Edw.* 3. and therefore in *an.* 50 E. 3. he was created Duke of *Cornwall* by a special Charter: Nor *Elizabeth* the eldest Daughter of King *Edw.* 4. was not Dutchess of *Cornwall*, for she was the first begotten Daughter of the King, and the limitation is to the first begotten Son. Neither was King *Hen.* 8. in the life of his Father, after the death of Prince *Arthur* his Brother, by force of the said creation Duke of *Cornwall*; for although he was the sole Son and heir apparent of *Hen.* 7. yet forasmuch as he was not the first begotten Son, he was not within the said limitation; for Prince *Arthur* was his first begotten Son.

3. The great care and regard that every King hath from time to time of the said Creation to preserve the said Dukedom to his eldest Son. And after divers Continuances the Judgement was given as followeth.

Super quo visis & plenius intellectis omnibus & singulis præmissis per dilectum & fidelem Consiliar' dicti Domini Regis nunc Thomam *Dominum* Elesmere *Cancell. Angliæ & per dict' Cur' hic, habitaque inde per eund' Dominum Cancellar. & dictam Cur. hic matur. & diligenti liberatione & advisamento cum* [b]

Johanne

Johanne Popham, *Milit', capitali Juſtic' dicti Domini Regis nunc ad placita coram ipſo Domino Rege tenend' aſſignat'*, Edwardo Coke, *Mil', capitali Juſtic. ipſius Domini Regis de Communi Banco*, Thoma Flemming, *Milite, capitali Barone de Scaccario ejuſdem Domini Regis*, & David Williams, *Milite, uno Juſtic' dicti Domini Regis, ad placita coram ipſo Dom. Rege tenend. aſſignat'*, *videtur eidem Domino Cancell. & dictæ Cur. hic, Quod plac. præd.* Johannis Hele, & Warwici Hele, *per ipſos ſuperius in barram placitat' ac materia in eodem placito content. minus ſufficiens in Lege exiſtunt ad manutenend', Quod præd. Literæ Patentes prædict. nuper Regin.* Elizab. *de prædictis maneriis Weſt Taunton, Trelowia, & Landulph præd', cum pertinen', in forma prædicta facti', revocari & cancellari, aut quod maneria ill' cum pertinen' in manus dicti Dom' Regis nunc capi & ſeiſiri non debeant, prout præd'* Henricus Hobart *Attornat. dicti Domini Regis generalis, qui*, &c. *pro eodem Domino Rege ſuperius inde allegavit.* [31] *Et quod prædictum placitum prædicti* Henrici Hobart *Atturnat. dicti Domini Regis nunc generalis, per ipſum pro eodem Dom. Rege modo & forma præd. (ad barram prædict.* Henrici Lindley) *ſuperius replicand. placitat', ac materia in eodem placito content. ſufficien' in Lege exiſtunt ad precludend' præfat'* Henric' Lindley *à dicendo, quod non habetur aliquod tale record. alicujus talis Actus Parliamenti prædicti nuper Regis* Edwardi *tertii edit', nec aliquod tale record. prædict. Chartæ per eundem nuper Regem* Edwardum *tertium, authoritate Parliamenti prædicti confect', qual' in prædicto brevi de* Scire facias *inde ſuperius recitatur & ſpecificatur, prout prædictus* Henricus Hobart *Attornat' dicti Domini Regis generalis, qui*, &c. *pro eodem Domino Rege ſuperius inde allegavit. Ideo conſideratum & adjudicatum eſt per dictum Dominum Cancellar. & per dict. Cur. hic, de Adviſamento prædicto, Quod prædict. Literæ Patentes prædict' nuper Regin. præfatis* Gellio Merick & Henrico Lindley, *ut præfertur, facti. quod prædict. maner. de Weſt Tawnton, Trelowia, & Landulph prædict. cum pertinen.) revocentur, evacuentur, adnullentur, ac vacuæ & invalidæ pro nullo penitus habeantur & teneantur. Ac etiam quod irrotulament' earundem (quod eadem maneria) caſſetur, cancelletur & adnihiletur. Quodque maneria illa cum pertinentiis in manus dicti Domini Regis nunc capiantur* [b] *& ſeiſientur, ut ea præfata nunc Duci tanquam membrum & parcell. Ducatus ſui prædicti ſecundum formam & effectum doni, conceſſion', & unionis prædict. habendum & tenendum per dictum Dominum Regem nunc liberentur*, &c.

Termino Paſchæ 26 Eliz. *in the King's Bench.*

Calye's Caſe.

[32] IT was reſolved by the whole Court this Term, That if a man cometh to a common Inn, and delivereth his Horſe to the Hoſtler, and requireth him to put him to Paſture, which is done accordingly, and the Horſe is ſtoln, the Innholder ſhall not anſwer for it; for the words of the Writ which lieth againſt the Hoſtler are, *Cum ſecundum legem & conſuetud. regni noſtri Angliæ hoſpitatores qui hoſpitia com. tenent ad hoſpitandos homines, per partes ubi hujuſmodi hoſpitia exiſtunt tranſeuntes, & in eiſdem hoſpitantes, eorum bona & catalla infra hoſpitia illa exiſtentia abſque ſubtractione ſeu amiſſione cuſtodire die & nocte tenentur, ita quod pro defectu hujuſmodi hoſpitatorum ſeu ſervientium ſuorum hoſpitibus hujuſmodi damnum non eveniat ullo modo, quidam malefactores quendam equum ipſius* A. *precii* 40*s. infra hoſpitium ejuſdem* B. &c. *inventum, pro defectu ipſius* B. *ceperunt*, &c. See the Regiſter amongſt the Writs of Treſpaſs, 105. and *Fitz. Nat. Brev.* 94. *a. b.* by which original Writ (which is in ſuch caſe the ground of the Common Law) all the Caſes concerning Hoſtlers may be decided. For,

1. It ought to be a common Inn; for if a man be lodged with another (who is not an Inholder) upon requeſt, if he be robbed in his houſe by the ſervants of him who lodgeth him, or any other, he ſhall not anſwer for it; for the words are, *Hoſpitatores com. hoſpitia tenent*, &c. And ſo are [b] the Books in 22 *H.*6.21.38. 2 *H.*4.7. 11 *H.* 4.45. 42 *Aſſ. pl.*17. 42 E. 3.11. 10 *El. Dyer* 226. 5 *Mar. Dyer* 158. And the Writ needeth not mention that the Defendent keepeth a common Inn; for the words of the Writ in the Regiſter are, *infra hoſpitium ejuſdem B.* but the ſame is to be intended in the Writ; for the recital of the Writ is, *hoſpitatores qui communia hoſpitia tenent*, &c. and the one part ought to agree with the other, and the latter words do depend upon the other, and the Plaintif ought to declare that he keepeth a common Inn; and ſo the Books in 22 *H.* 6. 22. 11 *H.* 4. 45. 10 *Eliz. Dyer* 266. &c. are well reconciled.

2. The words are, *ad hoſpitandos homines per partes ubi hujuſmodi hoſpitia exiſtunt tranſeuntes, & in eiſdem hoſpitantes*; by which it appeareth that common Inns are inſtituted for Paſſengers and wayfairing men; for the *Latin* word for an Inn is, *diverſorium*, becauſe he who lodgeth there is, *quaſi divertens ſe à via*; and ſo *diverſoriolum*. And therefore if a neighbour who is no Traveller, as a Friend, at the requeſt of the Inholder lodge there, and his goods be ſtolen, &c. he ſhall not have an Action; for the Writ is, *ad hoſpitandos homines*, &c. *tranſeuntes in eiſdem hoſpitantes.*

3. The words are, *eorum bona & catalla infra hoſpitia illa exiſtentia*, &c. So that the Inholder by Law ſhall anſwer for nothing that is out of his Inn, but onely for thoſe things which are *infra hoſpitium*. And becauſe the Horſe, which at the requeſt of the Owner is put to Paſture, is not within the Inn, for this cauſe the Inholder is not held by the Law to anſwer for him, if he be ſtolen out of the Paſture; for the thing with which the Hoſtler ſhall be charged ought to be within the

the Inn, and therewith agree the Books in 11 *Hen.* 4. 45. 22 *Hen.* 6. 21. 42 E. 3. 11. 42 *Aſſ. pla.* 17. where *Knivet* ſaith, that the Inholder is bound to anſwer for himſelf, and all the men of his chamber or hoſterie, for they are *infra hoſpitium:* And with this reſolution in this point agreed the opinion of the two Juſtices of Aſſiſe, *viz.* the two chief Juſtices *Wray* and *Anderſon* in the County of *Suffolk* in Lent Vacation, 26 *Eliz.* That if an Inholder lodgeth a man and his horſe, and the Owner requireth the horſe to be put to paſture, and there he is ſtoln, the Inholder ſhall not anſwer for him. But it was holden by them, that if the Owner doth not require it, but the Inholder of his own head putteth his Gueſts horſe to graſs, he ſhall anſwer for him if he be ſtoln, &c. And it is to be obſerved that this word *Hoſtler* is derived *à hoſtle*, and *hoſpitater*, which is uſed in Writs for an Inholder, is derived *ab hoſpitio*, and *hoſpes eſt quaſi hoſtium petens.*

4. The words are, *Ita quod pro defectu hoſpitator. ſervientium ſuorum*, &c. *hoſpitibus hujuſmodi damn. non eveniat*, &c. by which it appeareth that the Inholder ſhall not be charged, if the fault be not in him or his ſervants, in the well and ſafe keeping and cuſtody of their Gueſts goods and chattels within their common Inn; for the Inkeeper is bound in Law to keep them ſafe without any ſtealing or purloyning; and it is no excuſe for the Inkeeper to ſay, that he delivered the key of the chamber-door to the Gueſt in which he is lodged, and that he left the chamber-door open, but he ought to keep the goods and chattels of his Gueſts in ſafety; and therewith agree 22 *H.* 6. 21. 11 *Hen.* 4. 45. 42 *Edw.* 3. 11. And although that the Gueſt doth not deliver his goods to the Inholder to keep, nor acquainteth him with them, yet if they be carried away, or ſtoln, the Inkeeper ſhall be charged, and therewith agreeth 42 *Edw.* 3. 11. And although that thoſe who ſtole or carried away the goods be unknown, yet the Inkeeper ſhall be charged, *anno* 22 *Hen.* 6. 38. 8 *Rich.* 2. *Hoſtler* 7. *Vide* 22 *Hen.* 6. 21. But if the Gueſts ſervant, or he who cometh with him, or he who deſireth to lodge with him, ſteal, or carrieth away his goods, the Inkeeper ſhall not be charged; for the fault is in the Gueſt to have ſuch a ſervant, or companion; and the words of the Writ are, *pro defectu hoſpitator' ſeu ſervientium ſuorum. Vide* 22 *Hen.* 6. 21. But if the Inkeeper appointeth one to lodge with him, he ſhall anſwer for him as it there appeareth. The Inkeeper requireth his Gueſts that he will put them in ſuch a chamber under Lock and Key, and then he will warrant them, the Gueſts let them lie in an outward Court, where they are taken away, the Inkeeper ſhall not be charged, for that the fault is in the Gueſt, as it is holden 10 *Eliz. Dyer* 266. [33]

5. The words are, *hoſpitibus damnum non eveniat:* Theſe words are general, and yet foraſmuch as they depend upon precedent words, they ſhall produce two effects, *viz.*

Firſt, they ſhew the firſt words.

Secondly, they are reſtrained by them; for the firſt words are; *eorum bona & catal' infra hoſpitia illa exiſtentia abſque ſubtractione cuſtodire*, &c. which words (*bona & catalla*) by the ſaid words, *ita quod*, &c. *hoſpitibus damnum non eveniat*, although that of his proper nature, they extend not to Charters or Evidences concerning Free-hold, or Inheritance, or Obligations, or other Deeds or Specialties; being things in action. Yet in this caſe it is expounded by the latter words to extend to them; for by them great damages happen to the Gueſt. And therefore if one bringeth a bag or cheſt, &c. of Evidences into the Inn, or Obligations, Deeds, or other Specialties, and by default of the Inkeeper they are taken away, the Inkeeper ſhall anſwer for them, and the Writ ſhall be *bona & catalla* generally; and the Declaration ſhall be ſpecial. 2. Theſe words, *bona & catalla*, reſtrain the latter words to extend onely to moveables: And therefore by the latter words, If the Gueſt be beaten in the Inn, the Inkeeper ſhall not anſwer for it; for the injury ought to be done to his moveables which he bringeth with him; and by the words of the Writ, the Inholder ought to keep the goods and chattels of his Gueſt, and not his Perſon; and yet in ſuch caſe of Battery, *hoſpiti damnum evenit.* And theſe words aforeſaid, *abſque ſubtractione ſeu amiſſione*, extend to all moveable goods, although that of them Felony cannot be committed; for the words are not, *abſque felonica captione*, &c. but, *abſque ſubtractione*, which may extend to any moveables, although that Felony cannot be of them, as of Charters, Evidences, Obligations, Deeds, Specialties, &c. [b]

Trinit. 29 Eliz. *Rott.* 721. *In the Common Pleas.*

Pain's Caſe.

BEtween *Pain* Plaintif in Treſpaſs, and *Sams* and *Tanner* Deſendants, for Treſpaſs done in Lands in *B.* in the County of *Eſſex*, upon Not guilty pleaded, the Jurors gave a ſpecial Verdict to this effect. A man hath iſſue two daughters, the Lands, in which the Treſpaſs was, were given to the eldeſt daughter, and to the heirs of her body begotten, the Remainder to the youngeſt daughter, and to the heirs of her body, &c. The eldeſt daughter took to husband the ſaid *Sams*, one of the Defendants, who had iſſue, which was heard cry, and died, and afterwards the eldeſt daughter died without iſſue, after whoſe death the ſaid *Sams* held himſelf in as Tenant by the curteſie, upon whom the youngeſt daughter did enter, and the ſaid *Sams*, and *Tanner* as ſervant to him did re-enter, upon which re-entrie the youngeſt Siſter brought the ſaid action of Treſpaſs: And it was objected for the Plaintiff, that the Husband in this caſe ſhall not be Tenant by the curteſie, be- [34]

cauſe the eſtate of the Wife was determined, and the eſtate of the Husband which is derived out of the eſtate of the Wife cannot continue longer then the primitive eſtate endureth; for *ceſſante ſtatu primitivo ceſſat derivatus*; and therefore if Tenant in tail make a Leaſe for lives according to the Statue of 32 *Hen.* 8. *cap.* 38. and afterwards dieth without iſſue, this Leaſe being derived out of the eſtate tail, ſhall not continue longer then the eſtate tail, againſt the opinion in 33 *Hen.* 8. 48. *Dyer*, *quod fuit conceſſum per totam Curiam.* And when the Wife dieth without iſſue, he in the Remaider ſhall enter by force of an immediate gift to him, and his iſſue ſhall have a Formedon in the deſcender upon an immediate gift; and it is not like the caſe of Dower; for the
[b] Wife ſhall be endowed although that ſhe hath not any iſſue; and therefore although the eſtate determineth or not for want of Iſſue, yet the Wife by the Law ſhall be endowed, but a man ſhall not be Tenant by the curteſie if he hath no iſſue, nor if he hath iſſue, if not the ſame iſſue, or ſome other ſupport the eſtate which ſhall hold by the curteſie; and Dower is more favoured than the eſtate of a Tenant by the curteſie; for a woman ſhall be endowed of Lands where the huſband hath but a ſeiſin in Law; but a man ſhall not be Tenant by the curteſie of Land if the Wife be not actually ſeiſed in deed. To which it was anſwered and reſolved by the whole Court, That it was the Common Law, if Lands had been given to a woman, and the heirs of her body, and had taken a Husband, and ſhe had iſſue, and the iſſue died, and the Wife alſo without iſſue, by which the inheritance of the Land did revert to the donor, in that caſe the eſtate of the Wife is determined, and yet the Husband ſhall be Tenant by the curteſie, for the ſame is *tacitè* implied in the gift. It is adjudged in 21 *Hen.* 8. *Dower* 19. That if a man hath iſſue by a woman Inheretrix which is dead, which iſſue might inherit the Land, he ſhall be Tenat by the curteſie, although the Wife by a former Husband have iſſue inheritable, and although that his iſſue be dead. And therewith *Littleton* agreeth, *lib.* 1. *cap. Dower*, *fol.* 10. b. In every caſe where a man taketh a Wife ſeiſed of ſuch eſtate of the Tenements, ſo that the iſſue which he hath by his Wife might by poſſibility inherit the ſame Tenements of ſuch eſtate as the Wife hath, as heir to the Wife, in ſuch caſe, after the death of the Wife, he ſhall have the ſame Lands by the curteſie of *England*, otherwiſe not. By which Maxim it appeareth, that the ſeiſin of the Wife ought to be of ſuch inheritance which ought to have this incident amongſt others, that the iſſue, which the Husband ſhall have by her, might by poſſibility inherit; and that may fail either in reſpect of the iſſue, or in reſpect of the manner of Inheritance; In reſpect of the iſſue, if it be born dead. And therefore *Glanvil*, *lib.* 7. *c.* 18. *Si ex uxore ſua hæred. habuerit filium vel filiam clamantem & auditum infra quatuor parietes*, &c. *Et* Bract. *l.* 5. *de except. c.* 30. *fol.* 437, 438. *Si quis uxor. duxerit habentem hæredit. vel meritagium, vel aliquam terram cauſa donationis, ſi liberos int' ſe habuerint ex iſtis nuptiis procreat', ſi uxor præmoriat', remanebit viro hæredit. & terra ſua, tota vita ipſius viri, ſive ſuperſt. fuerint liberi ſive mortui, dum tamen ſemel aut vocem aut clamorem dimiſerint, quod audiatur int. quatuor parietes, ſi hoc probet: Et licet partus moriat. in ipſo partu, vel vivus naſcat', vel forte ſemimortuus, licet vocem non emiſerit, ſolent obſtetrices in fraud' veri hæred' proteſtari partum vivum naſci & legitim. & ideo neceſſe eſt vocem probar'; & licet naturalit. mutus naſcatur & ſurdus, tamen clamorem emittere debet, ſive maſculus ſit ſive femina (unde verſus) Nam dicunt E. vel A. quoquot naſcuntur ab Eva.* And *Fleta*, *lib.* 6. *cap.* 56. and he agreeth with *Bracton* almoſt in the ſame words. So that *Littl. lib.* 1. *cap.* 4. *fol.* 7. might well ſay, Some have ſaid, That he ſhall not be Tenant by the curteſie if the Child which he hath by his
[35] Wife be not heard cry; for by the Cry it is proved that the Child was alive; *ideo quære.* But he ſaith before in the ſame Chapter, If the Husband have iſſue alive or dead; ſo that in his opinion the Crying is not neceſſary; for it is true if the iſſue be born alive, it ſufficeth, and the Crying of the Child is but a proof that it is alive: And the ſame is well proved by the form of pleading (which is the ſtrongeſt proof in Law) for the Pleading ſuch caſe is, *Quod quædam A. G. fuit ſeiſita de tenementis prædictis in dominico ſuo ut de feodo, & ſic inde ſeiſita cepit in virum J. W. per quod idem J. & A. fuerunt ſeiſiti de tenementis prædictis cum pertinentiis in dominico ſuo ut de feodo in jure ipſius A. ipſique ſic inde ſeiſiti exiſtentes habuer. exitum inter eos*, &c. *poſteáque præd. A. uxor prædicti J. obiit, idémque J. ipſam ſupervixit, & tenuit in tenementis prædict. ac inde fuit ſeiſitus in dominico ſuo, ut de libero tenemento, ut tenens inde per legem Angliæ.* And if in that caſe iſſue be taken, *quod non habuerunt exitum*, &c. the effect of the iſſue ſhall be whether they had iſſue born alive, *quia mortuus exitus non eſt exitus*; and the Crying is but a proof of the life. *Vide* 22 H. 8. *Dyer* 25. But in the caſe at Bar, to remove all ſcruples, it was found that the iſſue was heard cry. And in this caſe it was well reſolved, that *Glanvil*, *Bracton*, *Britton* and *Fleta*, may be vouched for antiquity and ornament; and in caſes where they concurre with the later Authorities of Law, and do not impugne the common experience and allowance in Judicial proceedings at this day. 2. If the Wife be delivered of a Monſter, who hath not any ſhape of Mankind, it is no iſſue in the Law; but although the iſſue have any deformity or defect in the hand or foot, and yet hath humane ſhape, it ſufficeth; and therewith agreeth *Bracton ubi ſupra. Item, cum ſi partum ediderit, tamen prius declinavit ad monſtrum, & cum clamorem emittere deberet, emittit rugitum, & hinc videtur quod tenere non debet exceptio* (id eſt, *tenere don debet per legem Angliæ*) *quia partus monſtroſus eſt cum non naſcat. ut homo. Sed non dico partum monſtroſum licet natura membra minuerit vel amplificaverit, minuerit, ut in defect. digitor. vel hujuſmodi, ampliaverit, ut ſi plur. digitos vel articul. ſicut ſex vel plures, ubi non debet habere niſi quinque, ſi inutilia natur. reddidit membra, ut ſi curvus fuer', vel gibboſus, vel membra tortuoſa habuerit.* 3. In ſome caſe the time of the birth is material, and in ſome not; and therefore when the Lord *Dyer* was Serjeant (he was, as himſelf ſaith in the Common Pleas) of counſel with this caſe. One *Reppes* of *Norfolk* took to Wife an Inheretrix, who was great with Child by him, and died in her Travail, and the iſſue was ripped out of his Mother's belly alive, and by reference out of the Chancery to the Juſtices they reſolved, That

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he ſhould not be Tenant by the curteſie, for the ſame ought to begin by iſſue and be conſummated by the death of the Wife, and the eſtate of Tenant by the curteſie ought to take away the immediate deſcent. But if a man hath iſſue by his Wife, and afterwards Land deſcendeth to the Wife, be the iſſue alive or dead at the time of the deſcent, he ſhall be Tenant by the curteſie, for the time of the birth of the iſſue is not material, if it be in the life of the Wife. In reſpect of the manner of Inheritance; as if Lands be given to a woman, and the heirs males of her body, and ſhe taketh a Huſband, and hath iſſue a daughter, the Husband ſhall not be Tenant by the curteſie; for the iſſue cannot by any poſſibility inherit the ſame Lands; and ſo out of the Rule of *Littleton*, and of the Judgement in 21 *H.* 3. And at the Common Law, if Lands had been given to Husband and Wife, and to the heirs of their two bodies begotten, and they had iſſue, and the Husband died, and ſhe took another Husband and had iſſue, the ſecond Husband ſhould be Tenant by the curteſie; and ſo is it adjudged 30 *E.* 1. *Formedon* 66. which proveth that the iſſue by the ſecond Husband might inherit; for at the Common Law after iſſue, it was taken to three purpoſes that the Tenant in tail had a plain Fee-ſimple, 1. To alien; 2. To forfeit it by Attainder of Felony, as the Book is in 7 *E.* 3. 6, & 7. *b.* So that although the Tenant in tail afterwards died without iſſue, the Land ſhould not revert to the Donor; 3. That the Tenant in ſpecial tail by having of iſſue had a full Fee-ſimple to make the Lands deſcendable to her iſſues by any other Husband; For as by her alienation ſhe might make ſtrangers to the blood to be abſolutely inheritable: ſo by conſtruction of Law, after iſſue had, all lineal heirs of her body by what Husband ſoever they were begotten, ſhould inherit her, as a benefit and incident *tacitè* annexed to her eſtate by the Law; for it was ſaid, that by the having of iſſue the ſame was given and diſpoſed in Law to the Husband for his life; which diſpoſition and alteration of eſtate, although it be for life, *tacitè* as an incident to it maketh the iſſues of the ſecond Husband inheritable. As if a man hath iſſue a ſon and a daughter by one woman, and a ſon by another woman, and dieth, if the eldeſt ſon maketh a Leaſe for life, againſt whom the Wife of the Father recovereth Dower, and afterwards the eldeſt ſon dieth, the Siſter ſhall have the Reverſion in fee, becauſe the eldeſt hath altered the Reverſion by his Leaſe for life, and the Tenant in dower leaveth the Reverſion in the Leſſee for life, *Vide* 7 *H.* 5. 4. But that the iſſue of the ſecond Husband ſhall inherit in ſuch caſe, is directly proved by the Statute *de Donis conditionalibus*, *Nec habeat de cætero ſecundus vir hujuſmodi mulieris aliquid in tenemento ſic dato per conditionem poſt mortem uxoris ſuæ per legem Angliæ, nec exitus de ſecundo viro & muliere ſucceſſionem hæreditariam:* For if the iſſue of the ſecond Husband ſhall not inherit, the ſecond Husband ſhall not be Tenant by the curteſie; the ſame was adjudged in the Caſe in 21 *H.* 3. And *Fleta*, *ubi ſupra*, ſaith, *Lex tamen iſta ad ſecundos viros non extenditur, eo quod palam inhibetur per ſtatutum.* But after iſſue had, the Tenant in tail at the Commhn Law had not ſuch a Fee-ſimple, that his collateral heir which is not heir of his body, ſhould inherit. And if Land were given before the Statute to Husband and Wife, and the Heirs of their two bodies, and they have iſſue, and the Wife dieth, and the Husband taketh another Wife, ſhe ſhall be endowed, as is held in 12 *Edw.* 4. 2. *Markham's* Caſe: and by conſequence the iſſue, which ſhe by poſſibility might have, ſhall inherit the Land. And *Vide Fitz. tit. Tail* 2. and mark the agreement of the Law in both the ſaid Caſes. And where *Littleton* ſaith, as heir to the Wife, theſe words are very material; for that is a true reaſon, that a man ſhall not be Tenant by the Courteſie of a ſeiſin in Law, for in ſuch caſe the Iſſue ought to make himſelf heir to him who was laſt actually ſeiſed, &c. *Vide* 11 *H.* 4. 11. 40 *E.* 3. 9, &c. And the Tenant by the Courteſie ſhall be attendant to the Lord paramount, which he cannot be, becauſe the Wife died before that ſhe was actually ſeiſed; But Tenant in Dower ſhall not be attendant to the Lord paramount but to the heir, and therefore ſhe ſhall be endowed of a ſeiſin in Law. And the Caſe at barr is directly within the ſaid Maxim, for the iſſue of the Husband which he had by his Wife, might by poſſibility have inherited the Wife. 2. It appeareth, That at the Common Law the Husband ſhall be Tenant by the Curteſie if he hath iſſue, although afterwards the Wife dieth without iſſue, as it is adjuged in 30 *E.* 1. as above, and this caſe is not reſtrained by the Statute aforeſaid. 3. *Littleton lib.* 1. *cap.* 7. agreeth with this Judgement, for he ſaith, That Tenant by the Curteſie of *England* is, where a man taketh a Wife ſeiſed in Fee-ſimple, or in Fee-tail general, or as heir of ſpecial tail, and hath iſſue by the ſame woman male or female, heard or alive; be the iſſue afterwards dead (*Note that*) or alive, there, if the Wife dieth, the Husband ſhall hold the Land during his life by the Courteſie of *England*. So that it appeareth by him, that it is not material, if the Eſtate tail continue or not. 4. It appeareth, That the true reaſon of *Dower*, and the reaſon of this Caſe, (*ſcilicet*) the poſſibility of the iſſue to inherit, &c. are all one. And if Tenant in tail taketh a Husband, and hath iſſue and dieth, now the Husband is Tenant by the Courteſie; and although that afterwards the iſſue dieth without iſſue, ſo that the Eſtate tail is determined; yet his Eſtate ſhall continue and endure, for it is not derived meerly out of the Eſtate of the Wife, but it is created by the Law by privilege and benefit of Law *tacitè* annexed to the Gift.

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Pasch. 30 Eliz.

The Case *of Barretry.*

[b] NOte, at an Evidence upon a Traverse of an Indictment of Barretry, It was holden by the Court, That a common Barretor, is a common mover, or stirrer up, or maintainer of Sutes, Quarrels, or Parts, either in Courts or in the Country: In Courts of Record, and in the County, Hundred, and other inferiour Courts. In the Country in three manners; 1. In disturbance of the peace; 2. In taking or detaining of the possession of houses, lands, or goods, &c. which are in question or controversie, not onely by force, but also by craft or deceit, and for the most part in suppression of truth and right; 3. By false inventing and sowing of Calumny, rumors and reports, whereby discord and disquiet ariseth between his Neighbours. And all the said Qualities of a common Barretor are proved by the Indictment of Barretry, and by our Books; For first it is said in the Indictment, *Quod est communis Barrecator*, within which word is included a Quarreller in his own cause, and a mover and maintainer of Quarrels of others, for the most part in suppresion of truth and right: And the same appeareth by the Statute of *Westm.* 1. *cap.* 32. It is provided, That no Sheriff suffer any Barretors or maintainers of Quarrels in their County-Courts, &c. In 40 *Edw.* 3. 33. The Plaintiff counted in a *Decies tantum*, that the Recognitors in an Assise, took of certain people who were Barretors and embracers of the said sute, *sc.* of every one 20 *s.* which was in a Cause depending in a Court of Record. The Stat. of *Ragman*, the King wills and enjoyneth the Justices, That none in Complaining, nor in Answering, be not surprised nor encompassed by Hocketors or Barretors; that the truth be not followed, and the Trespasses remain unpunished. And the
[37] Statute of *Westm.* 1. *cap.* 18. For as much as the common Fine and Amerciament of the whole County in Eyre of the Justices by false Judgements, or for other Trespasses is unjustly assessed by Sheriffs and Extortioners on the Shires, so that the same is many times increased, and the parcels otherwise assessed than they ought to be, to the damage of the People. And the same shall suffice for stirring up and mainting of sutes in Courts: and for moving and maintaing of sutes in in the Country, *Littleton*, *lib.* 3. *cap. Warranty*, *fol.* 158. If *A. de B.* be seised of a house, and *F. de G.* who hath no right enter in the same house, claiming the house to him and his heirs, but the said *A.* doth continually dwell in the said house, in that case the possession of the Freehold shall be continually adjudged in *A.* But if the said *F. G.* make a Feoffement to certain Barretors in the Country for maintenance for them to have in the same house by a Feoffement with warranty, by force whereof the said *A. de B.* dareth not stay in the said house, but goeth out thereof, &c. this Warranty doth commence by Disseisin. By all which, and by many other Authorities which might be cited it appeareth, That a common Barretor is a common mover and maintainer of sutes, either in Courts, or in the Countrey. If it be asked wherefore this *Polypragmon* is called Barretor: Some derive a Barretor from the French word (*Barrateur*) which signifieth a Deceiver: Others, from the Latin word (*Baratro*) which signifieth a vile Knave, or Unthrift: Others, because they maintain Pleas at Barrs in Courts where causes are debated, or stirr causes of sutes, derive this word Barretor from two Legal words; (*Barra*) which signifieth the Barr where causes are debated, &c. and (*rettum*,) which, as it appeareth by the Writ *de Homine replegiando*, signifieth a Crime or Offence; and therefore a common Barretor is principally an Offender in moving or maintaining of sutes at barres, *sc.* in Courts, or in the Country, which are causes of sutes in Courts, he is called a Barretor or Barr offender. In the Civil Law *Barrataria dicitur quando Judex petit aliquid indebitum ut Justitiam faciat.* But in the Law of *England*, this word *Barrett* doth signifie a Quarrel, whence he who moveth and maintaineth Quarrels is called a Barretor, and the same is so expounded by the whole Parliament in 33 E. 1. in the Statute of Conspiracy; Where the Act saith, Stewards and Bailiffs of Great Lords, who by their Seigniory, Office, or Power, take upon them to maintain and uphold Pleas or Barrets, to have parties with those which touch their
[b] Seigniories with themselves. Where it is manifest that Barrets signifieth Quarrels; but he ought to be *Communis Barrecator*, *sc.* not in one or two, but in many Causes, so that he may be proved a Common Barretor. 2. The words of the Indictment are, *Pacis Domini Regis Perturbator*, *scil.* a common Mover or Maintainer of brawls and frayes, by which the Peace is broken; The other words of the Indictment are, *Communis Malefactor*, *Calumniator*, *& Seminator litium & discordiarum inter vicinos suos:* Malefactor, because that he willingly and maliciously doth wrong to his Neighbours, either openly after warning, or secretly in the night, &c. *quia qui male agit odit lucem.* Calumniator, so called, because by false and malicious Scandals he doth endeavour to robb his neighbour of his good name, which is a great Motive of Discords and Quarrels, and is against the Law of God, *Levit.* 19. *Non facias Calumniam proximo tuo: Seminator litium & discordiarum inter vicinos suos*; and from such seeds presently grow up many ill herbs, *Inimicus homo superseminavit zizania.* And the same is against the Commonwealth; for *Expedit reipublicæ*, *quod sit finis litium.* And this Barretor is *Seminator litium*, &c. And the same also is against the Law of God, *Levit.* 19. *Non eris susurro in populo.* In ancient Indictments, after these words, *Pacis Domini Regis Perturbator*, these words are added, *& Oppressor vicinorum suorum*, and that is either by force, as in the case of *Littleton*, in taking or keeping of possession, or by fraud and malice, under colour of Law, as by multiplicity of unjust and feigned sutes, or by Information upon penal Laws,

or

or in his own caſe, or in malicious bringing of a ſpecial *Supplicavit*, or *Latitat*, of the Peace; and all the ſame by fraud and malice to enforce the poor party *ad redimendam vexationem*, to give him money, or to make other Compoſition; and the ſame is the moſt dangerous Oppreſſor, for he oppreſſeth the Innocent by colour and countenance of Law, which was inſtituted to protect the innocent from all oppreſſion and wrong; And therefore the ſaid words in the old Indictments (if the truth of the caſe be ſuch) are material to be inſerted in the Indictment of Barretry.

Trin. 30 Eliz. *Rott.* 1012. *In the Common Pleas.*

Grieſlye's Caſe.

IN a Replevin brought by *Thomas Kingſton* againſt *Richard Bailie* the elder, and *Richard Bailie* the younger, in a place called *Stockings* in *Kingſton*, in the County of *Stafford*, the Defendants, as Bailiffs to *Thomas Grieſly* Eſquire, did acknowledge the taking of the Cattel in the place where, &c. For they ſay, That the place where, &c. containeth ſix Acres; and that the ſaid *Thomas Grieſly* was ſeiſed of the Mannor of *Kingſton*, within which Mannor the place where, &c. is, in his demeſne as of Fee, And preſcribeth to have *Curiam viſus franc' pleg' coram ſeneſchallo ſuo infra manerium illud tenend' bis per annum, viz. ſemel infra menſem proximum poſt feſtum Paſchæ, & iterum infra menſem proximum poſt feſtum Sancti Michaelis Archangeli de omnibus inhabitantibus & reſidentibus infra manerium prædict. tanquam ad manerium illud pertin. quodque infra manerium præd. habetur, &, à tempore cujus contrarii memoria hominum non exiſtit, habebatur talis conſuetudo, quod inhabitantes & reſidentes infra manerium præd. ad inquirendum & præſentandum ea quæ ad viſum franc' plegii pertinent onerati & jurati, annuatim, ad Curiam viſ. franc' plegii illius apud manerium illud, infra menſem proxim. poſt feſtum Sancti Michaelis Archangeli tent', elegerunt & eligere conſueverunt unum idoneum hominem de inhabitantibus infra manerium prædict. ad eſſendum Conſtabulorium de Kingſton pro ann. tunc proxim. ſequen', qui quidem homo ſic electus officium illud pro uno anno exercere per totum tempus præd. conſuevit, & ſi præſens fuerit hujuſmodi electioni tunc per totum tempus præd. jurari conſuevit per ſeneſchallum curiæ præd. in aperta curia ad officium illud exercendum.* And that at the Court of View of Frankpledge holden at the ſaid Mannor, 8 *Octob.* 28 *Eliz.* before *John Newport*, the Steward of the ſaid *Tho. Grieſly* of the ſaid Court, the ſaid *Thomas Kingſton* being an Inhabitant within the ſaid Mannor, was according to the ſaid Cuſtom choſen to be Conſtable of *Kingſton* for one year then next following, by the Jurors and Preſenters of the ſaid Court, and he being preſent in Court was charged by the ſaid Steward to take the ſaid Oath, which he utterly refuſed to doe, and departed in Contempt of the Court. For which cauſe the ſaid *John Newport* then Steward of the ſaid Court, in the ſaid Court ſet a fine of 5 *li.* upon the ſaid *Thomas Kingſton*. And becauſe the ſaid ſum of 5 *li.* was not paid to the ſaid *Tho. Grieſly*, they made conuſans of the diſtreſs of the Plaintifs cattel, as Bailifs of the ſaid *Thomas Grieſly*, in the place where, &c. upon which the Plaintif did demurr in Law: And in this caſe theſe Queſtions were moved and debated; 1. If the Steward may impoſe a fine in this caſe. 2. If this fine ought to be affered or not. 3. If the Lord of a Leet may diſtrain for ſuch fine without any Cuſtome enabling him ſo to doe. As to the firſt, It was reſolved by the whole Court, That if any contempt or diſturbance to the Court be done to the Court in any Court of Record, that the Judges may ſet upon the Offender a reaſonable fine, and a Leet is a Court of Record, and the Steward is Judge there; and therefore if any contempt or diſturbance be to the Court before him, he may ſet a reaſonable fine upon the Offendors: As if the Bailif of a Leet refuſeth in Court to execute his office, the Steward may ſet a reaſonable fine upon him; and therewith agreeth the book in 7 *H.* 6. 12. *b.* So if a Tithingman refuſe to make a Preſentment in a Leet, the Steward ſhall ſet a Fine upon him, as it is holden 10 *H.* 6. 7. So if one of the Jurors in a Leet depart before giving his verdict, he ſhall be fined by the Steward, as it appeareth in the Book of *Entries*, title *Amerciament in Debt*, *fol.* 149. and ſo of the like. But Courts which are not of Record cannot impoſe a fine or commit any to priſon. As to the ſecond, It was objected, That the fine in the caſe at barr ought to be affered: and that the ſame is proved by the Statute of *Magna Charta*, *cap.* 14. A Freeman ſhall not be amerced for a ſmall offence, but after the quantity of the offence, and for a great offence after the manner thereof, ſaving to him, &c. and none of the ſaid amercements ſhall be aſſeſſed, but by the Oaths of good and honeſt men of the vicinage: Earls and Barons ſhall not be amerced but by their equals, &c. And by the Statute of *Weſt.* 1. *cap.* 6. No City, Borough, or Town, nor any man ſhall be amerced without a reaſonable cauſe, and according to the quanitaty of his Treſpaſs; that is to ſay, every Freeman ſaving his Free-hold, a Merchant ſaving his Merchandiſe, and a Villain ſaving his gainure, and that by his and their equals. And 10 *E.* 3. 9, and 10. was cited, and ſtrongly urged, where the caſe was, That *William Freeman* brought a Replevin againſt the Abbot of *Ramſey*, and others, that they had wrongfully taken his Cattel. The Lord avoweth that taking, by reaſon that he is Lord of the Hundred of F. within which Hundred he hath a Leet in the Town of *M.* (where the Plaintiff is reſiant) to hold once a year, *ſcil.* every year after the Feaſt of *Eaſter* when he will warn it, &c. and at the Leet warned and holden there at ſuch a day, &c. twelve were ſworn to preſent things preſentable, and that the ſaid *William* was one of them; and after that they had received their Charge, they were

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commanded to anſwer to their Charge, and to preſent, &c. and they refuſed; for which cauſe the ſaid *William*, and the others were amerced, and the amercement of him was aſſered to half a mark; and for the ſaid half mark he did avow: and there Exception is taken by *Aſhton* to the Avowry, becauſe the amercement was upon them all in common, and the aſſeſſing of the amercement was ſeveral, *ſcil.* upon *William* half a mark, &c. *Parning*, It ſhall be thus according to Law; for becauſe all refuſed all ſhall be amerced, but every one ſhall be aſſered by himſelf according to the quantity of his offence. As in Aſſiſe of *Novel diſſeiſin* all the diſſeiſors ſhall be amerced, and aſſeſſed upon each of them. *Aſhton*, If a Decenary or a Town is amerced in Eire, the Aſſeſſment ſhall be in common, &c. It is not like the caſe, for when a Decenary or Town is amerced, there is no certain perſons named, as there is in this caſe. And the avowry was awarded to be good; By which it appeareth, that a fine impoſed for a contempt in Court ought to be aſſered. To which it was anſwered and reſolved, That in the caſe at barr the fine impoſed by the Steward was well enough without aſſeſſing; and therefore the difference is between a fine and an amercement; for a fine is alwaies impoſed and aſſeſſed by the Court, but an amercement, which is called in Latin *Miſericordia*, is aſſeſſed by the Country. And this word (*afferer*) is as much as to ſay, *ponere in certitudinem*, *ſeu taxare*, *ſcil.* to aſſeſs or tax, and the afferance as much to ſay as aſſeſſment, or taxation. And Afferors are Aſſeſſors or Taxers, and are derived from the *French* word (*afferer*) which ſignifieth *taxare*, &c. And therefore it appeareth by the Statute of *Weſtm.* 1. *cap.* 18. that it is enacted, That amercements before Juſtices in Eire, &c. ſhall be aſſeſſed by the Oaths of Knights and of honeſt men; where the word aſſeſſed, is as much as aſſered. And the Statutes of *Magna Charta*, and *Weſtm.* 1. extend to amercements, and not to fines; For amercements ought to be aſſered, or taxed, or aſſeſſed by equals; as if the Demandant or Plaintiff be Nonſute, or if judgement be given againſt the Tenant or Defendant, or againſt the Bail becauſe the principal doth not appear, or upon the Plaintiff becauſe he doth not proſecute, or *pro falſo clamore*, or the like; the Juſtices ſhall never aſſeſs any amercement, but by the ſaid Statute they ought to be aſſeſſed by their equals. But the Court in ſuch caſes ſaith, *Ideo in miſericordia* generally, without taxing or aſſeſſing any Sum certain; and the Clerk of the Warrants in the Common Pleas doth make eſtreats of theſe amercements, and delivereth them to the Clerks of the Aſſiſes within every Circuit, to deliver them to the Coroners in every County to aſſere; that is to ſay, to aſſeſs the amercements, which they doe accordingly; and ſuch an aſſeſment by the Coroners in every County hath been hold a ſatisfaction of the ſaid Statute of *Magna Charta*, by which it is enacted, That none of the ſaid amercements ſhall be aſſeſſed, but by the Oaths of good and lawfull men of the Vicinage. And the Coroners of the County were thought moſt indifferent, becauſe they are choſen by the whole County: But if a man be non-ſute after the Jury be ready to give their Verdict, the Court may cauſe the amercement to be preſently aſſered in Court by the ſame Jury, as it is holden in 18 *Edw.* 3. 13. And it ſeemeth the Statute of *Magna Charta* was but an affirmance of the Common Law. For *Glanvile*, who wrote in the time of *Hen.* 2. *Lib.* 9. *Cap.* 11. ſaith, *Eſt autem miſericordia Domini Regis, qua quis per juramentum legalium hominum de vicineto eatinus amerciandus eſt, ne aliquid de ſuo honorabili tenemento amittat.* And *Fleta*, *Lib.* 1. *Cap.* 48. recites the Statute of *Magna Charta*, and *Weſtm.* 1. A Freeman ſhall not be amerced, &c. but by the Oath of his equals, *viz.* of good and honeſt men of the Vicinage, who have beſt knowledge of their abilities. And *Bracton*, *Lib.* 3. *Cap.* 1. *fol.* 116. *b.* ſaith, Of thoſe who are in the King's mercy, and are not amerced, It is to ſee how one ſhall be amerced; and it is to be known, That a Knight and a Freeman ſhall not be amerced, but according to the meaſure of his offence, and according to the offence, be it great or ſmall, and ſaving his Freehold; a Merchant not but ſaving his Merchandiſe; and a Villain, not but ſaving his gainure, and this by the judgement of honeſt men of the Vicinage, *qui affidabunt ſimul cum ſerviente.* But Earls and Barons are not to be amerced but by their equals, and according to the meaſure of their offence, and this by the Barons of the Exchequer, or before the King himſelf: A Clerk ſhall not be amerced according to his Eccleſiaſtical Benefice, but according to the quantity of his Lay Fee, and the meaſure of his offence. And the Aſſeſſors ſhall ſwear to doe the ſame truly; that for hatred they ſhall not grieve any, nor ſpare any for love, and that they ſhall conceal thoſe things which they heard, *Vide* 38 *Edw.* 3. 31. 9 *Hen.* 6. 2. 19 *Ed.* 9. 21 *Edw.* 4. 77. An Earl, Baron, and Biſhop ſhall be amerced 100 *l.* and 12 *Edw.* 4. 9. a Duke to 10 *li.* *Vide* 1 *Hen.* 6. 7. in the Earl of *Northumberland*'s Caſe. Note, that although the Statute of *Magna Charta* be in the negative, Earls and Barons ſhall not be amerced but by their equals, and but according to the quantity of the offence, yet uſage hath reduced the ſame to a certainty. But note, Reader, as to amerciaments, this difference; between amerciaments in actions real or perſonal, of the Demandant, or Tenant, &c. upon preſentment or indictment, as for repairing of a Brige, or a High-way, &c. and the like; for as it is aforeſaid, ſuch amercements according to the ſaid Acts ought to be aſſered by equals; And amercements of any who hath adminiſtration of Juſtice, or of any Officer or Miniſter, who hath the execution of the King's Writs; for ſuch amercements ſhall be aſſeſſed by the Juſtices or Judges of the Court, where the cauſe dependeth. And there are two Reaſons of this difference.

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Firſt, theſe later ſorts of amercements are out of the Statutes of *Magna Charta*, and *Weſtm.* 1. for two Cauſes.

1. The words are, *Liber homo non amercietur*, &c. extendeth to private men, and not to thoſe who have adminiſtration of Juſtice, or Miniſters who have executions of Writs.

2. The words are, By the Oaths of good and honeſt men of the neighbourhood, which may have knowledge of the abilities of the parties, as *Fleta* ſaith, but the ſame doth not extend to the offences of commiſſion or omiſſion done by thoſe who have adminiſtration of Juſtice, or by Officers or Miniſters

Miniſters who have execution of the King's Writs, which Offences are done to Courts themſelves, and therefore by the Court ought to be aſſered and aſſeſſed.

The ſecond Cauſe of the ſaid Difference is, *Quia eventus judiciorum ſunt incerti*, and the Plaintif or Defendant may have publick cauſe of ſute or defence, till he hear that which the adverſe party can allege and prove to the contrary; and therefore it is great reaſon that ſuch Amercements which ariſe upon ſuch Cauſes ſhall be aſſered by equals in the Country, according to the ſaid Statutes, and not by the Court. But the Offence of one who hath the Adminiſtration of Juſtice, or of an Officer or Miniſter who hath Execution of the Kings Writs, in point of his Office, is *malum in ſe*, and hath not any probability or colour of excuſe; and yet both the kinds of Amercements are ſtiled with this word, *ſcil. miſericordiæ*, becauſe whoſoever hath the aſſering of them ought to uſe great moderation: And this Difference appeareth in our Books. And therefore in 22 *Edw.* 3. 2. *a. John* [b] *of London's* Caſe, in a falſe Judgement, if the Judgement be reverſed, the Suters, who were the Judges, ſhall be amerced, and the Amercement ſhall be aſſered by the Juſtices, for the Suters had the Adminiſtration of Juſtice; and therewith agreeth the Book of Entries, *titulo*, Falſe Judgment, *pl.* 13. *Et quod ſectatores Curiæ prædictæ ſunt in miſericordia, quæ aſſeratur per Curiam domini Regis hic ad*, &c. And if the Sheriff return, *Cepi corpus*, and hath not the body, at the day, the Entry is, *Ideo idem Vicecomes in miſericordia, & aſſeratur per Juſtic' hic ad*, &c. And therewith alſo agreeth the Book of Entries, *Capias* 19, 20. So if a Writ be delivered of Record to the Sheriff to be executed, *& Vicecomes non miſit Breve*, the Record ſaith, *Ideo Vicecomes in miſericordia, & aſſeratur per Juſticiarios, ad*, &c. and the ſame appeareth by the ſaid Book, *Record.* 2. So if a *Habeas corpus* be directed to the Sheriff, Gaoler, or Keeper of a Priſon, &c. and he bring not the body, &c. the Entrie is, *Idem ideo A. in miſericordia, & aſſeratur per Juſtic, ad*, &c. And ſo of the like. And in *L.* 5 *E.* 4. 6. it is reſolved by the Juſtices, that that which is aſſeſſed upon an Officer or Miniſter of the Court, is called Amercement and not a Fine; but upon a ſtranger to the Court for a miſdemeanour it is called Fine, and not Amercement. But upon a Nonſute in real or perſonal Action, or Barr to the Demandant or Plaintiff, or Judgement againſt the Tenant or Defendant, the Entrie is, *In miſericordia* generally, and the ſame ought to be aſſered by equals, *Fitz. Nat. Brev.* 76. So if *A.* be amerced upon a Preſentment, for not repairing a Bridge, or of a Highway in a Leet; *Ideo A. in miſericordia, & amerciamentum indè aſſeratur per aſſeratores in eadem Curia adtunc electos & juratos. ad*, &c. See the Book of Entries title Treſpaſs in Amercements 2. So if one be amerced for default of a Sute at a Leet, the Amercement ought to be aſſered *per probos & legales homines*, Book of Entries, Replevin, Amercement 2. And as to the ſaid Book of 10 *Edw.* 3. 9. It appeareth that the Amercement was aſſered, but it doth not appear by whom it was aſſered or aſſeſſed, and therefore it ſhall be intended to be done by the Steward; for in truth it was a Fine: And it is to be known, That if a Jury or a Leet do tax an Amercement it is ſufficient, without other afferement; for the Amercement is the act of the Court and the afferement of the Jury, and therewith agreeth 8 *Hen.* 7. 4. *Vide* 7 *Edw.* 3. 15. *Aſtelie's* Caſe. 45 *Edw.* 3. 26, 27. But if the Steward do affere an Amercement upon the preſentment of the Jury it is void, and ſhall not bind, *vide* 45 *E.* 3. *fol.* 27. But the Court ſhall aſſeſs Fines, and the ſame ſhall not be aſſered by others, if it be not in ſpecial Caſes; and that not onely upon Contempts and Miſdemeanours done in Court, but upon Writs of *Capias pro fine*, or upon Confeſſions, *&c.* as it appeareth *Trinit.* 22 *Hen.* 7. *rott.* 510. in the Common Pleas, where he who was taken by *Capias pro fine* prayed that he might be admitted [43] *ad finem ſuum cum domino Rege faciend', & admittatur pro* 5. s. *ſolut' hic in Curia ad manus J. R. Clerici* Roberti Reade *capital' Juſticiar' dom' Regis hic in partem ſolutionis pro reparatione & emendatione ciſtarum pro record' de banco hic in iiſdem cuſtodiend' ordinat' ex præcepto Curiæ.* And *Trin. anno* 4 *Hen.* 8. *rot.* 306. in the like Caſe, *& ſuper hoc finis eorundem T. & J. occaſione prædict. aſſeratur per Juſticiarios hic ad* 2. s. &c. But if a Juror doth appear, and is adjorned upon a pain, and maketh default, in that caſe becauſe he ſhall be fined according to the yearly value of his land; it ſhall be enquired of by the other of his Companions of the Jury; for in ſuch caſe the Court cannot know it, and therewith agreeth 4 *Edw.* 4. 6. & 9 *Hen.* 4. 5. *Vide* 20 *Aſſ. pl.* 11. And *finis dicitur quia finem litibus imponit*, and is not traverſable, as it is holden in 7 *Hen.* 6. 13. that is, the Party redeemeth his offence by his money, and thereby maketh an end of it, and of his impriſonment, and for that cauſe it is called alſo Redemption, as it appeareth in the Judicial Regiſter 31. *ad ſatisfaciendum nobis de Redemptione ſua pro quadam tranſgreſſione*, &c. And this Writ is called *Capias pro fine*, which Fine is expreſſed in the Writ by this word *redemption*; and the Statute of *Marlebridge*, cap. 3. *Non ideo puniatur Dominus per redemptionem*, id eſt, *per finem.* Another Difference is, if a man be convicted before the Sheriff in the County of a Recaption, he ſhall be but amerced, but if he be convicted thereof in the Common Pleas, he ſhall be fined, and the Reaſon of this difference is, becauſe that the County Court is not a Court of Record, and therefore cannot impoſe a Fine, for no Court can fine but ſuch a Court which is a Court of Record. *Vide Fitz. Nat. Brev.* 73. *b.* And by theſe Differences you will the better underſtand your Books, which are plentifull in theſe matters. As to the third Point it was objected, that for Amercement of things preſentable in a Leet, the Lord may diſtrein, but not for a Fine impoſed by the Steward; but of that an action of Debt lieth. To that it was anſwered and reſolved, that there are two manner of Offences, ſome done out of Court, and ſome done in Court; of thoſe which are done out of Court, the Jurors of the Leet have conuſance, and therefore power to preſent them. and to aſſeſs an Amercement for them, but for Contempts and Miſdemeanours in Court before the Steward himſelf, he hath conuſance of them, and therefore may impoſe a Fine for them, and therefore he needeth not to make enquiry; ſo that thoſe whohave conuſance of the thing are fit to impoſe a Fine or Amercement for the thing; and if for the Seſs, *ſc.* for Amercements of Offences out of Court a Diſtreſs ſhall be incident of com-

mon

[b] mon right, *à fortiori*, for Fines impoſed for Offences done in the ſame Court a Diſtreſs ſhall be incident, *quia quod licitum eſt pro minore, & pro majore licitum eſt*; and a Fine is more then an Amercement, and both impoſed by Authority of the Leet: And as nothing is more naturally to be puniſhed by the Court Leet than Offences in the ſame Court, ſo for no Sum impoſed for any Offence by Authority of the Leet a Diſtreſs is more incident than for ſuch as is impoſed for Offences done in the ſame Court. *Vide* 8 *Rich.* 2. *Avowrie* 194. 41 *Edw.* 3. 26. 45 E. 3. 38. 47 E. 3. 12. 2 H. 4. 20. 11 *Hen.* 4. 89. 7 *Hen.* 6. 12. 10 *Hen.* 6. 7. 12 *Hen.* 7. 15. 3 H. 7. 4. 21 *Hen.* 7. 40. *Fitzh. Nat. Brev.* 100. 23 *Hen.* 8. *br. Leet* 37. And it ſhall be hard to drive the Lord to his Action of Debt for every ſmall Fine or Pain, but the Lord may deſtrein and ſell them, or diſtrein and put them in the Pound, at his pleaſure.

Note, Reader, the ſaid Cuſtom, &c. *Eligere unum idoneum hominem de inhabitantibus infra manerium ad eſſendum Conſtabularium*, &c. well agrees with the Law: for the Common Law requireth, that every Conſtable be *idoneus homo*; that is to ſay, apt and fit to execute the ſaid Office; and he is ſaid to be *idoneus homo* who hath theſe things, Honeſty, Knowledge, and Ability; Honeſty to execute his Office truly, without malice, affection, or partiality; Knowledge to know what he ought duly to doe; and Abilitie as well in eſtate as in body, that he may intend and execute his Office, when need is, diligently; and not for impotencie or povertie to neglect it; for if poor men ſhall be choſen to this Office, who get their living by the labour of their hands, they will rather ſuffer Felons and other Malefactors to eſcape than loſe their labour by which they and their Wives and Children live: And the Commonwealth doth conſiſt in the well ruling of particular Towns, and the rule of them will not well be kept; but where the Officers are *idonei*, that is to ſay, Honeſt, Knowing, and of Abilitie. And this word *idoneus* is oftentimes in Law attributed to thoſe which have any Office or Function. And therefore if a Coroner, who is alſo an ancient Officer, be *minus idoneus ad Officium illud exequendum*, it is a good cauſe to remove him. *F. N. B.* 163, 164. *Regiſter* 177. that is to ſay, If the Coroner be *ſenio confractus, aut morbo paralyſis percuſſus, aut terras & tenementa in eodem Comitatu non habet, aut electus eſt in officio Vicecomitis*, &c. for he ought to be choſen Coroner, *qui melius ſciat, & poſſit intendere Officium illud*, F. N. B. 163. *Regiſter* 177. as appeareth by the Writs *de Coronatore eligendo*. And ſo he who is Conſtable ought to be *idoneus*, that is to ſay, who beſt knoweth, and can intend the ſaid Office. And in Letters Patents
[42] of Incorporating of Inhabitants of a Town into Mayor, or Bailiffs and Burgeſſes, the words are, *quod ipſi de ſeipſis eligere poſſunt unum hominem idoneum*, or, *duos homines idoneos*, &c. And the Law requireth, that he who the Patron preſenteth to a Benefice be *perſona idonea*, for the words of the Writ of *Quare impedit* are, *Præſentare idoneam perſonam ad Eccleſiam de*, &c. and properly they are ſaid *idonei, qui poſſunt & volunt in Eccleſiis deſervire*, ſcil. *qui moribus, honeſtate, & literarum ſcientia ſunt decorati.* And if one be elected Conſtable who is not fit, he by the Law may be diſcharged of his Office, and another man who is fit appointed in his Place.

Hill. 45 Eliz. *In the Starr-Chamber.*

Whittingham's Caſe.

[b] THE Caſe in the Starr-Chamber, *Hill.* 45 *Eliz.* was, That *Richard Whittingham* was ſeiſed of three Meſſuages, &c. in *Craford*, in the County of *Kent*, holden of the Queen in Socage, as of the Manor of *Newbery* in *Craford* in fee; and by his Will in writing deviſed them to *Prudence*, his Baſtard Daughter, and her heirs, and died. *Prudence*, being within the age of 21 years, by Deed, as was pretended, did enfeoff *Stephen* and others of the ſaid Tenements in fee, and died within age without iſſue, and if this Feoffement ſhall prevent the Queen of her Eſcheat was the Queſtion; and upon conſideration had with the two chief Juſtices, it was reſolved, That if there be Lord and Infant Tenant, and the Infant doth make a Feoffement in fee, and doth execute the ſame by livery and ſeiſin by his own hands, and afterwards dieth without heir, that the Lord ſhall not take benefit of any Eſcheat in that caſe. And as to that, it is to know, that there are three manner of Privities; *ſc.* Privity in Blood; Privity in Eſtate; and, Privity in Law. Privies in Blood are
ment of Privies in blood inheritable, and that in three manners, *ſc.* inheritable as general heir, inheritable as ſpecial heir, and inheritable as general and ſpecial heir. Privies in Eſtate are, as Jointenants, Husband and Wife, Donor and Donee, Leſſor and Leſſee, &c. Privies in Law are, when the Law without Blood, or Privity of Eſtate, doth caſt the Land upon one, or make his Entry lawfull; as the Lord by Eſcheat, the Lord who entreth for Mortmain, the Lord of a Villein, &c. And firſt, Privies inheritable, as general heir, ſhall take benefit of Infancy; and therefore if an In-
[43] fant, Tenant in Feeſimple, maketh a Feoffement, and dieth, his heir ſhall enter. The ſame Law of him who is heir general and ſpecial. As if a man giveth Lands to one and the heirs males of his body, and the Donee within age maketh a Feoffement in fee, his Son who is heir general and ſpecial ſhall enter. The ſame Law is of him who is ſpecial heir, and not general; as if in the ſame caſe the Donee hath iſſue two Sons, and the eldeſt hath iſſue a Daughter, and the Donee dieth, and the eldeſt Son, within age, maketh a Feoffement, and dieth without iſſue male, the younger is ſpecial heir *per formam doni*, and ſhall avoid his brother's Feoffement, although he be not general heir, becauſe he is

Privy

Privy in blood, and hath the Land by descent: So if Lands be given to one, and the heirs females of his body, and the Donee having issue a Son and Daughter maketh a Feoffement within age, and dieth, the Daughter being heir special (to whom the Right of Entry descendeth) shall enter, and not the Son, who hath nothing by descent: So of the heir in Borough English; for in all Cases when any claimeth by descent as special heir, he shall take benefit of a Right of Entry which descendeth to him for the infancy of his Ancestor: the same Law, if his Ancestor were *Non compos mentis* at the time when he made the Feoffement, because that in these, and the like cases, the heir general cannot enter, because that no Right or Title doth descend to him, but the Right doth descend to the special heir. So if Tenant in tail within age maketh a Feoffement in Fee, and is attainted of Felony, in that case the Issue shall enter for the Infancy, yet he is not general heir, for the Blood is corrupted.

Also Privies in estate (if it be not in special cases) shall not take advantage of the Infancy of the other. And therefore, if Donee in tail within age maketh a Feoffement in fee, and dieth without issue, the Donor shall not enter, because there was Privity betwixt them onely in estate, and no Right doth accrue to the Donor by the death of the Donee. So if two Jointenants be in Fee within age, and one maketh a Feoffement in fee of his moiety, and dieth, the Survivor cannot enter by reason of the Infancy of his Companion, for by his Feoffement the Jointure was severed so long as the Feoffement doth remain in force; and therefore in such case the heir of the Feoffor shall have *Dum fuit infra ætatem*, or shall enter into the moiety; But if two Jointenants be within age, and they join in a Feoffement, in such case a Joint-right doth remain in them, and therefore if one dieth, the Right shall survive, and the Survivor shall have the Right of the Land as from the first Feoffor: And therefore I conceive with *Littleton cap. Discont.* 44. that the Survivor may enter in respect of a Right accrued to him, otherwise this mischief will follow, That the heir of the Feoffor who dieth could not enter, because that the Right doth survive, nor the Survivor shall [b] enter, because he shall not take benefit of the Infancy of his Companion, but that the Survivor shall be driven to his Writ of Right, which without doubt he may have, because that after the Feoffement the Jointenants might have joined in it. And if the Husband within age maketh a Feoffement in fee, and dieth, the heir of the Husband cannot enter and avoid this Feoffement, because that nothing descendeth to him from the Husband; for the Law doth not respect what estate the Ancestor giveth, but what estate he hath before the gift, and what Right or Title the Ancestor doth leave to descend to his heir: and therefore if an Infant be Tenant in tail, and maketh a Feoffement in fee, and dieth without issue; his collateral heir cannot enter to avoid this Feoffement; for although by his Feoffement he giveth Fee-simple, yet when he dieth without issue, nothing descendeth to the heir, in respect of which he may enter: So if Lands be given to one and the heirs females of his body, and he hath issue a Son, and maketh a Feoffement in fee, and dieth within age without issue female, the Son shall not enter in this case for the said Infancy, because that no Right descendeth to him. So if an Infant be Tenant *pur auter vie*, and make a Feoffment in fee, and *Cestuy que use* dieth, the Infant or his heir shall never enter upon the Feoffee, but he in Reversion or remainder: But forasmuch as the Infant himself, during his life, might have entred upon the Feoffee in the Right of his Wife onely, and not in respect of any Right which he himself hath, it seemeth reasonable with *Littleton*, *fol.* 43. That the Wife in the said Case, when the Husband within age maketh a Feoffement in fee, may enter in her own Right, in whose Right her Husband might have entred; and the rather, because the Husband's heir cannot enter: But if the Husband within age had taken a Wife Tenant in general tail, and made a gift in tail to another, by which he gained a new Reversion in fee, there the Entry is given to the Wife for the cause aforesaid, that is to say, that the Husband might have entred in her Right; also the heir of the Husband who hath gained the new Reversion might have also entred; but if he doth not enter, and defeat the Estate tail made by the Husband Infant, presently the new Reversion by Act in Law doth vanish from the one, and vest in the other, and the Wife by operation in Law shall be presently seised of her ancient Estate: for when the Estate tail is defeated, which was the cause of gaining the new Reversion, the heir cannot have the Estate which his Ancestor had before the gift; for his Ancestor before the gift had nothing, but in the Right of his Wife, which determined by his death, as it is holden in 4 *H.* 6. 2. where the Case was, That a man seised of certain Lands in the Right of his Wife, made a Feoffement thereof by Deed indented to certain persons, upon condition that he should lease the Lands again to the Husband and Wife for their lives, with divers [44] Remainders over in tail, the Remainder to the right heirs of the Husband, and afterwards the Husband died, the Feoffees leased the Land to the Wife for life, with Remainders over in tail, the Remainder to the right heirs of the Wife, where it should be to the right heirs of the Husband: And in that case it is resolved, That for the Condition broken the Husband's heir might enter; for although that no Right descendeth to him from the Husband, whose Estate is determined by death, yet the Title of Condition, which he himself created upon the Feoffement, and reserved to him and his heirs, should descend after his death to his heir: and so a difference between a Title of Entry by reason of a Condition, and a Right of Entry by reason of Infancy; for none shall take benefit of the Infancy of his Ancestor; but he who hath a Right descended to him from the same Ancestor, but the heir may take benefit of a Condition, although that no Right descendeth to him from the same Ancestor. Three other Points are in a manner resolved in the said case of 4 *Hen.* 6. 1. That when the Husband's heir entreth for the Condition broken thereby, the Feoffement which made the Discontinuance is defeated, and by consequence, the Discontinuance it self is defeated: 2. That after that the heir of the Husband hath entered for the Condition broken, the Estate of the heir doth vanish, and presently the Estate is revested in the Wife, without Entry or Claim made

by her, for the heir doth enter by force of the Condition, and not in respect of any Right, and there two Cases are put to prove it: 1. If Tenant for life maketh a Feoffement in fee upon Condition, who entreth for the Condition broken, now the Feoffement is avoided, and by consequence the Reversion presently by the Entry revested. 2. If her Husband himself had entred for the Condition broken, the same had revested the Estate in the Wife. The third Point observable in the said Case of 4 *Hen. 6.* is, That although that the Wife hath accepted an Estate for life, and so concluded her self by acceptance to have any *Cui in vita*, yet when the Estate which she hath taken is defeated by the Condition, the Conclusion by the acceptance is also avoided. *Vide Littleton cap. Discontinuance*, 43. Privies in Law, as Lord by Escheat, *&c.* shall never take benefit of Infancy; because he is a Stranger to him, and when the Infant dieth without heir, the Feoffement is unavoidable. The same Law of Coverture, and *Non sanæ memoriæ*, and here you will better understand your Books, 14 *Edw. 3. Dum fuit infra ætatem 6. F. N. B. 192. 21 Edw. 3. 50. Dum fuit infra ætatem 2.* 18 E. 2. *Brev.* 831. 39 E. 3. 29. 45 *Edw. 3.* 49 *Edw. 3.* 13. 39 *Hen. 6.* 42. 34 *Hen. 6.* 41. 6 *Hen. 4.* 3. 9 *Hen. 6.* 6. 7 *Hen.* 4, 5. 2 *Hen. 4.* 13. 32 *Hen. 6.* 27. *The Abridgment of the Book of Assises*, 87. *b.* 7 *Hen.* 5. 9.

[b] It was also resolved, That if the Estate of the Infant had been upon Condition to be performed by the Infant, and the Condition had been broken during his minority, that the Land had been lost for ever. Note, Reader, That as to that it is to know, that there are two manner of Conditions, *scil.* a Condition in fact, that is, expressed, as to pay mony, or to doe, or not to doe any other Act, *&c.* and Condition in Law, that is, implied: Also Conditions in Law are of two natures, *scil.* by the Common Law, or by the Statute: And Conditions in Law by the Common Law are in two sorts, one which is founded upon a Confidence and Skill, and the other without Confidence or Skill. Conditions in Law by Statute Law are also of two qualities, *scilicet*, When the Statute for Execution of the Condition in Law giveth Recovery, and when the Statute giveth an Entry and no Recovery; as to the Condition in Law which is founded upon Skill and Confidence, as the Office of Parkership, Stewardship, *&c.* in fee, which descendeth to an Infant, or a Feme Covert, if the Condition in Law annexed to the said Offices be broken, the same shall barr the Infant, and Feme Covert for ever: the same Law of Liberties and Franchises: But if the Infant or Feme Covert be Lessee for life, or Tenant by the courtesie, or Tenant in dower, and the Infant, or the Husband of the Wife maketh a Feoffement in fee, and the Lessor entreth for the forfeiture, as he may, yet it shall not barr the Infant or Feme Covert, but that the Infant, or Feme Covert, after the death of the Husband may enter, for the same is by force of a meer Condition in Law, without any Skill or Trust annexed to the Estate. If an Infant, or a Feme Covert, Lessee for life doth waste, and the Lessor recovereth in an Action of Waste, it shall bind the Infant and Feme Covert; For the Statute giveth the Action to recover the Land. The same Laws of *Cessavit*, and of other like cases: As if an Infant be Gaoler, and suffereth an Escape, there an Action lieth. But if the Condition in Law be by force of a Statue Law, which giveth Entry, and no Action, as if an Infant, or the Husband seised in the Right of his Wife, alienateth in Mortmain, there, although that the Lord, of whom the Land is holden, entreth; yet the Right of the Infant or Feme Covert is not barred; no more than in the Case of a Condition in Law by the Common Law, which is grounded upon the Alienation of the Infant, Tenant for life, or of the Husband, *&c.* where the Entry of the Lessor is given by the Common Law. And so you will better understand your Books in 31 *Ass. pl.* 17. *Br. Covenant*, 71. *Plow. Com. Stowell's Case*, 355. *Doctor and Student*, 113. *Vide* 31 *Edw. 3. Age* 54. 14 *Edw. 3.* 88. 28 *Edw. 3.* 99. 2 *Edw. 2. Age* 132. 4 *Edw. 3.*

[45] Note, Reader, That a Condition in Law by force of a Statute which giveth a Recovery, is stronger than a Condition in Law without a Recovery: for if Lessee for life maketh a Lease for years, and afterwards entreth into the Land and committeth a Waste, and the Lessor doth recover in an Action of Waste against the Lessee for life, he shall avoid the Lease for years made before Waste done: But if Lessee for life maketh a Lease for years, and afterwards entreth, and maketh a Feoffement in fee, the Lessor shall not avoid the Lease for years. So if the Tenant maketh a Lease for years, and afterwards is attainted of Felony, and dieth without heir. The Lord by Escheat, although that he recovereth by Writ of Escheat, shall not avoid the Terme. But afterwards it appeared in the principal Case, that the said supposed Feoffement of the said *Prudence* was executed by Letter of Attorney made by the said *Prudence*, for which cause it was resolved that the same was void, and that the Land did escheat to the Queen.

Mich. 6 Jacobi. *In the Common Pleas.*

Jehu Webb's Case.

JEhu *Webb* brought an Assise against Sir *Thomas Knyvet*, Knight, Lord *Knyvet*, *John Freeburne*, and *Roger Rolles*, *de libero tenemento* in *Westminster*, and made his Plaint, *de Officio Magistr. ludorum pilarum palmarum*; *Anglicè*, the Office of the Master of the Tennis playes of the King, that now is in *Westminster*; And for his title said, *That the said Office is an ancient Office in* Westminster *aforesaid, and that the King that now is*, 25. *Nov. Anno* 5. *by his Letters Patents, of his certain knowledge and meer motion, did give and grant to the said* Jehu *the aforesaid Office of Master of the Tennis playes, as well within the Palace of* Westminster, *as of the said Lord the King elsewhere; To have and enjoy the said Office to the said* Jehu, *during the life of the said* Jehu; by force whereof the said *Jehu* was seised of the said Office with the Appurtenances for his life, and that he took and received the Profits thereof to his own use, until the Defendants wrongfully disseised him: and the Defendants pleaded No wrong, No disseisin. And upon the Evidence to the Recognitors of the Assise this Term, it was holden by the whole Court, That where the Grant was in English, *Of the Office of the King's Tennis playes in Westminster*, that that Grant shall be taken in a reasonable Sense; that is to say, the Tennis playes for the King's household, and not onely for the Tennis play when the King himself playeth in his Royal person; For the King is the Head of his household, and therefore from the most worthy part, the Tennis playes for the household may be well called *the King's Tennis playes:* So where a Commission is made to take Boys singing in Cathedral Church, *&c.* or other places where Children are taught to sing, for the furnishing of the King's Chapel, these general words by construction of Law have a reasonable intendment; *scil.* that such Boys as are brought up and taught [46] to sing to seek and get their living by it, may be taken for the King's Chapel; but the Son of a Gentleman, or any other, who is taught to sing for his ornament, delight, or recreation, and not thereby to get his living, cannot be taken against his will, or the consent of his Parents or Friends; and so it was resolved by the two Chief Justices, and all the Court of Star-chamber *Anno* 43 *Eliz.* in the Case of one *Evans*, who had by colour of such Letters Patents taken the Son of *Clifton* (a Gentleman in *Norfolk*) who was taught to sing for his recreation: which *Evans* for the said Offence was grievously punished. And in the Case at Barr divers Questions were moved, in what Case an Assise lay by the Common Law, and in what by the Statute of *Westm.* 2. *c.* 25. It is to be observed, that at the Common Law there was but two forms of Writs of Assise of *Novel Disseisin*, *scil. Assise de libero tenemento*, and *Assise of Common of Pasture* for his Cattel, *&c.* which was so necessary, that without the same his Freehold could not be manured. And the same appeareth by 35 *Ass. pl.* 11. 4 *Edw.* 2. *Ass.* 451. 11 *Hen.* 6. 22. and other Books, that *Assise de libero tenemento* lay of Land, Rent, and all other things whereof a *Præcipe quod reddat* lay at the Common Law. But of Profits apprender in a certain place, the Statute of *Westm.* 2. *Cap.* 25. gave an Assise of *Novel Disseisin* in the place of a *Quod permittat*, which was the remedy for them at the Common Law before the said Statute, as is to be seen in 4 E. 3. *Ass.* 449. 8 E. 2. *Ass.* 384. 16 E. 2. *Ass.* 370. 31 E. 1. *Ass.* 440. &c. And in some case, the Statute giveth an Assise in case where there was not any clear and certain remedy at the Common Law: for if one had not such Profits apprender but for terme of his life, it was holden that he should not have a *Quod permittat* of them, because that such Writ was in the nature of a Writ of Right, as appeareth in 30 E. 1. *Quod permittat* 9. where in a *Quod permittat* battel was waged. *Vide* 4 E. 3. 38. 32 *Edw.* 1. *Juris utrum*, 14. *F. N. B.* 124. *B. C.* And therefore the Statute saith, *That a Writ of Novel Disseisin shall hold place in more Cases then it hath done heretofore*; And first, the Statute beginneth, *with Profits taken, gathered, or received, in the soil of another*, &c. *as in Woods*, scil. *of Estovers of wood, and Profit to be taken in Woods.* 2. *Of Nutts and Acorns, and such Fruites to be gathered in the Land of another*, which are Examples of Profits to be taken in Woods. 3. *Of a Corody*, and of the Parts thereof, *which belong to Living and Clothing*, [b] scil. *delivery of Corn, and other Victuals and necessaries*, as Apparel, Lodging, Washing, *&c. in a certain place yearly to be received*; which is well explained by this word *recipiend'* for a Corody is properly to be received, and the Estovers and the other Profits to be taken, *scil. capiend' & colligend'*. So that the first Profits are *Profits taken or gathered*; and the Corody is, *a Profit received.*

4. Of Toll, and the *species* thereof, Tronage, Passage, Pontage, Pannage, and such like to be taken in certain places. *Tolnetum*, id est, *Theolonium*, id est, Τελώνιον *Græcè*, *& Latinè Vectigal, quod dicitur à vehendo, quia, præstatur de rebus quæ vehuntur, à vehendis mercibus sic dictum, unde dicuntur Vectores qui vehunt.* And *Bracton*, *lib.* 2. *cap.* 24. *numero* 3. *Si cui concedatur talis libertas*, &c. *quod Theolonium & Consuetudines capiat*, (which is the word that the Statute useth, *scil. Capiendis*) *infra libertatem suam de ementibus & vendentibus*, &c. See *Fleta*, *lib.* 1. *cap.* 47. and note that *Bracton* wrote in the end of *Henry* the Third, Father of King *Edward* 1. and *Fleta* wrote in the reign of King *Edw.* 1. who made the said Act. And in the Gospel of St. *Matthew*, *cap.* 9. *ver.* 9. *Jesus transiens vidit hominem sedentem ad telonium:* Mar. 2. 14. Luc. 5. 27. *Vide* 13 *Edw.* 1. *Assise* 401. No Assise lieth of sute to a Mill, but a Writ of *Secta ad Molendinum*, but of the Toll of a Market an Assise lieth; and so of the Toll of a Mill. *Vide* 23 *H.* 3. 435. *tit. Assise* 427. *acc.* So of Toll thorough, Toll traverse, and Toll turn, and all these a Man shall have in his own Land; and yet he being disseised of them shall have an Assise of them. *Tronage* is a *species* of Toll, *& dicitur à Trona*,

which ſignifieth a Beam with which things are to be weighed, *& propriè tronagium exigi debet de ponderatione lanarum, & præſagium exigi debet de mercibus*, as appeareth by a Record in the Treaſury, *Hill.* 5 E. 3. *Lincoln: numer.* 32. but oftentimes the one is taken for the other. And it appeareth by *Fleta lib.* 2. *cap.* 12. which was written in the time of E. 1. in which time the Statute was made, that *Trona* doth ſignifie a Beam. *Paſſage*, and the ſame is properly a Ferry for the paſſing of Men and Cattel over a water, for which the Owner hath a Toll; for if a Man hath paſſage in the Barge or Veſſel of another to the Church or elſewhere, it is not any profit, but an eaſement, whereof no Aſſiſe lieth, as it is adjudged in 31 E. 3. *Aſſ.* 44. and 19 E. 2. *Aſſ.* 399. and 34 *Aſſ. p.* 13. an *Aſſiſe de novel diſſeiſin* doth not lie of a way, becauſe it is but an eaſement, and no pro-
[47] fit to be taken, *nullum proficuum recipiend'*, as the Statute ſpeaketh. *Pontage* is a Toll for paſſage or carriage over a Bridge, and thereupon it is called *Pontage*, as appeareth 3 E. 3. *Aſſiſe* 445. and F. N. B. 227. and *Regiſter* 259. *Rex Collectoribus*, &c. *Pontag. in villa de S.* &c. *Pannage* is a Toll for the Paving of a City, or a Cawſie, or a way, as appeareth in 3 *Edw.* 3. *Aſſiſe* 445. F. N. B. 22. *Reg.* 259. and in old times it was written *pavagium*, or *pauvagium*, or *paviagium*, and by corruption *pannagium*, ſc. *nn*, for *uu*, &c. The Statute goeth farther, *& his ſimilibus*. As for *Murage*, ſc. Toll for making of a Wall for ſafeguard of men in time of War or Tumult, as appeareth in the ſaid Books of 3 E. 3. and F. N. B. 227 *Regiſter* 259. *Cranage* is a Toll for drawing of Merchandiſes out of Veſſels to the Wharf, &c. and ſo called, becauſe the Inſtrument is in the form of a Crane. See *Dyer* 18 *Eliz.* 352. and the Book of Entries, 3. So of *Stallage*, *Picage*, *Wharfage*, *Anchorage*, *Pedagium*, *à pede dictum*, *quod à tranſeuntibus ſolvitur*.

5. *Of Offices*, ſc. *Keepings of Woods, Parks, Foreſts, Chaſes, Warrens, Gates, and other Bailiwicks and Offices in fee, from henceforth an Aſſiſe of Novel diſſeiſin ſhall lie*; which words (*from henceforth*) have perſwaded divers, that an Aſſiſe of an Office did not lie at the Common Law, and ſo are ſome opinions in 16 E. 3. *Aſſ.* 370. and that no Aſſiſe lay of any Office, but of an Office in fee, becauſe the Aſſiſe came in the place of a *Quod permittat*, which none could have, at the time of making of the Act, but Tenant in fee. *Vide* 4 E. 3. *Aſſiſe* 449. and 8 E. 2. *ibid.* 385. But it appeareth by our Books that an Aſſiſe lay of an Office *ut de libero tenemento*, at the Common Law, for of all that a *Præcipe quod reddat* lay at the Common Law, an Aſſiſe lay. 7 E. 3. 63. in *Henry de Parker's* Caſe. A Writ of Entry in the *Per* and *Cui*, *de Balliva cuſtodiendi parcum de Charkel cum pertinentiis*; and 8 E. 3. 55, 56. the Biſhop of *Saliſburie's* Caſe, a Writ of Aiel of the Beddelrie of the Hundred of *Cademinſter*, and mark there the ſaying of *Stoufe*, 10 E. 3. 27. *b. acc.* and 19 *Ed.* 3. *View* 77. *Ad terminum qui præteriit* brought of the Soke of *Wincheſter*; and exception was taken, that it was a Profit iſſuing out of no Freehold, *& non allocatur.* 18 *Edw.* 3. 27. A Formedon of the Office of Serjeanty in the Cathedral Church of *Lincoln. Vide* 27 *Hen.* 8. 12. 7 *Hen.* 6. 8. 7 *Aſſ. p.* 12. 10 *Aſſ. p.* 11. The Statute ſaith, *Office in fee*; yet an *Aſſiſe* lieth of an Office although that the Diſſeiſee had but an eſtate for life; for the Statute was made as to that in affirmance of the Common Law, as in 30 *Aſſ. p.* 4. the Office of the Meaſurer; 22 *H.* 6. 9. the Office of Packing of Cloths; 9 *Edw.* 4. 6. the Office of one of the Clerks of the Crown in the Chancery; 18 *Edw.* 2. *Aſſiſe* 377. the Office of the Bedell of the Hundred of *Weſtm.* and *Midd.* and 4 *Edw.* 2. *Aſſiſe* 449.
[b] and *ibid.* 8 E. 2. 285. The Archbiſhop of *Canterbury* by Deed *dedit Johanni porteriam Curiæ ſuæ Cantuarienſis*, which Grant was but for life, and yet an Aſſiſe lay. 8 *Edw.* 4. 16. an Aſſiſe of an Office in the Common Pleas, 28 *H.* 8. *Dyer* 7. and 3 *Ma. Dyer* 114. an Aſſiſe of the Office of a Philizer in the Common Pleas, and the Poſt where he ſitteth was put in view, 5 *Ma. Dyer* 153. Aſſiſe of the Office of the Regiſter of the Admiralty, which the Plaintif had for life. Note, although the proceedings in that Court be according to the Civil Law, yet the Offices are determinable by the Common Law: and ſo of the Regiſter of the Conſiſtory of a Biſhop, 31 *H.* 8. *br. Grants.* 134. Aſſiſe lieth of the Office of Steward, Bailiffs, or Receivers of a Mannor; and all this is meant of Offices of profit, and not of an Office of charge and no profit, as it is holden in 27 *H.* 8. 12. and 31 E. *Aſſiſe* 440. *Vide* 21 E. 3. 4. *b.* And where ſome ſay in the time of E. as is aforeſaid, that an Aſſiſe was given by the ſaid Statute in the place of a *Quod permittat*, there is no Writ in the *Regiſter* of a *Quod permittat* of an Office; and yet I have a *Regiſter* of *H.* 2. time, which was long before the ſaid Act; and I conceive, that no Writ of *Quod permittat* lay of an Office, becauſe that a *Præcipe quod reddat* lay of it, as before is ſaid; and therefore a man ſhall have an Aſſiſe of an Office *ut de libero tenemento* at the Common Law. And the Statute, as to Offices, was but a declaration of the Common Law, as hath been ſaid, onely to remove a doubt which then was. And ſo the ſaid words (*from henceforth ſhall lie*) ſhall be conſtrued, that it ſhall from henceforth lie *abſque difficultate*. And it appeareth by the principal Caſe at barr, and by the ſaid Book of Offices in the Chancery, King's Bench, and Common Pleas, that although the Courts are removable in which the Offices are, yet if they be in a certain place at the time of the Diſſeiſin, it ſufficeth: For the words *de proficuo in certo loco* extend to Eſtovers, &c. and not to the clauſe of Offices. *Vide* 4 E. 4. 2. And the Statute ſaith, in all the Caſes afore rehearſed, the Writ ſhall be as it was wont to be, *de libero tenemento*: So that now of all profits apprender in a certain place, the Writ ſhall be *de libero tenemento*. And the old Writ is given in a new Caſe; and therefore in 15 *Aſſ. p.* 13. the Writ was general *de libero tenemento*, and the plaint *de quatuor acris ſaliceti*; that is, four acres of ſancey, and to have reaſonable eſtovers in a 100 acres of wood, *ſcil.* houſebote, haybote, and the plaint was challenged, 1. Becauſe the plaint ought not to be *de quatuor acris ſaliceti*, but *terræ cum prati*. 2. Becauſe the Plaintiff had joined in one plaint two Freeholds, one *ſcil.* the four acres of ſancey at the Common Law, and the other, *ſcil.* the Eſtovers by the Statute, *ſcil.* the Statute of *Weſt.* 2.
[48] *cap.* 25. *& non allocatur.* And there it is ſaid, that this Term one plaint of two Rents Services was adjudged good, for *liberum tenement.* although it be in the ſingular number, yet it is *nomen collectivum.*

Vide

Vide 7 Ass. 18. and the Statute farther saith, *And as beforetimes it hath lien and holden place for Common of Pasture, so shall it from henceforth hold place, for common of Turbarie, Fishings, and such like Commons which any man hath appendant to Freeholds, or without Freehold by special deed, at the least for terme of life:* And the reason wherefore an Assise lay at the Common Law of Common of Pasture, and not of other Commons, was, because there was a special Writ in the *Register* for Common of Pasture, and not of any other Common: and in those days they held themselves strictly to the form and order of the *Register*, which is mentioned in the Stat. of *West.* 2. made 13 E. 1. c. 24.) See *temps R.* 2. *Grants* 104. A man shall not have a Writ of Assise, *quod disseisivit eum de libero estoverio*, and yet *Bracton* held, *l.* 4. *f.* 231. *quod locum habet Assisa de qualibet communia pertinent. ad liberum tenemeetum*, sc. *Communia pasturæ, turbariæ*, &c. and 12 H. 3. *Assise* 417. That an Assise lay of Common of Piscarie, *&c.* And these opinions had great probability of reason, but because there wanted a Writ for them in the *Register*, for that cause before this Statute an Assise did not lie of them, but a *Quod permittat*; and it appeareth by *Bracton*, *lib.* 5. *De Exceptionibus*, *cap.* 17. *fol.* 413. who wrote a little before the making of the said Act, That Original Writs cannot be changed, but by Act of Parliament. For there he divideth Writs into three branches. *Sunt quædam Brevia formata* (id est, *originalia*) *seu de cursu*; (which appeareth there, where first formed and made by Authority of Parlament:) *Quædam judicialia ex eis* (id est, *ex originalibus*) *sequentia*, &c. *Quædam magistralia, quæ nec sunt de cursu, nec formata*, id est, *de aliqua certa forma, & sæpius variant, secundum varietatem casuum factorum & querelarum:* (as are Actions upon the Case, Actions of Deceit, Prohibitions, *&c.* which have not any certain forme, *&c.*) And of the Original Writs, formed, or of course, *Bracton* wrote divers remarkable things, *Breve quidem cum sit formatum ad similitudinem juris, quia breviter & paucis verbis intentionem proferentis exponit & explanat, sicut regula juris rem quæ est breviter enarrat*, &c. *Sunt Brevia quædam formata sub certis Casibus de cursu, & de Communi Consilio totius regni concessa & approbata, quæ quidem nullatenus mutari poterint absque consensu & voluntate eorum.* By which it appeareth, that Writs formed, and of Course, that is, Originals, were [b] at first authorized by Parliament, and without Parliament cannot be altered or changed, and therewith agree our Books, for in as much as the Original Writ of *Assisa ultimæ præsentationis* was formed in these words, *Quis advocatus tempore pacis præsentavit ultimam personam quæ mortua est*, this form shall hold, and cannot be changed, although that the Incumbent resigneth, as it appeareth in 18 E. 2. *Assise de Darrein presentment*, 20. and *F. N. B.* 31 *H.* Also the Writ of *Warrantia Chartæ* is framed in these words, *Quod juste*, &c. *warrantizet B. unum messuagium in D.* &c. *unde chartam habet*, &c. And yet if he be bounden to Warranty by force of an Exchange, or by Homage ancestrel, the Writ shall not be altered. 9 E. 4. 49. 21 *H.* 6. 8. *Fitz. Nat. Br.* 134. and many other Cases may be put upon them same ground. Also *Bracton* further saith, *Communia Brevia inter omnes pro jure generaliter observari debent cum sunt originalia, & actionibus originem præstent:* And therewith agreeth *Fitzherbert* in his Preface to his *Nat. Brevium:* In every Art and Science there are certain Rules and Fundamentals, to which a Man ought to give credit and belief, and which he cannot deny: In like manner, there are divers Rules and Fundamentals in the knowledge of the Common Law of the Land, to which a Man ought to give credit and belief, and not deny them, which are necessary for those who will understand the Law, especially at the beginning, for upon those Foundations the whole Law doth depend. For which cause in times past a very profitable Book was composed, called the *Register*, which containeth divers Principles, by which he shall be well instructed who would understand the said Laws.

And that was the cause, that forasmuch as there was no Original Writ formed of *Assise* of *Novel disseisin* of Common of Turbarie, Piscarie, &c. but onely of Common of Pasture, for that cause no *Assise* of *Novel disseisin* lay of them before the said Statute of 13 E. 1. And therewith also *Fleta* agreeth, They are called Writs *cum sint formata ad similitudinem regulæ juris, quæ breviter & paucis verbis intentionem proferentis exponit & explanat: sicut regula juris rem quæ est breviter enarrat*, &c. *Et sunt quædam Brevia formata sub certis Casibus, & quædam de cursu, quæ Consilio totius regni sunt approbata, quæ quidem mutari non poterint absque eorundem contraria voluntate. Sunt & Brevia ex eis sequentia, quæ dicuntur judicialia.* And whereas afterwards at the same Parliament of *Westm.* 2. *cap.* 24. It is enacted, *Et quotiescunque de cætero evenerit in Cancellaria quod in uno casu reperitur Bre', & in consimili casu cadente sub eodem jure & simili indigente remedio non reperitur, Concordent Clerici de Cancell' in Bre' faciendo, vel atterminent querentes in proxim' Parliament. & scribantur Casus in quibus concedere non possunt, & referant eos ad proxim' Parliament. & de Consensu Jurisperitorum fiat Breve ne contingat de cætero quod Curia Domini Regis deficiat de Conquerentibus in Justitia perquirenda.* [49] And the Preamble of the said 24. Chapter was consonant to the Conclusion, *de cætero non recedant à Curia Regis sine remedio.* By force of which Act the Writ called the Writ *de Ingressu in consimili casu* was formed by the Clerks of the Chancery, as it is adjuged in 3 E. 3. *Entry* 8. which was given in the same age that the said Act was made, and *F. N. B.* 206. *f. Vide* 38 E. 3. 13.

Note, Reader, at the time of the making of the said Act, as it appeareth by *Fleta*, *lib.* 2. *c.* 12. The Clerks of the Chancery (which are meant in the said Act) were grave, wise, and circumspect men, sworn to the King, of deep Knowledge of the Laws and Customs of *England:* for the words of the Book are, *Est autem inter cætera quoddam Officium quod dicitur Cancellaria, quod viro provido & discreto*, &c. *magnæ dignitatis debet committi*, &c. *cui associentur Clerici honesti & circumspecti, Domino Regi jurati, qui in Legibus & Consuetudinibus Anglicanis notitiam habeant pleniorem*, &c. And the Writs which they form, are called *Brevia Magistralia*, because that these Clerks, for their Knowledge, were called *Magistri Cancellariæ*, as those who wrote Writs of Course were, and yet are called *Cursitorii*, Cursitors: and as the Writs which the Cursitors write are called *Brevia de Cursu*, so the Writs which the Masters draw in difficult Cases, are called *Brevia Magi-*

which ſignifieth a Beam with which things are to be weighed, *& propriè tronagium exigi debet de ponderatione lanarum, & præſagium exigi debet de mercibus*, as appeareth by a Record in the Treaſury, *Hill.* 5 E. 3. *Lincoln: numer.* 32. but oftentimes the one is taken for the other. And it appeareth by *Fleta lib.* 2. *cap.* 12. which was written in the time of E. 1. in which time the Statute was made, that *Trona* doth ſignifie a Beam. *Paſſage*, and the ſame is properly a Ferry for the paſſing of Men and Cattel over a water, for which the Owner hath a Toll; for if a Man hath paſſage in the Barge or Veſſel of another to the Church or elſewhere, it is not any profit, but an eaſement, whereof no Aſſiſe lieth, as it is adjudged in 31 E. 3. *Aſſ.* 44. and 19 E. 2. *Aſſ.* 399. and 34 *Aſſ. p.* 13. an *Aſſiſe de novel diſſeiſin* doth not lie of a way, becauſe it is but an eaſement, and no pro-
[47] fit to be taken, *nullum proficuum recipiend'*, as the Statute ſpeaketh. *Pontage* is a Toll for paſſage or carriage over a Bridge, and thereupon it is called *Pontage*, as appeareth 3 E. 3. *Aſſiſe* 445. and *F. N. B.* 227. and *Regiſter* 259. *Rex Collectoribus*, &c. *Pontag. in villa de S.* &c. *Pannage* is a Toll for the Paving of a City, or a Cawſie, or a way, as appeareth in 3 *Edw.* 3. *Aſſiſe* 445. *F. N. B.* 22. *Reg.* 259. and in old times it was written *pavagium*, or *pauvagium*, or *paviagium*, and by corruption *pannagium*, ſc. *nn*, for *uu*, &c. The Statute goeth farther, *& his ſimilibus.* As for *Murage*, ſc. Toll for making of a Wall for ſafeguard of men in time of War or Tumult, as appeareth in the ſaid Books of 3 E. 3. and *F. N. B.* 227 *Regiſter* 259. *Cranage* is a Toll for drawing of Merchandiſes out of Veſſels to the Wharf, *&c.* and ſo called, becauſe the Inſtrument is in the form of a Crane. See *Dyer* 18 *Eliz.* 352. and the Book of Entries, 3. So of *Stallage*, *Picage*, *Wharfage*, *Anchorage*, *Pedagium*, *à pede dictum*, *quod à tranſeuntibus ſolvitur.*

5. *Of Offices*, ſc. *Keepings of Woods*, *Parks*, *Foreſts*, *Chaſes*, *Warrens*, *Gates*, *and other Bailiwicks and Offices in fee*, *from henceforth an Aſſiſe of Novel diſſeiſin ſhall lie*; which words (*from henceforth*) have perſwaded divers, that an Aſſiſe of an Office did not lie at the Common Law, and ſo are ſome opinions in 16 E. 3. *Aſſ.* 370. and that no Aſſiſe lay of any Office, but of an Office in fee, becauſe the Aſſiſe came in the place of a *Quod permittat*, which none could have, at the time of making of the Act, but Tenant in fee. *Vide* 4 E. 3. *Aſſiſe* 449. and 8 E. 2. *ibid.* 385. But it appeareth by our Books that an Aſſiſe lay of an Office *ut de libero tenemento*, at the Common Law, for of all that a *Præcipe quod reddat* lay at the Common Law, an Aſſiſe lay. 7 E. 3. 63. in *Henry de Parker's* Caſe. A Writ of Entry in the *Per* and *Cui*, *de Balliva cuſtodiendi parcum de Charkel cum pertinentiis*; and 8 E. 3. 55, 56. the Biſhop of *Saliſburie's* Caſe, a Writ of Aiel of the Beddelrie of the Hundred of *Cademinſter*, and mark there the ſaying of *Stoufe*, 10 E. 3. 27. *b. acc.* and 19 *Ed.* 3. *View* 77. *Ad terminum qui præteriit* brought of the Soke of *Wincheſter*; and exception was taken, that it was a Profit iſſuing out of no Freehold, *& non allocatur.* 18 *Edw.* 3. 27. A Formedon of the Office of Serjeanty in the Cathedral Church of *Lincoln.* *Vide* 27 *Hen.* 8. 12. 7 *Hen.* 6. 8. 7 *Aſſ. p.* 12. 10 *Aſſ. p.* 11. The Statute ſaith, *Office in fee*; yet an *Aſſiſe* lieth of an Office although that the Diſſeiſee had but an eſtate for life; for the Statute was made as to that in affirmance of the Common Law, as in 30 *Aſſ. p.* 4. the Office of the Meaſurer; 22 *H.* 6. 9. the Office of Packing of Cloths; 9 *Edw.* 4. 6. the Office of one of the Clerks of the Crown in the Chancery; 18 *Edw.* 2. *Aſſiſe* 377. the Office of the Bedell of the Hundred of *Weſtm.* and *Midd.* and 4 *Edw.* 2. *Aſſiſe* 449.
[*b*] and *ibid.* 8 E. 2. 285. The Archbiſhop of *Canterbury* by Deed *dedit Johanni porteriam Curiæ ſuæ Cantuarienſis*, which Grant was but for life, and yet an Aſſiſe lay. 8 *Edw.* 4. 16. an Aſſiſe of an Office in the Common Pleas, 28 *H.* 8. *Dyer* 7. and 3 *Ma. Dyer* 114. an Aſſiſe of the Office of a Philizer in the Common Pleas, and the Poſt where he ſitteth was put in view, 5 *Ma. Dyer* 153. Aſſiſe of the Office of the Regiſter of the Admiralty, which the Plaintif had for life. Note, although the proceedings in that Court be according to the Civil Law, yet the Offices are determinable by the Common Law: and ſo of the Regiſter of the Conſiſtory of a Biſhop, 31 *H.* 8. *br. Grants.* 134. Aſſiſe lieth of the Office of Steward, Bailiffs, or Receivers of a Mannor; and all this is meant of Offices of profit, and not of an Office of charge and no profit, as it is holden in 27 *H.* 8. 12. and 31 E. *Aſſiſe* 440. *Vide* 21 E. 3. 4. *b.* And where ſome ſay in the time of E. as is aforeſaid, that an Aſſiſe was given by the ſaid Statute in the place of a *Quod permittat*, there is no Writ in the *Regiſter* of a *Quod permittat* of an Office; and yet I have a *Regiſter* of *H.* 2. time, which was long before the ſaid Act; and I conceive, that no Writ of *Quod permittat* lay of an Office, becauſe that a *Præcipe quod reddat* lay of it, as before is ſaid; and therefore a man ſhall have an Aſſiſe of an Office *ut de libero tenemento* at the Common Law. And the Statute, as to Offices, was but a declaration of the Common Law, as hath been ſaid, onely to remove a doubt which then was. And ſo the ſaid words (*from henceforth ſhall lie*) ſhall be conſtrued, that it ſhall from henceforth lie *abſque difficultate.* And it appeareth by the principal Caſe at barr, and by the ſaid Book of Offices in the Chancery, King's Bench, and Common Pleas, that although the Courts are removable in which the Offices are, yet if they be in a certain place at the time of the Diſſeiſin, it ſufficeth: For the words *de proficuo in certo loco* extend to Eſtovers, &c. and not to the clauſe of Offices. *Vide* 4 E. 4. 2. And the Statute ſaith, in all the Caſes afore rehearſed, the Writ ſhall be as it was wont to be, *de libero tenemento*: So that now of all profits apprender in a certain place, the Writ ſhall be *de libero tenemento.* And the old Writ is given in a new Caſe; and therefore in 15 *Aſſ. p.* 13. the Writ was general *de libero tenemento*, and the plaint *de quatuor acris ſaliceti*; that is, four acres of ſancey, and to have reaſonable eſtovers in a 100 acres of wood, *ſcil.* houſebote, haybote, and the plaint was challenged, 1. Becauſe the plaint ought not to be *de quatuor acris ſaliceti*, but *terræ cum prati.* 2. Becauſe the Plaintiff had joined in one plaint two Freeholds, one *ſcil.* the four acres of ſancey at the Common Law, and the other, *ſcil.* the Eſtovers by the Statute, *ſcil.* the Statute of *Weſt.* 2.
[48] *cap.* 25. *& non allocatur.* And there it is ſaid, that this Term one plaint of two Rents Services was adjudged good, for *liberum tenement.* although it be in the ſingular number, yet it is *nomen collectivum.*

Vide

Vide 7 Ass. 18. and the Statute farther saith, *And as beforetimes it hath lien and holden place for Common of Pasture, so shall it from henceforth hold place, for common of Turbarie, Fishings, and such like Commons which any man hath appendant to Freeholds, or without Freehold by special deed, at the least for terme of life:* And the reason wherefore an Assise lay at the Common Law of Common of Pasture, and not of other Commons, was, because there was a special Writ in the *Register* for Common of Pasture, and not of any other Common: and in those days they held themselves strictly to the form and order of the *Register*, which is mentioned in the Stat. of *West.* 2. made 13 E. 1. *c.* 24.) See *temps R.* 2. *Grants* 104. A man shall not have a Writ of Assise, *quod disseisivit eum de libero estoverio*, and yet *Bracton* held, *l.* 4. *f.* 231. *quod locum habet Assisa de qualibet communia pertinent. ad liberum tenemeetum*, sc. *Communia pasturæ, turbariæ*, &c. and 12 H. 3. *Assise* 417. That an Assise lay of Common of Piscarie, *&c.* And these opinions had great probability of reason, but because there wanted a Writ for them in the *Register*, for that cause before this Statute an Assise did not lie of them, but a *Quod permittat*; and it appeareth by *Bracton*, *lib.* 5. *De Exceptionibus*, *cap.* 17. *fol.* 413. who wrote a little before the making of the said Act, That Original Writs cannot be changed, but by Act of Parliament. For there he divideth Writs into three branches. *Sunt quædam Brevia formata* (id est, *originalia*) *seu de cursu*; (which appeareth there, where first formed and made by Authority of Parlament:) *Quædam judicialia ex eis* (id est, *ex originalibus*) *sequentia*, &c. *Quædam magistralia, quæ nec sunt de cursu, nec formata*, id est, *de aliqua certa forma, & sæpius variant, secundum varietatem casuum factorum & querelarum:* (as are Actions upon the Case, Actions of Deceit, Prohibitions, *&c.* which have not any certain forme, *&c.*) And of the Original Writs, formed, or of course, *Bracton* wrote divers remarkable things, *Breve quidem cum sit formatum ad similitudinem jurit, quia breviter & paucis verbis intentionem proferentis exponit & explanat, sicut regula juris rem quæ est breviter enarrat*, &c. *Sunt Brevia quædam formata sub certis Casibus de cursu, & de Communi Consilio totius regni concessa & approbata, quæ quidem nullatenus mutari poterint absque consensu & voluntate eorum.* By which it appeareth, that Writs formed, and of Course, that is, Originals, were [b] at first authorized by Parliament, and without Parliament cannot be altered or changed, and therewith agree our Books, for in as much as the Original Writ of *Assisa ultimæ præsentationis* was formed in these words, *Quis advocatus tempore pacis præsentavit ultimam personam quæ mortua est*, this form shall hold, and cannot be changed, although that the Incumbent resigneth, as it appeareth in 18 E. 2. *Assise de Darrein presentment*, 20. and F. N. B. 31 H. Also the Writ of *Warrantia Chartæ* is framed in these words, *Quod juste*, &c. *warrantizet B. unum messuagium in D.* &c. *unde chartam habet*, &c. And yet if he be bounden to Warranty by force of an Exchange, or by Homage ancestrel, the Writ shall not be altered. 9 E. 4. 49. 21 H. 6. 8. *Fitz. Nat. Br.* 134. and many other Cases may be put upon them same ground. Also *Bracton* further saith, *Communia Brevia inter omnes pro jure generaliter observari debent cum sunt originalia, & actionibus originem præstent:* And therewith agreeth *Fitzherbert* in his Preface to his *Nat. Brevium:* In every Art and Science there are certain Rules and Fundamentals, to which a Man ought to give credit and belief, and which he cannot deny: In like manner, there are divers Rules and Fundamentals in the knowledge of the Common Law of the Land, to which a Man ought to give credit and belief, and not deny them, which are necessary for those who will understand the Law, especially at the beginning, for upon those Foundations the whole Law doth depend. For which cause in times past a very profitable Book was composed, called the *Register*, which containeth divers Principles, by which he shall be well instructed who would understand the said Laws.

And that was the cause, that forasmuch as there was no Original Writ formed of *Assise* of *Novel disseisin* of Common of Turbarie, Piscarie, &c. but onely of Common of Pasture, for that cause no *Assise* of *Novel disseisin* lay of them before the said Statute of 13 E. 1. And therewith also *Fleta* agreeth, They are called Writs *cum sint formata ad similitudinem regulæ juris, quæ breviter & paucis verbis intentionem proferentis exponit & explanat: sicut regula juris rem quæ est breviter enarrat*, &c. *Et sunt quædam Brevia formata sub certis Casibus, & quædam de cursu, quæ Consilio totius regni sunt approbata, quæ quidem mutari non poterint absque eorundem contraria voluntate. Sunt & Brevia ex eis sequentia, quæ dicuntur judicialia.* And whereas afterwards at the same Parliament of *Westm.* 2. *cap.* 24. It is enacted, *Et quotiescunque de cætero evenerit in Cancellaria quod in uno casu reperitur Bre', & in consimili casu cadente sub eodem jure & simili indigente remedio non reperitur, Concordent Clerici de Cancell' in Bre' faciendo, vel atterminent querentes in proxim' Parliament. & scribantur Casus in quibus concedere non possunt, & referant eos ad proxim' Parliament. & de Consensu Jurisperitorum fiat Breve ne contingat de cætero quod Curia Domini Regis deficiat de Conquerentibus in Justitia perquirenda.* [49] And the Preamble of the said 24. Chapter was consonant to the Conclusion, *de cætero non recedant à Curia Regis sine remedio.* By force of which Act the Writ called the Writ *de Ingressu in consimili casu* was formed by the Clerks of the Chancery, as it is adjuged in 3 E. 3. *Entry* 8. which was given in the same age that the said Act was made, and F. N. B. 206. *f. Vide* 38 E. 3. 13.

Note, Reader, at the time of the making of the said Act, as it appeareth by *Fleta*, *lib.* 2. *c.* 12. The Clerks of the Chancery (which are meant in the said Act) were grave, wise, and circumspect men, sworn to the King, of deep Knowledge of the Laws and Customs of *England:* for the words of the Book are, *Est autem inter cætera quoddam Officium quod dicitur Cancellaria, quod viro provido & discreto*, &c. *magnæ dignitatis debet committi*, &c. *cui associentur Clerici honesti & circumspecti, Domino Regi jurati, qui in Legibus & Consuetudinibus Anglicanis notitiam habeant plenioremi*, &c. And the Writs which they form, are called *Brevia Magistralia*, because that these Clerks, for their Knowledge, were called *Magistri Cancellariæ*, as those who wrote Writs of Course were, and yet are called *Cursitorii*, Curlitors: and as the Writs which the Cursitors write are called *Brevia de Cursu*, so the Writs which the Masters draw in difficult Cases, are called *Brevia Magistralia.*

ſtralia. But when ſuch Clerks ſo knowing of the Law failed, then the Judges in many caſes gave allowance to ancient forms of Writs, and drove the Party to make a ſpecial Count when the Writ doth warrant the Count in ſubſtance, although there be variance in Circumſtance, as in the ſaid Caſes of *Darrein preſentment*, and *Warrantia Chartæ*, and many others, the ſubſtance of the one is the Avoidance, and Death or Reſignation, but the Circumſtance; and in the other Warranty is the ſubſtance, and the manner of it but the Circumſtance. But when the Caſe will not bear it, (as in Aſſiſe of Common of Paſture, he cannot make his plaint of Common of Piſcarie, Turbarie, &c.) the laſt refuge is to refer the ſame *ad proximum Parliamentum*, as the Statute ſpeaketh.

Note, Reader, in the ſaid Statute of *Weſtm.* 2. *cap.* 24. a little before it is ſaid, *Et in Regiſtro de Cancellaria non eſt inventum aliquod Breve in iſto Caſu ſpeciali.* And therefore the Statute provided remedy in it, by which appeareth alſo the Antiquity of the Regiſter, which is as ancient as Original Writs, of whoſe Antiquity ſee in the Preface to the Third Part of my Reports. And in the principal Caſe Exception was taken to the Plaint, becauſe that in his title he ſaith, *Quod*
[*b*] *Officium prædictum eſt antiquum Officium in Weſtm. prædict. quodque prædictus Dominus Rex nunc*, &c. *& per Literas ſuas Patentes*, &c. *conceſſit eidem* Jehu *Officium Magiſtri Ludorum pilarum palmarum*, &c. *Habend' idem Officium eidem* Jehu, *durante vita ſua*, &c. And doth not ſhew that any Profit doth belong to the ſaid Office. And a man ſhall not maintain an Aſſiſe of an Office without Profit, as the Book in 27 *Hen.* 8. But it was anſwered and reſolved, That the Plaint was well enough: For true it is, that of an Office of charge no Aſſiſe lieth, as it is holden in 30 *Aſſ. pl.* 4. 8 *Ed.* 4. 22. and 27 *Hen.* 8. 12. And 30 *Aſſ. pl.* 4. There the Aſſiſe was brought of the Office of *Meſſor* of the Mannor of *D.* with the Appurtenances: And there *Shard* took a difference between an ancient Office and a new Office; For in an Aſſiſe of a new Office firſt erected and appointed, there the Plaintiff ought to ſhew what Fee or Profit is granted for the exerciſing of it, for it cannot have a Fee and Profit belonging to it, as an ancient Office may. And there *Burton* ſaith, that their opinion was, That if a man maketh his Plaint of an Office, and of the Profit, the Plaint had abated; for by the Recovery of the Office, the Fee and Profit, as parcel of it, ſhall be recovered. And therewith agreeth the Book in 8 E. 4. 22. where in an Aſſiſe of an Office in the Common Pleas, he made his Plaint of the Office and Fee, and Wages and Commodities; and *Choke* excepted againſt it, becauſe he complaineth of one thing twice, *ſcil.* of the Office and of the Fee: *Jenney*, who was of Counſel with the Plaintiff, we have amended our Plaint; For it is no other but of the Office, with the Appurtenances. *Pigot.* Then the Plaint is not good: For a man ſhall not maintain an Aſſiſe of an Office without Profit. And the Court held the Plaint good as to that, and therewith agree 5 *Edw.* 4. 3. 22 *Hen.* 6. 9. 9 *Edw.* 4. 6. And it is to know, that if a man be diſſeiſed of the whole Office he ſhall have an Aſſiſe *de Officio cum Pertinenciis*; but if he be diſſeiſed of parcel of the Profits, he may have an Aſſiſe of theſe parcels onely, 22 *Hen.* 6. 11. 13 *Edw.* 3. Plaint 23. If a man giveth to me the Keeping of a Park, taking two pence a day, and a Robe, the Plaint ſhall not be of the Office or Keeping, if I be not diſſeiſed of the whole Office: But if I be diſſeiſed of the Robe or Fee, the Plaint ſhall be onely thereof. And 3 *Edw.* 3. *Aſſiſe* 175. An *Aſſiſe* of *Novel diſſeiſin* was brought, and he made his Plaint of a Profit apprender, for the Keeping of the Park and Wood of *Preſton*, every day of the year a penny halfpenny for his Poulter, and a Robe, and the Aſſiſe was maintained. And there *Scrope* held, that if I have a Corodie to take Four Loaves, and Four Flagons of Ale in the Week, although they are but one Corodie and one Freehold, yet if I be diſſeiſed onely of the Bread, I ſhall not complain of both, *ſcil.* of the Ale and the Bread, but onely of the Bread, otherwiſe my Plaint ſhall abate: But if I be diſſeiſed of Two of the Loaves onely, I ſhall make my Plaint of all the Four Loaves, with which agreeth
[50] 22 *H.* 6. 9. and 12 *Aſſ. pl.* 23. Aſſiſe was brought of Meat and Drink, as appurtenant to his Office. And in the principal Caſe at Bar, The Aſſiſe for the Plaintiff againſt *Roger Rolls in duobus Sphæriſteriis, Anglicè*, Tennis Courts, whereof one is called the Cloſe Tennis Court, and the other called the Brake in *Weſtminſter* aforeſaid, and aſſeſſed Damages and Coſts, and acquitted the Lord *Knyvett*, and *John Freeborn*, of the Diſſeiſin of the ſaid Office aforeſaid. *Ideo conſideratum eſt quod prædictus* Jehu *recuperet ſeiſinam ſuam verſus præfatum* Rogerum *de Officio prædicto in prædictis duobus Sphæriſteriis per viſum recognitorum Aſſiſæ prædictæ*, with Damages and Coſts, *& prædictus* Rogerus *in miſericordia, & prædictus* Jehu *in miſericordia, pro falſo clamore ſuo verſus præfat'* Tho. Knyvett, *&* Johannem Freeborn, *eo quod ipſi de diſſeiſina prædict' ſuperius acquietati exiſtunt, & prædict'* Thomas *&* Johannes Freeborn *eant inde ſine die*, &c. And it is to know, that at the Common Law, the Aſſiſe was *remedium maximè feſtinum, & remedium maximè beneficiale feſtinum*, for therein the Defendant ſhall not be eſſoigned, nor caſt a Protection, alſo the Defendant ſhall not pray in aid, but onely of the King, nor ſhall not vouch a ſtranger, nor any party to the Writ, unleſs he enter preſently into the Warranty: The ſame Law of Receipt. Alſo the Plea ſhall not remain for Nonage, neither of the Plaintiff nor Defendant; and in many other reſpects the Aſſiſe is *feſtinum remedium*; it is alſo *maximè beneficiale*; for in no Action at the Common Law a man ſhall recover the Land it ſelf and Damages, but onely in an Aſſiſe againſt the Diſſeiſor. See the Statute of *Glouceſter*, *cap.* 1. And in ſome caſe a man ſhall have an Aſſiſe of *Novel diſſeiſin* at the Common Law when he himſelf is ſeiſed of the Freehold of the Land: As when the Lord doth ſo often diſtrein the Tenant of the Land that he cannot manure his Land; in that caſe the Tenant of the Land may have an Aſſiſe, and the Writ ſhall be general, but he ſhall make a ſpecial Plaint, that the Lord, *&c.* did often diſtrein, *& c.* and the Judgement ſhall not be *quod Querens recuperabit ſeiſinam tenementorum prædictorum*, for the Plaintiff himſelf is ſeiſed of the Freehold, but the Judgement ſhall be that he ſhall have and hold the Land, *abſque multiplici diſtrictione*, &c. So in his caſe who feedeth another's ſeveral, the Tenant of the Land ſhall have an Aſſiſe by the Common Law.

And

And the Statute of *Weſtm.* 2. *cap.* 25. is but an affirmance of the Common Law; for in the ſame manner he ſhall have an Aſſiſe for Fiſhing in his ſeveral Piſcarie, or Turbarie, and the Writ ſhall be general, as it appeareth by the Statute. But the Plaintiff in his Plaint ought to ſhew that the Defendant claiming Common of Paſture in his ſeveral with his cattel, *&c.* and the Judgement ſhall not be that he ſhall recover ſeiſin of the Tenements, *&c.* but that he ſhall have and hold the ſame in ſeveralty; for the Plaintiff himſelf is ſeiſed of the Freehold, and therefore he cannot make his Plaint to be diſſeiſed of his Freehold; for it is not ſo: and then the Judgement ſhould not follow it. *Vide F. N. B.* 178. *b.* 27 *Aſſ. pl.* 30, *&* 51. 28 *Aſſ. pl.* 50. *Weſtm.* 2. *cap.* 25. [*b*]

Mich. 6 Jacobi. *In the Common Pleas; which began Hill.* 5 Jac. *Rott.* 2541.

Syms Case.

[51] *James Game* brought a Formedon in the Remainder againſt *William Sims* and *Mary* his Wife, and demanded one Houſe and forty five Acres of Land, ſix Acres of Meadow in *Wethermonford*, &c. in the County of *Eſſex*, of the gift made by *Henry Winter* to *Stephen* his Son, and to the heirs males of his body; the Remainder to *John* his Son, and to the heirs males of his body, *&c.* the Remainder to *Alice Winter*, and her heirs; and that the Demandant was Son and heir to *Alice*, and that *Stephen* and *John* were dead without iſſue, *&c.* The Tenant pleaded in barr a Fine levied by the ſaid *Stephen* to *William Brown* of the Tenements aforeſaid; By which he did grant that he and his heirs would warrant the Tenements aforeſaid, with the Appurtenances, *&c.* againſt all People. After which Fine the ſaid *John* died without Iſſue, and afterwards the ſaid *Stephen* died without iſſue. After whoſe death the Warranty of the ſaid *Stephen* ſpecified in the ſaid Fine did deſcend to the ſaid *Alice*, as Siſter and heir of the ſaid *Stephen*, and after the deſcent of the ſaid Warranty the ſaid *Alice* died, after whoſe death the Warranty aforeſaid did deſcend to the ſaid *James*, as Son and heir of the ſaid *Alice*, and demanded Judgement if the ſaid *James* ſhould have the Action aforeſaid againſt the Warranty aforeſaid, *&c.* The Defendant confeſſed the Fine aforeſaid, *&c.* and the death of *John Winter* without iſſue, and that the ſaid *Stephen* died *prout*, &c. But further ſaid, that the ſaid Warranty of the ſaid *Stephen* did deſcend to the ſaid *Alice*, as Siſter and heir to the ſaid *Stephen*, and to one *Thomaſin Rampton* as coheir of the ſaid *Stephen*, and ſhewed how: And after the death of the ſaid *Alice*, the ſaid Warranty as to one moiety of the ſaid Tenements did deſcend to the ſaid *James*, as Son and heir of the ſaid *Alice*, &c. Upon which the Tenant did demur in Law; And if the ſaid Warranty which deſcended upon both the heirs ſhould barr the ſaid *Alice* and her heir for the whole, or for the moiety, foraſmuch as the ſaid Warranty deſcendeth upon both, and *Alice* onely had Right to the ſaid Land, was the Queſtion. And it was objected that it ſhould be a barr but for one moiety, becauſe the Warranty doth not onely deſcend upon her but upon the other Siſter. And the caſe in 45 *Edw.* 3. 23. was cited, which is abridged by *Br. Warrantie*, 14. where he abridgeth the caſe to this effect. Husband and Wife Tenants in ſpecial tail, to them and the heirs of their bodies, have iſſue a Daughter, the Husband diſcontinueth the Eſtate tail with Warranty, and the Wife dieth; and he took another Wife, and had iſſue another Daughter, the Husband died; the eldeſt Daughter took Husband, and they brought a Formedon, *&c.* And the Tenant did rebutt for one moiety by reaſon of the Warranty and Aſſets, and recovered for the other moiety, for he could not rebutt for the other moiety, becauſe that the Warranty did not deſcend onely upon him. But it was reſolved by *Coke* Chief Juſtice, and the whole Court, That in the Caſe at Barr, *Alice* and her heir was barred for the whole; for the Warranty is entire and extendeth to the whole Land, and is a Barr to every perſon upon whom the ſame deſcendeth of all the Right which he hath in the Land; and if each of them hath Right jointly or ſeverally, each is barred; and if one onely hath the Right and the other nothing, ſhe which hath the onely Right ſhall be barred of the whole, for as to that purpoſe the whole Warranty doth deſcend to each of them. And therewith agreeth a Caſe adjudged in the Point in 5 *Edw.* 2. *Warrant.* 78. where *Sibil* brought a *Sur cui in vita*, of the Diſſeiſin of *Margery* her Grandmother; the Tenant pleads, that the ſaid *Sibil* is coheir with *Elin* and *Maud*, to one *Walter*, their coſen, whoſe heirs they are, and that the ſaid *Walter* did enfeoffe the Tenant with Warranty, Judgement, *&c.* And there it is objected, That in a manner as one ſhall vouch he ought to rebutt, but you cannot vouch us, *quaſi diceret*, that he ſhould not vouch one onely, becauſe the Warranty deſcendeth upon all, and in the ſame manner, that he ſhould not rebutt onely againſt one, but it ought to be for a third part, becauſe the Demandant is not ſole heir to the Warranty. To whom *Hervie* Chief Juſtice anſwered; You are three coheirs, and the Tenant may barr you all, *ergo*, one alone. And he ſheweth the Deed of *Walter*, whoſe heirs you are, which you do not deny, wherefore, by Judgement of the Court, you ſhall take nothing, *&c.* And therewith agreeth 4 *Hen.* 7. 18. where it is holden, That if three Coparceners alien in Fee with Warranty, every Warranty ſhall be collateral to the other, and yet the Warranty of her who firſt dieth doth deſcend upon both the others. And the Caſe in 6 *Edw.* 3. 50. was in effect, That *A.* ſeiſed of three Acres made a Feoffement to one *B.* with Warranty, and died ſeiſed of [52]

the

the other two Acres, having iſſue two Daughters, who make partition, and each hath one Acre, the Wife of *A.* doth purchaſe the part of one Coparcener, and afterwards brought a Writ of Dower againſt *B.* who vouched the two Daughters and heirs of *A.* the one (who had enfeoffed the Demandant of her part) entred into the Warranty, as one who had nothing by deſcent, the other pleaded all the ſaid ſpecial matter, pretending that foraſmuch as the Demandant hath purchaſed the part of one, that ſhe ſhould not recover the whole in value againſt the other, but for a moiety, becauſe that the Warranty did diſcend upon both. But it was adjudged, that he ſhould recover the whole value againſt her who had by deſcent; for when two men are vouched, and the one hath nothing, the other who hath, ſhall anſwer the whole in value, and yet the Warranty did not deſcend upon him alone. And it was lawfull for the woman Demandant to purchaſe the part of one, and therefore it ſhall not prejudice her. *Vide* 11 *Hen.* 4. 20. 41 *Edw.* 3. 3. 10 *Hen.* 7. 13. And it was ſaid, That the Book in 45 *Edw.* 3. 23. doth not warrant ſuch opinion, as hath been collected upon it; for the principal Caſe in the Book at large (which is the Fountain) is, that in a *Precip' quod reddat* the Tenant did vouch two as heirs, and ſaid that one was within age, and prayed that the parol might demurr; the Demandant ſaid that he was full of age, and prayed that he might be inſpected in Court; upon which Proceſs was awarded, *tiel ſignatur ſub ſuo periculo*, at which day he came not, nor no Writ was returned, and the Demandant prayed Judgement for the moiety, becauſe one of them who was vouched made default, and prayed *Summons ad Warr.* againſt the other. To which the Demandant ſaid, That *Summon. ad Warr.* he could not have, becauſe that he who is Vouchee is Demandant: To which the Tenant ſaid, That the Anceſtor of theſe who were vouched by Deed which here is, did enfeoffe one *R.* with Warranty, whoſe Eſtate we have, Judgement if againſt the Deed; with Averment that he hath Aſſets by deſcent. To which the Demandant ſaith, that he hath nothing by deſcent. And the Court gave Judgement for one moiety in reſpect of the default of one of the Vouchees which the Tenant hath loſt by his Voucher, for which moiety he can plead nothing; and for the other moiety, although he hath vouched the Demandant by a ſtrange name, and ſo in a manner pleaded in chief, yet foraſmuch as the Demandant hath taken him from this Voucher as to him, becauſe he is Demandant himſelf, he may plead the Warranty and Aſſets in barr for the other moiety. Upon which Plea no Judgement is given in the Book, and therefore
[b] the Court regarded not the ſaid Collection of *Brook*, foraſmuch as the Book is adjuged upon another Point, *ſcil.* upon default of one of the Vouchees; but it was affirmed by the whole Court, That in the ſaid Caſe of Warranty and Aſſets, the lineal Warranty is as entire as the collateral Warranty; but in as much as the lineal Warranty is not a Barr to the Iſſue in tail without Aſſets, and Aſſets is to be adjudged according to the value, which may be more or leſs; for this cauſe the lineal Warranty ought to follow the Aſſets, becauſe that without Aſſets the lineal Warranty is no Bar. As if Warranty and Aſſets be pleaded in a Formedon brought of four Acres, each of the yarly value of twelve pence, and iſſue is taken upon the Aſſets, and it is found that but one Acre of the value of twelve pence deſcended, it is no Barr but for one Acre, as it is holden in 40 *E.* 3. 15. 21 *E.* 3. 9. againſt the Book in 21 *Edw.* 3. 28. But otherwiſe it is in Debt or Annuity brought againſt the heir, becauſe that Lands of their nature are deviſeable, and the Demandant in the Formedon may recover part, and be barred of the reſidue; but Debt or Annuity in ſuch caſe are entire, and not deriſable, as it is ſaid in 5 *Richard* 2. *Annuity* 21. *Annale aut debitum Judex nec ſeparet ipſum.* And the opinon of the Lord *Brook*, although it was not well collected out of the Book, was affirmed for Law, if the juſt Aſſets of the Land in demand, and not more doth deſcend upon the Demandant and the other Daughter, for then the Demandant ought to recover the moiety, becauſe ſhe hath no Aſſets but as to one moiety, and the lineal Warranty onely is no Barr. But if the moiety of the Land which deſcendeth upon the Demandant be of equal value to the Land in demand, ſhe ſhall be barred of the whole, for a lineal Warranty when Aſſets to the value of the Land in demand deſcendeth, is as entire and full a Barr as to the Demandant of a collateral Warranty, deſcend the Warranty in the one caſe or in the other upon the Demandant onely, or upon her and any other. And the Statute of *Glouceſter* doth enact, That if the Warranty of the Tenant by the courteſie be pleaded, the heir of the Wife ſhall not be barred by the Deed of his Father, from whom no inheritance doth deſcend, *&c.* And if inheritance doth deſcend from the part of the Father, then be he barred of the value of the inheritance which deſcendeth to him. By force of which Statute, the collateral Warranty which without Aſſets was a Barr entirely to the whole by the Common Law, is now but a proportionable Barr, having reſpect to the Aſſets deſcended; and the lineal Warranty and Aſſets pleaded in Formedon in the deſcender is taken to be within the equity of the ſaid Act; as it is reſolved in 11 *Edw.* 2. *Statham Garr.* 21 *Edw.* 3. 28. 38 *Edw.* 3. 23, *&c.* *Plow. Com. in Fulmerſton's Caſe, fol.* 110. But where in the ſaid *Fulmerſton's* Caſe it is ſaid, if in the one caſe or the other Aſſets is not deſcended at the time of the Aſſiſe of *Mortdanceſter*, or *Formedon* brought, but afterwards Aſſets deſcend, that the Tenant ſhall have a *Scire facias* in the caſe of Warranty made by Tenant by the courteſie, to have the Land which was of the Seſin of his Mother, and not of the Aſſets by
[53] the expreſs purview of the ſaid Statute of *Glouceſter*, and in the caſe of Warranty made by Tenant in tail which is taken within the equity of the ſaid Act, the Iſſue in tail ſhall have a *Scire facias* to have the Aſſets which afterwards deſcendeth, and not the Land given in tail: and Equity is the reaſon that the caſe taken within the equity of the former Law ſhall not follow the purview thereof, but ſhall have another and diverſe conſtruction; for equity requireth that incertainty be avoided, as the authour of contention, and that there ſhould be an end of controverſies according to equity and right, the final end of all Laws: And therefore the ſaid Statute of *Glouceſter* well provided an abſolute and juſt end in the caſe of Tenant by the courteſie of Land in Fee-ſimple; for when the Tenant in ſuch caſe after Aſſets deſcended doth recover the inheritance of the Mother, which he hath

he hath purchased, the same maketh an end of that Controversie, so that the Demandant or his heirs shall be by force of the said Act barred for ever to claim the said Land. But if in the said Case of Formedon, the Tenant after Assets descended shall have a *Scire facias* for the Land intailed, then if the Assets shall be aliened, the issues inheritable to the Estate tail may by Writ of Formedon in the descender recover the Land in tail, which shall be cause of new Sute and Contention, and shall not answer to the final intention of the Purview of the said Act; and therefore according to the rule of Wisedom, *Sapiens incipit à fine*, to make a perpetual barr as well in that Case as in the other. It was adjudged reasonable and consonant to the final intention of the Makers of the said Act, That in that Case of an Estate tail the Tenant should have a *Scire facias*, to have the Assets which descendeth to the Issue in tail in Fee-simple, which as to them shall be a perpetual Barr against him and his heirs, which in just and proportionable equity agreeth with the other Case. *Vide* 43 E. 3. 26. and 40 E. 3. 39. &c. Where it is holden, that if Warrantie and Assets be pleaded against the Issue in tail, and if the Demandant hath nothing by descent, and Land descendeth to the Issue afterwards, he shall have a *Scire facias* to have the value. And therefore if in a *Mortdancester*, *Cosinage*, *Aiel*, *Besaiel*, &c. the Tenant pleadeth the Warrantie of the Tenant by the courtesie with Assets, or in a Formedon the Tenant pleads a lineal Warranty with Assets, and the Demandant taketh Issue upon the Assets, and it is found by Inquest that nothing descended for which the Demandant recovereth, and after that Recovery Assets descendeth, the Tenant shall never have a *Scire facias* to take the benefit of the said Act, for divers reasons.

1. Because the said Trial is so peremptory to him, as if Assets had been found by the Inquest; it had been to the Demandant.

2. There is no Record upon which he can ground his *Scire facias*.

3. By the putting himself upon the Trial of Assets, he hath waived the advantage which he might have had upon the said Act.

4. He who will take benefit of that Act ought not to begin with Falsity. But if the Tenant will take benefit of the said Act, he ought to plead the Warranty, and to acknowledge the Demandant's Title, and pray the Advantage of the Statute where Assets shall after descend, to be saved to him, [b] and upon that Record, when Assets shall descend he shall have a *Scire facias*; and that standeth with the Letter and Intention of the said Act; for the words are *(by Writ of Judgement which issue out of the Rolls of the Justices.)* So that the *Scire facias* ought to be grounded upon the Rolls of the Justices. Also the Statute goes farther; To resummon the Warranty, as it hath been done in other Cases, *scil.* where the Warrantee or Vouchee cometh in Court, and saith, that nothing is descended to him from him by whose Deed he is vouched, *&c.* which if the Tenant cannot gainsay, *&c.* he shall have the benefit of the Assets which afterwards descendeth to the Vouchee; but if he taketh Issue that Assets is descended to him, and the same by Inquest be found against him, that nothing descended, then he shall never have any benefit of the Assets which shall afterwards descend to the Vouchee. But it was said, If Assets be found by the Inquest, but not to the value, there the Demandant shall have benefit of the Assets which afterwards descend, because the Vouchee's Plea is false; and on the other part, it shall be hard to drive the Demandant, who is a stranger, to know the precise value of the Land which the Vouchee hath by descent, but he may well take knowledge whether he hath any Land by descent from the same Ancestor or not. And in this Case divers good Differences were observed, which do appear in our Books.

1. Between a collateral Warranty, and an Estoppel: for a collateral Wrranty shall bind the Right of him who claimeth, not by him who maketh the Warranty; but an Estopple shall bind only the heir who claimeth the Right of him to whom the Estoppel was: As at the Common Law before the said Statute of *Glouceſter*, *cap.* 3. If the Husband had aliened the Land which he had in the Right of his Wife with Warranty, and the Husband and Wife died, in that Case the Right descended from the Wife, and yet that Warranty being collateral to the Title of the Land should barr the Wife's heir. But it is adjuged in 18 *Edw.* 3. 9. That where Lands were conveyed to the Husband and Wife, and to the heirs of the Husband, and the Husband gave them in Tail, and the Husband died, the Wife should recover the Land against the Donee by Writ of *Cui in vita*, supposing that she had the Lands to her and her heirs in Fee; the Wife after the Recovery enfeoffed another, and died, the Donee in tail dieth without issue, the issue of the Husband and Wife brought a Formedon in the Reverter against the Feoffee of the Wife; and although that the Issue was heir to the Wife who was estopped by the said Recovery in the *Cui in vita*, to say that she had a lesser Estate than a Fee-simple, yet the Issue who claimeth the Reversion of the Land as Heir to the Husband, shall not be bound by that Estoppel made by the Wife, although that he be Heir to her also, for then by her own act the Wife who hath but an Estate for life, might barr the Heir who hath Right, and who claimeth as Heir to his Father; But a collateral Warranty cannot take effect without the Act of God, *scilicet*, the Death of him who maketh it, and in the mean time the Estate to which, *&c.* may be abated. But in this point the Warranty and the Estoppel concurr, that both shall descend upon the general Heir to him who made the Warranty or Estoppel, and not upon the particular Heir, as upon the younger Son: And not upon the Sister of the half blood, *&c.* [54] as it appeareth 35 *Hen.* 6. 34. and as to the Heir who doth not claim the Land as Heir to him who made the Estoppel, as hath been said, shall not be bound thereby for his disadvantage: so in the same Case he shall not be capable of the disadvantages, if it be not in special Cases. And therefore it is adjudged in 38 *Edw.* 3. 10. That if a Woman her self bind her self and her Heirs to acquital to the Tenant and his Heirs, and after the Woman taketh a Husband, and the Tenant by his Deed doth grant to the Husband, that he nor his Heirs shall be bound to the said Acquital, and afterwards the Husband and Wife have Issue and die, this Issue although he be Heir to the

Husband, yet becauſe that the Bond of Acquital doth deſcend to him as Heir to his Mother, he ſhall not be capable of the ſaid Advantage of the ſaid Diſcharge, *quia Hæres dicitur ab hæreditate, & non hæreditas ab Hærede.* But therein alſo there is a difference between Advantages in groſs, as in the Caſe of 38 E. 3. and Advantages which by the Grant are made appurtenant or incident to another thing: As if a man be ſeiſed of a Houſe in the Right of his Wife, and another granteth to the Husband and his Heirs, to have ſufficient Eſtovers to burn in the ſame Houſe, in that Caſe the Eſtovers are appurtenant to the ſaid Houſe, and ſhall diſcend to the Iſſue of the Husband and Wife. So if one hath a Houſe of the part of his Mother, and one granteth to him, that he and his Heirs ſhall have competent Houſebote to be burnt in the ſame Houſe, the ſame is appurtenant to the Houſe; and although it be a new Purchaſe, yet it ſhall go with the Houſe to the Heir of the Part of the Mother. The ſame Law if a Man hath a Rent-ſeck by deſcent of the Part of his Mother, and the Terr-tenant granteth to him and his Heirs that he ſhall diſtrein for the Rent, &c. the ſame is as appurtenant to the Rent, and ſhall goe with the Rent to the Heir of the Part of the Mother. And ſo it is holden in 5 E. 2. *Avowrie* 207. in *Jordan*'s Caſe. That where *Alice* was ſeiſed of a Manor in Fee, and took to Husband one *Jordan*, and had Iſſue *Sibill*; and afterwards *Jordan* and his Wife died, and *Sibill* was ſeiſed of the Mannor, as Heir of the Part of her Mother, who before the Statute of *Quia Emptores terrarum* did enfeoffe *P.* of parcel of the Mannor by four ſhillings Rent, and afterwards *Sibill* died without Iſſue: And there the Queſtion was, Who ſhould have this Seigniory and Rent of four ſhillings newly created, either the Heir of the Part of the Mother, or the Heir of the Part of *Jordan* the Father? And there *Beresford* Chief Juſtice of the Bench ſaith, When *Sibil* enfeoffeth *P.* of parcel of the Mannor which deſcendeth to her from *Alice*, theſe Services are then appurtenant to the Remainder of the Mannor; by which the death of *Sibill* without Heir of her
[b] body cannot defeat this Appendance. So it is holden in 7 *H.* 6. 4, 6. That if a Man be ſeiſed of Land of the Part of his Mother, and maketh a Gift in tail rendring Rent, this new Rent which is incident to the Reverſion, ſhall goe with the Reverſion to the Heir of the Part of the Mother. And it is to be known, that there is a difference between Eſtopples or Concluſions which ſtand upon recompence, and other Eſtopples which ſtand upon affirmance or admittance of any matter by matter of Record: As if an Abator marrieth with the right Heir, and hath Iſſue by her, and the Abator maketh a Leaſe for life rendring Rent, and he and his Wife die, in this Caſe the Iſſue hath the meer Right of the Part of his Mother; and yet if he accepteth the Rent, and maketh Acquittance, it ſhall eſtopp him and his Heirs to avoid the ſaid Leaſe, in reſpect of the acceptance of the Recompence: and therewith agree 37 *H.* 6. 27. *Vide* 28 *H.* 6. 24. But an Eſtoppel which accrueth by admittance, &c. of Record, ſhall not conclude the Heir who claimeth not the Right by the ſame Anceſtor, as it is adjudged in 18 E. 3. aforeſaid.

Mich. 6 Jacobi. *In the Common Pleas.*

Roger Earl of *Rutland*'s Caſe.

[55] *ROger* Earl of *Rutland* brought an *Aſſiſe of Novel diſſeiſin* againſt *Gilbert* Earl of *Shrewſbury*, and others, complaining him to be diſſeiſed of his Free-hold in *Clipſon*, in the County of *Nottingham*, and made his Plaint to be diſſeiſed of the Office of Keeper of the Park called *Clipſon* Park, and of the Pannage and Herbage of the ſaid Park of *Clipſon* aforeſaid: and for title of free-hold of the ſaid Office, and of the Pannage and Herbage aforeſaid, the Plaintiff ſaid, That Queen *Elizabeth* was ſeiſed of the ſaid Park in Fee in the right of her Crown, and the 19th of *March*, Anno by her Letters Patents granted to *Thomas Markham* Eſq; the Office of Keeper of her Park called *Clipſon* Park, (without ſaying *prædict.*) And the ſaid *Thomas Markham* aforeſaid, of her Park called *Clipſon* Park, *fecit, ordinavit, & conſtituit per eaſdem Literas Patentes*, To have and to hold to him for terme of his life, with all Fees due and accuſtomed: And further granted by the ſaid Letters Patents to the ſaid *Thomas Markham*, *Pannagium & Herbagium prædict' Parci ſui de Clipſon*, To have and to hold the ſaid Pannage and Herbage to the ſaid *Thomas Markham* for terme of his life. And afterwards the Queen ſo ſeiſed of the ſaid Park as is aforeſaid, died thereof ſeiſed. After whoſe death the ſaid Park deſcended to the King that now is: and the ſaid *Thomas Markham* of the ſaid Office, and Pannage and Herbage aforeſaid, in forme aforeſaid being ſeiſed, the ſaid King, 9 *Junii*, *Anno Regni ſui primo*, by his Letters Patents, &c. reciting the ſaid Eſtate of the ſaid *Tho. Markham* of and in the aforeſaid Premiſes, ſo as beforſaid granted unto him, granted to the ſaid Earl of *Rutland* the aforeſaid Office of Keeper of the aforeſaid Park, called *Clipſon* Park, To have and to hold to him for his Life, ſo ſoon as the ſaid Office, by Death, Surrender, Forfeiture, or any other ways whatſoever, ſhould become void, with all Fees, &c. And further granted by the ſame Latters Patents the ſaid Herbage and Pannage to the ſaid Earl of *Rutland* for terme of his Life (without ſhewing when
[b] the Eſtate of the Herbage and Pannage ſhould begin) *adeo plenè & integrè prout præd' Tho. Markham*, &c. *habuit, tenuit, ſeu gaviſus fuit*, &c. And afterwards the ſaid *Thomas Markham*, 9 *Martii*, *Anno quarto Regis nunc* died, after whoſe death the Plaintiff was ſeiſed of the ſaid Office, and of the Herbage and Pannage, till diſſeiſed by the Defendants. To which the Defendants pleaded the general Iſſue, *Nul tort, nul diſſeiſin*; and as to the Office, the Recognitors of the Aſſiſe found for the Plaintiff,

Plaintiff; and as to the Herbage and Pannage they found the Letters Patents at large as above; and if the Herbage and Pannage pass by the said Letters Patents they found for the Plaintiff. And the matter in Law was such, The King grants the Herbage and Pannage of the Park of *C.* to *Tho. Markham* for life, and afterwards the King reciting the Grant to *Markham*, and that he is living, grants the Herbage and Pannage of the said Park to *Roger* Earl of *Rutland* for his life, without shewing when it shall begin. And if the said Grant to *Roger* Earl of *Rutland*, of the said Herbage, *&c.* were good or not, was the Question. And it was objected, that the said Grant to *Roger* Earl of *Rutland* was void for the incertainty of the beginning thereof, for it cannot begin presently, because that then *Markham* had it for life, and it doth not appear, that it should begin after the death of *Markham*, or Forfeiture, or Surrender, or when it should begin, and for such incertainty the Grant in the King's Case shall be void. And the Cases in 3 *H.* 7. *ult.* 6 *H.* 7. 14. and 8 *H.* 7. 12. were cited, that the King cannot grant the Reversion of an Office which one hath for life; but may recite how that such a one *habeat & teneat* such an Office for terme of his life, and grant *Offic' præd' post mortem*, &c. but if the King granteth the Office to another (without such special recital) for life, the second Grant is void. *Vide* 11 E. 4. 1. *b.* 32 E. 3. *Avowrie*, 112. But it was resolved by *Coke* Chief Justice, *Walmsley*, *Warburton*, *Daniel*, and *Foster*, Justices, that the said Grant of the Herbage and Pannage was good; and in this Case divers Points were resolved.

1. That the King hath divers manners of Inheritances. 1. Some to give only in Possession, and not in Reversion, as a Corody in a house of Religion, or to present to a Church of his Patronage, as it is agreed in 39 *H.* 6. 48. for in these Case, and other like, the King hath but a Presentation or Commendation when the Corodie or Church is void, and not before, and cannot give the Corodie or present to the Church in Reversion. 2. The King hath some Inheritances which the King may grant as well in Reversion, as in Possession, but he cannot use or exercise them himself, as Offices, as 1 *H.* 7. 29. *b.* a man granteth an Office of Service, as Foresterships, *&c. cum omnibus terris eidem Officio pertinentibus*, the Remainder to the King in Fee; in this Case, although that the King cannot be Officer to any one, yet the King is capable thereof, to grant the Office to another, which he himself cannot use or exercise; also such Office may be forfeited to the King, and the King may have an Inheritance in it to give, *&c. Vide* 3, 6, and 8 *H.* 7. before. 3. Other Inheritances the [56] King hath, as well to use and enjoy himself, as to grant to another, *scil.* in Possession, Remainder, or Reversion; as Houses, Lands, Tenements, Commons, Herbage, and Pannage, and the like, which are Parcels of his Inheritance.

2. It was resolved, That the King was not deceived in his Grant, for he hath recited the Estate of *Markham* which he hath in the Herbage and Pannage for terme of his life, and that *Markham* was then living, so that the King well knew that he could not grant that in Possession, which another then held for terme of his life, but it ought to take effect as it might by Law. And the Case of the Lord *Chandos*, in the Sixth Part of my *Reports*, was resolved to be a stronger Case, for there the King mistook the Law, thinking that by the surrender of the Letters Patents the Estate tail was extinct, and that he thereupon was seised in Fee, and therefore he granted the Mannor in Possession, and yet the Reversion did pass without any word of Reversion, for the Grant ought to take effect, as by Law it may; which Case of the Lord *Chandos* was affirmed for good Law by the whole Court: But in the Case at Barr the King mistook nothing, nor took upon him to grant that which he could not grant, nor was deceived in any part of his Grant; And when the King's Charter may be taken to two intents, in many Cases it shall be taken to such intent as is most beneficial for the King; but if it may be taken to one intent good, and to another intent void, then for the King's honor, and for the benefit of the Subject, it shall be taken to such intent as the King's Grant may take effect, for it was not the King's intent to make a void Grant. And therewith agreeth the Reason and Rules of the Book of 21 *E.* 4. 44. where King *Richard* the Second granted to the Abbot of *Waltham*, that he and his successors should not be *Collectores Decimarum*, &c. *Concess. Regi per Clerum Angliæ, nec alicujus inde parcell.* in that case if the Grant be taken litterally *per Clerum Angliæ*, that is, *per totum Clerum Angliæ*, the Grant is void; for all the Clergy of *England* never meet at one Convocation, but every Province hath a several Convocation, and therefore the King's Grant shall not be taken in such sense, for then the Grant shall be void; but it shall be taken in such sense as it may stand with Law, and that is by the Clergy, as the Clergy can grant Tenths, and that is in their several Provinces: and the same is also a stronger Case than the Case at Barr, for here the words of the Grant may well stand with the King's meaning, *scil.* to grant the Herbage and Pannage in Reversion, for in Possession he cannot grant it; but in the Case of 21 *E.* 4. the words of the Grant, and the King's intent varying, the Letter giveth place to the King's intention. And the Case of Sir *John Molyns*, in the Sixth Part of my *Reports*, was cited, in which Case also the words were against the King's intent, for at that time of the Grant there was not any [b] Chief Lord, for then all Segnories were extinguished; but yet for the King's honor, and to make his Grant to take effect, it was adjuged, that the Tenure was revived.

3. It was resolved, That there was not any Incertainty in the said Grant of the Herbage and Pannage to the Plaintiff when the same should take effect in Possession; for the same shall begin when the first Grant shall be ended and determined, and although it may determine by three ways, *scil.* Death, Surrender, or Forfeiture, yet it cannot determine but once, and which of them first happeneth, then the Grant to the Plaintiff shall begin: so that there is not any Incertainty in this Grant, for it is implied in Law, that the second Grant shall begin after the determination of the first Grant, *& expressio eorum quæ tacitè insunt nihil operatur.* And therefore, if the King reciting that such a one holdeth the Mannor of *D.* for his life, granteth the Manor to *B.* for his life; in this Case the Law implieth, that the second Grant shall take effect after the determination of the first Grant; the same

Law of a gift in Tail, or of a grant in Fee. And it was ſaid by *Coke* Chief Juſtice, and affirmed by other Juſtices, That of late times ſuch nice and ſtrict conſtruction hath been ſtreined by ſome of Letters Patents to ſubvert the force and effect of them, that many Letters Patents are drawn into Queſtion, which is to the King's diſhonour, the diſenheriſin of the Subject, and againſt the reaſon and ancient rule of the Law, as it appeareth in all our Books, *& talis certitudo certitudinem confundit*, ſuch nice and captious pretence of certainty doth confound true and legal certainty, *& maledicta Expoſitio eſt quæ corrumpit & confundit Textum.* And it was ſaid, That it was reſolved in Auditor *King*'s Caſe, That where the Queen granted a Mannor to *B.* and his heirs, (in the Premiſes of the Letters Patents,) To have and to hold the ſaid Mannor to *B.* and his Aſſigns (leaving out Heirs in the *Habendum*) that the Fee of the Mannor did paſs by the Premiſes of the Letters Patents, and the *Habendum* was void; for the Premiſes were certain enough to paſs the Fee-ſimple, and the omiſſion of Heirs in the *Habendum* ſhould not overthrow that which was certain in the Premiſes. Which Caſe was affirmed for good Law by the whole Court, for the Queen's intent doth appear to paſs a Fee-ſimple by the Premiſes, and her Grant ought to be conſtrued *ſecundum intentionem Regis, & non in deceptionem Regis:* and when a literal and ſtrict conſtruction is made to make his Grant void, *contra intentionem Regis*, it ſoundeth of deceipt, and it is a great indignity to him; *propter apices juris* to make his Charter under the Great Seal of things which he may lawfully grant, void and of none effect, *quia apices juris non ſunt jura.* And as to the Caſe of Office, it was ſaid, That the ſaid Books which were cited, prove that the King may not grant *reverſionem Officii*,
[57] for he hath no Reverſion, but an Inheritance grantable in Reverſion. Alſo when one is Officer for life, if the King, without reciting the ſame, granteth the Office to another for life, the ſecond Grant is void for want of a recital: But no Book ſaith, That if the King reciteth the firſt Grant of the Office, *&c.* and that the Officer is living, and granteth the Office to another for life, that this laſt Grant ſhall be void, for want of certainty of the beginning; for the Law, upon the matter which appeareth, ſhall limit the beginning, to the end the King's Grant ſhall not be void. And Exception was taken to the Plaint, foraſmuch as in alleging the Grant to the ſaid *Tho. Markham*, the Plaint is, That Queen *Elizabeth* did grant the Office *Parci ſui vocat. Clipſon Park* (without ſaying *prædict'*) and therefore it was objected, It ſhall be intended another Park. But it was reſolved, That upon Conſideration had of all the parts of the Plaint, it appeareth, that it was the ſame Park: For the Plaintiff doth begin his Plaint, *Pro titulo liberi tenementi de Officio prædicto.* Alſo he ſheweth, that the Queen was ſeiſed, *&c. de Parco prædicto*, and ſo ſeiſed, granted *Officium Parci ſui de Clipſon*, which ought to be intended the ſame Park whereof the ſeiſin was alleged at the time of the Grant, and the rather in reſpect of this Pronoun poſſeſſorie (*ſui*) and in all other parts of the Plaint (*prædict'*) is added. So that it is well ſaid in *Long*'s Caſe in the Fifth Part of my *Reports*, that there are three manners of Certainties; 1. Certain in a common intent, and that ſufficeth in Barrs for thoſe who defend themſelves: 2. To a certain intent in general, and that is ſufficient in Indictments, Plaints, Counts, and Replications, *&c.* 3. To a certain intent to every particular intent, and that is rejected in Law, for there it is ſaid, *Quod talis certitudo certitudinem confundit*: and ſo was it adjudged in the Point in Aſſiſe brought by the Lady *Ruſſel* againſt the Lord Admiral: and this Aſſiſe being (after a general Verdict for the Plaintiff for part, and a ſpecial Verdict for the reſidue) adjorned into the Common Pleas, Judgement was there given; But the Aſſiſe ought to be brought *in proprio Comitatu*, by the Statute of *Magna Charta*, *cap.* 12.

And after this Judgement a Writ of *Error* was brought, and all that which was reſolved by the Court of Common Pleas was affirmed for good Law, by *Fleming* Chief Juſtice; *Fenner*, *Yelverton*, *Williams*, and *Crooke*, Juſtices of the King's Bench. But for other *Errors* not aſſigned nor moved in the Common Pleas, in which the Juſtices of the King's Bench were not all agreed, the Judgement was reverſed. And ſo this Caſe, as to the Points reported by me, was reſolved by both
[b] Courts: And afterwards, upon a new Aſſiſe brought before *Warburton* and *Foſter*, Juſtices of Aſſiſe in the County of *Derby*, at the next Aſſiſes, the Plaintiff had a general Verdict, according to the opinion of all the Juſtices, and Judgement alſo at the ſame Aſſiſes, and Execution awarded, *&c. Et ſic finita eſt iſta Quæſtio.*

Mich. 6 Jacobi.

Beecher's Caſe.

[58] BEE *cher* brought Debt upon two Obligations, one of 3000 *li.* the other of 2000 *li.* by *Quo minus* in the Exchequer againſt Sir *Thomas Shirley*, Knight, who *Trin.* 41 *Eliz.* pleaded in barr payment according to the Conditions of the Obligations, *&c.* and the Parties were at iſſue, and tried for the Plaintiff: but for default of a good Viſne Judgement was arreſted, and afterwards, *ſcil. Hill.* 44 *Eliz.* the Plaintiff *per Johannem Osbourne*, his Attorney, *venit hic in Curia, & fatetur ſe in Curia hic ulterius nolle proſequi:* upon which Judgement was given that the Defendant *eat ſine die*, and no Amercement upon the Plaintiff. Upon which Judgement the Plaintiff brought a Writ of *Error* in the Exchequer Chamber: and upon ſundry Arguments by the Plaintiffs and Defendants Counſel

Counsel at several days, It was resolved by the Court, and the two Chief Justices, that the Judgement was erroneous for divers Causes.

1. It was resolved, That a *Rextraxit* cannot be, if not that the Plaintif or Defendant be in Court in proper person, for the Entry is in divers manners, (as it appeareth after) as, *Quod Querens in propria persona sua venit & dicit, quod ipse placitum suum prædict' ulterius prosequi non vult, sed abinde omnino se retraxit*, &c. or being present in Court and demanded, where the Entry is, *à secta sua prædicta in contemptum Curiæ se retraxit*, or, *fatetur se ulterius nolle prosequi*, &c. and therewith agreeth 3 *H.* 6. 14. 21 *E.* 4. 43. & 4 *E.* 3. 23. where the Case was, That three Coparceners were Plaintiffs in a Writ of *Deceit*, and two of them did appear in person, and the third by Attorney; and said, that they would not forward sue, and could not, because that one was by Attorney; for which cause they were Non-sute. *Vide Lib. d'Entries*, 92. *title Attaint*, Br. 5. *title Appeale*, 56. *title Tresp.* 589. *a.* 13, 14, 15, 16. *title Conspiracy*, 125. *b.* 6 *Edw.* 3. 30, and 31. *John Fremd's* Case, in a *Formedon*, the Attorney of the Tenant cannot depart in despight of the Court, but a *Grand cape* shall be awarded. And it is to know, that at the Common Law, when any one was by the King's Writ commanded to appear, it was alwaies taken that he should appear in person, and could not appear by Attorney; but after that he had appeared, the Courts of Chancery, King's Bench, and Common Pleas, and all other Judges who held Plea by Writ, might, after appearance, have admitted him by Attorney: otherwise when Plea was holden without Writ, if the King granted not a Writ *De Attornato faciendo*, and that appeareth by *Britton, cap.* 126. *fol.* 287. But see the Statute of *Westm.* 2. *cap.* 11. and other Statutes, which gave remedy in many cases, but the Case at Barr is not remedied by any Statute. But it was objected, That it is true, in rigor of Law, the Plaintiff in the Case at Barr ought to have appeared in proper person, but yet it is not Error; for if the Court admit the Plaintiff or Defendant by Attorney where he ought for to appear in person, it is not Error; as in 37 *H.* 6. 27. If the Court admit one upon a *Capias* or *Exigent* by Attorney, where by rigor of Law he ought to appear in person, it is not Error. *F. N. B.* 25. *acc.* To that, it was answered and resolved, That there is a difference between Cases where the Defendant or Tenant cannot by the Law appear by Attorney, and in Cases where the Defendant or Tenant may appear by Attorney, but upon some Process by reason of some Default or Contempt; he ought to appear in person. In the first Case, If the Court admit the Defendant or Tenant by Attorney, the same is Error; but in the other not: *come si inf. soit admit de appearer per Attorn. ceo est Error, &c. mes quant le Defendant poit fair Attorney*, and the cause that enforceth him to appear in person, is the Contempt to the Court, and the Court may dispense with the Contempt in their discretion, and admit him by Attorney, and that is no prejudice to the Plaintiff; But in the Case at Barr, the Law requireth that he appeare in proper person to make the *Retraxit*, because it shall be a perpetual Barr, and in a manner a Release, and the admittance of the Court cannot prejudice the Plaintiff in so high a degree. But in all dilatory matters the admission of the Court may turn the Plaintiff or Demandant to delay, but shall never barr the Plaintiff or Demandant; As if the Court granteth Process against the Testimonies, or grant View, or Aid, where it is not grantable, it is no Error, as it is holden in 5 *H.* 7. 8. and 8 *H.* 7. 9. *b.* and the reason is given there, because the Demandant is not prejudiced in his Right, but only detained; But if the Court admit a Voucher where it ought not to be, the same is Error, as it is holden 8 *H.* 7. 11. *a.* The same Law if an Essoign be cast and allowed where it is not allowable, it is not Error; but to deny any of these dilatories, where of right the Court ought to grant them, is Error, as appeareth in the said Books, and 21 *E.* 4. 65. 22 *E.* 4. 15, &c. And a *Retraxit* is alwaies on the Plaintiff or Demandant's part, and a Departure in despight of Court is alwaies on the Defendant's or Tenant's part, and the Entry there is, *Quod Tenens recessit in contemptum Curiæ*, and in one Case the Plaintiff or Demandant is barred, and in the other Case the Plaintiff or Demandant shall have Judgement presently, *Qui semel Actionem renunciavit amplius repetere non potest.* See for these matters, 20 *E.* 2. *Excommengement* 28. 4 *E.* 3. 23. *in Formedon.* 6 *E.* 3. 31, 32, 34. *in Quare impedit.* 8 *E.* 3. 3. *b.* & 68. 38 *E.* 3. 13. 16 *Rich.* 2. *Cause de remover Plea*, 12. 3 *H.* 4. 2. 11 *H.* 4. 94. 3 *H.* 6. 13. 9 *H.* 6. 38. 39 *H.* 6. 16. 33. *Prisoit.* 7 *H.* 7. 39. *Vide tit. Departure in Despight of Court*, Brooke.

[b]

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2. It was resolved, That the Plaintiff in this case ought to be amerced, for it is a stronger case than the case of a Non-sute, which is but a Default, or Not-appearance; but a *Retraxit* is a voluntary acknowledgement that he hath no cause of Action, and therefore he will no farther proceed; and for this cause it is a Barr for ever. And it was objected, That the Plaintiff should not assign that for Error, because it was for his advantage that he was not amerced, and a man shall never assign that for Error which is for his advantage, 7 *E.* 3. 25. by *Herle*, 8 *H.* 5. 2. 11 *H.* 4. 8. *F. N. B.* 21. as to say, that he was essoigned, where he ought not to be essoigned, or that he had a longer day then the common day, or that Aid was granted to him where it was not grantable. To which it was answered and resolved, That it is true, that in Proceeding or Delay, which is advantageous for the Party, he shall not assign it for Error; but in the Case at Barr the Judgement is not perfect, for the Amercement ought to be parcel of the Judgement, and it is also for the King's advantage, and therefore divers Judgements have been reversed in the King's Bench, because that the Judgement was, *Ideo in misericordia*, where it should be, *Capiatur*; and yet it was for the Partie's advantage; but because the Judgement was erronious, and the Error of the Court in giving it; for this cause it hath been often adjudged, that it is not amendable, but the whole Judgement shall be reversed. *Vide* 29 *Ass. pl.* 26. 7 *E.* 6. *Dyer* 89. 14 *Eliz. Dyer* 315. See now the Doubts well explained. And because it is material in all Judgements to know when the Plaintiff or Demandant, Tenant or Defendant shall be amerced or fined, in as much as the mistaking thereof doth make the Judgement erronious, it is very necessary to understand the true sense of Law in these Cases.

[b]

And this word (*finis*) hath divers ſignifications in Law, *quia aliquando ſignificat Pretium, aliquando Pœnam, & aliquando Pacem.* For, 1. The Price or Sum which is the cauſe of obtaining of a Benefit is called a Fine, as Fine in the Hamper for the King's Writs, Fine for Alienation, Fine for Admiſſion of a Copyholder, Fine for obtaining Leaſes, and other like. 2. That which the Offendor giveth in ſatisfaction of his Offence, is called a Fine, and in that ſence, it is *Pœna.* And, 3. The Aſſurance which men have of enjoying their Lands and Inheritances in peace, is called a Fine, *quia finem litibus imponit.* And all theſe are called Fines, becauſe they are Ends, or Cauſes of Ends, of all the ſaid Buſineſſes.

Amercement is in *Latin* called *Miſericordia*, and the Cauſe thereof is, becauſe by the Common Law (which is a Law of mercy) no man ought to be amerced ſo much as he deſerved, but leſs. *Vide F. N. B. 76.*

1. In all Actions *Quare vi & armis*, as *Reſcous*, *Treſp. vi & armis*, &c. if Judgement be given againſt the Defendant, he ſhall be fined and impriſoned, for to every Fine, Impriſonment is incident; and alwaies when the Judgement is, *quod Defendens capiatur*, it is as much as to ſay, *Capiatur uſque finem fecit. Vide 19 H. 6. 8. 34 H. 6. 24. 11 H. 4. 25. 30 Aſſ. pl. 28.* And if there be divers Defendants, they ſhall be ſeverally fined. So in an *Aſſiſe*, if the Diſſeiſin be found with force, the Defendant ſhall be fined and impriſoned; otherwiſe if the Diſſeiſin be found without force; for the Writ of *Aſſiſe* doth not mention *vi & armis*, but, *injuſtè & ſine judicio diſſeiſivit*, *33 H. 6. 21.*

2. In a Writ of *Deceit* upon a real Action upon a Recovery by default, if it be found that the Tenant was not lawfully ſummoned, the Judgement ſhall be, *Et prædict' Defend' pro falſitate & deceptione prædict' capiatur:* and the writ of *Deceit* is, *Oſtenſum eſt nobis ex parte A. quod B. in Curia noſtra falſo & in deceptione Curiæ recuperavit ſeiſinam*, &c. and that is the cauſe, *ſcil.* the deceit to the Court in obtaining the Judgement, that he ſhall be fined and impriſoned; but in an Action perſonal, the deceit between party and party, is in the nature of an Action upon the Caſe, there the Defendant ſhall not be fined and impriſoned, but only amerced, for there is no deceit done to the Court, but to the party.

[60] 3. If the Defendant plead a falſe Deed to him, or deny his own Deed, and the ſame be found againſt him, or if he, *relicta verificatione*, doth confeſs the Action, he ſhall be fined for his Falſitie, *quia certi debemus de proprio facto*; but if he denieth his Anceſtors Deed, or pleadeth the Deed of his Anceſtor, and ſame be found againſt him, yet he ſhall not be fined, but amerced only, *quia de alieno facto.* So you will better underſtand your Books in *3 E. 6. Dyer 67. 26 Aſſ. p. 5. 33 H. 6. 54. 34 H. 6. 20.* But if he denieth a Recovery, or other Record to which he is party, he ſhall not be fined, *10 Aſſ. p. 10. 16 Aſſ. p. 19.* for it is not his act, but the act of the Court, and he doth not deny the Record abſolutely, but, *non habetur tale recordum.*

4. If the Defendant in a *Replevin* claimeth Property falſely, and it is ſo found in *proprietate probanda*, he ſhall be fined and impriſoned, *11 H. 4. 4.*

5. In *Appeal* of Death, Robbery, or other Appeal of Felony or Mayhem, if the Plaintiff be barred, or if he be non-ſute, or if the Writ abate by his own default he ſhall be fined and impriſoned, *8 H. 4. 17. 20.* for the Malice is the higher which concerneth life or member.

6. So in Attaint *32 Aſſ. p. 9. 42 E. 3. 26.* if the Plaintiff be nonſute or barred, he ſhall be fined and impriſoned. So if the *Attaint* paſs againſt the Defendant, if he were not party to the firſt Record, he ſhall be fined and impriſoned, but if he were not party to the firſt Record, as Tenant by Receit, or other Terr-tenant, he ſhall not be fined, *14 Aſſ. p. 2. 42 E. 3. 26. 9 E. 4. 33.*

7. If any uſeth the Countenance of the Court (which was conſtituted to make an end of Controverſies and Sutes) for double Vexation, he ſhall be fined: As if a man ſueth in the Common Pleas, and afterwards for the ſame cauſe ſueth in *London*, or any ſuch Court, the Plaintiff ſhall be fined for his unjuſt Vexation, *9 H. 6. 55. 14 H. 7. 7.* and in a *Recaption* the Plaintiff ſhall recover damages, and the Defendant ſhall be fined and impriſoned for his double Vexation.

8. For Contempts done to any Court of Record againſt the King's Command by his Writ under the Great Seal, the Defendant ſhall be fined and impriſoned, as in *Quare non dimiſit, Quare incumbravit, Attachment upon Prohibition*, &c. *Vide 19 E. 3. Quare non dimiſit, 7. 23 E. 3. 22. 26 E. 3. 75. 20 E. 2. Coron. 233. Stamf. 132. The Statute of 25 E. 3. cap. 6.* &c. but when the Demandant or Plaintiff, or the Tenant or Defendant, *ſe retraxit*, or *receſſit, in contemptum Curiæ*, yet there is no Contempt againſt the King's Command by his Writ. And by theſe differences you will better un-
[b] derſtand your Books in caſes of Fines and Impriſonment, and learn the true reaſon and ſenſe of the Law.

9. In all Caſes, where a thing is forbidden by any Statute, the Offender ſhall be fined and impriſoned, *35 H. 6. b. 19 H. 6. 4.* in *Maintenance. Vide 9 E. 4. 28.* And that is the reaſon, That where the Statute of *Marlebridge* forbiddeth, *Quod nullus de cætero liceat ex quacunque cauſa diſtrictiones facere extra feodum ſuum, nec in Regia via, vel communi Strata*; that the party who is diſtreined in the High-way cannot plead the ſame in barr of Avowrie, for then the King ſhould loſe his Fine; but ſhall be driven to an Action upon the Statute, in which the King ſhall have his Fine, and therewith agreeth *11 R. 2. Avowrie, 87. Vide 19 E. 2. bre. 8. 41. 21 E. 3. 11. 39 E. 3. 20. 43 E. 3. 30. F. N. B. 90. & 173. Regiſter 97.*

10. In ſome Action the Defendant ſhall be fined in one Court, and but amerced in another Court, and yet the Offence ſhall be all one; as in a Writ of *Recaption*, if it be brought in the Common Pleas, and Judgement be there given, the Defendant ſhall be fined and impriſoned as hath been ſaid, but if the Writ be brought in the County Court, and the Defendant be convict before the Sheriff in the County, the Judgement ſhall not be, *Quod capiatur, quia nulla Curia, quæ recordum non habet,*

habet, poteſt imponere finem, neque aliquem mandare Carceri, quia iſta ſpectant tantummodo ad Curias de Recordo, and therefore in ſuch Caſes he ſhall be only amerced. And although that the Writ, *ſcil.* the Reception is of Record, yet foraſmuch as the Judges in the Court, *ſcil.* the Suters are not Judges of Record, nor the Court is of Record, they cannot impoſe a Fine, or commit to Priſon. And ſo in the like Caſes. *Vide F. N. B. 73. d.* 8 E. 4. 5. 34 H. 6. 24.

Now is to ſee concerning Amercement.

1. In all Writs of *Præcipe quod reddat*, as Writ of Right, Formedon, Writ of Aiel, *&c.* Writs of Entrie, *&c. Præcipe de quod permittat*, as to have Eſtovers, Common, *&c.* Or, *Præcipe quod faciat*, as Writ of Cuſtoms and Services, *&c.* If the Demandant be barred, or if he be Nonſute, or if his Writ abate for matter or form, the Demandant ſhall be amerced. But if there be two Demandants, and the Writ abate for the death of one of them, the other ſhall not be amerced, 28 E. 3. 23. 46 E. 3. *in tit. Accompt* 40. 5 E. 3. 3. 22 H. 6. 7. 38 E. 3. 31. 7 H. 6. 36. 41 *Aſſ.* 14. So in all the ſaid Writs of *Præcipe*, if Judgement be given againſt the Defendant or Tenant he ſhall be amerced.

2. In all Perſonal Actions, as Det, Detinue, and the like Actions without force or deceit to the Court, and alſo in Actions which comprehend force or deceit to a Court of Record; if the Plaintiff be barred, nonſute, or the Writ abate becauſe vicious in matter, or form, he ſhall be amerced only, and not fined; but if the Writ abate by the death of one Plaintiff, or if one Plaintiff appeareth, and the other be nonſute, (which in Law in a Perſonal Action is a Nonſute of both) he who ſurviveth, or appeareth, ſhall not be amerced; for no default is in him, but he onely who appeareth not. 47 E. 3. 6. & 43 *Aſſ. pl.* 3. 7 H. 6. 36. 38 E. 3. 31. 41 *Aſſ.* 14 And in the ſame Actions which are without force or fraud to the Court, the Defendant ſhall be amerced. [61]

3. If one Demandant in a real Action, or one Plaintiff in a perſonal Action where Summons and Severance lieth, as in Debt by Executors, if one Demandant or Plaintiff be nonſute, and the other ſueth forward, he who is nonſute ſhall not be amerced, 28 H. 6. 1. 21 E. 4. 77.

4. In all judicial Proceſs if the Plaintiff be barred, nonſute, or if the Writ abate, the Plaintiff ſhall not be amerced, becauſe that the Proceſs is founded upon a Judgement and Record, 11 H. 4. 55. in *Quid Juris clamat*, *Scire facias*, &c. 21 E. 3. 23. 9 E. 3. 32. in *Per quæ ſervicia*, 18 *Hen.* 6. *tit. Pledges* 1. And in theſe Actions the Plaintiff ſhall not find Sureties, becauſe that he ſhall not be amerced.

5. In all Actions real and perſonal, if part be found for the Demandant or Plaintiff, and part againſt him, or all or part againſt one Tenant or Defendant, and nothing, or but part, againſt the other, the Demandant or Plaintiff ſhall be amerced; if not that no default be in the Demandant or Plaintiff. And therefore in Treſpaſs of Batterie againſt Husband and Wife, ſuppoſing the Batterie to be done by them both, and the Wife is only found guilty, *&c.* and the Husband acquitted, yet the Plaintiff ſhall not be amerced, for the Plaintiff cannot have another Writ in ſuch caſe, and no default in him. *Vide* 22 *Aſſ.* 8. 7 *Aſſ. pl.* 14. 31 *Aſſ. pl.* 31. *Br. Amerc.* 42. 40 E. 3. 40. 21 H. 6. 41.

6. In all Actions real or perſonal, where there is but one Tenant or Defendant, he ſhall not be twice amerced, but there where there is but one Demandant or Plaintiff, the Plaintiff may be divers times amerced, 9 E. 3. 6. 31 *Aſſ. pl.* 31. 21 H. 6. 41. 40 E. 3. 40.

7. Upon Diſcontinuance in a real or perſonal Action the Demandant or Plaintiff ſhall not be amerced, for the ſame is the Act of the Court, 38 E. 3. 31. The ſame Law, and for the ſame cauſe, when the Court is ouſted of the Jurisdiction. [b]

8. In all Actions real or perſonal (in which there is not contained any force or deceit to the Court) if the Tenant or Defendant appeareth the firſt day, and rendreth the thing demanded to the Demandant or Plaintiff, he ſhall not be amerced; for he doth what the King commandeth by his Writ; for where the Writ is, *Præcipe quid reddat*, &c. the ſame in Judgement of Law is, that he render the ſame at the return of the Writ in Court, and not in the Country, as it is reſolved in *Vaughan's* Caſe, in the Fifth Part of my *Reports*, *fol.* 49. And there the cauſe of the Amercement of the Defendant or Tenant is well explained. But in Actions in which the Offence is ſuppoſed with force, or in deceit of the Court, if the Defendant at the firſt day confeſſeth the Action, yet he ſhall be fined and impriſoned, for his Appearance and Confeſſion is a manifeſtation, and no ſatisfaction for the Offence.

9. In all Actions, when a real and perſonal Writ doth abate for want of form or matter, or the Demandant or Plaintiff be barred, the Judgement is, *Quod Petens, ſive Querens nihil cap. per breve ſuum, ſed ſit in miſericord' pro falſo clamore ſuo inde, & præd' Tenens ſeu Defendens eat inde ſine die.* And in all ſuch Caſes the Eſtreat out of the Common Pleas into the Exchequer, which the Clerk of the Warrants maketh in ſuch Caſes is, *De A. pro falſo clamore ſuo verſus S. in placito*, &c. *Vide Fitz. Nat. Brev.* 76. But if the Demandant or Plaintiff be nonſute in any Action (certain ſpecial Caſes excepted) the Judgement is, *Ideo conſideratum eſt quod prædict' Querens & Plegii ſui de proſequendo ſint inde in miſericordia*, &c. *& præd' Def. eat inde ſine die*; and there the Eſtreat is, *De Johanne N. pro ſe & pleg. ſuis, quia non eſt proſecutus breve ſuum verſus B. in placito*, &c. *Vide Fitz. Nat. Brev.* 76. But in Caſe of *Retraxit* the Judgement is, *Quod nihil capiat per breve ſuum præd', ſed ſit in miſericordia pro falſo clamore*, &c.

10. That there are ſome perſons who ſhall not be amerced, and therefore they ſhall not find Sureties; ſome for the dignity of their perſons, as the King, and ſo the Queen, for as to that ſhe partaketh of the King's Prerogative. *Vide Fitz. Nat. Brev.* 31. *fol.* 47. *C.* 101. *A.* 18 *Edw.* 3. 2. *Br. tit. Amerecement* 53. Some for imbecillity of age, as Infants, and therefore they ſhall not find Sureties; but the Entrie is, *Ideo in miſericordia, ſed perdonatur, quia Infans. Vide* 43 *Aſſ.* 45. 44 E. 3.

Amerce-

Amercement 10. 3 *Edw.* 3. *Infant* 14. 14 *Aſſ. pl.* 41. 17 *Edw.* 3. 75. *Bract. fol.* 254. *Fitzh. Nat. Brev.* 195. h.

[62] Thirdly: True it is, if the Tenant do diſclaim, he ſhall not have a Writ of Error, becauſe that by his diſclaimer he hath barred himſelf of the Right of the Land, for the words of Diſclaimer of the Tenant are, *Nihil habet, nec habere clamat, in terra illa, nec die impetrationis originalis brev. prædict'*, &c. *habuit, ſive clamavit, ſed aliquid in terra illa habere de advocat. & diſclamat.* And againſt the ſame he cannot have a Writ of Error to have reſtitution of the Land againſt this diſclaimer. *Vide 6 Edw.* 3. 7. and *Fitz. Nat. Brev.* 22. *C.* And if the *Retraxit* in the Caſe at Barr had been duly made, it was objected, That againſt the ſame no Writ of Error lay; but here the *Retraxit* it ſelf was erroneous; becauſe the Atturney did it where it ought to be done in proper perſon. Alſo the Plea was diſcontinued, as appeareth by the Record. And foraſmuch as the Tenant or Defendant after the departure in deſpight of the Court might have a Writ of Error, or if he hath an Eſtate for life or in tail, *Quod ei deforceat*, *Fitz. Nat. Brev.* 155. l. And the Defendant or Tenant againſt his own confeſſion may have a Writ of Error; It was reſolved, That although the Plaintiff in proper perſon had made a *Retraxit*, yet he may have a Writ of Error, either in the Judgement or in the Proceeding; for no imperfection is ſaved in ſuch Caſe by any Statute when Judgement is given upon *Retraxit*, and it is no more than a Confeſſion of the Party of the Defendant; for the effect of the Entrie of a *Retraxit* is, *Quod idem Querens fatetur (ſeu cognovit) ſe ulterius nolle proſequi verſus Def. de placito præd'*, which Confeſſion is a Barr in all Actions, although that the words are *de placito ſuo prædicto*, and therefore it is not like a Diſclaimer, by which the Tenant diſclaimeth, and barrs himſelf abſolutely of all his Right in the Land.

Fourthly: It was reſolved; That the Entrie of the ſaid *Retraxit* was inſufficient; for it appeareth by the Precedents that there are ſundry manners of Entries of a *Retraxit*. 1. After both Parties have appeared in Court, the Entrie is, *Et poſtea eodem die revenit hic ad barram præd' Tenens per Attorn. ſuum præd. & præd' Petens tunc ſolemniter exactus non venit, ſed à ſecta ſua præd' in contempt' Cur' ſe retraxit. Ideo conſideratum eſt quod Petens nihil capiat per brev. ſuum præd. ſed ſit in miſericordia pro falſo ſuo clamore inde, & quod prædictus Tenens eat ſine die.* And that appeareth, *Trint.* 5 *Hen.* 6. *Rott.* 320. in the Common Pleas. Another form of a *Retraxit* is, *Et ſuper hoc idem Querens dicit, quod ipſe non vult ulterius placitum ſuum præd. proſequi, ſed abinde omnino ſe retraxit*, &c. *Ideo*, &c. Another form is, *Quod idem Querens fatetur ſe (ſeu cognovit ſe) ulterius nolle proſequi verſus præd' Defendent.* &c. *de placito præd.* And the Entrie of departure in deſpight of

[b] Court on the part of the Tenant is, *Et prædict' A. licet ſolemniter exactus non revenit, ſed in contemptum Curiæ receſſit & defaltam fecit.* And the ſame is when in Judgement of Law he is preſent in Court, and being demanded departeth in deſpight of the Court, the ſame amounteth to a Bar in reſpect of the deſpight and contempt of the Court; and yet the Judgement is there given upon his default, as appearth before. Otherwiſe where he imparleth to a certain day, for there he is not in Judgement of Law preſent in Court; and ſo the difference. *Vide anno* 20 *Edwardi* 3. *Excom.* 22. and all the Books aforeſaid. And if the Writ do abate for falſe *Latin*, or other matter or form upon Plea to the Writ, the Judgement is, *Quod præd. Tenens*, or *Defendens, eat inde ſine die.* And alſo if the Demandant or Plaintiff be upon a Barr pleaded, &c. by Judgement of Law to be barred, the words of the Judgement are all one, *ſcil. quod præd' Tenens*, or *Defendens, eat inde ſine die*; and alwaies the Judgement ſhall have relation to the Plea, *ſcil.* if upon a Plea in Barr, then the Judgement ſhall be applied to it: If to the Writ, then the Judgement ſhall be applied to the Writ only; and therewith agree the Books in 3 *H.* 4. 1. & 3 *H.* 4. 11. *Vide* upon Plea of Excom. which doth not abate the Writ, 11 *Rich.* 2. *Excom.* 25. the Entry is, *Remaneat loquela ſine die quouſque*, &c.

Mich. 6 Jacobi. *In the Common Pleas.*

Swayn's Caſe.

[63] *Richard Swayne*, Eſquire, brought an Action of Treſpaſs againſt *Walter Becket*, for breaking of his Cloſe at *Hannington* in the County of *Wilts*, and lopping of 10 Oaks and 15 Aſhes, &c. And upon Not-guilty, the Caſe as it was ſpecially found, was ſuch; Queen *Elizabeth* was ſeiſed of the Mannor of *Hannington* in the County of *Wilts* in Fee in the Right of her Dutchy of *Lancaſter*, and that the ſaid Oakes and Aſhes ſo lopped, were growing upon a yard and a half of Land parcel of the ſame Mannor and Copyhold Land, &c. and demiſable for 1, 2, or 3 Lives; And afterwards the Queen by Indenture under the Seal of the Dutchy of *Lancaſter*, *Anno* 29. of her reign did demiſe the ſame Mannor to *John Wolly*, Eſquire, *exceptis omnibus boſcis, ſubboſcis, arboribus, & marem.* &c. To have and to hold to him (except before excepted) for 21 years, who, 35 *Eliz.* aſſigned all his Intereſt to *John Plummer*, and others, and afterwards the Queen died, and then the King that now is, by his Letters Patents under the Dutchy Seal, granted to *Alexander*, Lord *Fitz*, *Richard Swayne*, and *Peter Whetcombe*, *reverſionem prædict' ac præmiſſa ſic ut præfertur, except.* And at a Court holden by the Leſſee 17 *Octobr.* 3 *Jac. Regis*, their Steward granted by Copy of Court Roll, to the ſaid *Walter Becket* now Defendant, &c. a Houſe, and the ſaid yard and a half of Land upon which the ſaid Oaks and Aſhes were growing, for term of Life, *ſecundum conſuetudinem Manerii*;

and

and that within the ſaid Manor there hath been ſuch a Cuſtome, That every Copyholder, Tenant for life hath uſed to take all Trees growing upon their Copyhold Lands, to be imploied for fewel in his Copyhold houſe, and for Bounds and Fences, and other neceſſary Reparations to be in and upon the Cuſtomary Lands and Tenements; And that the Defendant did lop the ſaid Trees upon his Copyhold, and imployed the ſame for Bounds and Fences in and upon his Copyhold Lands and Tenements, *&c.* And the Doubt was, That foraſmuch as the ſaid Leſſees held the Court by virtue of the ſaid Leaſe of the Manor, (out of which Leaſe the ſaid Trees were excepted) if the Defendant, to whom they by their Steward granted the ſaid Tenements by Copy, might lop the ſaid Trees, which by the ſaid Exception were divided from the ſaid Leaſe. And in this Caſe divers Points were reſolved by *Coke* Chief Juſtice, *Walmſley*, *Warburton*, *Daniel*, and *Foſter*, as after appeareth. But firſt it was objected, *Quod nemo poteſt plus juris in alium transferre quam ipſe habet*; and the Lords *pro tempore* who held the ſaid Court, and made the Grant to the Defendant, had nothing in the Trees, for they were excepted out of their Leaſe; *Ergo*, the Copyholder who claimeth by Grant of the Leſſees could not meddle with the Trees. But it was anſwered and reſolved by the whole Court, that notwithſtanding the Severance by the Exception, and notwithſtanding that the Defendant came in by a voluntary Grant of the Lords for life, and not by Surrender, that yet ſuch Grantee by Copy ſhould have Eſtovers; For the Eſtate of the Copyholder (who cometh in by voluntary Grant) is not derived out of the Eſtate or Intereſt of the Lord of the Manor, for the Lord of the Manor is but an Inſtrument to make the Grant: but the Cuſtom of the Manor (after the Grant made) eſtabliſheth and maketh it firm to the Grantee: ſo that although the Grant be new, yet the title of the Copyholder is ancient, and ſo ancient that the ſame by force of Cuſtom exceedeth the memory of Man. And therefore neither for Infancy, *Non ſanæ memoriæ*, Coverture, nor other ſuch diſabilities, neither in reſpect of exility, baſeneſs, or incertainty of the Intereſts or Eſtates of the Lords (as at Will, or upon Condition, *&c.*) the Grants by Copy ſhall be avoided, becauſe they claim in by force of a good and ancient Cuſtom which hath no diſability of Perſon, or defect of a perfect Intereſt. And *Paſch.* 26 *Eliz.* in the King's Bench it was adjudged, That if the Lord taketh a Wife, and afterwards granteth the Land by Copy according to the Cuſtom, and dieth, his Wife being endowed of the Land amongſt other, ſhall not avoid the Eſtate by Copy, for although that her Title of Dower was before the Grant, yet the Title of the Copyholder, which is the Cuſtom, is ancienter than the Title of Dower; and ſo the Copyholder, who cometh in by voluntary Grant, ſhall not be ſubject to the Charges or Incumbrances of the Lord before the Grant. And all that, in this Caſe was affirmed for good Law. 2. It was reſolved, That when the Copyholders for life, according to Cuſtom, have uſed to have Common in the Waſtes of the Lord of the Manor, or Eſtovers in his Woods, or any other Profit apprender in any other part of the Manor, and afterwards the Lord alieneth the Waſtes, or Woods, to another in Fee, and afterwards granteth certain Copyhold houſes and lands for Lives, ſuch Grantees ſhall have Common of Paſture, or Common of Eſtovers, *&c.* notwithſtanding the Severance, for the Title of the Copyholder, is paramount the Severance, and the Cuſtom doth unite the Common, or Eſtovers, which are but Acceſſories or incident, as long as the Houſe and Lands being principal, is maintained by the Cuſtom, which cuſtomary Appurtenances are not appertaining to the Eſtate of the Lord, for he is the Owner of the Freehold and Inheritance of all the Manor, but they are appertaining to the cuſtomary Eſtate of the Copyholder, after the Grant made unto him. Which Profit apprender being due by Cuſtom to the Copyhold Tenement, notwithſtanding the Feoffement or Fine, *&c.* of the Waſte or Woods, made by the Lord, doth remain and is preſerved by the Cuſtom, which is, as hath been ſaid, the Title of the Copyholder, and is paramount the Severance: But if the Copyholder had derived his Intereſt from the Eſtate of the Lord, then clearly by the Feoffement, or Fine, *&c.* of the Lord, all thoſe who claim by him ſhall be barred of any Profit apprender in the ſame Waſte or Woods. See *Murrel's* Caſe, in the Fourth Part of my *Reports*, that after the Cuſtom hath fixed a cuſtomary Intereſt, no Severance of the Inheritance ſhall overthrow the Copyhold. And ſee *Brown's* Caſe, *ibid.* And if a man granteth a Rent to another upon Condition, and afterwards maketh a Feoffement of the Land, yet the Condition to determine the Rent doth remain, and is not extinct by the Feoffement, for it is collateral to the Title of the Land. And note a difference between Preſcription which is made in the Perſon of any, as he and all his Anceſtors, *&c.* and all thoſe whoſe Eſtate he hath, *&c.* and Cuſtom which lieth upon the Land, as *infra Manerium talis habetur Conſuetudo*, &c. And this Cuſtom ſhall bind the Law, as *Gavelkind*, *Borough-Engliſh*, and the like. But after ſuch Severance of the Waſte, or Woods, *&c.* The Copyholder, when he entitleth himſelf to Common, or Eſtovers, *&c.* in pleading, ſhall not plead generally, *quod infra Manerium prædict' talis habetur*, &c. *Conſuetudo*, &c. for after the Severance, the Waſte or Wood, *&c.* is not within the Manor, but abſolutely divided from it; but ſhall plead that until ſuch a time, *ſcil.* before the Severance, *talis habetur*, *& toto tempore*, &c. *Conſuetudo*, &c. And then ſhew the Severance, as he ought in the Caſe of *Murrell*, where the Lord of the Manor alieneth the Freehold and Inheritance of the Copyhold. *Vide* 3 *H.* 6. 9. 11 *H.* 6. 23. 39 *H.* 6. 13, 14. 7 *E.* 4. 32. 20 *E.* 4. 6. *b.* 22 *E.* 4. 44. And *Coke* chief Juſtice ſaid, That the Caſe at Barr was a general Caſe, for in all Leaſes of Manors made by Queen *Elizabeth*, or the King that now is, ſuch Exception of Trees and Timber is. And Judgement was given for the Defendant.

[b] [64]

Mich. 6 Jacobi.

Sir *William Foſter*'s Caſe.

[b] IN a *Replevin* between *Bernard Cowper* Plaintiff, and Sir *William Foſter* Defendant, of taking his Cattel, *ultimo die Auguſti, anno quarto Jacobi Regis*, at *Stratfield* in the County of *Berks*, in a certain place called *Rye-piddle*, the ſaid Sir *William* did avow the taking as Baily of *Edward Gregory*, Eſquire, and *Mary* his Wife, Adminiſtratrix of the Good's and Chattels which were *Thomas Foſter*'s, Gent. and ſaid, that the place where doth contain three Acres of Land, parcel of the Manor of *Bechilwick* in the ſaid County, whereof *Charles Foſter*, Eſquire, was ſeiſed in Fee, and 30 *Jan. Anno* 4 *Edw.* 6. by his Deed indented did enfeoff of the ſaid Manor *Richard Puttenham*, to him and his Heirs, yielding therefore yearly to the ſaid *Charles*, his Heirs and Aſſigns, 6 *li.* 13 *s.* 4 *d.* at the Feaſts of *Michael* and the *Annunciation*, by equal portions, with clauſe of Diſtreſs, and afterwards the ſaid *Charles* died ſeiſed of the ſaid Rent. After whoſe death the ſame deſcended to the ſaid *Thomas Foſter*, as to his Son and Heir, and afterwards, *ſcilicet*, 10 *Julii, anno* 25. died inteſtate, and becauſe that 100 *li.* of Rent aforeſaid was behind for fifteen years ended 10 *Eliz.* he avowed the taking as Bailiff to the ſaid Husband and Wife, Adminiſtratrix of the ſaid *Thomas Foſter*. The Plaintiff in bar of his Avowry pleaded, *Quod nec prædictus Tho. Foſter, nec anteceſſores ſui, nec aliqui alii quorum ſtatum præd' Tho. Foſter habuit in reddit. præd' unquam fuerunt ſeiſiti de eodem reddit infra* 40 *annos jam ultimos elapſos ante prædictum tempus quo*, &c. Upon which the Avowant did demurr in Law. And this Avowry is grounded upon the Statute of 32 *H.* 8. 37. which giveth Diſtreſs to an Executor or Adminiſtrator, *in like manner and form as*
[65] *the Teſtator, &c. might or ought to have done.* But the matter in Law was founded upon another Act made at the ſame Parliament, *cap.* 3. of Limitations, for by the ſame Act it is enacted, *That no perſon or perſons ſhall hereafter make any Avowry or Conuſans for any Rent, Sute, or Service, and allege any Seiſin of any Rent, Sute, or Service in the ſame Avowry or Conuſans; in the poſſeſſion of his or their Anceſtor or Predeceſſor, &c. above fourty years next before the making of the ſaid Avowry or Conuſans.* And it was reſolved by the whole Court, That theſe words ought to be intended where the Avowant was driven to allege any Seiſin by force of any old Statute of Limitation,
[b] and that was when the Seiſin was material, and of ſuch force that it ſhould not be avoided in Avowry, although it were by encroachment, as of Rent between the Lord and Tenant. But in the caſe of Reſervation or Grant of a Rent, there the Deed is the Title, and the beginning thereof appeareth, and no encroachment in that caſe ſhall hurt, nor any Seiſin is material: The ſame Law of a Gift in tail after the Statute of *Donis conditionalibus* rendring Rent; there no encroachment ſhall be prejudicial, or ſeiſin requiſite, for the Reſervation is the Title, and the beginning thereof appeareth within time of memory: and this Conſtruction ſtands with the words of the Act, for the words are, *No man ſhall make Avowry, and allege any Seiſin*, &c. By which it appeareth, that that branch doth extend only where the Avowant ought to allege ſeiſin; but when no ſeiſin is requiſite, it is out of the words and intent of the Act, for the ſame intends to limit a time for the ſeiſin, when ſeiſin was required by the Law to be alleged, and not to compell any one to allege ſeiſin where ſeiſin was not neceſſary before. *Vide Plow. Com.* 94. in *Woodland*'s Caſe *acc.* And ſo you will better underſtand your Books in 22 *Aſſ.* 68. 22 *Edw.* 3. 18. 30 *Hen.* 6. 5, 6. 7 *Ed.* 4. 12 *Ed.* 4. 7. 20 *Edw.* 4. 17. 11 *Hen.* 7. 11. 10 *Edw.* 3. 25. 20 *Edw.* 3. *Avowrie* 131. 10 *Hen.* 6. 3. 4 *Edw.* 2. *Avowrie* 204. *Fitz. Nat. Br.* 10. & 163. *Vide* 8 *Edw.* 3. 18. 6. 1 *Ma. Br. Avowrie* 107. & 14 *Eliz. Dyer* 315. & 16 *Eliz.* in *Warring*'s Caſe, in the Common Pleas adjudged, That the Avowant need not in his Avowrie ſhew ſeiſin within fourty years, but the ſame ſhall come on the other part, *ſcilicet*, not ſeiſed of the Services after the Limitation. Note, Reader, Leſſee for life, or Donee in tail ſhall not have, *Nè injuſte vexes* againſt the Donor, for in as much as the Reſervation is his Title, no encroachment upon them ſhall hurt them, but they ſhall avoid the ſame in Avowrie; and the Statute of *Magna Charta*, *cap.* 10. upon which the Writ of *Ne injuſte vexes* is grounded, ſcil. *quod nullus diſtringatur ad faciendum majus ſervitium de libero tenemento quam inde debetur*, doth not extend to Donee in tail, Leſſee for life, or Grantee of a rent-charge, which appeareth by theſe words, *majus ſervitium*, which is meant between very Lord and very Tenant.

Mich.

Mich. 6 Jacobi. *In the Exchequer.*

Loveday's Case.

IN an Information in the Exchequer upon the Statute of *Usury* by *C. qui tam*, &c. against *Loveday*, the Defendant pleaded to Issue, and a Jury was returned who gave an imperfect Verdict, for they found an Acceptance, *&c.* and no Loan, *&c.* for which the Court awarded a new *Venire facias*, and thereupon another Jury was returned and appeared; and when they were ready to give their Verdict the Plaintiff was non-sute, upon which Judgement was given; And now the Plaintiff brought a Writ of *Error* in the Exchequer-Chamber, and assigned for *Error*, that the Court of Exchequer in the said Case did erre in granting a new *Venire facias*; but ought to have granted a new *Nisi prius*; for an imperfect Verdict is no Verdict, as *anno* 20 *Edw.* 4. 6. an insufficient Indictment is no Indictment. And at the Common Law, if the Recognitors of the Assise give Verdict which is not well examined by the Justices, and therefore imperfect, in this Case the Plaintiff shall have a Certificate of Assise, and the first Imperfection shall be enquired by the first Jurors; and that appeareth in *Fitz. Nat. Brev.* 181. 7 *Hen.* 4. 45. 43 *Assise, pl.* 5. 12 *Hen.* 4. 9. And the words of the Writ are, *Quia super quibusdam Articulis contingent Assisam Novæ disseis.* &c. *quædam sunt dubitationes*, &c. But it was resolved by the Court, and the two Chief Justices, That the *Venire facias* was well awarded: For when a Jury (returned by force of any *Venire facias* to try an Issue) hath given a Verdict which is accepted and recorded by the Court; be it perfect or imperfect, the Jurors are discharged thereof for ever, and shall never be called back in the same Cause to try the same Issue; But if the Verdict be so imperfect that Judgement cannot be given upon it, then the Court shall award a new *Venire facias*, to try the said Issue by others; and therewith agreeth the Book in 18 *Edw.* 4. 48. where it is resolved, because the Enquest found part to be holden of the Demandant, and found not by what Services the same was holden, nor what Arrerages were behind, and for that Cause was not fully taken, that a new *Venire facias* shall be awarded to return a new Jury, and not a new Trial to try the same Issue again by the same Jury. So in 27 *Hen.* 6. 4. In Conspiracy against divers, all plead Not-guilty, and one *Venire facias* was awarded against all, and the Sheriff returned not the Writ; and the Plaintiff prayed several *Venire facias* against the Defendants, and had it, and it was found for the Plaintiff, and all the Justices adjudged the same a Jeofail, so that the Plaintiff could not have Judgement upon the said Verdict, which was fully found, forasmuch as the first Award was of one joint *Venire facias*, the Plaintiff could not vary, (to have several Writs *de Venire facias*) from the first Award; and therefore the Court did award *Venire facias de novo*, 21 *Hen.* 6. 21. 21 *Edw.* 4. 26, 27. And as to the Case of Assise, the Recognitors are not returned to try any certain Issue, for there is a Jury the first day before any Plaint, Plea, or Issue. 2. There no new Process can be awarded; for the Recognitors who are but once returned, shall stand. But when a Jury is returned upon a *Venire facias*, which is a judical Process for the Trial of an Issue certain, there the Court, if the Verdict be imperfect, may award a new judicial Process, *scilicet*, *Venire facias de novo*; but the Court cannot so doe in Case of Assise, for they are returned upon the Original, and because the Writ of Assise is *festinum remedium*, the Plaintiff shall have a Writ of Certificate *de Assise*, to supply the first Imperfections (which happen for default of good examination) according to the truth of the matter. And Judgement was affirmed. [b] [66]

Mich. 6 Jacobi. *In the Common Pleas.*

Edward Crogate's Case.

[b] EDward *Crogate* brought an Action of Trespass against *Robert Mary*, for driving of his Cattel in *Townbarningham* in *Norfolk*, &c. The Defendant pleaded, That a House and two Acres in *Bassingham*, in the said County, were parcel of the Manor of *Thurgarton* in the same County, and demised, and demisable, *&c.* by Copy, *&c.* in Fee-simple, *&c.* according to the custom of the Manor, of which Manor *William* late Bishop of *Norwich* was seised in Fee in the Right of his Bishoprick, and prescribed to have Common of Pasture for him and all his Customary Tenants of the said House, and two Acres of Land in a great piece of Pasture called *Bassingham* Common, *pro omnibus averiis*, &c. *omni tempore anni*, and the said Bishop, at such a Court, *&c.* granted the said House and two Acres by Copy to one *Will. Marys*, to him and his Heirs, *&c.* and that the Plaintiff put in his said Cattel in the said great piece of Pasture, for which cause, the Defendant, as servant to the said *William*, and by his Commandment, *molliter* drew the said Cattel out of the said place, where the said *William* had Common *in prædicta villa de Townbarningham*, adjoining to the said Common of *Bassingham*, &c. The Plaintiff replyed, *de injuria sua propria absque tali causa*: Upon which the Defendant did demurr in Law. And it was objected on the Plaintiffe's part, that the said Replication was good, because the Defendant doth not claim any Interest, but justifieth by force of a Commandment; to which *de injuria sua propria absque tali causa* may be fitly applied: And this Plea of *De injuria sua propria*, [67] *scilicet*, of his own wrong, shall have reference only to the Commandment, and to no other part of the Plea, and cited the Books in 10 *Hen.* 6. 3. 9. 16 *Hen.* 7. 3. &c. 3 *Hen.* 6. 35. & 19 *Hen.* 6. 7. *&c.* But it was adjudged, That the Replication was insufficient. And in this Case divers Points were resolved.

1. That, *absque tali causa*, doth referr to the whole Plea, and not only to the Commandment; for all maketh but one Cause, and any of them, without the other, is no Plea by it self. And therefore in a False Imprisonment if the Defendant justifieth by a *Capias* to the Sheriff, and a Warrant to him, there, *De injuria sua propria* generally is no good Replication, for then the matter of Record shall be parcel of the cause (for all maketh but one cause) and the matter of Record ought not to be put in issue, to the trial of the people; but in such case he may reply *De injuria sua propria*, and traverse the Warrant, which is matter in fact: But upon such a Justification by force of any proceeding in the *Admiral* Court, Hundred, or County, *&c.* or any other which is not a Court of Record, there *De injuria sua propria* generally is good, for all is matter of fact, and all maketh but one cause. And by these differences you will agree your Books in 2 *H.* 7. 3. 5 *H.* 7. 6. 16 *H.* 7. 3. 21 *H.* 7. 37. 19 *H.* 6. 7. 42 *E.* 3. 29. 17 *E.* 3. 44. 18 *E.* 3. 10. 2 *E.* 4. 6. 12 *E.* 4. 10. 14 *H.* 6. 16. 21 *H.* 6. 5. 13 *R.* 2. *Issue* 16.

2. It was resolved, That when the Defendant in his own Right, or as Servant to any other, claimeth an Interest in the Land, or to any Common, or Rent going out of the Land; or to any Way or Passage upon the Land, &c. there *De injuria sua propria* generally is no Plea. But if the Defendant justifieth as Servant, there *De injuria sua propria* in some of the said Cases, with traverse of the Commandment, the same being made material, is good. And so you will agree all your Books, *scilicet*, 14 *H.* 4. 32. 33 *H.* 6. 5. 44 *E.* 3. 18. 2 *H.* 5. 1. 10 *H.* 6. 3. 9. 39 *H.* 6. 32. 9 *E.* 4. 22. 16 *E.* 4. 4. 21 *E.* 4. 6. 28 *E.* 3. 98. 28 *H.* 6. 9. 21 *E.* 3. 41. 22 *Ass.* 42. 44 *E.* 3. 13. 45 *E.* 3. 7. 24 *E.* 3. 72. 22 *Ass.* 85. 33 *H.* 6. 29. 42 *E.* 3. 2. For the general Plea *De injuria sua propria*, &c. is properly when the Defendant's Plea doth consist meer upon excuse, and upon no matter of Interest whatsoever: And it is said, *De injuria sua propria*, because the injury properly in this sense is to the person, or to the fame; as Battery or Imprisonment to the Person; or, Scandal to the Fame; there, if the Defendant excuse himself upon his own Assault, or upon Hue and Cry, there properly *De injura sua propria* generally is a good Plea, for there the Defendant's Plea doth consist only upon matter of Excuse.

3. It was resolved, That when by the Defendant's Plea any Authority or Power is mediately or immediately derived from the Plaintiff, there, although no Interest be claimed, the Plaintiff ought to answer it, and shall not reply generally *De injuria sua propria*. The same Law of an Authority [b] given by the Law; as to view Waste, 12 *Edw.* 4. 10. 9 *Edw.* 4. 31. 20 *Edw.* 4. 4. 41 *Edw.* 3. 2. 16 *Hen.* 7. 3.

Lastly it was resolved, That in the Case at Bar the Issue shall be full of multiplicity of matter, where an Issue ought to be full and single, for parcel of the Manor, demisible by Copy, grant by Copy, prescription of Common, *&c.* and Commandment shall be parcel of the Issue. And so by the Rule of the whole Court Judgement was given against the Plaintiff.

Mich.

Mich. 6 Jacobi. *In the Exchequer.*

John Trollop's Case.

Lancelot Richeſon brought Debt upon Obligation of 34 *li.* by *Quo minus* in the Exchequer a- [68]
gainſt *John Trollop*, Eſquire, and upon Iſſue and Verdict againſt *Trollop*, upon which *Trollop* brought a Writ of *Error* againſt the ſaid *Richeſon*, who pleaded an Excommunication, *& profert hic in Cur. literas Clementis Colnor, Legum Doctoris, reverendi in Chriſto patris, Tobiæ nuper Dunelm. Epiſcopi vic' in ſpiritualibus generalis, & officialis principalis legitime fulciti, ſigillo conſiſt. Dunelm. ſignat'*, viz. *Clemens Colnor*, &c. *univerſis & ſingulis Clericis & literatis quibuſcunque per totam diœceſin Dunelm. ubilibet conſtitut', ſalut':* and recited that he did proceed againſt him for Recuſancy, and that for Contempt, in not appearing, *&c.* being lawfully cited and forewarned, he was excommunicated, *Vobis igitur tenore Præſentium mandamus quatenus præfat' Joh. Trollop, ſic ut præmittitur per nos excommunicatum fuiſſe & eſſe, in Eccleſia veſtra Parochial' diebus Dominicis, & aliis feſtivis*, &c. *publice denuncietis, & cum effectu declaretis*, &c. and demanded Judgement if he ſhould be anſwered. The Plaintiff ſaid, That after the ſaid Excommengement the King by his general Pardon in his Parliament *Anno* 3. did pardon all Contempts, *&c.* and all that he might pardon; and averred that neither the Offence nor the Perſon, *&c.* is excepted, *&c.* Upon which the Defendant in the Writ of Error did demurr in Law. And it was reſolved by the Court, and the two Chief Juſtices, that the ſaid Plea of Excommunication was inſufficient for two Cauſes.

1. Becauſe the ſaid Excommengement is certified by the Official or Commiſſary of the Biſhop, where it ought to be certified by the Biſhop, who is the immediate Officer to the Court, for no Certificate of Excommunication by any ſhall diſable one, but the Certificate of him to whom the Court may write to abſolve the party excommunicated, as the Biſhop, Gardian of the Spiritualties, *&c.* and therewith agree the Books in the Point in 34 E. 3. *Excommengement* 23. 20 E. 3. *Excommengement* 24. 41 *Aſſ. p.* 29. 20 *H.* 6. 1. 8 *H.* 6. 3. 7 E. 4. 14. 14 *H.* 4. 14. *Vide* 11 *H.* 6. 64. that it was ſo ordained by the Parliament, 12 E. 4. 15, 16. *F. N. B.* 64. *cap.* 65. *a.* But the Chan- [b]
cellors of the Univerſity of *Cambridge*, or *Oxford*, may certifie an Excommengement, for they doe it by the King's Charter, *Regiſter*, *F. N. B.* 64. *c.*

2. If the Biſhop himſelf had certified it, yet it had been inſufficient, for the direction ought to be to this Court in particular, or at leaſt, *Univerſis ſanctæ matris Eccleſiæ filiis*; But in the Caſe at Bar it is directed, *Univerſis & ſingulis Clericis & literatis quibuſcunque per totam diœceſin Dunelmenſ. ubilibet Conſtitut.* By which particular direction the Court is excluded; as a Certificate of an Excommengement in the Chancery ſhall not ſerve in any other Court; neither ſhall a Protection directed to one Court, ſerve in another: for always a Certificate directed to a particular Court and in particular manner, ſhall extend no farther; and therewith agreeth 20 *Hen.* 6. 25. 2 *Edw.* 4. 4. And it was objected, That an Excommengement is a Spiritual Judgement, and therefore the Temporal Judges ſhall not diſpute upon the manner of it. To which it was anſwered and reſolved by the Judges, That the Judges of the Common Law ſhall adjuge upon the manner (and in ſome Caſes) of the matter alſo of Certificate in caſe of Excommunication; as if the Biſhop himſelf be ſued, and he pleadeth an Excommengement by himſelf, or his Commiſſary (who is his Deputy) although it be for another cauſe than that is in queſtion, it ſhall not diſable the Plaintiff, becauſe that he himſelf is Party, and therewith agree 16 E. 3. *Excommeng.* 5. 5 E. 2. *Excommengement* 27. 5 E. 3. 8. 8 E. 3. 69. 18 E. 3. 58. 9 *H.* 7. 21. 10 *H.* 7. 9. Alſo if a Prohibition be brought againſt a Biſhop, and he ſheweth forth the Letters of the Archbiſhop, that the Plaintiff is excommenged, *propter diverſas contumacias*, without ſhewing any Cauſe in ſpecial of the Excommuncation, it ſhall not diſable the Plaintiff. The ſame Law if any other be Defendant in any Action, and would diſable the Plaintiff by Excommunication, he ought to ſhew the Biſhop's Certificate, containing the principal Cauſe why the Plaintiff is excommunicated, to the end that the Judges of the Law may know whether the Spiritual Court have Conuſans of the original Cauſe, and if the Excommengement be againſt the Law, the Court ought to write to them to abſolve the party; which they cannot doe if the Certificate be general; and if the Biſhop refuſeth, his Temporalties at the Common Law ſhall be ſeiſed, 28 E. 3. 97. 22 E. 4. 20. 20 E. 3. *Excom.* 9. 13 *H.* 7. 16. and in 14 *H.* 4. 14. *Hanks* there ſaith, That a Doctor of the Civil Law ſaid to him, That no Letter of Certificate of Excommengement (although it be of the Biſhop) ſhall be allowed, if the principal Cauſe be not contained in the Writ; *F. N. B.* 64. *f.* The Biſhop ought to expreſs the Cauſe and Sute againſt the Plaintiff ſpecially in the Certificate, *vide* 3 *H.* 4. 3. miſreported in the Report: For the opinion there is reformed in 14 *H.* 4. 14. as appeareth before. *Vide Fleta, lib.* 6. *cap.* 26. *Weſt.* 2. *cap.* 43. Alſo the Biſhop ought to certifie that which hath been ſentenced in his own Court, and not in another Court; And therefore he cannot certifie, that another Biſhop hath certified to him, or that he hath ſeen a Sentence of Excommengement made by another Biſhop; but the Biſhop may certifie an Excommengement made by his Commiſſary or Official, for that the Biſhop's Court and his [69]
Comiſſary doth in his Right, *F. N. B.* 65. *a.* 33 E. 3. *Excom.* 29. 9 *H.* 7. 21. 10 *H.* 7. 8.

But if the Biſhop maketh a Certificate, and dieth before that it be received, it is nothing worth, but his Succeſſor ought to certifie it, *F. N. B.* 65. 8 E. 2. *Excommeng.* 26. 14 E. 3. *ibid.* 8. But note, Reader, in ſome Caſe the Vicar General may certifie an Excommengement; but the ſame

is when the Bishop is in *remotis agendis*, which is as much as to say, Out of the Kingdom in the King's Service; But the Court will understand thereof by matter of Record, *scil.* by Writ out of the Chancery directed to them, and not by the surmise of the party, and then for necessity (which is alwaies the Law of time, for *Necessitas est Lex temporis*,) the Certificate of the Vicar General shall be allowed, because that no other can doe it. And therewith agreeth 31 E. 3. 10. F.N.B. 64. And after that a Bishop is elect, and before he is consecrated, he may certifie an Excommengement, for the power of the Guardian of the Spiritualities ceaseth after his election by the King's *Conge de eslier:* and therefore for necessity he ought to certifie, F. N. B. 62. N. and *Register.*

And it is to know, That when a Plea of Excommengement is allowed, the Writ shall not abate, but the Entry is, *Quod remaneat loquela sine die quousque*, &c. 3 *Hen.* 6. 3. 3 *Edw.* 4. 8. 3 *Ass. p.* 12.

The Point in Law in the Case at Bar was, If the general Pardon should discharge a man excommunicated of the Excommunication or not, and by the Award of the Court the Defendant was ruled to answer over.

Hill. 6 Jacobi; *which began Mich.* 6 Jacobi, *in the Common Pleas.*

Whitlock's Case.

[b] IN a *Replevin* between *John Chappel* Plaintiff, and *William Whitlock* Defendant, for taking of a Gelding in *Kings-Ash*, in the County of *Devon*, in a place called *Cunnie* Park; the Defendant did avow the taking in the place where, &c. as in his Freehold, for damage feasant. The Plaintiff in barr of the Avowrie pleaded, That one *William Whitlock* the elder was seised of a Messuage, 20 acres of Land, 12 acres of Wood, and 20 acres of Heath in *Kings-Ash* aforesaid in Fee, whereof the place where is parcel, and demised the said Tenements to one *Joan Bulhead* for her life, by force whereof she was seised for life, the Reversion expectant to the said *William Whitlock* the elder; and the said *William Whitlock* the elder, 11 *Marcii*, 18 *Eliz.* by his Indenture Tripartite, in consideration of a Marriage to be solemnized between *William Whitlock* the younger, and *Margaret* Daughter of *John Boteler*, covenanted and agreed by the said Indentures, That the said *William Whitlock* the elder, before the Feast of the Birth of Christ next ensuing, would assure and convey unto *Leon. Yeo*, and *Anthony Whitlock*, and their Heirs, the Tenements aforesaid, to the uses, intents and purposes declared in the said Indentures, and to no other uses or intents, *viz.* until the said Marriage unto the use of the said *William Whitlock* the elder and his Heirs, and after the said Marriage to the use of *Will. Whitlock* the elder for terme of his life, without Impeachment of Waste, [70] and afterwards to the use of the said *William Whitlock* the younger, and the Heirs of his body, and after to the use of *John Whitlock* and his Heirs. And by the said Indenture it was further provided, granted and agreed, That it should be lawfull for the said *William Whitlock* the elder, at any time then after to make Lease or Leases, Grant or Grants, as well in Possession as Reversion of the Tenements aforesaid, with the Appurtenances, whereof, &c. or of any part thereof. Provided alwaies, that the said Lease or Leases, Grant or Grants, should not exceed the number of three Lives at the most, or 21 one years, and that upon every such Lease or Leases, Grant or Grants, the the most ancient and accustomed yearly Rent, Heriot, and Services, or more should be rendered and reserved, paiable during the said Lease or Leases, Grant or Grants; and that the said *Leon* and *Anthoney*, and their Heirs, should stand seised to the use of every such Fermor, &c. And afterwards, 10 *Maii*, 18 *Eliz.* the said *William* the younger and *Margaret* entermarried, and afterwards, *Trin.* 18 *Eliz. William Whitlock* the elder levied a Fine of the said Tenements aforesaid, according to the same Indentures, to the uses therein contained, by force whereof, and of the Statute of *Uses*, the said *William Whitlock* the elder was seised of the Reversion of the said Tenements, &c. for his Life, the Remainder over according to the said Indentures. And the said *William Whitlock* the elder so seised, 1 *Septemb.* 31 *Eliz.* demised to one *Christian Hearne* the Tenements aforesaid, with their Appurtenances, wherein, &c. amongst others, To have and enjoy to the said *Christian* and her Assigns for 99 years fully to be compleat and ended, if the said *Christian* and one *Peter Rattenburie*, or any of them should so long live, the said terme to begin after the death or determination of the Estate of the said *Joan Bulhead*, yielding and paying therefore yearly after the beginning of the said Lease, to the said *William Whitlock* the elder, his Heirs and Assigns, and such Person and Persons to whom the Inheritance of the Premises after the death of the said *William* the elder shall of right belong or appertain, during the said terme 14 *s.* at the four most usual Feasts yearly to be paid. And the Plaintiff justified under the said Lease, and averred the Life of *Peter Rattenburie*, and that the most ancient and accustomed yearly Rent, Heriot and Services, &c. were reserved, &c. upon which the Avowant did demurr in Law. And in this Case two Questions were moved.

1. If *William Whitlock* the elder had pursued his Authority or not, in making of the said Lease for 99 years, determinable upon the said two Lives.

2. If the said Reservation of the Rent were according to the said Proviso, &c.

And

And as to the first it was objected, That the Authority was distinguished, *scil.* either to make a Lease not exceeding the number of three lives, or 21 years; by which it appeareth that the intention was either to make a Lease for three lives, *&c.* or if he would make a Lease for years, that it ought to be for 21 years; but in the case at bar, the Lease is not for three lives, *&c.* nor for 21 years, but for 99 years, if two or any of them so long shall live, and so his Authority was not pursued. And if one hath power to make Leases for lives, he cannot make a Lease for 99 years determinable upon three lives, *quod fuit concessum per totam Curiam.* But it was answered and resolved by the Court, that in the case at bar, the Lease was good, and the Power which the Lessor had well pursued; For the Proviso of Creation of his Power to make leases is absolute in the beginning, affirmative and indefinite, *scil.* to make a lease or leases, grant or grants, *&c.* as well in the possession as in reversion of the Tenements, or any parcel thereof, *&c.* which is without limitation. Then the Proviso of Correction is added, *scil.* That such lease or leases, grant or grants, shall not exceed the number of three lives at most, or 21 years, which clause is negative, and doth qualifie the generality of the first Proviso; So that the Power by the first is general, and by the second the Lease ought not exceed three lives, *&c.* And when the Lease is made for 99 years determinable upon two lives, the same doth not exceed the number of three lives, although in truth it is not a lease for lives. 2. The Power is as well to make leases in possession as reversion, with the limitation aforesaid: and a Lease for three lives cannot be made a reversion, but a lease for years determinable upon three lives may, and the Lessor himself hath but a reversion expectant upon an Estate for life at the time of the creation of the said Power. So that the intention of the parties was to make a Lease for years absolutely but for 21 years, but any other terme determinable upon 3 lives, *&c.* which is in equippage with 21 years, he well might. And the difference was taken and agreed between a particular Power affirmative, and a general Power restrained with a negative; For it is true, That if one hath Power to make a Lease for three lives, or 21 years, there he may make a Lease for 99 years, if three so long live, for the same doth not exceed the number of three lives, but in truth is less, for every terme for years, which is but a Chattel, is less in estimation of Law than an Estate for life, which is a Free-hold. [b]

As to the second Point it was objected, That the said Reservation was such, that the same was not payable during the said Lease as it ought, but onely during the life of the Lessor; for he having but an Estate for life, doth reserve the Rent to him and his heirs, and his heirs cannot have it, and the latter words, *scil.* To such person and persons who shall have the Premisses, *&c.* are meerly void, for no Rent can be reserved but to the Lessor, Donor, or Feoffor, and his heirs, who are Privies in blood, and not to any who is Privie in estate, as he in the reversion or remainder, *&c.* But it was resolved, That the Reservation in the case at bar is good. For the said Lease hath not his essence from the Estate of the Lessor, which he hath for life, but the Lease hath his essence out of the said Fine, and in Construction of Law doth preceed the Estate for life and all the Remainders; for after the Lease made, the same is as much as if the Use had been limited originally to the Lessee for the said terme, and then the other limitations in construction of Law follow it: And that is the cause that the usual clause in such Indentures is, That the Conusees and their Heirs shall stand seised to the use of such Lessees, *&c.* So that the Lessee in the case at bar doth derive his Estate out of the Estate which passeth by Fine. Then when the Lessor reserveth Rent to him and his Heirs, the same is good, for the same by construction of Law doth preceed the limitations, uses, and then the same being well reserved, the same is well transferred to every one to whom any use is limited. So if the reservation be to the Lessor, and to every person to whom the Inheritance or Reversion of the Premisses shall appertain during the terme the same is also good, for the Law doth distribute that to every one to whom any limitation of the use shall be made. And in such case no Lease is reserved to a Stranger, but the Reservation doth preceed the limitation of the uses to Strangers. But it was agreed, That the most clear and sure way, was to reserve Rent yearly during the same terme, and leave the Law to make the distribution, without mentioning a Reservation to any person. But it was resolved, That all the said three wayes were good enough and effectual in Law. [71]

Pasch. 7 Jacobi.

Greneley's Case.

IN an *Ejectione firmæ* between *Owen Greneley* Plaintiff, and *Philip Greneley* Defendant, upon a Demise made by *Stephen Greneley* of three Acres of land in *St.* upon *Arrow* in the County of *Hereford*, and upon Not Guilty pleaded, the Jury gave a special Verdict to this effect: *William Woodhouse* and *John Badland* were seised of the said three Acres in fee, and 20 *Octob.* 38 *Hen.* 8. did thereof enfeoffe *Philip Greneley* the elder, and *Isabel* his Wife, To have and to hold to the said *Philip* and *Isabel*, and to the Heirs of their two bodies lawfully begotten: *Philip* the elder, 1 *Decemb.* 17 *Eliz.* did enfeoffe *Philip Greneley* the younger of the said three Acres in fee; and afterwards 20 *Eliz.* *Philip* the elder died, and *Isabel* overlived him; and afterwards the said *Isabel* (before any Entry made by her, *viz.* 26.) died; and the said *Stephen Greneley* the Lessor of the [b]

Plaintiff

Plaintiff was Heir of their two bodies, *&c.* And the only Question in this case was, If the said Feoffement of *Philip* the elder to *Philip* the younger, hath taken away the Entry of the said *Stephen*, or that the Entry of *Stephen* was lawfull or not.

1. It was resolved, That at the Common law this Feoffement was a Discontinuance to the issue, for the issue ought to claim as Heir of their two bodies individually, and as Heir to one he cannot inherit, and by consequence cannot enter, for his Entry ought to ensue his Title and his Action, and the Formedon in the Descender in such case is, *Quod C. dedit D. & E. uxori ejus & heredibus de corporibus ipsorum D. & E. exeuntibus, & quod post mortem præd' D. & E. præfato K. filio & hæred' ipsorum D. & E. descendere debet per formam doni prædicti*, &c. *Regist. Orig.* 238. *b.* By which it appeareth that in his Formedon he ought to make himself Heir to both, and not to the
[72] Survivor: So if the said Donees had been disseised, and a Descent cast, and afterwards the Father died, and before Entry the Mother died, the Entry of the Issue is not congeable, because he ought to claim as Heir of both their bodies, and as Heir to the Father he is bound by the descent, as his Father himself was, and as Heir to his Mother only he cannot enter, for he hath not any such Title. *Vide* 35 *H.* 6. 45. *b.* in Assise, but if the Mother in such case had entred, and re-continued the Estate tail, then the Discontinuance was utterly prorogued and removed, and the Estate tail actually revested in the Wife; which after her death doth descend to the Issue.

2. It was resolved, That although the Husband and Wife had a joint and undivided Estate in tail, and the words of 32 *H.* 8. *cap.* 28. are, *That no Fine, Feoffement, or other Act or Acts hereafter to be made, suffered, or done by the Husband only, of any Manors, Lands, Tenements, or Hereditaments, being the Inheritance or Freehold of his Wife, during the coverture between them*, &c. That this joint Estate was within these words, *(the Inheritance or Freehold of his Wife)* for she hath a Freehold and Inheritance in the Land, although she hath not the sole Freehold or Inheritance. So hath it been alwaies taken upon the Statute of *West.* 2. *cap.* 3. *In casu quando vir amiserit per defaltam tantum, quod fuit jus uxoris suæ*, &c. *propter quod statuit Rex, quod mulier post mortem viri sui habeat Recuperare per breve de Cui in vita*, &c. that a joint Estate to Husband and Wife hath been alwaies taken in these words *(jus uxoris)* and yet it was not the sole and only Right of the Wife; and according to this Resolution in the principal case was it adjudged in *Beamount's* Case, and therewith agreeth *Eliz. Dyer, Hawtrey's* Case.

3. It was resolved, That by the said Act the Entry of the Issue in tail was lawfull in the case at bar; for the words of the Act go farther, *(shall in any wise be or make any Discontinuance, or be prejudicial or hurtfull to the said Wife, or to her Heirs, or to such as shall have Right, Title, or Interest to the same, by the death of such Wife or Wives. But that the same Wife or her Heirs, and such other to whom such Right shall appertain after her decease, shall or may then lawfully enter into all such Manors, Lands, Tenements and Hereditaments, according to their Rights and Titles therein.* So that if the Issue in tail shall not be within these words, *(her heirs)* because that he is Heir to both, *sc.* to Father and Mother; yet without Question he is within these words, *(or to such as have Right by the Death of such Wife.)* And in this case a difference was taken and agreed, between a Discontinuance, which implieth a wrong, and a lawfull Bar, which implieth a right; and therefore, if Lands are given to Husband and Wife, and to the Heirs of their two bodies begotten, and the Husband levieth
[*b*] a Fine with Proclamations, and committeth High Treason, and dieth, and the Wife before, or after Entry dieth, the Issue is barred; and the Conusee, or the King hath Right to the Land, because that the Issue cannot claime as Heir to both; and therewith agreeth 18 *Eliz.* 351. *b.* adjudged. *Vide* 5 *Hen.* 7. 32. *Colt's Assise.* And it was resolved, That the Statute of 32 *Hen.* 8. extendeth only to Discontinuances, although that the Act hath general words, *or be prejudicial or hurtfull to the Wife or her Heirs*, &c. But the Conclusion is, *(shall lawfully enter*, &c. *according to their Rights and Titles therein,)* which they cannot doe, when they are barred, and have no Right, Title, or Interest; and this Statute giveth advantage to the Wife, *&c.* so long as she hath Right, but it doth not extend to take away a future Bar, although the Statute giveth Entry without limitation of any time, but the Entry ought to wait upon the Right. And therefore, If the Husband levieth a Fine with Proclamation to another, and dieth, now the Wife may enter by force of the Statute; For yet the Fine is not any Bar to her, but her Right doth remain, which she may re-continue by Entry; but if she surcease her time, five years after the death of her Husband, she is barred of her Right, and by consquence she cancot enter; and the Statute speaketh of Fine only, and not of Fine with Proclamations; and therewith agreeth 6 *E.* 6. *Dyer* 72. *b.* And it was resolved, That if the Husband be Tenant in tail, the Remainder to the Wife in tail, that if the Husband maketh a Feoffement in fee, and dieth without Issue, the Wife may enter, because it was the Inheritance of the Wife; But if the Husband suffereth a Common Recovery, and dieth without Issue, there the Wife is barred, and cannot enter by force of this Statute: But this Statute was made to relieve him who hath Right, and to suppress Wrong, and to advance Right without respect to the Warranty of the Discontinuee, if he hath any. And if before the Stature of *Donis conditionalibus* Lands had been given to Husband and Wife, and the Heirs of their two bodies begotten, and they have Issue, and the Husband *post prolem suscitatam* alienateth the Land, and dieth before the Statute, and the Wife survived, and died before the Statute, the Issue should have a Formedon: For notwithstanding the same Alienation, a Right doth remain, for as much as the Husband only alienated, which Right is entailed by the Statute; and before the Statute the Issue in such case might have a *Sur cui in vita*, and claime as Heir of the body of both, for the Feoffement was no Bar, but a Discontinuance: and therewith agreeth 21 *Edw.* 3. 45. 12 *Hen.* 4. 7. And in all cases where the Wife might have a *Cui in vita* by the Law, she shall enter by force of this Statute of 32 *Hen.* 8. and where the Issue cannot have a *Sur cui in vita*, or Formedon, there he shall not

not enter within the remedy of this Statute. And therefore if the Husband hath Iſſue, and alieneth, and the Wife dieth, the Iſſue ſhall not enter during the life of the Husband, becauſe at the Common Law he had no remedy to recover the Land during the Husband's life, and the words of the Act are, *(according to their rights and titles therein.)* But if the Husband alieneth, and afterwards the Wife is divorced *cauſa præcontractus*, or any Divorce which diſſolveth the Marriage *à vinculo Matrimonii*, there the Wife during the Husband's life may enter, for the words of the Act are, *(no fine, feoffement,* &c.) during the Coverture between them. And although that afterwards the Husband and Wife are divorced, yet the Feoffement was made during the Coverture between them. And although that the Statute ſaith, *(But that the ſame Wife,* &c.) *the ſame* is meant of her who was his Wife at the time of the Alienation, for when the Husband dieth, ſhe is not then his Wife, but ſhe is called Wife to deſcribe the Perſon only who ſhall enter; and it is not ſaid in the Statute that the Wife ſhall enter after the death of her Husband, but generally, that ſhe ſhall enter according their right and title; be it in the life of the Husband after a Divorce *à vinculo Matrimonii*, or after his death. [73]

Trin. 7 Jacobi. *In the Common Pleas.*

The Lord *Stafford*'s Caſe.

BEtween *Thomas Malyn* Plaintiff, and *Tho. Tully* Defendant, in a Replevin, which began in the Common Pleas, *Trin. 6 Jacobi*, *Rott.* 2341. upon the pleading the parties demurred in Law, and upon the whole Record the Caſe was ſuch. Queen *Mary* was ſeiſed of a Park called *Eſtwood* Park, within the Manor of *Thorneburie*, in the County of *Glouceſter*, in Fee, and by her Letters Patents, 10 *Julii*, in the ſecond year of her reign, granted the ſaid Park to *Henry* Lord *Stafford*, and *Urſula* his Wife, and to the Heirs of the body of the ſaid *Henry* Lord *Stafford*, by force whereof the Lord *Stafford* and *Urſula* his Wife was ſeiſed accordingly, the Reverſion over expectant to the ſaid Queen *Mary*, her Heirs and Succeſſors, which Reverſion of Fee-ſimple by the death of Queen *Mary* deſcended to Queen *Elizabeth*. *Hill. 3 Eliz. Tindall* levied a Fine to the Lord *Stafford*, and *Urſula* his Wife, *come ceo*, and to the Heirs of the Lord *Stafford*, of the ſaid Park, by which Fine the Lord *Stafford* and his Wife did render the ſame to *Tindall* for 25 years: And afterwards *Henry* Lord *Stafford*, *ult. Junii*, 7 *Eliz.* died, and *Urſula* his Wife ſurvived, and held in as Survivor, and the Remainder of the ſaid Eſtate tail deſcended to *Henry* Lord *Stafford* the Son: And afterwards Queen *Elizabeth* by her Letters Patents 10 *Julii*, 7 *Eliz.* reciting the former Eſtate, the Reverſion and Reverſions thereof to the ſaid Queen *Eliz.* her Heirs and Succeſſors expectant, the ſaid Queen by the ſaid Letters Patents, and for the Sum of 53 *li.* 18 *s.* paid by *Tho. Tindall*, Gent. did grant to the ſaid *Tho. Tindall* the Reverſion of the ſaid Park, *&c.* To have and to hold to him and the heirs of his body lawfully begotten. And further, The ſaid late Queen *Elizabeth* willed and declared by the ſaid Letters Patents, That if the ſaid *Tho. Tindall*, his Heirs or Aſſigns, at any time after ſhould pay or cauſe to be paid, or any of them ſhould pay or cauſe to be paid, at the Receipt of the Exchequer of the ſaid late Queen, her Heirs or Succeſſors, to the uſe of the ſaid late Queen, her Heirs or Succeſſors, the Sum of 20 *s.* of lawfull mony of *England*, for the Premiſſes, *ultra* the ſaid Sum of 53 *li.* 18 *s.* [74] then the ſaid late Queen *Elizabeth*, of her farther ſpecial grace, certain knowlege and meer motion, by the ſaid Letters Patents, for her, and her heirs and ſucceſſors, *conceſſit & declaravit quod* from thenceforth, the ſaid *Tho. Tindal. & hæredes ſui haberent & tenerent, ac habere, tenere, & gaudere valerent & poſſent, ſibi & hæredibus ſuis in perpetuum virtute earundem Literarum Patentium ſuarum prædict' reverſionem prædicti Parci, cum pertinentiis inter alia habend', tenend' & gaudend', ea omnia & ſingula Præmiſſa cum pertinent. præfat. Tho. Tindall, hæredibus & aſſignatis ſuis*: by force whereof the ſaid *Tho. Tindall* was ſeiſed of the ſaid Reverſion in tail; And he being ſo ſeiſed, the Reverſion over to the Queen, as aforeſaid, the ſaid *Thomas Tindall*, 23 *Feb.* 8 *Eliz.* at the Receipt of the Exchequer, paid to *Tho. Gardiner*, then one of the Tellers of the Exchequer, to the uſe of the ſaid Queen, the Sum of 20 *s.* for the ſaid Park, above the ſaid Sum of 53 *li.* 18 *s.* which 20 *s.* was received, as by the Record of the Receipt thereof, in the ſaid Court of Exchequer at *Weſtminſter* aforeſaid remaining fully appeareth, by force whereof he was ſeiſed of the ſaid Reverſion in fee expectant upon his Eſtate tail: And afterwards *Henry* Lord *Stafford*, 8 *Eliz.* died; After whoſe death the ſaid Remainder deſcended to *Edward* Lord *Stafford* his Son, who, *Paſch.* 8 *Eliz.* levied a Fine to *Clark* and others of the ſaid Park with Proclamations, and afterwards the ſaid *Urſula*, 10 *Eliz.* died, and afterwards *Edward* Lord *Stafford* died, and *Edward* Lord *Stafford*, that now is his Son and Heir, pretending that the ſaid Reverſion in fee did not accrue to *Thomas Tindall* by the paiment of the ſaid 20 *s.* but remained in the Crown, by the ſaid *Thomas Malyn* diſtreined the Cattel of *Tulley* the Plaintiff in the ſaid Park, who claimed under the ſaid Fine; And to enforce the Letters Patents of Queen *Eliz.* the Statute of Confirmation of Letters Patents made 18 *Eliz.* was pleaded; which was not pertinent to this Caſe; But the principal Point of the Caſe was, If by the paiment of the ſaid 20 *s.* the ſaid *Tindall* hath gained the Reverſion of the Fee out of Queen *Eliz.* For if no Reverſion remaineth in the Queen, then the Fine with Proclamations doth bar the Lord *Stafford* that now is, who claimeth as Iſſue in tail; and if the Reverſion doth remain in her at the time of the Fine, then the Fine levied by *Edward* Lord *Stafford* the Father doth not bar him. [b]

[b] And this Caſe was very well argued by the Serjeants, *ſcil. Hutton*, *Nichols*, and *Harris* the younger, and *Houghton*, and afterwards this Terme the ſame was argued by all the Juſtices at Bench, *ſcil. Coke* Chief Juſtice, *Walmeſley*, *Warburton*, *Daniel*, and *Foſter*. And two Objections were made againſt the Subſtance of the Grant; and two againſt the Form of the Grant. The Objections againſt the Subſtance were,

1. That ſuch Condition cannot be annexed to a thing which lieth in Grant, but to a thing which lieth in livery; and therefore it was ſaid, that Rents, Commons, Advowſons, Reverſions, *&c.* cannot be granted for life or years, with Condition to have Fee, but only Land which lieth in livery, for the increaſe of ſuch future Eſtate for the moſt part taketh its effect by Livery, then by Grant; for without Livery ſuch future Eſtate will not paſs in caſe of Land, and it ought to paſs *ab initio* by the firſt Livery; and a man cannot grant a Rent *in eſſe*, or a Common, or Advowſon, or a Reverſion, or any thing which lieth in grant to begin *à futuro*, as from *Michaelmas* next following, or after ſuch thing done, *&c.* And all the Books in Law which ſpeak of ſuch Condition for increaſe of an Eſtate, put the caſe alwaies of Lands, to which Livery is requiſite, 31 *Edw.* 3. *Voucher*, 281. 31 *E.* 3. *Feoffements and Faits*, 119. 2 *E.* 2. *Quid juris clamat*, 31. 12 *E.* 2. *Voucher*, 265. 7 *E.* 3. 10. 10 *E.* 3. 40, 55. 10 *Aſſ. p.* 15. *&* 19. 12 *Aſſ. p.* 5. 32 *E.* 3. *Garr.* 30. 43 *E.* 3. 35. 43 *Aſſ. p.* 41. 44 *E.* 3. *Attaint.* 22. 50 *E.* 3. 27. 6 *R.* 2. *Quid juris clamat*, 20. 27 *H.* 6. 7. *Plow. Com. Saye's* Caſe, 272. *Plow. Com.* the Lord *Lovel's* Caſe, 487.

The ſecond Objection was, That ſuch Condition which ſhall increaſe an Eſtate, ought alwaies to drown the firſt Eſtate upon the Encreaſer, and make all but as one Eſtate and one Grant, and therefore ought to be annexed to an Eſtate for years or life, which ſo may drown upon the Performance of the Condition, that all ſhall be but as one Eſtate or Grant, and not ſeveral and divided Eſtates; and therefore in all the ſaid Books ſuch Condition is alwaies annexed to an Eſtate which may drown; but in the Caſe at Bar the Condition is annexed to an Eſtate in tail, which cannot drown by the acceſs of a Fee-ſimple to it: and ſuch Condition was never annexed to any Eſtate tail, in any Book or Precedent which can be ſhewed.

As to the Objections to the Form of the Grant, the firſt was, That after that the Queen had granted the Reverſion to *Thomas Tindall*, and to the Heirs of his body, She now upon the *contingit* granteth to him *prædictam reverſionem* to him and his Heirs: in which the Queen was deceived in her Grant, for *prædicta reverſio*, is that which the Queen hath granted to *Tindall* in tail, which now ſhe cannot grant in Fee-ſimple, for *intentio Reginæ non convenit cum Lege*, for that which ſhe hath granted firſt in Tail, ſhe cannot afterwards grant in Fee, and the Eſtate tail was granted abſolutely,
[75] and cannot be drowned or deſtroyed by the ſaid Grant upon the ſaid Contingency.

The ſecond Objection, as to the Form of the Grant, was, That the ſaid Grant did ſound only in Covenant, which in the Caſe of Inheritance ſhall not transferr it in the King's Caſe, as it may in caſe of a Chattel, and therefore the words are, That the Queen willeth and declareth, That if the ſaid *Tho. Tindall* pay 20 *s.* then the ſaid Queen doth grant, That the ſaid *Tho. Tindall* and his Heirs ſhall have the ſaid Reverſion; ſo that the Reverſion it ſelf is not granted, but it is a Grant which ſoundeth in the nature of a Covenant, that he ſhall have the ſaid Reverſion.

But it was reſolved by the whole Court upon ſolemne Argument, That the ſaid Grant was good. And as to the two firſt Objections it was reſolved, That ſuch Grant with a Condition precedent may be made, as well of things which lie in grant, as of land which lieth in livery, and may be annexed as well unto an Eſtate tail, which cannot be drowned, as to an Eſtate for life, or years, which may be drowned by the acceſs of a greater Eſtate; but ſuch Encreaſer of an Eſtate by force of a common Precedent, ought to have Four Incidents; 1. It ought to have a particular Eſtate, as a foundation upon which the Encreaſer of the greater Eſtate ſhall be built; 2. Such particular Eſtate ought to continue in the Leſſee or Grantee, until the Encreaſer happen; 3. It ought to veſt at the time the Contingent falleth, otherwiſe it ſhall never veſt; 4. The particular Eſtate and the Increaſe ought to take effect by one and the ſame Inſtrument or Deed, or by ſeveral Deeds delivered at one and the ſame time, and there ought to be a precedent Eſtate, upon which the Eſtate, as upon a foundation, may accrue and encreaſe. But *Coke* Chief Juſtice ſaid, That ſuch Foundation ought to be permanent and not revocable at the will of the Grantor or Leſſor; And therefore if a man granteth an Advowſon to another at will, upon Condition that if he doe ſuch a thing, *&c.* that he ſhall have Fee, in this Caſe the Eſtate at will is not any ſuch Foundation as the Law requireth to ſupport an Accruer of an Eſtate of Freehold or Inheritance, for the Grantor may determine
[b] the Will before the Condition performed, and ſo avoid his own Grant, and a Leaſe at will cannot ſupport a Remainder over. And if a man granteth an Advowſon, or a Rent, *&c.* for years upon Condition that if the Leſſee pay 10 *s.* within one year, that he ſhall have for life, and if after the year he pay 20 *s.* that he ſhall have Fee; the Leſſee payeth the 10 *s.* within the year, and after the year he payeth the 20 *s.* according to the Condition, yet he ſhall have but for life, for the Eſtate for life at the time of the Grant was but in Contingency, which is no Foundation upon which an Eſtate can increaſe; for a poſſibility cannot accrue upon a poſſibility, and the Eſtate in Fee-ſimple cannot accrue upon the Eſtate for years, for the ſame is drowned by the acceſs of the Eſtate for life, as ſhall be afterwards ſaid.

As to the ſecond; The Privity of Eſtate ought to continue; and the ſame is proved by the ſaid Caſe of the Lord *Lovell*. And therefore if the Leſſee for life, or years, or Donee in tail who hath ſuch a Condition annexed to his Eſtate, alien before the Condition performed; or if Leſſee for life, or years, ſurrendreth to the Leſſor, he ſhall never after take benefit of ſuch Condition, for the Privity of Eſtate in ſuch caſe ought to continue, for the Increaſe of the Eſtate ought to enure upon the particular Eſtate, as upon a Foundation; And therefore, if in ſuch caſe the Leſſee for life, or years, or the

the Donee in tail alienateth all his Estate, and take back an Estate, and afterwards perform the Condition; yet nothing can accrue to him, because that by the absolute alienation the privity was once absolutely destroyed, which cannot be revived by taking back any Estate; As if one Coparcener after partition maketh a Feoffement in fee, and taketh back an Estate to her self again and her Heirs, yet the privity of the Estate to have Aid paramount is destroyed, 11 *Hen.* 4. 22. *Vide* 38 *Edw.* 3. 10. *b.* So if Tenant by Homage ancestrel maketh a Feoffement in fee, and taketh back an Estate to him in fee, he shall not hold by Homage ancestrel. *Littl. lib.* 2. *fol.* 33. But if Lessee for life, *&c.* grant his Estate upon condition, and entreth for the condition broken, and afterwards performeth the condition, there peradventure the Fee shall accrue to him; for the possibility was not absolutely destroyed; and when he entreth for the condition broken, he hath his old Estate; and it needeth not that the particular estate continue to all respects, but if such a Privity of Estate continueth which is capable of an Accruer, it is sufficient. And therefore, if such Lessee for life maketh a Lease for years, or if Lessee for years maketh a Lease for a lesser terme; or if such Donee maketh a Lease for his own life, or for years, yet for the Privity of Estate which continueth in them; they are capable of an Accruer of an Estate: But if such Tenant in tail maketh a Lease for the life of another, there he is not capable of any Accruer, because he hath gained a new Reversion in fee, and the first Privity remaineth not, and yet in such case if the Lessee for life dieth, there the first Privity of Estate is revived. So if a man maketh a Gift to one, to have and to hold to him and the Heirs of his body of his Wife lawfully begotten, with such condition *ut supra*, and afterwards the Wife dieth without Issue, so that now he is become Tenant in tail after possibility, *&c.* in this case, although that the Estate be changed, yet forasmuch as the Privity remaineth, he may by the performance of the Condition, have Fee after. So if a Lease be made to two with condition to have Fee, and one dieth, the Survivor may perform the Condition, and have Fee. But if the said Joint-tenants have made partion of the terme, the Condition is destroyed; for the Estate in Fee ought to accrue to them jointly, and not in severalty. And in the case at bar, although that *Tho. Tyndall* had died before the performance of the Condition, his Heirs of his body might have performed it, for although that the persons were altered, yet the same Estate continueth; and this power to perform the Condition descendeth to his Heir, as an Inheritance annexed to the foundation which descendeth to him, and he, after the Condition performed, shall have the Reversion in Fee *quodam modo* by descent, as in *Shelley*'s Case, in the First Part of my *Reports*. And although it be requisite that Privitie of Estate continue; yet it is not requisite that the Accruer do drown the particular Estate; for if a man maketh a Lease for life, the Remainder for life, or in tail, upon condition that if the first Lessee doth such a thing, that he shall have Fee; in this case by the Performance of the condition he shall have Fee, and yet it shall not drown the Estate for life, *quod fuit concessum per Curiam.* And if a man maketh a Lease for years, upon condition that if the Lessor do oust him within the terme, that he shall have Fee; in this case if the Lessor do oust him, now the interest of the terme is turned into a Right; and yet the Lessee in such case shall have Fee, for two Causes. 1. because it is the act and wrong of the Lessor himself, whereof he shall not take advantage: 2. at the same instant that the Lessor doth put him out, at the same instant the Lessee hath fee, and the title of the Lessee is by force of the Condition, which is paramount the ouster; and therewith agreeth 6 *R.* 2. *Quid juris clamat.* 20. And that a Possession in an instant is sufficient to support the encrease of a Fee, appeareth in 12 E. 2. *Voucher* 265. A man maketh a Lease for years upon condition, that if the Lessor doth not pay to the Lessee 100 marks at the end of the terme, that he shall have Fee, there the end of the terme doth consist upon an instant of time. And if the Estate tail of the Lord *Stafford* had determined for want of Issue, and *Ursula* had died, so that the Reversion of *Tho. Tyndall* had come in possession; yet forasmuch as the Privity of the Estate continueth, although that the Quality of the Reversion is altered to a Possession, the Condition remaineth. But there is a difference between the Continuance of the Privity of the Estate of the Lessor or Grantor, and of the Privitie of Estate of the Lessee or Grantee; for the Privitie of the Estate on the part of the Lessor needeth not continue; for although the Lessor or Grantor alieneth his Reversion, or be attainted, *&c.* yet the Condition remaineth; for by no act that he can doe can he frustrate or derogate from his Grant; and therewith agreeth 31 *Edw.* 1. *Feoffements and Faits*, 119. 6 *R.* 2. *Quid juris clamat*, 20. and *Plowden*'s *Com.* in the Lord *Lovel*'s Case. But if Lessee for years with condition to have Fee accept a Release from the Lessor for his life, or in tail, and afterwards the condition is performed, he shall not have Fee, because that the Estate for years, which is the foundation upon which the Accruer is, by his acceptance of a greater Estate, is drowned, and hath no continuance: As if Lessee for years without impeachment of Waste taketh an Estate for his life, the Privilege which was annexed to the Estate for years, is lost, 5 *Hen.* 5. 9. 3 *Ed.* 4. 44. in *Mary de la Idles* Case. 28 *H.* 8. *Dyer* 10. 6. And it was resolved, that if the Queen had died before the Condition performed, that yet *Tyndall* might have performed the Condition; and if the Queen under her Great Seal had refused to take the money; yet if *Tyndall* had tendred the money at the Receipt of the Exchequer that he had gained the Fee-simple, for the Queen by no means could countermand or hinder the encrease of the Estate in such case.

[76]

[b]

As to the third, it was resolved; That if the Condition had been that when *Tyndall* shall pay to *I. S.* 20 *s.* that he shall have Fee, that presently by the paiment by operation of Law, the Fee shall be devested out of the Queen, and vested in *Tyndall*, and that for necessity, for if it shall not vest at the time of the Condition performed, it shall never vest; and therefore if Office, or Petition, *Monstrans de droit*, or other thing should be requisite, it should make the Queen's Grant void, and disable the Queen to make such Grant, and therewith agreeth *Plow. Com.* in the Lord *Lovel*'s Case, for there it is said, when the Condition is performed, the Fee-simple shall be immediately out of the

King, without Petition or *Monſtrans de droit*, or other Circumſtance, for if he ought to ſay, to uſe ſuch Circumſtances, then it ſhould not veſt preſently; and if it ſhall not veſt preſently it ſhould never veſt; for if an Eſtate cannot be enlarged at the time of the enlargement appointed, it ſhall never be enlarged; and theſe are the words of the Book; and therefore for neceſſity the Fee-ſimple ſhall paſs in the Caſe at bar out of the Queen without any circumſtance; for the Law will not require Circumſtances when they ſhall ſubvert the Subſtance. And therefore there is a notable Caſe in 49 *E.* 3. 16. where the Caſe was, That *Iſabel Goodcheap* was ſeiſed in Fee of a certain Houſe in *London*, and by her Will in writing, and enrolled, deviſed the ſaid Houſe, being holden of the King, to *Richard Goodcheap*, to him and to the Heirs of his body: ſo that if he die without Iſſue, that the Lands ſhall be ſold by her Executors, or Executors of the Executors, and made *W. D.* and *W. W.* and *I. de T.* her Executors, and died without Heir. *Richard Goodcheap* died without Iſſue, by which the Houſe came to the King by Eſcheat, and afterwards *I.* one of the Executors died, *W. W.* refuſed, and *W. D.* ſold, *&c.* And there the Queſtion is, If the Sale by one Executor be good, or not? But it is there argued by all, That if the Sale be good, that the ſame ſhall deveſt the Land out of the King, and the cauſe is for neceſſity of Law, for if the Sale ſhall not deveſt the Land at the time of the Sale, no Sale ſhall be made at all, and the Executors, who have but a Power, cannot have a Petition, *Monſtrans de droit*, or other Remedy. [77]

As to the fourth Incident, it was reſolved; That it ought to be by one and the ſame Grant, or by two Deeds delivered at one time, which is all one in effect; For, *Quæ in continenti fiunt in eſſe videntur*; and the reaſon thereof is, Becauſe the Foundation, *ſcil.* the particular Eſtate, and the Increaſe of the Eſtate thereupon is but one Grant to take effect out of one Root, although it veſt at ſeveral times, yet when it is veſted, it hath its vigor and force of one Grant. And therefore it is well ſaid in 27 *H.* 6. that when he hath performed the Condition he hath Fee from the time of the beginning of the Leaſe, as by one Grant, and one and the ſame Eſtate.

As to the firſt Objection againſt the Form of the Grant, *ſcil. Prædictam reverſionem*, to conſtrue the ſame to extend to the Eſtate tail granted before to *Tyndall*, (which the Queen cannot grant again) and not to the Reverſion of the Fee; (which the Queen may grant, and which is mentioned before) ſhall be a Conſtruction tending to the great diſhonour of the Queen, and in great damage and diſenheriſin of the Subject: In diſhonour of the Queen for three Cauſes; 1. To have her Grant under the Great Seal by captious and nice conſtructions avoided; 2. Preſume ſuch Ignorance in the Queen (who was a wiſe, learned and moſt excellent Princeſs, and the Phœnix of her Sex) that ſhe intended to grant that which ſhe could not grant, and not that which ſhe could grant. 3. That the Queen (as it was objected) cannot make ſuch a Grant *in futuro*, when a Subject may doe it without queſtion; and therefore *à fortiori*, the Queen might doe it in ſuch caſe. Alſo the ſame ſhould tend to the damage of the Subject who ſhall have the King's Charter under the Great Seal, but by ſuch nice and captious Conſtruction ſhall loſe the Land contained therein; which ſhall turn to the overthrowing of him and his whole family and poſterity. And the Caſe of Sir *John Molyns*, the Lord *Chandos*, and the Earl of *Rutland*, were affirmed for good Law. But, Note, the Queen granteth not only the Reverſion aforeſaid, but alſo all and ſingular the Premiſſes, *&c.* which words make this Caſe clear.

And as to the laſt of the ſaid two Objections, It was reſolved by the whole Court, That the words were ſufficient to paſs the Inheritance of the Lands, for to paſs a future Eſtate upon a Contingent, words in future are apt and ſufficient enough, as in all Charters and Letters Patents of Lands, the Clauſe of Grant of Liberties and Franchiſes are all with ſuch words in effect as theſe are, becauſe they are contingent, and future. And the invention of this Grant to *Tyndall* was commended by the Juſtices, for when the Lord *Stafford* was Tenant in tail the Reverſion to Queen *Mary*, if the Queen had granted the whole Fee-ſimple, then by a Common Recovery, or Fine levied, the Lord *Stafford* might have barred his Iſſues; and by a Common Recovery the Reverſion to *Tyndall* in Fee, which was not the meaning of the Queen, or of *Tyndall*, but the Purpoſe was, that it ſhould be in the power of *Tyndall* and the Heirs of his body to hold and reſtrain the Lord *Stafford* and the Heirs of his body, that they ſhould not alien or bar his Reverſion in tail, by taking the Fee-ſimple out of the Crown by the Performance of the Condition to enable them to alien. But *Coke* Chief Juſtice in his Argument moved a Queſtion upon the Statute of 34 *H.* 8. *cap.* 20. That if the Lord *Stafford* and his Wife had ſuffered a Common Recovery with Voucher, if the ſame ſhould not bar the Reverſion which *Tyndall* had in tail, the Reverſion in Fee being in the Crown: And thereupon he did conſider the words of the ſaid Act, The Preamble of which ſeemeth for to provide for the Heirs of the bodies of the King's Donees in tail. And the Queſtion mentioned in the Preamble is, *Whether ſuch feigned and untrue Recoveries againſt ſuch Tenant in tail*, &c. *ſhould after the death of the Tenant in tail, bind the Heirs in tail, or not:* And the body of the Act is, *For the plain declaration whereof, and to avoid and extinct from henceforth diverſity of opinions in ſuch caſes, Be it ordained and enacted, that no ſuch feigned Recovery, hereafter to be had by aſſent of parties, againſt any ſuch Tenant in tail of any Lands*, &c. *whereof the Reverſion or Remainder at the time of ſuch Recovery had, ſhall be in the King, ſhall bind or conclude the Heirs in tail, whether any common Voucher be had in ſuch feigned Recovery or not, but that after the death of any ſuch Tenant in tail*, &c. *the Heirs in tail may enter*, &c. So that by the Letter of the Act no remedy is provided for him in the Reverſion or Remainder in tail, although that the Reverſion of the fee be in the King. But yet the Chief Juſtice held, that by neceſſary conſequence ſuch Reverſions and Remainders in tail are preſerved by the ſaid Act: for when there is Tenant in tail, the Remainder in fee, and Tenant in tail ſuffereth a Common Recovery, the reaſon of bar of the Eſtate of him in the Remainder who is a Stranger to the Recovery is, by Conſequent, becauſe that the Common Recovery doth bar the Eſtate [b]

of Tenant

of Tenant in tail, who is party to the Recovery, and by Conſquent, all Reverſions and Remainders of common perſons expectant thereupon: But when the Act of 34 *Hen.* 8. provided, That no Common Recovery had againſt Tenant in tail, who is party to the Recovery, ſhall barr the Iſſues when the King hath the Reverſion, *&c.* thereby *incluſive* the Act doth preſerve the Reverſions and Remainders in tail of the King's Grants, for they cannot be barred, but when the Eſtate tail, upon which they depend, is barred; and that is the cauſe, that when Tenant in tail is in of another Eſtate, and ſuffereth a Common Recovery as Tenant, it ſhall not bar any Reverſion or Remainder, becauſe the ſame ſhould bar the Eſtate of the Tenant in tail, who is party to the Recovery; for, *Quod non valet in principali in acceſſoria ſeu conſequenti non valebit, & quod non valet in magis propinquo, non valebit in magis remoto.* And if the Lord *Stafford* might have barred the Reverſion in tail of *Tho. Tyndall* before the Condition performed, the Invention of the ſaid Grant had failed of his final purpoſe: for which cauſe it ſeemed to the ſaid Lord Chief Juſtice, that the ſaid Act doth preſerve the Reverſion of the ſaid *Tho. Tyndall*; which was argued by the whole Court. [78]

Laſtly, It was reſolved by the whole Court, That if the Reverſion in fee had remained in the Crown, That the Fine levied by the ſaid *Edward* Lord *Stafford*, the Father, had not barred the Lord *Stafford* that now is, but that he might enter, according to the Reſolution in *Noteley's* Caſe, *Paſch.* 31 *Eliz.* in the Common Pleas, and eſpecially, by reaſon of theſe words in the ſaid Act of 34 H. 8. *The ſaid Recovery, or any other thing or things hereafter to be had, done, or ſuffered, by or againſt the ſaid Tenant in tail, to the contrary notwithſtanding.*

Trinit. 7 Jacobi. *In the Common Pleas.*

Wiat Wield's Caſe.

IN a *Replevin* between *William Wood* Plaintiff, and *William Norton*, Eſquire, Defendant, upon taking of his Sheep at *Croydon*, in the County of *Surrey*, in a place called *Norwood*; The Defendant ſaith, That the place where, *&c.* doth contain 200 Acres, part of the Manor of *Croydon*, and entituleth himſelf to have Common there, and avoweth for damage feaſant. The Plaintiff, in bar of the Avowrie, ſaith, That before and at the time of the taking, he himſelf was, and as yet is ſeiſed of five Acres of Land in *Croydon* aforeſaid in fee, and that he and all thoſe whoſe Eſtate he hath in the ſaid five Acres, time out of mind, *&c.* have uſed to have Common of paſture in the ſaid 200 Acres for all his Cattel commonable, upon the ſaid five Acres of Land levant and couchant at all times of the year, as to the ſaid five Acres of Land appertaining; for which cauſe he put in his Cattel, *&c.* To which the ſaid Defendant ſaith, That before the ſaid *William Wood* had any thing in the ſaid five Acres of land, one *Wiat Wield* was ſeiſed of a Meſſuage and 40 Acres of land in *Croydon* aforeſaid, whereof the ſaid five Acres were parcel, in Fee, and that the ſaid *Wiat*, and all thoſe whoſe Eſtate he had in the ſaid Meſſuage and fourty Acres of land, whereof, *&c.* had time out of mind Common of paſture in the ſaid 200 Acres for all his Cattel commonable upon the ſaid Meſſuage and fourty Acres of land, whereof, *&c.* levant and couchant, as to the ſaid Meſſuage and fourty Acres of land appertaining. And that the ſaid *Wiat Wield*, ſo ſeiſed of the ſaid five Acres, did enfeoffe one *John Wood* in Fee, whoſe Eſtate the ſaid *William Wood* before the taking, *&c.* had, *Idemque Willielmus Wood colore inde clamans Communiam paſturæ* in the ſaid 200 Acres, *pro omnibus averiis ſuis communicalibus ſuper prædict' quinque acris terræ*, levant and couchant, *&c.* put in his Cattel, and he took them damage feaſant; upon which the Plaintiff did demurr in Law. And the laſt Terme and this Terme this Caſe was argued by the Serjeants at the bar, and this Terme by the Juſtices of the Bench, *ſcil. Coke* Chief Juſtice, *Walmeſley*, *Warburton*, *Daniel*, and *Foſter*: And in this Caſe two Points were reſolved: [b] [79]

1. That (be the Common appendant or appurtenant) the Common in the Caſe at Bar is apportionable.

2. That the Pleading thereof was ſufficient.

As to the firſt it was agreed, that Common appendant was of Common right, and ſeverable, and although that the Commoner purchaſeth parcel of the Land in which, *&c.* yet the Common ſhall be apportioned, but in ſuch caſe Common appurtenant, and not appendant, by purchaſe of parcel of the Land in which, *&c.* is extinct for the cauſes and reaſons given in *Terringham's* Caſe, all which was affirmed for good Law by the whole Court. And it was ſtrongly urged, that the Common appurtenant ſhall not be ſeverable in the Caſe at bar for divers cauſes.

1. Becaſe that this Common appurtenant wholly belonged to a Houſe and fourty Acres of Land by preſcription; and he by his own Act cannot make this entire thing ſeveral.

2. The Feoffee of parcell ſhall not have Common, becauſe that the Preſcription faileth, for no Common was ever appurtenant to that Parcel, but to the Meſſuage of the whole Land.

3. Common appurtenant is a thing againſt Common right, and therefore by the act of the party ſhall be no more ſevered or divided, than a Condition or *Nomine pœnæ*, or any other thing againſt Common right. As to that it was anſwered and reſolved, That it appeareth by the Preſcription, that the ſaid Common is ſeverable, for the Preſcription is to have Common in the Land, in which, *&c.* to be taken by the mouths of his Beaſts which are levant and couchant upon the Land,

to which, *&c.* and the ſame extendeth to the whole, and every parcel, and it cannot be more damage to the Tenant of the Land in which, *&c.* after the Severance, than it was before, for no other Beaſts can paſture there, but thoſe which are levant and couchant upon the Land, to which, *&c.* But if he who hath Common appurtenant purchaſeth parcel of the Land in which, *&c.* all the Common is extinct; Or, if he taketh a Leaſe of parcel of the Land, all is ſuſpended, becauſe it is the folly of the Commoner to entermeddle with part of the Land in which he hath Common, which
[b] belongeth not to him. But when the Commoner entermeddleth not but with his own Lands, by alienation thereof, the ſame in ſuch caſe ſhall not turn to his prejudice, for the ſame is not againſt any Rule of the Law, as the other caſe, when he purchaſeth part of the Land, in which, *&c.* becauſe that his Common appurtenant was againſt Common right; and he cannot common in his own Land which he hath purchaſed. And it ſhall be a great inconvenience, If by alienation of parcel the Alienee ſhall loſe the Common which belongeth to him, for then the Alienor ſhall loſe his Common alſo, for by the reaſon which hath been made, *Wiat Wield* could not preſcribe to have Common to the Houſe and 35 Acres, becauſe that the Common was entirely appurtenant to the Meſſuage and 40 Acres, and if the Law ſhould be ſuch, all Common appurtenants in *England* ſhould be deſtroyed (which ſhould be againſt the Commonwealth) for no Land doth continue in ſo intire a manner, every Acre together with another, as it hath been *ab initio*, but by preferment of younger Sons, advancement of Daughters, paiment of Debts, or other neceſſary Conſiderations, part hath been ſevered; and therefore this caſe is not like to a Condition, or *Nomine pœnæ*, which are entire, and not ſeverable by the act of parties, but is like to a Rent reſerved upon a Leaſe for years: And therefore, If a man maketh a Leaſe of three Acres, each of equal yearly value, rendring 30*s.* rent, and the Leſſor granteth the Reverſion of one Acre, and the Tenant attorneth, the Grantee ſhall have 12 *d.* rent, for although that it was one Leaſe, one Reverſion, and one Rent, yet the ſame was incident to the Reverſion, which was ſeverable, and the Rent ſhall wait upon the Reverſion, and upon every part of it. So in the Caſe at bar, although that at the beginning there was but one Common attendant upon the Tenancy; yet foraſmuch as the ſame is attendant upon the Tenancy which is ſeverable, and upon every part of it, the Alienee of part of the Tenancy ſhall have Common. So if he who hath ſuch Common appurtenant leaſeth part of the Land to another, the Leſſee ſhall have Common for the Beaſts levant and couchant; and if an Advowſon be appendant to a Manor which deſcendeth to divers Coparceners, and the Coparceners make partition of the Manor to which, *&c.* without ſpeaking of the Advowſon, the Advowſon, notwithſtanding the Diviſion and Severance from the Manor to which, *&c.* doth remain appendant, 13 *Ed.* 3. *Quare Imp.* 38. 19 *Ed.* 3. *ibid.* 59. 17 *Ed.* 38. 43 *Ed.* 3. 35. 13 *E.* 2. *Quare Imp.* 170. 2 *H.* 7. 50. *Vide* 4 *Eliz. Dyer* 213.

Trin. 7 Jacobi. *Rott.* 2629.

Vinyor's Caſe.

[b] *TRin.* 7 *Jacobi*, *Rott.* 2629. *Robert Vinyor* brought an Action of Debt againſt *William Wylde*, upon an Obligation of 20 *li.* 15 *Julii*, *Anno* 6. of the ſame King. The Defendant demanded Oyer of the Bond and Condition endorſed, which was, *That if the above bounden* William Wylde *do and ſhall from time to time, and at all times hereafter, ſtand to, abide, obſerve, perform, fulfill and keep, the rule, order, judgement, arbitrament, ſentence and final determination of* William Rugge, *Eſquire, Arbitrator indifferently named, elected and choſen, as well on the part of the ſaid* William Wylde, *as on the part of the ſaid* Robert Vinyor, *to rule, order, adjudge, arbitrate, and finally determine all matters, ſutes, controverſies, debates, griefs, and contentions heretofore moved and ſtirred, and now depending between the ſaid parties, touching and concerning the ſum of Two and twenty pence heretofore taxed upon the ſaid* William Wylde *for divers kind of Pariſh buſineſs, within the Pariſh of* Themilthorpe, *in the County of* Norfolk, *ſo as the ſaid award be made and ſet down in writing under the hand and ſeal of the ſaid* William Rugge, *at or before the Feaſt of Saint* Michael *the Archangel next enſuing after the date of theſe Preſents, That then*, &c. And the Defendant pleaded, That the ſaid *William Rugge* made no arbitrament, *de & ſuper Præmiſſis*, &c. The Plaintiff replyed, That after the making of the ſaid Writing obligatory, and before the ſaid Feaſt of St. *Michael*, *ſcil.* 22 *Aug. Anno* 6. *ſupradict. apud* Themilthorpe *præd. prædict'* Williel' Wylde *per quoddam ſcriptum ſuum cujus datus eſt eiſdem die & anno revocavit & abrogavit*, *Anglice*,
[82] did call back, *omnem authoritatem quamcunque quam idem* Willielmus Wylde *per prædict' ſcriptum obligatorium dediſſet & commiſiſſet præfat'* Willielmo Rugge *arbitratori ſuo, & adtunc totaliter deadvocavit, & vacuum tenuit totum & quicquid dict'* Willielmus Rugge *poſt deliberationem ejuſdem ſcripti ſibi faceret in circa dict' arbitrium, regulam*, &c. *undo ex quo præd'* Willielmus Rugge *poſt confectionem præd' ſcripti, & ante præd' Feſtum Sancti* Mich' *tunc prox' ſequen' in forma prædict' exoneravit, & abrogavit arbitratorem præd' de omni authoritate arbitrandi de & ſuper Præmiſſis in condit. præd. ſuperius ſpecificat', contra formam & effectum conditionis illius, & ſubmiſſionis in eadem mentionat'*, *idem* Robertus *petit judicium*, &c. Upon which the Defendant did demurr in Law. And in this Caſe three Points were reſolved.

1. That

1. That although that *William Wylde* the Defendant was bound in a Bond *to ſtand to, abide, obſerve*, &c. *the Rule, Order, Abitrament*, &c. yet he may countermand the ſame; for a man cannot by his act make ſuch Authority, Power, or Warrant not countermandable; which by the Law of his nature is countermandable; As if I make a Letter of Attorney to make Livery, or to ſue an Action in my name; or if I aſſigne Auditors to make an Accompt; or if I make one my Factor; or if I ſubmit my ſelf to an Arbitrament; although that theſe are done by expreſs words irrevocably, yet they may be revoked: So if I make my Teſtament and laſt Will irrevocably, yet I may revoke it, for my act or my words cannot alter the Judgement of the Law to make that irrevocable, which of its own nature is revocable. And therefore (where it is ſaid in 5 *Edw.* 4. 3. *b.* If I be bounden to ſtand to the Award which *I. S.* ſhall make, I could not diſcharge that Arbitrament, becauſe I am bound to ſtand to his Award, but if it be without Obligation it is otherwiſe) it was reſolved, That in one caſe, or the other, the Authority of the Arbitrator may be revoked; but then in the one caſe I ſhall forfeit my Bond, and in the other I ſhall forfeit nothing; for, *ex nuda ſubmiſſione non oritur actio:* and therewith agreeth Brooke in abridging of the ſaid Book of 5 *Edw.* 4. 3. and ſo the Book of 5 *Edw.* 4. is well explained, *Vide* 31 *H.* 6. 30. 28 *H.* 6. 6. 49 *E.* 3. 9. 18 *E.* 4. 9. 8 *E.* 4. 10.

2. It was reſolved, That the Plaintiff needeth not averr, that the ſaid *William Rugge* had notice of the ſaid Countermand, for that is implied in theſe words, *revocavit & abrogavit omnem auctoritatem*, &c. for without Notice it is no Revocation or Abrogation of the Authority: and therefore if there was no Notice, then the Defendant might take Iſſue, *quod non revocavit*, &c. [b] and if there were no Notice, it ſhall be found for the Defendant; as if a man plead, *quod feoffavit, dedit*, or *demiſit pro termino vitæ*, the ſame impleth Livery, for without Livery, it is not Feoffement, Gift or Demiſe: But there is a difference when two things are requiſite to the performance of an act, and both things are to be done by one and the ſame part, as in caſe of Feoffement, Gift, Demiſe, Revocation, Countermand, &c. And when two things are requiſite to be performed by ſeveral perſons; as of a Grant of a Reverſion, Attornement is not implied in it, and yet without Attornment the Grant hath not perfection, but forasmuch as the Grant is made by one, and the Attornement is to be by another, it is not implied in the pleading of the Grant of one; but in the other caſe both things are to be done by one and the ſame perſon, and that maketh the difference. And therewith agreeth 21 *Hen.* 6. 30. where *William Bridges* brought an Action of Debt for 200 *li.* upon an Arbiterment againſt *William Bentley*, the Defendant pleaded, that before any Judgement or Award made by the Arbitrators, the ſaid *William Bentley* diſcharged the Arbitrators at *Coventry*, in the County of *Warwick*; and the ſame was holden a good Bar, and yet he did not averr any Notice to be given. So it is adjudged in 28 *Hen.* 6. 6. 6 *H.* 7. 10, &c.

3. It was reſolved, That by this Countermand or Revocation of the Power of the Arbitrator; the Obligee ſhall take benefit of the Obligation, and that for two Cauſes; 1. becauſe he hath broken the words of the Condition, which are, *That he ſhould ſtand to, and abide*, &c. *the Rule, Order*, &c. and when he countermandeth the Authority of the Arbitrator, *he doth not ſtand to and abide*, &c. which words are put in ſuch Conditions, to the intent that there ſhould be no countermand, but that an end ſhould be made by the Arbitrator of the Controverſie, and that the Power of the Arbitrator ſhould continue till he had made an Award; and when the Award is made, then there are words to compell the Parties to perform it, *ſcil. obſerve, perform, fulfill, and keep the Rule, Order*, &c. and this Form was invented by prudent Antiquity: and it is good to follow in ſuch Caſes the ancient Forms and Precedents, which are full of Knowledge and Wiſedom: and with this Reſolution agreeth the ſaid Book of 5 *Edw.* 4. 3. which is to be intended as aboveſaid, That the Obligor cannot diſcharge the Arbitrament, but he ſhall forfeit his Bond, and the Book giveth the Reaſon, which is the Cauſe of this Reſolution, *ſcil.* Becauſe I am bound to ſtand to his award, *ſcil. to ſtand to his award*, which I do not when I diſcharge the Arbitrament. The other Reaſon is, becauſe the Obligor by his own act hath made the Condition of the Obligation (which was endorſed for the Obligor, to ſave him from the Penalty of the Obligation) impoſſible to be performed, and by conſequence his Obligation is become ſingle, and without the benefit or help of any Condition, becauſe he hath diſabled himſelf to perform the Condition. *Vide* [83] 21 *Ed.* 4. 55. *per Choke*, & 18 *Ed.* 4. 18. *b.* & 20. *a.* If one be bound by an Obligation, with Condition that the Obligor ſhall give leave to the Obligee for the time of ſeven years to carry Wood, &c. in that caſe although that he give him leave, yet if he countermand it, or diſturbe the Obligee, the Obligation is forfeited. And afterwards Judgement was given for the Plaintiff.

Trin.

Trin. 7 Jacobi. *Rott.* 3649.

Sir *Richard Pexhall*'s Caſe.

[b] IN a *Second Deliverance* brought by *Euſtace Barton* againſt *Nicholas Moore*, for taking of his Cattel the 17 of *April*, 5 *Jacobi*, at *Broxhead*, in the County of *Southampton*, in a place called *Gate*, the Defendant did avow the taking, becauſe Sir *Richard Pexhall*, Knight, was ſeiſed of the ſaid Manor of *Broxhead* within the ſaid County, whereof the place in which, *&c.* was parcell in fee; and held the ſame of the Biſhop of *Wincheſter* in Socage, as of his Manor of *Sutton*, and was alſo ſeiſed of the Manors of *Beanraper*, *Cranes*, *Chinham*, *Steventon*, and divers other Manors, Lands and Tenements, and a Houſe in *London* deviſable by Cuſtom in Fee, and held the ſaid Manor of *Steventon* of the Queen by Knights Service *in capite*, and ſo ſeiſed made his Will in writing, and thereby deviſed to *Elianor* his Wife the ſaid Houſe in *London*, and two parts of the ſaid Manors, Lands and Tenements for 13 years, and added a Proviſo, that the ſaid Deviſe ſhould not be prejudicial to any Eſtate, Title, or Intereſt for year or years, life or lifes, which ſhould be after deviſed in the ſame Will; and after in the ſame Will gave and bequeathed to the ſaid *Nicholas Moore* his Kinſman 10 *li.* iſſuing and payable *de & ex præd' Meſſuag. & de & ex præd' duabus partibus maneriorum & cæterorum tenementorum præd'* quarterly at the moſt uſual Feaſts, and for not payment thereof to diſtrein; and the Diſtreſſes to detein *quouſque*, &c. And that the ſaid Sir *Richard* ſo ſeiſed, died ſeiſed, and for 20 *li.* for two years ended *Anno* 16 *Eliz.* he avowed and averred the value of the ſaid Manors and Tenements aforeſaid at the time of the Will, *&c.* to be 200 *li. per annum*, above
[84] all repriſes: and it appeareth by the Bar to the Avowrie, that the words of the Will were, *I will and bequeath to Dame* Elianor *my Wife, all my Manors, Lands, Tenements, &c. for the terme of thirteen years next after my deceaſe: Provided that this Gift, Deviſe and Bequeſt, made to the ſaid* Elianor, *ſhall not be prejudicial to any of the Eſtate or Eſtates, Titles, or Intereſt for year or years, life or lives that ſhall be hereafter in this preſent Will given or bequeathed.* And further in the ſame Will deviſed, *Item, I give and bequeath to my Coſin* Nicholas Moore *a hundred Sheep, and ten Bullocks, and 10 li. iſſuing and payable out of my Lands and Tenements quarterly, at the moſt uſual Feaſts, and for non-payment to diſtrein, and the Diſtreſs to detein untill he be ſatisfied of the Arrerages, and to keep the Court and Courts of all my Manors upon lawfull requeſt to the ſaid* Nicholas, *by him or his deputy during his life, and when the ſaid* Nicholas *ſhall think it moſt convenient and meet to keep.* And upon the whole Record, the Queſtions which aroſe out of this part of the Will were two.

1. If Sir *Richard Pexhall* hath power, by the Act of 34 *H.* 8. to deviſe this Rent of the 10 *li.* to *Nicholas Moore* out of all the Lands?

2. What Eſtate *Nicholas Moore* hath in the Rent?

As to the firſt, it was objected, That Sir *Richard Pexhall* had not purſued the power which the Act of 34 *H.* 8. hath given to him; For the words of the Act are, *That every one*, &c. *may deviſe any Rent, Common, or other Profit out of the ſame two Parts*, (viz. *out of his Manors, Lands, Tenements and Hereditaments in three Parts to be divided*) *or out of any Part thereof, or as much thereof as ſhall amount to the full clear yearly value of two Parts thereof:* And the ſole Queſtion doth depend upon the ſaid Clauſe of 34 *H.* 8. for the Statute of 32 *H.* 8. giveth not any Power to the Owner of the Land, to deviſe Rent, Common, or other Profit out thereof: And in this Caſe, where Sir *Richard* hath a Power to deviſe a Rent, *&c.* out of two Parts by this Act, he hath deviſed a Rent out of all his Lands, and ſo hath not purſued the Authority which the Act hath given to him, and the Clauſe of 34 *H.* 8. which followeth next after the ſaid branch of the Act, by which it is enacted, *That by the Authority aforeſaid, the ſaid Will ſo declared ſhall be good and effectual for two Parts of the ſaid Manors, Lands, Tenements or Hereditaments, although the Will declared be made of the whole, or of more than of two Parts*, extend only to a Deviſe of the Land it ſelf, and not to any Rent, Common, or Profit out thereof; as appeareth by the Letter thereof, and by all the ſubſequent branches concerning the Diviſion, and this Clauſe is an Explanation of the Act of 32 *H.* 8. when all is diviſed, but, as hath been ſaid, the Power to deviſe a Rent, *&c.* out of the Land, is only given by the Statute of 34 *H.* 8. And the opinion in *Butler* and *Baker*'s Caſe in the Third Part of
[b] my *Reports*, 33. was cited, where it is ſaid, that if a man ſeiſed of three Acres, (holden by Knights Service) each of the yearly value of 12 *d.* and deviſeth a Rent of 3 *s.* out of theſe three Acres, this Deviſe is void for the whole, becauſe he doth not purſue the Power which the Statute preſcribeth; but in ſuch caſe, If he deviſeth a Rent of 3 *s.* which is the value of all, out of two Parts, it is good, becauſe that in that caſe the value doth extend to the Land, and not to the Rent, for the words are, *any Rent*, without reſtraint. As to that it was anſwered and reſolved by the Court, 1. That it is true, that the Statute of 32 *H.* 8. doth not extend to a Deviſe of any Rent, *&c.* out of the Land, but the Power as to that is given by the Statute of 34 *H.* 8. which hath two diſtinct branches as to this Point; 1. That every one having a ſole Eſtate in Fee-ſimple, *&c. of and in any Manors*, &c. *and having no Manors*, &c. *holden of the King, or of any other perſon by Knights ſervice, ſhall have full and free liberty, power, and authority, to give, diſpoſe, will, or deviſe*, &c. *all his Manors*, &c. *or any Rent, Common, or other Profit, out of, or to be perceived of the ſame, or out of any*

any parcell thereof, at his own free will and pleasure, any Clause in the said former Act notwithstanding. By this branch it appeareth, That he who hath no Lands holden by Knights service may devise any Rent, Common, or Profit out of his Lands whereof he is seised in fee, to what value he will, although the Rent, Common, or Profit doth exceed the value of the Land; for the words are, *at his own free will and pleasure.* The second branch is, When any is sole seised of any Manors, *&c.* holden of the King by Knights service *in Capite, shall have full and free liberty to devise,* &c. *by his last Will in writing,* &c. *two parts of all his Manors,* &c. *or any Rent, Common, or Profit, out of, or to be perceived of the same two parts, or out of any parcel thereof in three parts to be divided, or as much thereof as shall amount to the full and clear yearly value of two parts thereof, in three parts to be divided at his own free will and pleasure.* The third branch is, *That all and singular persons having a sole Estate in Fee-simple,* &c. *of and in any Manors,* &c. *holden of the King by Knights service, and not in chief, or holden of any other person in Knights service, shall have full and free liberty,* &c. *by his last Will and Testament in writing,* &c. *two parts of the said Manors,* &c. *or any Rent, Common, or other Profit, out of, or to be perceived of the said two parts, or out of any parcell thereof in three parts to be divided, or as much thereof as shall amount to the full and clear yearly value of two parts thereof in three parts to be divided, at his free will and pleasure.* The fourth branch is, *And that the said Will so declared shall be good for two parts of the said Manors,* &c. *although it be declared of the whole. And also for the whole of all other such Manors,* &c. *not holden by Knights service, and of any Rent, Common, or other Profit, out of, or to be perceived of the same, or out of any parcell thereof, at his free will and pleasure.* By all these branches it appeareth, that it is principally for the King or Lord (of whom the Land is holden by Knights service, *&c.*) that the owner of the Land hath not power by his own will to charge but two parts, and by consequence the same tendeth to the benefit of the Heir; For in Case when there is not any Tenure to draw Wardship, *&c.* there the owner may at his free will and pleasure devise the whole. Then in the Case at Bar where the Manor of *Steventon* was holden of the King by Knights service *in Capite*, Sir *Richard* had not power to charge but two parts; yet when he chargeth the whole, he chargeth two parts and more, and therefore it shall be good, for so much as the Statute doth enable him, and void for the residue, *Quia quando plus fit quam fieri debet, videtur etiam ipsum fieri quod faciendum est*; but forasmuch as Sir *Richard* hath not power by his Will to charge but two parts, the charge of the whole is void for the third part, not only as to the King, or other Lord, but as to the Heir also, because that as to the third part the Will doth remain at the Common Law, which was utterly void; and according to this Judgement, and for the same reason, was it adjudged, *Mich.* 3 & 4 *Phil.* & *Mar.* in the Common Pleas, *Rott.* 126. in *Umpton* and *Hide's* Case, That a Will in writing after the Statute of 32 *H.* 8. and before the Statute of 34 *H.* 8. declared of the whole Land, whereof part was holden of the King by Knights service *in Capite*, was good for two parts: and so it had been if the Statute of 34 *H.* 8. had never been made, which is all one in reason with the Case at Bar; and by this Construction the true intention as well of the Testator in his Will, as of the said Acts of Parliament, without prejudice to any is well observed. And there is a difference between the common case of Licence, and the Case at Bar. For if the King license one to alien two parts of his Manor of *D.* which is holden of him *in Capite*, and he alieneth the whole Manor, he hath not pursued the Licence, for by his Alienation the whole Manor passeth, which is not according to his Licence: But when an Act of Parliament doth authorize the Owner of Lands holden *in Capite* to charge two parts thereof, which he could not doe by the Common Law, in this Case, if he charge the whole Land it is meerly void for the third part, and thereby he hath well pursued the Authority which the Statute hath given to him, to charge two parts. So if a man hath the moiety of the Manor of *D.* known by the name of the Manor of *D.* and he alieneth the Manor, he hath well pursued the Licence, for in truth nothing passeth but the moiety; and so you will better understand the Law, amongst the various opinions *Obiter*, in *Plow. Com.* 68. *b.* and in *Butler* and *Baker's* Case. [b]

As to the second Point it was agreed by the whole Court, that he hath an Estate for life in the said 10 *li. per annum*; 1. Because if it had been in Grant, the Grantee should have it for life: for if a man by his Deed granteth a Rent of 10 *li.* issuing and paiable out of all his Lands quarterly at the usual Feasts, and for non-paiment to distrein for the Rent, and all the arrerages, in this Case the Grantee shall have the Rent for life: Also, in respect that he ought to hold the Courts of all his Manors for his life, *Et officium & feodum sunt concommitantia*, and he shall have such Estate in the Fee, as he hath in the Office. But it was objected, that then the Divisee should have also 100 Sheep and Bullocks yearly for his life, as well as the Rent; which was denied by the Court for two Causes; 1. the second (*Et*) in the said sentence doth disjoin and sever the Rent, from the Sheep and Bullocks; as in the Case of 9 *E.* 4. 43. where two were bounden to stand to the Arbitrament of *I. S. de omnibus actionibus personalibus, sectis & querelis*, this word (*personalibus*) shall be referred to all; But if the words were, *de omnibus actionibus personalibus & sectis & querelis*, it shall be otherwise; for the last (*Et*) doth disjoin *querelis* from the whole first part of the sentence, and shall be taken generally, without any reference to *personalibus*. So in the Case at Bar, when Sir *Richard* deviseth 100 Sheep, and 10 Bullocks, and 10 *li.* the last (*and*) doth sever and disjoin the Rent from the Sheep and Bullocks: 2. These words (*payable quarterly*) at the usual Feasts, ought to have reference to the Rent, for 10 Bullocks *per annum* cannot be delivered quarterly. And Judgement was given for *Nicholas Moore* the Avowant. [85]

Mich. 7 Jacobi. *In the Common Pleas.*

Buckmere's Caſe.

[86] IN a *Formedon* in the *Remainder*, brought by *George Buckmere*, *Oliver Fowler*, *William Buckmere*, *Chriſtopher Buckmere*, and *Nicholas Buckmere*, againſt *Robert Sayer*, and *Vrſula* his Wife, of a houſe in *Kent* of the nature of Gavelkind, the Caſe was ſuch; *Thomas Bole* had iſſue three Daughters *Marion*, *Johan*, and *Catherine*, and gave the ſaid houſe to *Marion*, and the heirs of her body begotten; the remainder of the other moiety of the ſaid houſe to *Johan*, and to the heirs of her body begotten, the remainder of the other moiety to *Catherine*, and the heirs of her body begotten; and if *Johan* ſhould die without Iſſue, the remainder of her moiety to *Catherine* and the heirs of her body, with the like remainder for want of Iſſue of *Catherine* to *Johan*: and afterwards *Marion* did diſcontinue, and died without Iſſue, *& de eadem* Mariona *eo quod obiit ſine hærede de corpore ſuo exeunte remanſit jus* (which proveth ſhe diſcontinued, for otherwiſe it ſhould be *tenementa præd' remanſ.*) *unius medietatis tenementorum præd' cum pertin' per formam*, &c. *præd'* Johannæ Bole: *& remanſit jus alterius medietatis eorundem tenementorum cum pertinentiis, per formam*, &c. *præfat.* Catherinæ Bole, and afterwards *Johan* died without iſſue, by which the right of her moiety did remain to the ſaid *Catherine*, and after the death of *Catherine*, *deſcendit jus integrorum tenementorum iſtis Georgio*, &c. and the Tenants did demurr in Law upon this Count, becauſe that the Demandants do demand by one Writ of *Formedon* ſeveral remainders, where the Demandants ought to [b] have demanded the ſeveral remainders by ſeveral Writs. And becauſe it is to ſee in what caſes the Demandant or Plaintiff ſhall join divers cauſes of Action in one and the ſame Writ againſt the Tenant or Defendant, It is to know, That there is a difference between real and perſonal Actions, and between Actions real which are founded upon a title in the Writ, and Actions real meerly founded upon wrong or deforcement. Real Actions, which are founded upon title, are, as in a Writ of Eſcheat. *Præcipe A. quod reddat B. 10 acras terræ*, &c. *quas C. de eo tenuit, & quæ ad ipſum B. reverti debent tanquam eſcaeta ſua, eo quod præd' C. obiit ſine hærede.* So the *Ceſſavit*, *Præcipe A. quod reddat B. unum meſſuagium quod idem A. de eo tenuit per certa ſervitia, & quod ad ipſum B. reverti debet*, &c. *eo quod idem A. in faciend' ſervitia per biennium jam ceſſavit.* So the Writ of Ward, and the Writ of Meſne, and the Writs of *Formedon* in the Deſcender, Remainder, and Reverter. Then put caſe, that *B.* before the Statute of *Quia Emptores terrarum*, had enfeoffed *A.* of *Black* acre, to hold by Fealty at 3 *d.* and by another Deed had enfeoffed him of *White* acre, to hold of him by Fealty at 6 *d.* and afterwards *A.* had died without heir, *B.* ſhould not have one Writ of Eſcheate of theſe two acres, for the Writ ſhall ſay, *Præcipe C. quod reddat B. duas acras, quas A. de eo tenuit*, which ſhall be intended an intire Tenure; and therefore in ſuch caſe the Demandant is driven to ſeveral Writs upon the ſeveral Tenures; and therewith agreeth 21 *H.* 7. 39. So, and upon the ſame reaſon upon a Ceſſer, in ſuch Caſe the Lord ought to have ſeveral Writs of *Ceſſavit*: and therewith agreeth 3 *Ed.* 3. 47. 14 *Ed.* 3. *Ceſſavit* 20. 10 *Ed.* 4. 1. 10 *Hen.* 7. 24. So upon ſeveral Tenures the Tenant ſhall have ſeveral Writs of Meſne againſt the Meſne and ſhall not join them in one Writ; and therewith agreeth 2 *H.* 5. 2. *b.* And one ſhall not have one Writ of Ward of the body and Land upon ſeveral Tenures, as it is holden in 6 *Edw.* 3. 48. 3 *Hen.* 6. 53. 17 *H.* 6. *Gard* 117. But a Writ of Ward of Land was founded upon two ſeveral Tenures in 46 E. 3. *br.* 619. but there it is holden, that if he had demanded the body, the Writ ſhould have abated. Then put caſe *B.* by one Deed giveth the Manor of *D.* to *A.* and to the heirs of his body, and afterwards *B.* by another Deed giveth 50 acres of Land to *A.* and to the heirs of his body, and afterwards *A.* dieth without Iſſue, The Donor upon theſe diſtinct Gifts ſhall not have one Writ of *Formedon* in the Reverter, ſuppoſing *Quod idem B. dedit prædict' Manerium & 50 acras terræ cum pertinentiis eidem A. & quæ ad præfat. B. reverti debent*, &c. no more than upon ſeveral feoffements (as above) and tenures reſerved, he ſhall have one Writ of Eſcheat, or one Writ of *Ceſſavit*; both which Writs do ſuppoſe, *quod tenementa prædicta reverti debent.* So of two ſeveral diſtinct Gifts to one with ſeveral Remainders over to one, he ſhall not have one Writ of Formedon in the remainder, nor the Iſſue of ſuch Donee one Writ of Formedon in the deſcender, for the foundation of theſe Writs is the Gift which is diſtinct and ſeveral; and therefore in ſuch caſes, upon the ſeveral foundations, there ought to be ſeveral Writs founded. But if Land be given to a man, and to his Siſter, and to the heirs of their bodies iſſuing, in this caſe they are Joint-tenants, for life, and have ſeveral Inheritances, *ſcil.* the Brother one moiety to him and to the Heirs of his body, and the Siſter the other moiety to her and to heirs of her body; and in this caſe, although that the Inheritances were ſeveral, yet becauſe the foundation was one, and at one time, and as out of one root, for this cauſe the Donor ſhall have one Writ of Formedon in the Reverter, and therein ſhall ſhew the Gift as it was to the Brother and Siſter, and conclude in the cloſe of the Writ, *Quia uterque eorum obiit ſine hærede de corpore*, &c. which words prove that each of them hath ſeveral right; and ſo is the Book adjudged in *Roger Dardernes* Caſe, in 17 E. 3. 51, & 78. 18 E. 3. 39. which is all one Caſe. So, if Lands be given to Father and Son, and to the heirs of their two bodies begotten, the remainder over in fee, and afterwards the Father dieth without any Iſſue but the Son,

Son, and afterwards the Son dieth without Iſſue, and a Stranger abateth, he in the remainder ſhall have one Formedon in the remainder, although the Eſtate tails were ſeveral, yet foraſmuch as aſwell the ſeveral Eſtates in tail, and the remainder alſo depend upon one joint Eſtate in the Father and Son for their lives, and all begin at one time, for this cauſe one Formedon in the remainder lieth. So in the ſaid Caſe of 17 E. 3. If Land had been given to Brother and Siſter, and the Heirs of their two bodies begotten, the remainder over in fee, if the Brother dieth without Iſſue, now the Siſter hath an Eſtate for life in one moiety, the remainder over in fee, and for the other moiety an Eſtate tail, the remainder in fee, and afterwards the Siſter hath Iſſue and dieth, and a Stranger abateth, now for one moiety the remainder doth begin, and after the Iſſue dieth without Iſſue, although that the remainder falleth at ſeveral times, yet he in remainder ſhall have one Formedon, for both remainders, which depend upon one Eſtate, come to one and the ſame perſon. And ſo is the Book to be intended in 31 *Hen.* 6. 14. where it is ſaid, a man may have one Formedon of divers Gifts. *Vide* 44 E. 3. tail 13. a good Caſe, and 50 E. 3. *Feoffements and faits* 97. 7 H. 4. 88.

So it was reſolved in the Caſe at Bar, That when the whole is deviſed to *Marion* in tail, although that the Deviſor divideth the remainder by moieties, yet, when the whole Land doth remain to *Catherine*, and all the remainders depend upon one Eſtate, and begin by Demiſe at one time, the Heirs of the body of *Catherine* ſhall have one Formedon in the remainder, in the ſame manner as if the remainder had been limited to *Catherine* and *Johan*, and to the Heirs of their two bodies, the remainder for default of Iſſue of *Johan* to *Catherine*, and to her Heirs for ever.

But all Actions real, which are founded upon Wrong or Deforcement, and do not comprehend any Title in them, there the Demandant may demand in one Writ divers Lands and Tenements, which come to him by ſeveral Titles: As if divers Lands deſcend to me from ſeveral Anceſtors, and I am diſſeiſed or deforced of them, I may have a Writ of Right, or a Writ of Entrie in the nature of an Aſſiſe, or a Writ of Aſſiſe, and comprehend all theſe Rights in one Writ, becauſe that in theſe Writs no Title is made in the Writ. *Vide Litt.* 5 *Ed.* 4. 80. 12 *Ed.* 4. 1. 17 *Ed.* 3. 52. 17 *Aſſ.* 10. 12 E. 3. *Aſſiſe* 112. 22 *Aſſ. p.* 52. 66. 7 *Aſſ. p.* 18. 7 E. 3. *Aſſiſe* 138. and 15 *Edw.* 3. *Charge*, 9. 15 *Aſſ. pl.* 11. But if I bring a Writ of Entrie upon a Diſſeiſin done to my Mother and Aunt, Coparceners in Fee-ſimple, the Writ ſhall abate, for there Title is made in the Writ, and it appeareth that there was ſeveral Cauſes of Action, becauſe that the Title is by ſeveral Anceſtors, and therewith agreeth the Book in 31 *H.* 6. 14. 6. and 43 E. 3. 17. So if an Eſtate tail deſcendeth to two Daughters Coparceneres, and one entreth into the whole, and the other hath Iſſue, and ſhe who entreth dieth without iſſue, in this caſe, the Iſſue ſhall have ſeveral Writs of *Formedon* in the Deſcender of one moiety of the Poſſeſſion of his Mother, *quam inſimul tenuit*, and of the other moiety of his Poſſeſſion of her Grandmother; and therewith agreeth 43 E. 3. 16, & 17.

And in perſonal Actions the Plaintiff may comprehend ſeveral Wrongs, and ſeveral Cauſes of Actions, as one Action of Treſpaſs for ſeveral Treſpaſſes made at ſeveral days, and in ſeveral places. *Vide* 31 *H.* 6. 14. 8 E. 4. 5. & 44 E. 3. 34. 14 *H.* 8. 12. *F. N. B.* 60. An Action of Waſte upon ſeveral Leaſes, for in the Prohibition of Waſte at the Common Law againſt Tenant in Dower, &c. damages were only recovered which was in the perſonalty: So of Debt upon ſeveral Leaſes.

Note, Reader, As to the bringing of Writs of *Formedon* theſe Differences; 1. If a Remainder [88] be executed in a Writ of *Formedon* in the Deſcender he ſhall never ſpeak of this Remainder, but the general Writ of *Formedon* in the Deſcender ſhall ſerve in that caſe, and he ſhall count of an immediate Gift; for he cannot have a *Formedon* in the Remainder, when the Remainder is once executed. But if a Leaſe for life be made, the remainder in tail to *A.* the remainder in tail to *B.* if *A.* dieth without Iſſue in the life of the Tenant for life; if *B.* be driven to his *Formedon* in the Remainder, in his *Formedon* he ought to mention the Remainder to *A.* although it were determined or ſpent, as is aforeſaid. For the Demandant in the *Formedon* in the Remainder ought to make mention of all the precedent Remainders in tail, 8 E. 3. 19. 38 E. 3. 26. 44 E. 3. 8. *a.* 50 E. 3. 1. 11 H. 4. 39. 18 *H.* 8. 4. *F. N. B.* 219. *Vide Regiſter* 239. *b.* & 243. *b.* & 244. *a. brevia nunquam ſatis mentionem de remanere quando breve eſt* in the Deſcender.

2. If a Man bringeth a *Formedon* in Reverter or Remainder, as here, the omiſſion of the eldeſt Son who ſurvived the Father, or the like in the Pedigree on the part of the Donee, or of him in the Remainder, ſhall abate the Writ; but of the part of the Donee, although that the Donee had many Iſſues in lineal deſcent inheritable to the Eſtate tail, and which attend the Eſtate, the Demandant needeth not to name any of the Iſſues in the Clauſe & *quæ poſt mortem*; but ſhall ſay, *quæ poſt mortem* of the Donee *ad ipſum reverti debet*, *eo quod* the Donee died without Iſſue; and that for two cauſes. 1. Becauſe that the Demandant is a Stranger to the Pedigree of the Donee. 2. Becauſe if the Iſſue ſhall be ſuppoſed by the Writ to die without Iſſue, yet it may be that the Eſtate tail is not ſpent, for the Iſſue may have Brothers, or Coſins, inheritable to the Donee, and the Land ought not revert to the Donor ſo long as the Eſtate tail continueth. And in ſome old written *Regiſters* the Clauſe is, *eo quod* the Iſſue died without Iſſue. But the printed *Regiſter*, which imitateth the moſt ancient and trueſt Precedents is; *Et quod poſt mortem* of the Donee *reverti debet*, *eo quod* the Donee died without Iſſue, and therewith agree 22 *H.* 6. 36. by the Juſtices, 4 *Eliz. Dyer* 216. by the Juſtices, and 28 *H.* 8. *Dyer* 14, 16. *Vide* 18 E. 3. 42. 26 E. 3. 75. 45 E. 3. 44. 42 E. 3. 20. 44 E. 3. 40. 10 E. 3. 35 E. 3. *droit* 30. 47. 18 E. 2. *Formedon* 58, 59. *Regiſter* 239. *b.*

3. In a *Formedon* in the Deſcender, the Demandant (becauſe he is Privy, and ought to know [*b*] his Pedigree and Deſcent) ought to make mention of every one to whom any Right did deſcend; as after a Diſcontinuance made by the Father, if the eldeſt Son ſurviveth his Father and dieth without Iſſue, yet the younger Brother ought to make mention of him in a *Formedon* in the Deſcender,

otherwiſe if the eldeſt Brother dieth without Iſſue in the life of the Father: *à fortiori* he ought to make mention of every Heir in tail to hold the Eſtate; that is, who was ſeiſed by force of the tail. But obſerve alſo therein a difference, for if any of the Heirs in tail ſurvive their Father, and holdeth the Eſtate tail, he ought to be named in the Writ Son and Heir; but if he ſurviveth, and dieth before that he was ſeiſed, he need not name him Heir, but may name him Son only, *Et quod poſt mortem præd' D. & E. filii ejuſdem D. & E. filii & hæredis præd' D.* &c. So is the Writ when the eldeſt Son doth not enter, and when the younger Son entreth and is ſeiſed. *Vide Regiſter* 238. *b. F.N.B.* 212. *f.* 10 E. 3. 49, 50. 44 E. 3. 21, 40. 4 E. 2. *Formedon* 48. 11 E. 2. *ibid.* 56. 46 E. 3. 9. 6 E. 3. 261. 8 E. 3. 379. 11 *H.* 4. 72.

4. In a *Formedon* in the Deſcender it behoveth alwaies that the Demandant make himſelf Son and Heir, or Coſin and Heir to him who was laſt actually ſeiſed by force of the Tail, for a later Seiſin of any Heir in tail after, ſhall abate the Writ. 2. It behoveth, that he who was laſt ſeiſed be made Heir in tail to the Donee, or otherwiſe the Writ is vicious, and it is not ſufficient that he be named Son, for he may be Son and not Heir. But the ſureſt way for the Demandant is to make every one he nameth in the Writ to be Son and Heir in the Writ although they were never ſeiſed by force of the Tail, and it is not material although he name them Heirs, if they were ſeiſed or not, and thereby the Demandant ſhall be certain to make himſelf Heir as well to the Donee *per formam doni*, as to him who was laſt ſeiſed. And therewith agree 22 *H.* 6. 36. 8 *H.* 6. *Formedon* 4. 11 *H.* 6. 20. 8 E. 3. 11. 10 E. 3. 49. 27 E. 3. 81. 38 E. 3. 29. 48 E. 3. 7. 49 E. 3. 21. *Regiſter* 23, *F. N. B.* 212. And, Note, in the *Formedon* in the Diſcender there is the Clauſe, *Et quod poſt mortem*, &c. and then the Deſcent, and no Clauſe, *De eo quod*, &c. for that is moſt convenient when the Eſtate tail is ſpent, which ſerveth well in a *Formedon* in the Reverter or Remainder, but not in
[89] the Deſcender, if not in ſpecial Caſes. And ſo by theſe Differences, and the Reaſon of them, you will better underſtand your Books. Note in the Caſe at Bar, although that the Heirs of the body of *Catherine* claim the Remainder by Deſcent, yet foraſmuch as *Catherine* was never ſeiſed in Poſſeſſion of the Eſtate tail, but only of the Remainder; for this Cauſe the Writ ſhall ſay, *remanere debet*, and not, *deſcendere debet*; for the Writ ſhall never ſay, *Deſcendere debet*, to one as Son and Heir, if the Anceſtor ſtood not ſeiſed, by the Rule in the *Regiſter*, 241. *a.* & *b.*

Mich. 7 Jacobi. *In the Common Pleas.*

Fraunces Caſe.

[*b*] IN a *Replevin* between *Richard Milnor* Plaintiff, and *Tho. Fraunces* Defendant, which began *Mich.* 6 *Jacobi*, *Rott.* 2220. of taking his Cattel at *Bloxwith* in the County of *Stafford*, in a place called *Newland*, the Defendant did avow the taking of the Cattel in the place where, which contained ſix Acres, *&c.* becauſe it was his Freehold, and ſo did avow for damage feaſant. The Plaintiff in bar to the Avowry pleaded, That one *Richard Frances* was ſeiſed of the ſaid ſix Acres in Fee, and held them in Socage, and 7 *December*, by his Will in writing (whereof he made *Richard*, *Edward*, and *James* his Sons, his Executors) deviſed them to *John Fraunces* his eldeſt Son for the terme of ſixty years, if the ſaid *John* ſhould ſo long live, the Remainder thereof to the ſaid *Thomas Fraunces* for his life, the Remainder to the Heirs males of the body of the ſaid *John Fraunces*, the remainder to the Heirs males of the body of the ſaid *Thomas*, with divers remainders in Tail to his other Sons, the remainder to the right Heirs of the Deviſor: and afterwards, 30 *Jan.* next following the Deviſor died, by which *John* entred into the ſaid ſix Acres, and was thereof poſſeſſed, and 25 *Martii*, 5 *Jacobi*, demiſed the ſaid ſix Acres to the Plaintiff for one year next enſuing, for which he put in his Cattel, *&c.* In bar of which Avowrie, the ſaid *Thomas* ſaid, That the ſaid *Richard*
[90] *Fraunces* the Father was ſo ſeiſed, *&c.* and made his Will, as in the Bar to the Avowrie is alleged. And further, that the ſaid *Richard Fraunces* the Father was ſeiſed of twenty Acres of Paſture in *Tibbington*, and of a Houſe and five Acres of Land in *Dorlaſton* in the ſaid County, and alſo of the ſaid ſix Acres, in which, *&c.* And the ſaid *Richard* the Father, after the making of the ſaid Will, 8 *Jan.* 45 *Eliz.* by his Deed of all his ſaid Lands, did enfeoffe *Richard Fraunces* his Son, and *John Alport*, their Heirs, to the Uſes and Intents following; *ſcil.* to the uſe of the ſaid *Richard Fraunces* the Father for his life; and after his death of the Lands of *Tibbington* to the uſe of the ſaid *Thomas Fraunces* and his Heirs; and of the Lands in *Dorlaſton*, to the uſe of the ſaid *James Fraunces* and his Heirs and Aſſigns; and of the ſaid Lands in *Bloxwith*, in which, *&c.* to the uſe of the ſaid *John Fraunces* for ſixty years, after the death of the Deviſor, if he ſo long ſhould live; and after to the uſe of the ſaid *Thomas* for life, and after to the Heirs Males of the body of the ſaid *John*; and afterwards to the Heirs males of the body of the ſaid *Thomas*, with divers other Remainders in tail, to his other Sons, the Remainder to the right Heirs of the Feoffor, with this Proviſo in the Deed: *And farther by the aforeſaid Writing it was Provided, That if the ſaid* John Fraunces *ſhould diſturb the ſaid* Thomas Fraunces, *or the ſaid* James Fraunces, *or their Heirs or Aſſigns, or any of them*, &c. *ſo that they cannot quietly have, hold, and enjoy ſuch Lands, Tenements, and Hereditaments, as he the ſaid* Richard Fraunces *the Father had conveyed to them, and to every or either of them, or any part or parcel of the ſaid Lands, Tenements*, &c. *Or if the ſaid* John Fraunces, *his Executors*,

Executors, Administrators or Assigns, &c. *shall not suffer the Executors of the said* Richard Fraunces, *or his Assigns, quietly to have, remove, take, and carry away all and every the goods and chattels of the said* Richard Fraunces *the Father, which should be and remain in his then dwelling house*, &c. *or should doe any thing to hinder and prejudice the intent of the said* Richard Fraunces *his Father concerning the same in his last Will and Testament expressed; that then the said uses limited to the said* John Fraunces *and his Heirs, should cease, and be utterly void to all intents*; and afterwards, 30 *Jan.* 45 *Eliz. Richard* the Father died, and the said *John* entred into the said six Acres, and was thereof possessed, the remainder over as aforesaid; and that the said *Richard* the Father at the time of the Feoffement did dwell in a house in *Bloxwith* aforesaid, which is the Messuage mentioned in the said Proviso. And that the said *Richard* the Father was possessed of a Bedstead, a Table-board, and a Cup-board, as of his proper goods, and died thereof possessed in the said house: after whose death *John* entred into the said house where the said goods were, and took them, and was thereof possessed. And the said Executors 12 *Feb.* 45 *Eliz.* came to the said house, and there would have taken and carried away the said goods, and requested the said *John*, *ad permittendum ipsos bona & catalla præd' capere & asportare*, *prædictúsque* Johannes Fraunces *ad tunc & ibidem non permisit ipsos Executores* to take and carry away the goods and chattels, *secundum formam & effectum prædicti scripti Feoffamenti*, *sed idem* Johannes *ne ipsi bona & catalla præd' in eodem messuagio*, *ut prefertur existent. caperent & asportarent penitus prohibuit & impedivit*; by which the said terme of sixty years, limited to the said *John*, did cease; whereupon the said *Thomas* did enter, as in his remainder, and was thereof possessed for life, *&c.* Upon which the Plaintiff did demurr in Law. [b]

And it was objected on the Plaintiffe's part, That the said Proviso was utterly void to cease the Uses limited by the said Deed to the said *John*, for nothing by the Deed is limited to him but for sixty years, for in as much as he took but a Lease for years, the remainder limited to his Heirs males of his body, after the death of *Thomas*, doth not vest in him, but remaineth in contingency: otherwise if *John* had taken an Estate for life: and the Proviso was void, and the Use and Uses limited to the said *John Fraunces* and his Heirs, where no such Use was limited to him; and therefore the Proviso void: and Provisoes and Conditions which goe in destruction and defeasance of Estates are odious in Law, and shall be taken strictly, and shall not be construed to make void any other Use or Estate, which is not within the words of the Proviso; For, *Conditio beneficialis quæ statum construit*, *benignè secundum verborum intentionem est interpretanda*, *odiosa autem quæ statum destruit*, *strictè secundum verborum proprietatem est accipienda:* as if a Feoffement be made upon such Condition, that the Feoffee shall give the Land to the Feoffor, and to the Wife of the Feoffor, and to the Heirs of their two bodies begotten, the remainder to the right Heirs of the Feoffor, if the Husband dieth living the Wife, the Feoffee by the Law ought to make the Estate to the Wife, *&c.* so near the Condition, and also so near the Intent of the Condition as he can doe, as *Littleton* holdeth, *lib.* 2. *cap. Condition*, *fol.* 82. *scil.* to lease the Land to the Wife for terme of her life, without Impeachment of Waste, and after her decease to the right Heirs of her Husband and her begotten, the remainder to the right Heirs of the Husband. So *Littleton* saith there, If the Husband and Wife die before the Deed made, *&c.* and therewith agreeth the Book in 2 *H.* 4. 5. by all the Justices, (although it was said) that 18 *Ass. p. ult.* & 19 *E.* 3. *Entre congeable* 39. are contrary: But when Conditions do enure in destruction of Estates, then they shall be taken strict; as if a Feoffement be made in Fee of certain Lands, upon condition that the Feoffee shall not give the Land to the Husband and Wife, and to the Heirs of their two bodies begotten, if the Husband dieth without Issue, and the Feoffee maketh a Lease for life to the Wife without Impeachment of Waste (as above) it is no breach of the Condition, for it is taken strict, becausse that it extendeth to the destruction of the Feoffement. So in the Case at Bar, forasmuch as the said Proviso doth extend to the destruction of a former Use and Estate, it shall be taken strictly, and shall not destroy another Use by construction, then that only to which in words it extendeth. To which it was answered and resolved by the whole Court, That it is true, that Conditions or Provisoes which shall destroy former Estates, shall be taken strictly, but in this Case the words of the Proviso were sufficient to cease the Use limited to *John* for years, and the Use limited to the Heirs males of his body; for the words of the Proviso are, *That then the said Uses limited to the said* John Fraunces *and his Heirs should cease*; and therefore if it be asked what Uses shall cease? the Proviso will answer, *prædicti Usus*; if it be further asked, To whom are *prædicti Usus* limited? The Proviso will answer, To the said *John*, and to his Heirs; and if it be further enquired, What Use expressed before the Indenture is limited to *John*? the Deed will answer, To *John* for sixty years, *&c.* And, What Use before mentioned in the Indenture, To his Heirs? the Deed will answer, A remainder to the Heirs males of his body: So these words (*prædicti Usus*) by reference to the Uses before expressed, in the same Deed, make the words of the Proviso to be sufficient to cease the Use before limited to the said *John*, and the said Use before limited to his Heirs to cease: and it is all one to say *prædicti Usus* before limited to his Heirs, and to say the Uses before limited *prædictis Hæredibus*: In both which Cases this word (*prædicti*) hath so strong reference, as if the Uses before limited had been particularly recited in the Proviso; and, *verba accipienda sunt cum effectu.* But note, Reader, the said Books in 18 *Ass. p. ult.* & 19 *E.* 3. *Entr. Cong.* 39. are not contrary unto *Littleton*, and 2 *H.* 4. in the Case aforesaid, but are ruled upon another reason, *& hæc sunt diversa*, *& non adversa*, as it appeareth in the Second Part of my *Reports*, in the Lord *Cromwell*'s Case, *fol.* 80. *a.* where the said Cases are very well and at large explained; and therefore the outward semblance of Discord between our Books in this and other Cases, doth arise upon ignorance of the inward understanding of the said Cases, and the true reason and rule of them; for the most part every particular Case is adjudged upon a particular reason. [91]

2. It was reſolved, That a verbal denial is not any breach of the Condition, but there ought to be an act done; as after requeſt made by the Executors, to ſhut the door againſt them, or to
[b] lay his hands upon them, and to have reſiſted them, or the like Acts, ſo that by reaſon of any ſuch Act, he would not ſuffer them to take and carry away the ſaid goods, according to the ſaid Proviſo. And *Coke* Chief Juſtice held, That in ſuch caſe it is not ſufficient to ſay, *That the ſaid* John *did not ſuffer the ſaid Executors quietly to have, remove, and take, the aforeſaid goods:* or that *impedivit illos*, &c. but he ought to allege a ſpecial breach, by reaſon of ſome ſpecial diſturbance or interruption in ſuch caſe by ſome Act, to which the other party may have certain anſwer, and upon which an Iſſue certain may be taken, of which the Jury may inquire, and the Court may judge if it be a ſufficient breach of the Proviſo, or not; and he cited the Book in 10 E. 3. 40. *Roger Fannel*'s Caſe. In an Aſſiſe brought by *John* againſt *Roger Fannell* of 20 Acres of Land, and upon *nul tort* pleaded, the Aſſiſe found this ſpecial matter, That *Roger Fannell* leaſed by Deed to *John* the Plaintiff a Houſe and the 20 Acres of Land for 12 years, and in ſurety of her Term made him a Charter of Feoffment, upon ſuch Condition, That if the Leſſee was diſturbed within the Terme, that he cannot have the Tenement till the end of the Terme, that he ſhould hold the Tenements to him and his Heirs for ever: And further ſaid, That *John* was diſturbed of the Tenements, by which he was ſeiſed in the Manor, and prayed the opinion of the Court. And this Enqueſt was inſufficient for three Cauſes.

1. Becauſe the Recognitors have found a diſturbance, and have not found by whom the diſturbance was done; for if the diſturbance was done by a Stranger without the aſſent or procurement of the Leſſor, the Leſſor ſhall not loſe his Inheritance.

2. They have not found how the diſturbance was done, but generally, the Leſſee was diſturbed; ſo that the Court cannot judge that it was a diſturbance to make the Leſſor to loſe his Inheritance.

3. Whether Livery and Seiſin were made, *&c.* And therefore it appeareth in the Book, that *Shard* asked the Recognitors, 1. By whom he was diſturbed? 2. How he was diſturbed? 3. If Livery were made upon the one Charter and the other? To the firſt, they anſwered, by the Leſſor; To the ſecond, by the Sale, *ſcil.* by Feoffement in fee; To the third, upon one and the other: and thereupon *John* did recover, *quod nota*, a very good Caſe to this purpoſe. And he cited alſo the Caſe in 35 *H. 6. barr.* 162. The Maſter of St. *Katherine*'s leaſed three Houſes to one by Indenture, upon Condition that he ſhould not permit or harbour any lewd woman within the ſaid Houſes, if he be warned thereof by the Maſter, or his Servant, and if ſhe ſtay there by the ſpace of ſix weeks after warning by the Maſter or his Servant, that then the Maſter and his Succeſſors ſhould re-enter; And it was ſhewed, that the Leſſee did ſuffer ſuch a lewd woman to ſtay there, for which ſuch a Servant of the Maſter gave warning to him, that he do not ſuffer her to dwell there; and he would not, but ſuffered the ſaid woman to continue there by the ſpace of ſix weeks, for which the Maſter did put him out, *&c.* To which the Leſſee ſaid, That after the ſaid warning given, the Ma-
[92] ſter commanded the ſaid lewd woman to be in one of the ſaid Houſes, and continue there for ſix weeks after; without that ſhe continued there by the Plaintiff. And it was holden by the whole Court, that that Replication was not good, becauſe the Indenture is, *Quod non permittat* any lewd woman to continue there: As if I be bound to enfeoffe you of one Acre of Land before ſuch a day, within which time you diſſeiſe me, the ſame is not to the purpoſe, for he had no colour to enter upon me, and I may re-enter and make the Feoffement; So in the ſame Caſe, the Maſter had no colour to put the lewd woman into poſſeſſion; for which cauſe the Leſſee might well put her out. So it is no plea without ſpecial matter ſhewed: wherefore the Leſſee ſaid, That the Maſter did out him, and with force and arms againſt the will of the Leſſee put her in poſſeſſion, and made her continue there violently with force againſt the Leſſee's will for ſix weeks, *&c.* and that was holden a good plea. And ſo it is in the caſe of Feoffement before, ſuch ſpecial pleading is good, *ſcilicet*, that he did diſſeiſe him, and kept it with force, ſo that he could not enter: and theſe are the words word for word of the ſaid Caſe: *à fortiori* in the Caſe at Barr, the ſaid Prohibition by word, without an Act done by which the Executors cannot take the goods, is no breach of the Proviſo.

3. It was reſolved, That although the Defendant in the Caſe at Barr had particularly ſhewed a ſpecial act of Diſturbance againſt the words of the Proviſo, That yet the ſaid *John* ſhould not loſe his terme; for none ſhall loſe any Eſtate, or Intereſt, which he lawfully hath, without ſome act or default in himſelf; and therefore in this Caſe, foraſmuch as *John* the eldeſt Son was a Stranger to this Feoffement, he ſhall not loſe his Eſtate, without Notice given to him of the Proviſo, and of the Will of his Father, *Quod noſtrum eſt ſine facto ſive defectu noſtro amitti ſeu in alium tranſferri non poteſt.* And the opinion of *Popham* Chief Juſtice in *Mallorie*'s Caſe, in the Fifth Part of my *Reports*, *fol.* 113. That the Feoffee of Land, or Bargainee of a Reverſion by Deed indented and enrolled, ſhall not take advantage of a Condition for non-payment of Rent reſerved upon a Leaſe, upon demand by them, without notice thereof given to the Leſſee; nor the Leſſor by acceptance of Rent ſhall diſpence with a collateral Condition broken by the Leſſee, without notice given to the Leſſor, as it is adjudged in *Penant*'s Caſe, in the Third Part of my *Reports*, 64. *b.* And the Judgement, *Hill.* 1 *Jacobi*, between *Beconſhaw* Plaintiff, and *Southcote* and others Defendants in this Court, that if the Eſtate of the Lord of the Manor ceaſe by limitation of an Uſe, and the Uſe and Eſtate thereof transferred to another, who demanded the Rent of a Copyholder, who denieth to pay the ſame to him, is no forfeiture, without Notice given to the Copyholder of the alteration of the Uſe and
[b] Eſtate: And another Judgement in this Court, That the Bargainee of a Manor by Deed indented and enrolled, ſhall not take advantage of a forfeiture of Copyhold for denial of paiment of Rent to him, without Notice given to him of the Bargain and Sale, were all affirmed for good Law by the

by the whole Court. And this agreeth with the reason of *Barrough's* Case, *Mich.* 18 & 19 *Eliz.* *Dyer* 354. *a.* where Uses were limited by Fine under this Proviso, *That if B. at any time during his life*, &c. *do pay, or cause to be paid to the said A.* 20 *li. at the Fontstone within the Cathedral Church of Sarum, that then*, &c. *the Conusees in the said Fine and their Heirs should stand seised to the use of B. and his Heirs.* And it was resolved by *Wray*, *Dyer*, and *Manwood*, that tender of the 20 *li.* at the place according to the Proviso in the absence of *A.* and no Notice of the time of the tender before given by *B.* to *A.* is not good in Law to make the first Uses, for the incertainty of time during the life of *B.* and therefore in such case notice of the time of the tender ought to be given, although that he to whom the paiment should be made was party to the Conveyance, but in such case when *B.* will make a tender, he ought to give notice to *A.* that he will at such time make the tender to him, and require him to be there to receive it; and then if he at the time appointed maketh a tender, although that *A.* absent himself, it is a good performance of the Proviso to make the Uses to cease. But if a man bind himself in a Bond to performe the Award of *I. S.* and *I. S.* maketh an Award, the Obligor ought to take notice thereof at his peril, for that he hath bound himself thereto. And in such case no notice is requisite to be given to him, as it is holden in 1 *H. 6. fol.* 5. A man was bounden in an Obligation, upon Condition that if he did accompt before an Auditor by the Obligee to be assigned, when he should be required, of certain Receipts of the Manor of *D.* and should pay to him the Arrerages that should be found upon his Accompt before the said Auditor; that then the Obligation should be void: In Debt upon that Bond, The Defendant pleaded, That the Plaintiff did assign him such an Auditor, before whom he accompted, and that he hath been alwaies ready to pay the Arrerages found before the Auditor, if the said Auditor had given him notice: And it was holden by the whole Court, in 18 E. 4. 18, & 24. that the Plea was insufficient, for in as much as he hath bound himself thereto, he hath taken upon him to take notice thereof at his peril. And therefore *Brian*, *Vavasor*, and *Catesby*, Justices, agreed, That in the said Case of Arbitrament, the Obligor ought to take notice thereof at his peril. And so they said it was adjudged in the same King's time in the King's Bench: and so is the Law without question, against a sudden opinion in 8 E. 4. 1. So make a good difference, when a man bindeth himself to doe or perform any thing to be awarded, *&c.* by a stranger, he thereby taketh upon himself to take notice at his peril of all things incident thereunto for the saving of his own Bond; But it appeareth in the principal Case, and in the other Case beforesaid, the Law shall not compell one to take notice of acts done between Strangers, or of any thing incertain, upon pain of Forfeiture of his Estate, or Interest, but in such case notice ought to be given to those who are to have the loss. [93]

4. It was resolved, That although that now it appeareth, that the Title by which the Plaintiff claimeth in his Bar to the Avowry was utterly destroyed, (for the Plaintiff claimed by the Will of *Richard Frances* the Father, which Will appeareth was afterwards countermanded by the said Feoffment which the Avowant after pleaded, and which the Plaintiff did confess by his Demurrer) yet the Plaintiff should have Judgement, because that his Count is good, and the Avowant in his Replication to the Bar of his Avowry hath done two things; One, he hath destroyed the Title which he made by Will; the other, he hath given to the Plaintiff another Title, *scil.* to have the Land for 60. years, *&c.* by force of the Uses declared upon the Feoffement. So that upon the whole Record it appeareth (upon which the Court ought to judge) that the Plaintiff hath a lawfull terme in the Land; and that the Defendant wrongfully hath taken his Cattel, and therefore Judgement ought to be given against the Avowant, and for the Plaintiff, although that the Title which he made for himself was destroyed. And Judgement was entred accordingly.

Hill. 7 Jacobi.

Foxe's Case.

IN a Writ of *Second Deliverance* by *Eliz. Smalman* Widow, and *Tho. Powys* Defendant, which began in the Common Pleas, 7 *Jacobi*, *Rott.* 1546. the Defendant did demurr upon the Bar to the Avowry; and upon the Record the Case was such, *Edward Fox* seised of four acres of Meadow, 50 acres of Pasture, and 10 acres of Underwood in *Snitton* in the County of *Shrewsbury*, *An.* 31 *Eliz.* divised them to *Gilb. Smalman*, and to the said *Elizabeth* his then Wife, and to *Thomas Smalman*, *Habendum* to *Gilbert* and *Elizabeth* for terme of their lives, the Remainder to the said *Thomas* for his life, yielding during their lives, the yearly rent of four marks, at the Feasts of the Annunciation of our Lord, and St. *Michael* the Archangel, by equal portions, and afterwards the said *Gilbert Smalman* died; after whose death, *scil.* 20 *Sept.* 3 *Jacobi*, the said *Edward Fox* by Indenture, for the Consideration of 50 *li. præd'* by the said *Tho. Powys* to the said *Edward* paid, demised, granted, set, and to farm let to the said *Tho. Powys* the said Tenements aforesaid; To have and to hold to the said *Tho. Powys* from the day of the date of the said Indenture, for the terme of 99 years, yielding and paying therefore during the said term, to the said *Edw. Fox* and his heirs, the yearly rent of 40 shillings, at the Feasts of the Annunciation of our Lady, and St. *Michael* the Archangel, or within 28 days after every of the said Feasts, and that the said *Eliz.* did never attorn. And the only Point in this case was, If the said Demise and Grant to *Tho. Powys* shall amount to a Bar- [b]

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gain and Sale, ſo that the Reverſion with the Rent ſhall paſs unto *Tho. Powys* by the Statute of Uſes without any attornement. And it was adjudged, that this Demiſe and Grant upon Conſideration of 50 *li.* doth amount to a Bargain and Sale for the ſaid years; for in caſe when a Freehold or Inheritance paſſeth by Deed indented and inrolled, it needeth not to have the preciſe words Bargain and Sale, but words equipollent, or which doe *tant amount*, are ſufficient; as if a man covenanteth in Conſideration of money to ſtand ſeiſed to the uſe of his Son in Fee; if the Deed be enrolled, it is a good Bargain and Sale, and yet there are not any words of Bargain and Sale, but they do amount to ſo much, as it is holden in *Bedel*'s Caſe, in the Seventh Part of my *Reports*. So if a man for money alien and grant Land to one and his Heirs, as in tail, or for life, by Deed indented and enrolled, the ſame doth amount to a Bargain and Sale, and the Land ſhall paſs without any Livery and Seiſin. And at the Common Law before the Statute of 27 *H.* 8. of Uſes, If a man for money had aliened and granted Lands to one and his Heirs, *&c.* by that the Uſe of the Lands ſhould paſs, for the ſame is a full Bargain, and all the ſame was unanimouſly agreed; but foraſmuch as the intention of the parties is the Creation of Uſes, if by any clauſe in the Deed it appeareth, that the intent of the parties was to paſs it in poſſeſſion by the Common Law, there no Uſe ſhall be raiſed; and therefore if any Letter of Attorney be in the Deed or Covenant to make Livery of the Lands, according to the form and effect of the Deed, or other the like, there it ſhall not paſs by way of Uſe; *quia verba intentioni non è contra debent inſervire: & verba debent intelligi ut aliquid operentur.* But in the Caſe at Bar, the intent of the Grantor may be well collected, that he did intend that the Grant ſhould take effect preſently, and ſhould not depend upon any ſubſequent Attornment; for the Rent reſerved thereupon was payable preſently; and therefore it ſhall be reaſon that *Tho. Powys* the Leſſee ſhould have the Rent reſerved upon the firſt Leaſe for lives preſently; and that he cannot have before attornment (which peradventure ſhall never be done) and ſo much the rather, becauſe the ſaid *Tho. Powys* hath no means to compell the firſt Leſſees to attorn; But it ſhall paſs as a Bargain and Sale preſently executed by the Statute of 27 *Hen.* 8. (for there needeth no inrollment in this Caſe) becauſe it is but a terme for years which paſſeth, and no eſtate of Freehold, and there needeth no Attornment, becauſe it is executed by the Statute. And by this conſtruction ſhall have ſuch remedy, for that which he ought to have. See Sir *Rowland Hayward*'s Caſe, in the Second Part of my Reports, *fol.* 35.

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Mich. 7 Jacobi. *In the Common Pleas.*

Matthew Manning's Caſe.

[b] IN Debt for 200 marks by *William Clark* Plaintiff, and *Matthew Manning* Adminiſtrator of *Edward Manning* deceaſed, upon *plenè adminiſtravit* pleaded, the Jury gave a ſpecial Verdict to the effect following, which Plea began *Mich.* 4 *Jacobi, Rott.* 1829. *Edward Manning* the inteſtate *Anno* 30 *Eliz.* was poſſeſſed of the moiety of a Mill in *Clifton*, in the County of *Oxford*, for the terme of 50 years, of the cleer yearly value of 40 *li.* and afterwards the ſaid *Ed. Manning*, 30 *Eliz.* made his Will in writing, and thereby deviſeth this Indenture and Leaſe of the Farm and Mill in *Clifton*, and all the years therein to come to *Matthew Manning* after the death of *Mary Manning* my Wife, (which Farm and Mill my Will is, that *Mary Manning* my Wife ſhall enjoy during her life, conditionally, that the ſaid *Matthew* ſhall not demiſe, ſell, or give the ſaid Leaſe, but to leave the ſame wholly to *John* his Son. *In the mean time my will and meaning is, That* Mary Manning *my Wife ſhall have the uſe and occupation both of the Farm and Mill*, &c. *during her natural life: Yielding and paying therefore yearly to the ſaid* Matthew Manning, *&c. during her natural life ſeven pounds at the Feaſts of St.* Michael *the Archangel, and the Annunciation of our Lady*, &c. and made *Mary* his Wife his ſole Executrix, and died; *Mary* took upon her the charge of the Will, and had not ſufficient to pay the Debts of the ſaid *Ed. Manning* above the ſaid Terme; but ſhe entred into the ſaid Farm and Mill, and paid to *Matthew Manning* the ſum of 7 *li.* according to the ſaid Will; and ſaid, That if ſhe died, the ſaid *Matthew Manning* ſhould have the ſaid Farm and Mill aforeſaid; and afterwards the ſaid *Mary*, 16 years after the death of her ſaid Husband died inteſtate, after whoſe death the ſaid *Matthew Manning* entred into the ſaid Farm and Mill, and was thereof poſſeſſed *prout lex poſtulat*; And afterwards Adminiſtration of the Goods of the ſaid *Edward* by the ſaid *Mary* not adminiſtred was committed to the ſaid *Matthew*; and that none of the Profits of the ſaid Farm and Mill, which did accrue in the life of the ſaid *Mary*, came to the hands of the ſaid *Matthew*, beſides the ſaid 7 *li.* yearly as aforeſaid; And the doubt of the Jury was, If the reſidue of the terme in the ſaid Farme and Mill ſhould be Aſſets in the hands of the ſaid *Matthew*. But I conceived upon trial of the Iſſue at *Guild-hall* in *London*, That the deviſe to *Matthew* was good, and that there was ſufficient aſſent to the Legacy, by the ſaid paiment of the Rent of 7 *li.* But yet upon the motion of the Plaintiffe's Counſel, I was contented, that the whole ſpecial matter ſhould be found as is aforeſaid. And the Caſe was argued at the Bar, and at divers ſeveral days debated at the Bench, and *prima facie Walmſley* Juſtice conceived, That the Deviſe to *Matthew Manning* after the death of *Mary* was void, for the Wife having the ſame deviſed to her during her life, ſhe had the whole term, and the Deviſor cannot deviſe the poſſibility over, no more then a man can doe

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doe by grant in his life; for that which the Teſtator cannot doe by no advice of Counſel in his life, the Teſtator, who is intended to be *inops conſilii*, ſhall not do by his will; but by grant in his life he cannot grant the Land unto the wife for her life, the Remainder over unto another, for by the grant the wife hath the whole term at leaſt, if ſhe ſo long live, and a poſſibility cannot be limited by way of Remainder; and although that the later opinions in the Caſe (where a man poſſeſſed of a Leaſe for years, deviſeth the ſame to one for life, the remainder over) have been, that the Remainder was good; yet he ſaid that the old opinion, which hath more reaſon (as he conceived) was, that the Remainder in ſuch caſe was void, 28 *H.* 8. 7 *Dyer*, *Baldwyn* and *Shelley*, that the Remainder is void. *Englefield* contrary, 6 *E.* 6. 74. *acc.* by *Hales* and *Mountague*, 2 *E.* 6. *Deviſe Brook* 13. that the Remainder is void, for the deviſe of a Chattel for one hour is good for ever. But *Coke* chief Juſtice, *Warburton*, *Daniel*, and *Foſter* contrary, that the deviſe was good to *Matthew Manning*; and five points were reſolved by them.

1. That *Matthew Manning* took it not by way of Remainder, but by way of an executory deviſe, and one may deviſe an eſtate by his laſt will in ſuch manner, that he cannot doe by any grant or conveyance in his life. As if a Man ſeiſed of Lands in Fee holden in Socage deviſe, that if *A.* pay ſuch a ſum to his Executors, that he ſhall have the Land to him and his heirs, or in tayl, or for life, *&c.* and dyeth, and afterwards *A.* payeth the money, he ſhall have the Land by this executory deviſe, and yet he cannot have it by any grant, or Conveyance executory at the Common Law; but it well ſtandeth with the nature of a deviſe; So in the Caſe at barr when the wife dyeth it ſhall veſt in *Matthew Manning* as by an executory deviſe, as if he had deviſed that afterwards, that his Son has paid ſuch a ſum to his Executors, that he ſhall have his term; or that after the death of *A.* that [b] *B.* ſhall have the term; Or that after his Son ſhall return from beyond the Seas, or that *A.* dyeth, that he ſhall have it, in all theſe Caſes and other like, upon the Condition or Contingent performed the deviſe is good, and in the mean time the Teſtator may diſpoſe of it, and therefore in judgment of Law, *ut res magis valeat*, the executory deviſe ſhall precede, and the diſpoſition of the Leaſe, till the contingent happen, ſhall be ſubſequent, as in the caſe at Barr it was, and ſo all ſhall well ſtand together; For when he maketh the executory deviſe he hath lawfull power, and may well do it; and afterwards in the ſame Will he hath lawfull power, and may well deviſe the Leaſe till the Contingent happen; and therefore it is as much, as if the Teſtator had deviſed, that if his wife dyeth within the term, that then *Matthew Manning* ſhould have the reſidue of the term; and further deviſeth the ſame to his wife for her life.

2. The caſe is the ſtronger, becauſe that this deviſe is but of a Chattel, whereof no *Præcipe* lieth; and which may veſt, and reveſt at the pleaſure of the deviſor, without prejudice to any. And therefore if a man maketh a Leaſe for years upon Condition, that if he do not ſuch a thing, that the Leaſe ſhall be void, and afterwards he granteth the Reverſion over, the Condition is broken, the Grantee ſhall take benefit of the Condition by the Common Law, for the Leaſe thereby is abſolutely void; but in ſuch caſe, if the Leaſe had been for life, with ſuch Condition, the Grantee ſhall not take benefit of the breach of the Condition; for a Free-hold (of which a *Præcipe* lieth) cannot ſo eaſily ceaſe; but is voidable by entry, after the Condition broken, which by the Common Law cannot be transferred to a Stranger; and therewith agreeth 11 *H.* 7. 17. *Br. Conditions* 245. 2 *Mariæ*, by *Bromley* the ſame difference.

3. There is no difference when one deviſeth his term for life, the Remainder over; and when a man deviſeth the Land, or his Leaſe, or Farm, or the uſe or occupation, or profits of his Lands; for in a will the intent and meaning of the deviſor is to be obſerved, and the Law ſhall make conſtruction of the words to ſatisfy his intent, and to put them in ſuch order and courſe, that his will ſhall take effect. And always the intention of the deviſor expreſſed in his will, is the beſt Expoſitor, director, and diſpoſer of his words: And when a man deviſeth his Leaſe to one for life, it is as much as to ſay, he ſhall have ſo many years as he ſhall live, and that if he dyeth within the term, that another ſhall have it for the reſidue of the years; and although at the beginning it be uncertain how [96] many years he ſhall live, yet when he dyeth it is certain how many years he hath lived, and how many years the other ſhall have, and ſo by a ſubſequent act all is made certain.

4. That after that the Executor hath aſſented to the firſt deviſe, that it lyeth not in the power of the firſt deviſee to barr him who hath the future deviſe, for he cannot paſs more to another then he himſelf hath.

5. In many Caſes a man by his will may create an intereſt, which by grant or Conveyance at the Common Law he cannot create in his life; And therefore when Sir *William Cordell* Maſter of the Rolls did deviſe his Mannor of *Melford*, &c. in the County of *Suffolk* to his Executors for the payment of his debts, and untill his debts ſhould be paid, the remainder to *Edward* his brother, *&c.* and made *George Cary* his Executor, and others, and dyed, and after his death the debts were paid; and his wife demanded Dower, and one Queſtion amongſt others was moved, What Intereſts or Eſtates the Executors had? for if they had a Freehold, then the wife ſhould not have Dower, and if they had but a Chattel determinable upon the payment of the debts, then ſhe ſhould be endowed; and this Caſe was referred to *Anderſon* chief Juſtice of the Common Pleas, and to *Francis Gawdie* chief Juſtice of the Kings Bench, before whom the Caſe was at ſeveral daies debated, *Paſc.* 36 *Eliz.* and I was of Counſel with the Executors; And it was Reſolved by them, that the Executors had but a Chattel, and no Freehold, for if they ſhould have a Freehold for their lives, then their Eſtate ſhould determine by their death, and ſhould not goe to the Executors of the Executors, and ſo the debts ſhould remain unpaid; but the Law doth adjudge the ſame a particular Intereſt in the Land, which ſhall go to the Executors of the Executors, as aſſetts for payment of his debs. But if ſuch eſtate be made by grant, or Conveyance at the Common Law, the Law ſhall adjudge

the ſame an eſtate of Freehold, and ſo a more favourable interpretation is made of a Will in point of Intereſt or eſtate to ſatisfy the Will of the dead for the payment of his debts, then of a grant or Conveyance in his life; which he may enlarge, or make other proviſion at his pleaſure. And ſo was it Reſolved in the beginning of the reign of Queen *Elizabeth*. That where a man had iſſue a daughter, and deviſed his Lands to his Executors for the payment of his debts, and untill his debts were paid, and made his Executors and died, the Executors entred, the daughter married a Husband, and had iſſue and died, and after the debts were paid, It was Reſolved in the caſe of one *Guavarra*, that he ſhould be Tenant by the Courteſie, *Vide* 13 *H.* 7. 13. 27 *H.* 8. 5. 21 *Aſſ. p.* 8. 14 *H.* 8. 13.

Note Reader, it hath been of late oftentimes adjudged according to theſe Reſolutions, *ſc.* in *Weldons* caſe, *Plow. Com.* in the Common Pleas: and *Paramours* caſe, *Plow. Com.* in the Kings Bench, *Mich.* 26. & 27 *Eliz.* in a writ of Error in the Kings Bench, upon a Judgment given in the Common Pleas, the Caſe was ſuch, *Thomas Amner* brought an *Ejectione firmæ* againſt *Nicholas Loddington* upon a deviſe made by *Alice Fulleſhurſt* for 7 years of certain houſes in *London*, and upon Not-guilty pleaded, the Jury gave a ſpecial verdict, *ſc. Hugh Weldon* was ſeiſed of the ſaid houſes in fee, and 24 *H.* 8. demiſed them to *Thomas Perpoint* for 99 years, who by his Will in writing 1544. deviſed his ſaid Leaſe in theſe words, *I deviſe my Leaſe to my wife during her life, and after her death I will it go to her Children unpreferred*, and made his wife his Executrix, and died, his wife entred and was poſſeſſed by reaſon of the gift and legacy, and married with Sir *Thomas Fulleſhurſt*, and afterwards 2 and 3 *Phil.* and *Mary*, *Beſtwick* did recover againſt Sir *Thomas* 140 *l.* debt in the Common Pleas, and by force of a *Fieri facias* directed to *Altham* and *Mallorie* Sheriffs of *London*, the ſaid Term was ſold to *Nicholas Loddington* the Defendant, and afterwards the Judgment againſt Sir *Thomas Fulleſhurſt* was reverſed by a Writ of Error brought in the Kings Bench, *& quod ad omnia quæ amiſit ratione judicii præd. reſtituatur.* And afterwards *Alice* the wife and Executrix died, *Alice Fulleſhurſt* being then the only daughter who was unpreferred, entred, and made the Leaſe to the Plaintiff *Thomas Amner*. And this Caſe was often argued at barr by the Serjeans in the Common Pleas, and at laſt by the Judges, and in this caſe 3 points were reſolved by them. [b]

1. That the ſaid Executory deviſe of the Leaſe after the death of the wife to the daughter unpreferred, was good; and there is no difference when the term, or Leaſe, or houſes, and when the uſe, or occupation, *&c.* is deviſed, and that in all theſe caſes the executory deviſe is good.

2. That the ſale either by *Alice* the wife, or by the Sheriff upon the *Fieri facias*, after that the wife was poſſeſſed as Legatory, ſhould not deſtroy the Executory deviſe, although that the perſon to whom the executory deviſe was made, was then uncertain, as long as *Alice* the wife lived; for the ſaid *Alice* the daughter might have been preferred in her life, and then ſhe ſhould take nothing, ſo that ſuch Executory deviſe which hath dependance upon the firſt deviſe may be made to a perſon incertain, and this poſſibility cannot be defeated by any ſale made by the firſt deviſee, *&c.*

3. That the ſale by the Sheriff by force of the *Fieri facias* ſhould ſtand, although the Judgment was after reverſed, and the Plaintiff in the writ of Error reſtored to the value, for the Sheriff who made the ſale, had lawfull authority to ſell, and by the ſale the Vendee had abſolute property in the term during the life of *Alice* the wife; and although that the Judgment, which was the warrant of the *Fieri facias*, be afterwards reverſed, yet the ſale which was a collateral act done by the Sheriff, by force of the *Fieri facias*, ſhall not be avoided; for the Judgment was, that the Plaintiff ſhould recover his debt, and the *Fieri facias* is to levy the ſame of the Defendants goods and Chattels, by force of which the Sheriff ſelleth the term which the Defendant hath in the right of his wife, as he well may, and the Vendee payeth monies to the value of it. And if the ſale of the term ſhould be avoided, the firſt Vendee ſhould loſe his term, and his money alſo: And thereupon great inconvenience would follow, that none would buy of the Sheriff goods or Chattels in ſuch caſes, and ſo Execution of Judgment (which is the life of the Law) ſhould not be done. And according to theſe Reſolutions Judgment was given in the Common Pleas for the Plaintiff. And in the Kings Bench upon a writ of Error the Caſe was after argued at the Bar by Sir *Chriſtopher Wray*, and the Court there, and at length the Judgment was affirmed. And ſo the ſaid 3 points were adjudged in both Courts: And by theſe latter Judgements you will better underſtand the Law in the books, in which there are ſome variance of opinions. 37 *H.* 6. 30. 33 *H.* 8. *br. Chattels* 33. 2 *E.* 6. *br. demiſe* 13. 28 *H.* 8. *Dyer*, 7. 10 *Eliz. Dyer*, 277. *Plow. Com. in* Weldons & Paramores *Caſe*, &c. *Quia judicia poſteriora ſunt in lege fortiora.* [97]

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and yet the Common Law doth except Infants, thoſe who are out of the Realm, or which are impriſoned, *&c.* and therewith agreeth 5 E. 3. 222. 7 E. 3. 335. that the year and day ſhall be accounted after the Execution, for by the tranſmutation of the poſſeſſion, the Country hath notice thereof. *Vide* 4 E. 3. 46. and 11 R. 2. *Eſcheat* 13. *Plow. Com.* 356. And the reaſon why a Recovery in a Writ of Right where the Trial was Battel, or Grand Aſſiſe, was final to all Strangers, is, for the grand notice that men have of Battel, and of the Trial by Grand Aſſiſe, their Proceedings and Performance are with ſo notorious, famous, and publick Solemnities, and if ſuch Recoveries with ſuch Solemnities ſhall not barr him who is out of the Realm, nor Infants, nor Men of *non ſanæ memoriæ* nor Men in priſon; *à fortiori* Cuſtom and Proclamations in a private Court of a Manor ſhall not bind them. And the Law in theſe Caſes was grounded upon great reaſon, for he who is out of the Realm, in another Country, cannot by intendment of Law have notice of things done within this Realm; an Infant hath not underſtanding, nor can know his Right either to follow it by Entry, or Action; So of a man of *non ſanæ memoriæ*, who wanteth reaſon and ſenſe to make claim; ſo of him who is impriſoned, who by Judgement of Law ought to be *in ſalva & arcta Cuſtodia, ſc. Salva*, as to the party at whoſe Sute he is impriſoned, becauſe he ought to be impriſoned ſo ſtrong that he may not eſcape; and *arcta*, in reſpect he ought to be cloſe in Ward, without conference with others, or intelligence of things abroad; and he ought not to go out of the Priſon to make his claim. And that is the cauſe that a Recovery by default againſt him in a real Action ſhall not bind him, but he ſhall reverſe the ſame by Error, as it appeareth in 5 *Ed.* 3. 50. *b.* 4 *Ed.* 2. *Diſceit*, 51. Littl. 102. [*b*]

Note, Reader, That a Feme Covert is not mentioned in any of the ſaid Acts, but was bound at the Common Law by her Non-claim, becauſe ſhe had a Huband who might make claim, and that was one of the cauſes, that the Statute of 34 *Edw.* 3. *cap.* 6. ouſted Non-claim: but the Statute of 4 *H.* 7. *cap.* 24. excepteth Feme Coverts who are Strangers to the Fine, ſo that ſhe make her Claim within five years after the death of her Husband. And at the Common Law, Men out of the Realm, Infants, Men of *non ſanæ memoriæ*, and in Priſon, who were not bound to make Claim within the year and day, were perpetually for them and their Heirs exempted to make Claim. And therefore it was reſolved, That the ſaid Cuſtom in the Caſe at Bar is ſo to be intended, that it ſhall bind him who doth not make his Claim, *&c.* if he be within the Realm, of full Age, of perfect Memory, and out of Priſon; for no Cuſtom by the Law can extend to bar thoſe, who by Judgement of Law are not bound to make Claim. But it was reſolved, That if *William Copley* had been within the Realm at the time of the firſt Proclamations, and afterwards gone out of the Realm, that the Proclamations ſhould bind him, although that he be *extra quatuor maria*, at the time of the other Proclamations, for he ſhall not defeat the Lord of his Fine or Forfeiture by his own act. *Vide* 9 *H.* 7. 24. and the reaſon of *Littl. lib.* 3. *fol.* 104. was well obſerved, who having put the Caſe of Non-claim of him who is out of the Realm that he ſhall not hurt him in the Caſe of Fine, he ſaith as followeth, by great reaſon, *&c.* That a Diſſeiſin and a Deſcent, which is matter in fact, ſhall not ſo much grieve him who is ſo diſſeiſed when he was out of the Realm at the time of the Diſſeiſin, and alſo at the time that the Diſſeiſor died ſeiſed, but that he may well enter, notwithſtanding the Deſcent; upon which Two things were collected.

1. That as at the Common Law, If a man was within the Realm at the time of the Fine levied, and within the year goeth out of the Realm, he ſhall be bounden; So if a man be diſſeiſed, and afterwards goeth out of the Realm, a Deſcent caſt afterwards ſhall take away his Entry, as appeareth alſo by *Littl.* 103. *a.*

The ſecond thing is, That if he who is out of the Realm ſhall not be bound by Non-claim upon a Fine, which is a matter of Record, *à fortiori*, he ſhall not be bound by Non-claim upon a Deſcent, which is a matter in Fact. If a man be diſſeiſed, and afterwards is impriſoned, and afterwards a Deſcent is caſt, it ſhall take away his Entry, and therewith agreeth 9 *H.* 7. 24. *a.* And ſome ſay that in this caſe, that if a man be ſeiſed of Land, and hath Iſſue two Sons Baſtard eigne, and Mulier puiſne, and the Father dieth ſeiſed, the Mulier being beyond Sea, or within age, or impriſoned, or of *non ſanæ memoriæ*, and the Baſtard eigne entreth, and continueth in peaceable poſſeſſion of the Lands, and hath Iſſue, and dieth, and the Lands deſcend to his Iſſue, the Right of the Mulier in all the ſaid Caſes is bound for ever; and ſome hold the contrary. [101]

2. It was reſolved, That foraſmuch as *William Copley* was out of the Realm at the time of the death of his Father, although that he was not in the King's ſervice, yet he ſhall not be barred by the ſaid Cuſtoms and Proclamations, becauſe he could not by intendment of Law have notice; and at the Common Law ſhould not be barred by Non-claim upon a Fine, or Writ of Right, *Bracton, lib.* 5. *tract. de Exceptio. Cap.* 29. *fol.* 436. *Excuſatur quis quod clameum non appoſuerit, ut ſi in toto tempore litigii fuit ultra mare quacunque occaſione*, Littl. *acc. fol.* 134. *a. Vide* 9 *H.* 4. 3. 26 *H.* 6. *Error*, 27. 33 *H.* 6. 1. 1 *Aſſ. p.* 2. 21 *H.* 6. 24. 2 *E.* 3. *Coron.* 153. *The Preamble of the Statutes of* 26 *H.* 8. *cap.* 13. *&* 5 *&* 6 *E.* 6. *cap.* 11. Note, Reader, as to thoſe Caſes which have been put of Baſtard eigne and Mulier puiſne, I conceive that the better opinion is, That in ſuch Caſes the Mulier ſhall be barred for ever; and the reaſon is, becauſe that the continuance in poſſeſſion, and dying ſeiſed in peace, and deſcent to his Iſſue maketh him Heir, and his Iſſue ſhall inherit as Heir, becauſe that he was legitimate by the Law of holy Church; for (as *Bracton, lib.* 2. *fol.* 63. ſaith) *Matrimonium ſubſequens facit quoad ſacerdotium* (becauſe that they are legitimate by the Common Law) *non quoad ſucceſſionem, propter conſuetudinem regni quæ ſe habet in contrarium.* And by the Law of *England* by the Continuance in poſſeſſion, and dying ſeiſed in peace and deſcent, *&c.* he is adjudged Heir to his Father, for although that the Baſtard dieth ſeiſed without Iſſue ſo that the Land doth not deſcend, the Mulier ſhall have it; and therewith agreeth the *Abridgement of the Book of Aſſiſes* 3.

and the rule in 13 E. 1. *Baſtardy* 28. is ſo to be intended, *Juſtum non eſt aliquem antenatum mortuum facere Baſtardum, qui pro tota vita ſua pro legitimo habebatur. Vide* 29 E. 3. 14. & 39 *Aſſ. p.* 10. And in the Caſe of Legitimation (which is in Law ſo pretious and of ſo great eſtimation) the Law doth not reſpect Infancy, or other Defects of the Mulier, but doth prefer Legitimation of Blood before any benefit of temporal Inheritance. And therefore the Law ſaith, That by the death of the Baſtard eigne in peace, he becometh right Heir, and by conſequence the Mulier is barred. *Vide* 5 E. 2. *Br. Deſcent* 49. 31 *Aſſ. p.* 18. and 22. *John Alleyn*'s Caſe; and 33 E. 3. *Verdict* 48. the ſame Caſe. 36 *Aſſ. p.* 2. *Plow. Com. Stowel*'s Caſe. *Vide* 10 E. 3. 2. the dying ſeiſed of the Baſtard eigne doth bind the Right, and the deſcent ſhall not take away the entry only, but alſo the right; and therefore a deſcent in that caſe may be a barr of the right, when it ſhall not take away the entry in caſe of diſſeiſin, as a deſcent of Services, Rent, Reverſion expectant upon an Eſtate tail, &c. ſhall barr
[b] the Right of the Mulier, as it appeareth in 18 E. 2. *Baſtardy* 26. but ſuch deſcent ſhall not take away the entry or claim of the Diſſeiſee; and ſo in many other Caſes, as it appeareth by the ſaid Books afterwards cited in this Caſe. And if a man hath two Daughters baſtard eigne, and Mulier puiſne, and they enter and occupie as Heirs, now the Law in favour of Legitimation will not adjudge the whole poſſeſſion in the Mulier, who then had the ſole right, but in both: ſo that if the Baſtard dieth ſeiſed, her Iſſue ſhall inherit; and therewith agreeth 17 E. 3. 59. *Baſtardie* 32. And if in the ſame Caſe the Daughters, *ſcil.* the Baſtard eigne and Mulier puiſne enter, and make Partition, this Partition ſhall bind the Mulier for ever, 2 E. 2. *Baſtardie* 19. 21 E. 3. 34. *b.* 30 *Aſſ. p.* 7. but if Partition be made betwixt two Daughters, where one hath no colour, as to a ſpecial Eſtate, there the Partition is void, 11 *Aſſ. p.* 23. *Hugh de Wimondham*'s Caſe. And an Aſſiſe of *Mortdanceſter* doth not lie betwixt the Mulier and the Baſtard eigne, no more then between two Brothers, and therewith agreeth *Britton*, 70. and if the Baſtard eigne entreth, and is ſeiſed of Lands as Heir, he ſhall be vouched as Heir, and if he be within age the Plea ſhall demurr, 20 *Edw.* 3. *Voucher* 129. And if a man hath Iſſue Baſtard eigne and Mulier puiſne, and dieth, and the Baſtard within age entreth and is impleaded, he ſhall have his age; and therewith agreeth the Book in 11 E. 3. *Age* 3. Which Caſes prove, That when the Baſtard eigne entreth into the Lands, until he be interrupted, he is accounted Heir, although that the Mulier be within age, for when the Baſtard eigne is within age, of neceſſity the Mulier puiſne alſo ought to be within age. *Vide* 5 H. 7. 2. And if a man hath Iſſue Baſtard eigne and Mulier puiſne, and the Baſtard hath Iſſue, and dieth in the life of his Father, and afterwards the Father dieth, the Iſſue of the Baſtard entreth and dieth without interruption; ſome ſay the ſame ſhall barr the Mulier. So if a Baſtard born before marriage entreth, and hath Iſſue, and dieth ſeiſed, it ſhall barr the collateral Heir, and the Lord by Eſcheat, as well as the Mulier puiſne; So if the Baſtard eigne entreth and dieth ſeiſed, his Wife with Child with a Son, and afterwards the Son is born, he ſhall inherit the Land, for in as much as his Father died ſeiſed in poſſeſſion without interruption, the Mulier ſhall not allege againſt the Iſſue baſtardy in his Father who is dead. And if the Baſtard eigne dieth ſeiſed, and his Iſſue endoweth the Wife of the Baſtard; yet the Mulier ſhall not enter upon the Tenant in Dower, for the right of the Mulier was barred by the dying ſeiſed and the deſcent: Otherwiſe it is of a Deſcent which taketh away Entry only, and not the Right. The ſame Law in the caſe aforeſaid, If the Wife of the Father of the Baſtard eigne and Mulier puiſne be endowed, yet the Iſſue of the Baſtard ſhall have the Reverſion of it, *Cauſa qua ſupra. Vide* 10 E. 3. *Waſte* 142. 20 H. 3. *Baſtardie* 29. 2 *Aſſ. p.* 9. 14 E. 3. *Baſtardie* 26. 13 E. 1. *Baſtardie* 28. 32 E. 1. *Baſtardie* 31. 39 E. 3. *The laſt Caſe.* 36 *Aſſ. p.* 2. 6 E. 3. 54. *Faux Recovery* 2. 10 E. 3. 2. *Plow. Com. Talbot*'s Caſe, 57. and *Stowell*'s Caſe, 373, 374. Note, Reader, the reaſon wherefore the younger Son who is born during the marriage of a lawfull Wife, is called Mulier puiſne, *ſeu*, *Filius mulieratus*, is, becauſe this word (*Mulier*) in Latin hath three ſignifications. 1. *Sub nomine Mulieris continetur quelibet Fœmina.* 2. *Propriè continetur Mulier quæ Virgo non eſt.* 3. *Appellatione Mulieris in Legibus Angliæ continetur Uxor.* So that, *Filius natus ex juſta Uxore appellatur in Legibus Angliæ, Filius mulieratus; ſicut Baſtardus dicitur à Græco vocabulo, Baſſaris*, i. e. *Meretrix, ſeu Concubina, quia procreatur ex Meretrice ſive Concubina.* And therewith agreeth *Glanvil. l.* 7. *c.* 1. *Quod ſi verum eſt*, &c. *tunc melioris conditionis eſt in hoc baſtardus Filius quam mulieratus*, &c. where he maketh an oppoſition of a Son Mulier, and a Baſtard Son, and there Mulier is taken for Legitimate, *procreat. de Uxore*; and *Baſtardus, ex Meretrice ſive Concubina.* And therewith agreeth *Britton*, 70. of *Mortdanceſter*, *fol.* 81. where he ſaith, in the ſame manner, of two Brothers of divers Mothers, and between a Brother Mulier and a Brother Baſtard, *&c.* And the Books in 32 E. 1. *Baſtardie* 31. 6 E. 2. *Baſtardie* 24. 39 E. 3. 14. 39 *Aſſ. p.* 10. 44 E. 3. 12, &c. *Littleton ubi ſupra*, &c.
[102]

Hill. 7 Jacobi.

Baſpole's Caſe.

WIlliam *Freeman* brought an Action of Debt upon an Obligation of 25 *li.* bearing date 9 *Aprilis*, 6 *Jacobi*, againſt *John Baſpole*, The Defendant demanded oyer of the Condition, which [b] was, That if the within *John Baſpole*, &c. ſhall well and truly ſtand to, abide, fulfill, and keep the Award, Arbitrament, Order, Rule, Judgement, and final Determination of *Francis Theobald*, Gent. indifferently named, elected and choſen, as well on the part and behalf of *John Baſpole*, as of the ſaid *William Freeman*, for to order, judge, rule, and final Determination to make of all Matters, Suits, Debts, Duties, Actions and Demands whatſoever had, made, or depending between the ſaid *John* and *William* from the beginning of the World until the day of the date hereof, ſo as the ſaid Award, Order, and final End be made and given up under the Hand and Seal of the ſaid *Francis Theobald*, to either of the ſaid Parties, at or before the Feaſt of Saint *James* the Apoſtle, next enſuing, that then this preſent Obligation to be void; and pleaded, That the Arbitrator *nullum fecit Arbitrium*, &c. *de & ſupra Præmiſſis in Conditione præd' ſpecificat'*: The Plaintiff replied, that the Arbitrator 25 *Junii*, *an.* 6. of the King that now is, by his writing made an Order and Award between the ſaid *William* and *John*, *de & ſupra Præmiſſis modo & forma ſequentibus*, viz. That where a Sute was depending between the ſaid *John Baſpole* and *William Freeman*, for a Debt due by *William Paſpole*, Father of the ſaid *John Baſpole*, deceaſed, to *Robert Freeman*, Father of the ſaid *William Freeman*, deceaſed, which juſt Debt was 20 *li.* to be paid by ſeven years then paſt to the ſaid *Robert Freeman*, and now due to *William Freeman*, as Adminiſtrator of his Father, which Debt the ſaid, *John Baſpole*, for good conſideration, did promiſe to pay to the ſaid *William*, as upon good proof appeareth to the Arbitrator; That the ſaid *John Baſpole* ſhould pay to the ſaid *Will. Freeman* in [98] conſideration of the ſaid Debt long due, and for his great coſts in that part ſuſtained, the ſum of 22 *li.* And that after, he requeſted the ſaid *Joh. Baſpole* to pay the ſaid ſum of 22 *li.* which he refuſed to doe, upon which the Defendant did demurr in Law. And two Objections were made againſt this Arbitrament; 1. Becauſe that the Arbitrament was made of the one part, and not of the other, as in 7 *H.* 6. 40. that one Party ſhould goe quit of all Actions had by the other againſt him; and nothing is ſpoken of the Actions which he hath againſt the other, and therefore void. 2. It doth not appear that this matter, of which he maketh the Arbitrament, was the matter only which was betwixt them, for the ſubmiſſion is general of all Actions and Demands, *ſo as the ſaid Award be*, &c. So that if he doth not make Award of all Matters in controverſie the Award is void. To which it was anſwered and reſolved, That as to the firſt the Award was ſufficient and good; for here the Award is as well of the one Party as of the other, for the one receiveth money, and the other is diſcharged of the Debt, and his Promiſe to pay it. And it is not like the ſaid Caſe in 7 *H.* 6. 40. for there one ſhall be diſcharged of Actions, and the other ſhall receive nothing in ſatisfaction thereof. *Vide* 22 *Edw.* 4. 25. To the ſecond Objection it was anſwered and reſolved, 1. It appeareth by the Award, that it was made, *de Præmiſſis præd' in Conditione præd' ſpecificat'*, which words implie, that he made an Arbitrament of all that which was referred unto him, and ſo ſhall it be intended till the contrary be ſhewed and alleged by the other Party; For when the ſubmiſſion is general in all Actions, *&c. generale nihil certi implicat*, and therefore it well ſtandeth with the generality of the words, that there was but one Cauſe depending in controverſie between them. But where the ſubmiſſion is of certain things in ſpecial, and with a Proviſo or Condition, that the Award be made, *de Præmiſſis*, &c. or words which do amount to ſo much, there it behooveth that the Arbitrator make the Award of all, otherwiſe it is void. But if diverſe things in ſpecial are ſubmitted without ſuch conditional concluſion, the Arbitrator may make the Award of any of them. And as it is of diverſe particular things, ſo it is of diverſe particular perſons: And therefore if two on the one part, and one on the other part, ſubmit themſelves, the Arbitrator may make Arbitrament between one of the two of the one part, and the other of the other part, and it ſhall be good. 2. Although that there were many matters in controverſie; yet if one only be ſignified to the Arbitrator, he may make an Award thereof; for the Arbitrator is in the place of a Judge, and his Office is to determine *ſecundum allegata & probata*, and the duty of the Parties who are grieved, and know their particular Griefs, is to ſignifie their Cauſes of controverſie to the Arbitrator, for they are privie to them, and the Arbitrator a ſtranger, and each ought to doe that which lieth in his knowledge, and if other conſtruction ſhould be made, many Arbitraments might be avoided; for one might conceal a Treſpaſs done, or other ſecret cauſe of Action [b] given to him, and ſo avoid the Award, *Et expedit Reipublicæ ut ſit finis Litium.* And the ſame is like to *Cullamore's* Caſe upon the Statue of Bankrupts, in the Second Part of my *Reports*, 25 and 26. which provideth, that equal diſtribution ſhall be made of the Bankrupt's Goods between all the Creditors, but that is, (as it is there reſolved) to be intended of thoſe who will come in and ſignifie their Debts. And hereby you will the better underſtand your Books in 39 *H.* 6. 9. 22 E. 4. 25. 19 *H.* 6. 6. *b.* 2 *R.* 3. 18. 4 *Eliz. Dyer* 216. 8 *Eliz. Dyer* 242.

Hill. 7 Jacobi *Regis.*

Sir *Richard Lechford*'s Caſe.

[99] IN an *Eject. firmæ* in the Kings Bench by *Thomas Undrel* Plaintiff, and *Briſtow Elſay* Defendant, of a demiſe made by *Will. Copley*, 2 *No.* 2 *Jac. Reg.* of a houſe and 20 acres of Lands, *&c.* in *Lee* in the County of *Surrey* for term of one year, the Defendant pleaded that *R. Lechford* Knight was ſeiſed of the Tenements, in which, *&c.* in his Demeſn, as of fee, and leaſed them to the Defendant for his life, and that *Will. Copley* did diſſeiſe him, and made the leaſe to the Plaintiff, and that the Defendant did re-enter, *&c.* and that the Plaintiff replyed and ſaid, that the tenements in which, *&c.* are, and time out of mind were parcel of the Mannor of *Sherwood* in *Lee* aforeſaid, whereof *Henry Lechford* Eſquire was ſeiſed, and that the ſaid Tenements in which, *&c.* are, and time out of mind were demiſed and demiſable, *&c.* by Copy of Court Roll, *&c.* And that the ſaid *Henry Lechford* at the Court of his Mannor, *Anno* 2 *Eliz.* granted the ſaid Tenements to *Tho. Copley* father of the ſaid *William Copley*, to have and to hold to him and his heirs by Copy of Court Roll, *&c.* And afterwards the ſaid *Thomas Copley* died ſeiſed thereof of ſuch eſtate, which deſcended to the ſaid *William Copley* his ſon and heir, the Leſſor, *&c.* The eſtate of the ſaid *Henry Lechford* in the ſaid Mannor the ſaid Sir *R. Lechford* Knight hath, who entred upon the poſſeſſion of the ſaid *William Copley* the ſon, and expulſed him of the Tenements, in which, and demiſed them to *Briſtow Elſey*, as is aforeſaid, upon whom the ſaid *William Copley* did re-enter, and demiſed them to the Plaintiff, *&c.* To which the Defendant did re-joyn and confeſs, that the Tenements aforeſaid were parcel of the Mannor, and de-
[*b*] miſed and demiſable, *&c.* And the grant by Copy made to the ſaid *Thomas Copley*, and the deſcent to *William Copley*, *prout*, &c. But further he ſaid, That within the ſaid Mannor, there is, and time out of mind, *&c.* was ſuch a cuſtom, That if any cuſtomary Tenant of the ſaid Mannor dyeth ſeiſed of any Lands, or Tenements, holden by Copy, *&c.* in fee-ſimple, that every heir of ſuch Tenant ſo dying ſeiſed, ſhall pay a reaſonable fine for his admittance to be in full Court of the ſaid Mannor by the Lord or his Steward ſet or impoſed. And further within the ſaid Mannor there is another cuſtom time out of mind, That if any Copyhold Tenant, ſeiſed of any Lands or Tenements holden by Copy, *&c.* of the ſaid Mannor in fee-ſimple dyeth thereof ſeiſed, and his heir doth not come at the next Court of the ſaid Mannor, and claim the ſaid Tenements, and pray to be admitted to them, *&c.* then open proclamation ſhall be made in full Court that the ſaid heir come at the ſame Court to claim the ſame Lands, and to pray to be admitted, and ſo at two other Courts following of the ſaid Mannor the like proclamation ſhall be made; and if ſuch heir at any time of the ſaid Courts in which Proclamation ſhall be made, cometh not to claim the ſaid Tenements, and pray to be admitted to them, Then the Lord of the Manner hath always uſed and accuſtomed to ſeiſe them into his hands, as forfeit to him, and pleaded that three proclamations were made at three ſeveral Courts, according to the cuſtom; and that the ſaid *William Copley*, ſon and heir of *Thomas Copley*, came not to any of them to claim the ſame Lands, and pray to be admitted to them: For which the ſaid Sir *Richard Lechford* then and yet Lord of the ſaid Mannor, ſeiſed the ſaid Tenements aforeſaid, in which, *&c.* as forfeit to him, and leaſed them to the Defendant, as aforeſaid. To which the Plaintiff ſaid, That the ſaid *Thomas Copley* 10 *Julii*, 27 *Eliz.* as is aforeſaid, dyed ſeiſed of the ſaid Tenements, after whoſe death the Tenements aforeſaid, in which, *&c.* deſcended to the ſaid *William Copley*, as aforeſaid; And that at the time of the death of the ſaid *Thomas Copley*, and at the time of the ſaid ſeveral proclamations, the ſaid *William Copley* was reſident at *Bruxels*, beyond the ſeas, *extra quatuor maria, & ibi per totum tempus remanebat*, and there for all the ſaid time remained untill the firſt day of *Septemb. Anno* 1. *Jac. Reg.* which day he returned from *Bruxels* aforeſaid into *England*; And that immediately after his return aforeſaid, then having notice, and not before, of the death of the ſaid *Thomas Copley*, the ſaid *William Copley* 30 *Sept.* 1 *Jac.* came to the ſaid Sir *Richard Lechford*, there Lord of the ſaid Mannor, and prayed to be admitted to the Tenements aforeſaid, in which, *&c.* And offered to the ſaid Lord any reaſonable fine for his admittance to them, which the Lord utterly refuſed, *&c.* Upon which the Defendant did demur in Law; And it was adjudged that this Cuſtom and Non-claim ſhould not bar him who was beyond Sea (*extra maria*) at the time of the proclamations made of his Inheritance, becauſe that he
[100] who is out of the Realm could not have knowledge by intendment of Law of the death of his Father, nor of the proclamations made to warn him to come to claim his Inheritance, and pray to be admitted to it. And it appeareth by the Statute of *modo levandi fines*, made 18 *E.* 1. That a fine levied of Lands in the Common Pleas, is as high a bar, and of as great force, and of ſo high nature in it ſelf, that it doth barre not onely thoſe who are parties and privies to the fine and their heirs, but alſo all people of the world who are of full age, out of priſon, of good memory, and within the 4 Seas the day of the fine levyed, if they do not make their claim within the year and day, *&c.* And that appeareth alſo by the Statute of *Donis Conditionalibus*, made 13 *E.* 1. upon which it was concluded, That if the ſublimity of a fine, which is ſo high a barr, and of ſo great force, and of ſo puiſſant a nature, and which hath ſuch ſolemnity in ſo high a Court of Record, ſhall not barr him who is out of the Realm, *à fortiori* Proclamations made in a baſe Court in a private corner, ſhall not barr him. So Judgment final in a Writ of Right in the Common Pleas ſhall bind all ſtrangers, if they make not their claim within the year and day after the Judgement and execution;

and

Hill. 7 Jacobi. *In the Common Pleas.*

John Talbot's Case.

John Chapman brought a Writ of *Second Deliverance* against *John Pendleton* of two Heifers taken at *Albrighton*, in a place called *Bromley* in *Albrighton*, in the County of *Shrewsbury*, &c. The Defendant made Conusans as Bailiff to *John Talbot* Esquire, and said that the place where, *&c.* did contain three Acres of Pasture, lying in a field called *Bromley* in *Albrighton*, and that one *John Chapman* Father of the said *John Chapman*, whose Heir he is, was seised of the said three Acres of Pasture in Fee, and held them of the said *John Talbot*, as of his Manor of *Albrighton* in the said County by Fealty, and Sute of Court to the Manor from three weeks to three weeks, and by the Service to render after the death of every Tenant of the said three Acres of Pasture in which, *&c.* dying thereof seised, the best beast which the Tenant had at the time of his death in the name of a Heriot; Of which Services he was seised by the hands of the said *John Chapman* the Father, as by the hands of his very Tenant, *&c.* And the said *John Chapman* the Father so being thereof seised, died seised thereof: And that at the time of his death he was possessed of a beast of the price of 5 *li.* as of his proper beast; which Ox was this best beast which he had at the time of his death, *&c.* And because the said Heriot was behind, and not delivered, the Defendant, as Bailiff of the said *John Talbot*, did acknowledge the taking of the Cattel aforesaid in the place where, *&c.* as *infra feodum & dominium suum*, &c. In barr of which the said *John Chapman*, now Plaintiff, said, That before the said *John Chapman* his Father had any thing in the said three Acres of Pasture, one *John Barny* was seised of a House and a half yeard Land, of Land meadow and pasture, containing by estimation 50 Acres, in *Albrighton* aforesaid, whereof the said three Acres of Pasture in which, *&c.* were parcel, in his demean as of fee, and the said House and half yeard of Lands, meadow and pasture, held of the said *John Talbot*, as of his said Manor by Fealty, Sute to his Court, and Heriot service, after the death of every Tenant dying thereof seised; and that the said *John Barny* being so seised of the said Messuage and Half yard entirely, *Anno* 32 *Eliz.* of three Acres of Lands parcel of the said half yard Land, did enfeoffe the said *John Talbot*, to have and to hold to him and his Heirs: And afterwards, *Anno* 36 *Eliz.* of the said three Acres of Pasture in which, *&c.* did enfeoffe the said *John Chapman* the Father, to have and to hold to him and his Heirs, who died thereof seised, and the same descended to *John Chapman* the now Plaintiff, *&c.* Upon which the Avowant did demurr in Law. And the only Question in this Case was, If the Lord by the purchase of the said three Acres of pasture in which, parcel of the said Tenements holden of him by Heriot service, hath extinct his Heriot or not. And the Counsel of the Avowant did insist strongly upon the words of *Littl. lib.* 2. *cap. ult. fol.* 49. where he saith, That notwithstanding the purchase of parcel, *&c.* by the Lord, the Homage and Fealty remain intire to the Lord; for the Lord shall have the Homage and Fealty of his Tenant for the remnant of the Lands and Tenements holden of him, as he had before, because that such Services are not annual Services, and cannot be apportioned; which reason proveth (as it was urged) that the Heriot service in the case at barr doth continue, for this Service is not annual, (being due only upon the death of the Tenant) and cannot be apportioned because it is entire; *scil. optimum animal.* So they said, That it appeareth by *Littleton, lib.* 2. *cap.* 3. and 7 E. 3. 29. That he who holdeth by Knights service, ought to goe in person, or find another able person for him Covenably arrayed for the Warr, *&c.* which is an intire Service: and yet *Littleton* saith, *fol.* 49. That if the Lord purchase part of the Land so holden, the Escuage shall be apportioned, which proveth that the Tenure by Knights service doth remain for the residue, and the reason is, as it was urged, because that the entire service was not annual, and the service by the body of a man cannot be apportioned. Also they cited the Book in 34 E. 3. *Heriot* 1. where it is holden, That if my Tenant who holdeth of me by a Heriot alieneth parcel of his Land to another, each of them is chargeable to me of a Heriot, because it is entire; and although the Tenant purchaseth the Land again, *&c.* I shall have of him for every part a Heriot. So in the Case at Barr, although that the Lord purchaseth parcel of the Land, yet he shall have a Heriot for the residue, for that it is entire, and not annual. But it was answered and adjudged by the whole Court, That in the Case at Barr, the Heriot service was extinct. And first the Resolutions in *Bruerton's* Case in the Sixth Part of my *Reports* were affirmed to be good Law by the whole Court. And in this Case these Points were resolved.

[b] [105] [b]

1. That some entire Services by alienation of parcel of the Tenancy shall be multiplied, *scil.* that every several Alienee shall pay a several entire Service; and some entire Services, by alienation of parcel shall not be multiplied, but the Lord shall be content with one amongst all the several Alienees: And as to that, it is to know, that there are four manners of entire Services: 1. When a thing entire, be it a Chattel valuable, or a thing of pleasure, shall be rendred and paid by the Tenant to the Lord, a Chattel valuable, as a Horse, an Ox, a pair of Spurrs, Bow and Arrows, a Launce, a Gauntlet, or the like; things of pleasure, as a Faulcon, or other Bird, a Dog, or other things of pleasure: All such entire Services by alienation of parcel of the Tenancy shall be multiplied, and every Alienee shall render the entire Service: And yet by the purchase of parcel by the Lord the whole is extinct, as it is resolved in *Bruerton's* Case. The second is a personal Service to be done by the Tenant to the person of the Lord, as Homage, Fealty, Knights service, to be Carver,

ver, Sewer, Butler, or other like perſonal Services to the Lord, and ſome of theſe ſhall multiply, and ſome not; And therefore Homage and Fealty by alienation of parcel ſhall multiply, becauſe that when the Tenant doth Homage or Fealty, he doth them from all the Tenements which they hold of the Lord, ſo that theſe Services extend to the entire Tenancy, and every parcel of it, and although that the Lord purchaſeth part, yet the Homage and Fealty do remain for the reſidue: So that although *Littl.* (as above) holdeth, That the Homage and Fealty by purchaſe of parcel ſhall not be extinct, but ſhall remain for the reſidue, becauſe that ſuch Services are not annual, and cannot be apportioned, the ſame is *ratio una*, but not *unica*, as it appeareth before. So Knights ſervice, which is an entire Service to be performed by the body of a man, ſhall be alſo multiplied by the alienation of parcel; And although that the Lord purchaſeth parcel, the Knights ſervice ſhall not be extinct, but ſhall remain for the reſidue, *quia pro bono publico*, and for the defence of the Kingdom. And Eſcuage ſhall be apportioned. But the perſonal Service to be Sewer, Carver, Butler, *&c.* or when the Tenant is bound by his Tenure, To feaſt the Lord and his Family once in the year; and to ride with his Lord in the County of *N.* at his own charges (*vide* 10 *E.*3. 23. in *John de Brampton's* Caſe) by alienation of parcel ſhall not be apportioned nor multiplied: For ſuch Services [106] which are for the private benefit of the Lord, and are perſonally to be done by a man, ſhall not be multiplied, becauſe that they are to be perſonally done by one man only, and multiplication of them ſhall be a prejudice, and chargeable to the Lord, and the purchaſe of parcel of the Tenancy by the Lord ſhall extinct all ſuch perſonal private Service. The third is, When the Tenant is to exerciſe a perſonal Office, as to be Steward of the Court of the Manor, or Baily of the Manor, or Collector of the Rents of the Manor, or Woodward of the Manor, or the like Offices, they by alienation of parcel of the Tenancy ſhall not be multiplied, but the Lord may diſtrain each of them in theſe Caſes to doe it, but one only ſhall exerciſe it: And if the Lord purchaſe any party of the Tenancy, the whole Service is extinct. The fourth is, When the Tenant by his Tenure is to doe manual labour, or work touching Houſes, Lands, or Tenements; as to cover or repair the Hall of the Lord's Houſe, to make or repair his Park pale, to plough and ſowe the Lord's Demeans, *&c.* or to reap his Corn, or to cut his Graſs, or to grind his Corn, or ſuch like; theſe or other Services by alienation of parcel ſhall not be multiplied; for there works are to be done upon a certain thing, which cannot be multiplied.

2. It was reſolved, That there is not any difference between annual Services, be they valuable, or things of pleaſure, and which ſhall be multiplied, as aforeſaid, and between ſuch entire Services, not annual: As if Lord and Tenant be to render a Horſe every three, four or five years, or upon alienation, or death; in theſe and the like Caſes, if the Lord purchaſeth parcel of the Tenaney, ſuch entire Services, not annual, ſhall be aſwell extinct as the like annual Services.

3. It was reſolved, That if *John Barny* had firſt enfeoffed *John Chapman*, the Father, of the ſaid three Acres of Paſture, and afterwards had anfeoffed the Lord of the ſaid three Acres of Land, that notwithſtanding the Heriot ſervice had remained for the Land which *John Chapman*, the Father, held; and the Cauſe is, becauſe that *John Chapman* by his purchaſe of three Acres holdeth by one ſeveral and diſtinct tenure of Heriot ſervice, and therefore the purchaſe of the Lord of any part of the reſidue which *John Barny* held ſhall extinct only the Service which he ought to render, and not the Heriot which *John Chapman*, by reaſon of his diſtinct and ſeparate Service, ought to pay.

4. There is a difference between Heriot Service, and Heriot Cuſtom, as to the extinguiſhment [*b*] thereof, when the Lord purchaſeth parcel of the Tenancy: For if the Lord purchaſeth parcel of the Tenancy, the Heriot ſervice is extinct: But if the Cuſtom of the Manor be, That upon the death of every Tenant of the Manor, who dieth ſeiſed of any Lands holden of the Manor, the Lord is to have a Heriot; although that the Lord purchaſeth parcel of the Tenancy, yet the Lord ſhall have a Heriot by the Cuſtom of the Manor for the reſidue, for he remaineth Tenant to the Lord, and the Cuſtom doth extend to every Tenant: Look, Reader, the Books cited in *Brownton's* Caſe, for theſe Differences, where the Reaſon of them appeareth.

Hill. 7 Jacobi. *In the Common Pleas.*

Doctor Bonhams Case.

THomas *Bonham* Doctor in Philosophy and Physick brought an action of false imprisonment against *Henry Atkins*, *George Turner*, *Thomas Mounford*, and *John Argent*, Doctors in Physick, and *John Tayler*, and *William Bowden* Yeomen, For that the Defendants the 10 of *Novemb.* 4. *Jacobi.* did imprison him, and detain him in prison by the space of 7 days. The Defendants pleaded the Letters Patents of King *Henry* the 8. bearing date the 23. of *Septemb.* in the 10 year of his reign, by which he reciteth; *Quod cum regii officii sui munus arbitrabatur ditionis suæ hominum fœlicitati omni ratione consulere, id autem vel imprimis fore si improborum conatibus tempestivè occurreret*, &c. By the same Letters Patents the King granted to *John Chambre*, *Thomas Linacre*, *Ferdinando de Victoria*, *John Halswel*, *John Frances*, and *Robert Yaxley*, *quod ipsi omnesque homines ejusdem facultatis de & in civitate* London *sint in re & nomine unum corpus & communitas perpetua, per nomen Præsidentis & Collegii, sive communitatis facultatis medicinæ* London, *&c.* And that they might make meetings and Ordinances, *&c.* But the Case at Bar doth principally consist upon two Clauses in the Charter. The first, *Concessimus etiam eisdem Præsidenti & Collegio seu Communitati et successoribus suis, quod nemo in dicta Civitate, aut per septem millaria in circuitu ejusdem exerceat dictam facultatem Medicinæ, nisi ad hoc prædict. Præsident. et Comunit. seu successores suos, qui pro tempore fuerint, admissus sit per ejusdem presidentis et Collegii Literas sigillo suo communi sigillat. sub pœna centum solidorum quo prolibet mense quo non admissus eandem facultatem exercuerit, dimidum inde Domino Regi et hæredibus suis, et dimidium dict. Præsidenti et Collegio applicand.* &c. The second clause is, which immediately followeth in these words, *Præterea voluit et concessit pro se et successoribus suis (quantum in se fuit) quod per Præsident. et Collegium prædict. Communitat. pro tempore exist. et eorum successores imperpetuum, quatuor singulis annis per ipsos eligerent qui haberent supervisum et scrutinium, correctionem et gubernationem omnium et singulorum dict. Civitatis Medicorum, utentium facultat. medicinæ in eadem Civitate, ac aliorum Medicorum forinsecorum quorumcunque facultatem illam Medicinæ aliquo modo frequentantium et utentium infra eandem Civitatem et suburbia ejusdem, sive infra septem millaria in circuitu ejusdem Civitatis, ac punitionem eorundem, pro dilictis suis in non bene exequend. faciend. et utend. illa: nec non supervisum et scrutinium omnium medicinarum, et earum receptionem per dictos Medicos seu aliquem eorum hujusmodi legis dict. nuper Regis pro eorum infirmitatibus curand. et sanand. dand. imponend. et utend. quoties et quando opus fuerit, pro commodo et utilitat. eorundem ligeorum dicti nuper Regis: Ita quod punitio eorundem Medicorum utentium dict. facultate Medicinæ sic in præmiss. delinquentium per fines, amerciamenta et imprisonament. corporum suorum, et per alias vias rationabiles et congruas exequeretur*, as by the said Charter more fully appeareth. And that by force of the said Letters Patents, The said *Thomas Chambre*, *Thomas Linacre*, &c. and all the men of the same faculty in the said City were *unum Corpus, et communitas perpetua sive Collegium perpetuum.* And afterwards by Act of Parliament, *An.* 14 *H.* 8. It was enacted, That the said corporation, and every grant, article, and other things in the said Letters Patents contained and specified, should be approved, granted, ratified, and confirmed, *in tam amplo et largo modo prout poterit acceptari, cogitari, et constitui per easdem Literas Patentes.* And further it was enacted, That the said 6 persons named in the said Letters Patents, as Principal of the said College, and 2 others of the said College, who should be named *Electi*, and that the said Elects should choose one of them to be President, as by the said Act appeareth: And further they pleaded the Act of 1 *Mariæ*, by which it is enacted, *Quod quædam concessio per Literas Patentes de incorporation. fact. per prædict. nuper Regem Medicis* London. *et omnes clausulæ et articuli content. in eadem concessione approbarentur, concederentur, ratificarentur et confirm. per prædict. nuper Parl. In consideratione cujus inactitat. fuit authoritate ejusdem Parliamenti. quod præd. statut. et act. Parliament. in omnibus articulis et clausulis in eodem content. extunc imposterum starent et continuerent in pleno robore*, &c. And further it was enacted, *That whensoever the President of the College or Commonalty of the faculty of Physick of* London *for the time being, or such as the said President and College shall yearly, according to the tenor and meaning of the said Act, authorize to search, examine, correct and punish all offenders and transgressors in the said faculty, &c. shall send or commit any such offendor or offendors for his or their offence or disobedience, contrary to any article or clause contained in the said grant or act, to any ward, goal, or prison within the same City (tho Tower of* London *except) that then from time to time the Warden, Goaler or keeper, &c. shall receive, &c. such person so offending &c. and the same shall keep at his proper charge without bail or mainprise, until such time as such offendor or disobedient be discharged of the said imprisonment by the said President and such persons as shall be thereunto authorised, upon pain that all and every such Warden, Goaler, &c. doing the contrary, shall lose and forfeit the double of such fines and amerciaments as such offender and offenders shall be assessed to pay by such, as the said President and College shall authorize as aforesaid, so that the fine and amerciament be not at any one time above the sum of* 20 *l. the one moity to the King, the other moity to the President and College*, &c. And further pleaded, That the said *Thomas Bonham* the 10th. of *April*, within *London*, against the form of the said Letters Patents, and the said Acts, *exercebat artem Medicinæ non admissus per Litteras præd. Præsidentis et Collegii sigillo eorum communi sigillat. ubi revera præd.* Tho. Bonham *fuit minus sufficiens ad artem Medicinæ exercend.* By force of which the said *Thomas Bonham* 30 *April* 1606. was summoned in *London* by the Censors or Governours of the College, to appear before the President and Cen-

[b] [114] [b]

ſors, and Governours of the College aforeſaid, at the College, &c. the 14 day of *April* next following, *ſuper præmiſſis examinand'*. At which day the ſaid *Thomas Bonham* came before the Preſident and Cenſors, and was examined by the Cenſors *de ſcientia ſua in facultate ſua Medicinæ adminiſtrand. Et quia præd.* Thomas Bonham *ſic examinatus minus aptè et inſufficienter in præd. arte medicinæ reſpondebat, et inventus fuit ſuper examinationem præd. per præd. Præſident. et Cenſores minus ſufficiens et in expert. ad artem Medicinæ adminiſtrand. ac pro eo quod præd.* Tho. Bonham *multotiens ante examinatus, et interdictus per ipſum Præſident. et Cenſores, de cauſis præd. ad artem medicinæ adminiſtrand. per unum menſem et amplius poſt talem interdictionem facultatem illam in* Lond. *præd. ſine licentia*, &c. *ideo adtunc et ibid. conſideratum fuit per præd. Præſident. et Cenſores, quod præd.* Tho. Bonham *pro inobedientia et contempt. ſuis præd. amerciaretur to* 5 *l. in proximis commitiis præd. Præſident. et Collegii perſolvend. et deinceps abſtineret*, &c. *quouſque inventus fuerit ſufficiens*, &c. *ſub pœna conjiciendi in*
[b] *Carcerem ſi in præmiſſis delinqueret.* And that the ſaid *Tho. Bonham* 30 *Octob.* 1606. within *London* did practiſe Phyſick, and the ſame day he was ſummoned by the Cenſors, to appear before the Preſident and them the 22 of *Octob.* then next following, at which day *Bonham* made default. *Ideo conſideratum fuit per præd. Cenſores*, that for his diſ-obedience and contempt he ſhould be amerced to 10 *l.* and that he ſhould be arreſted and committed to cuſtody, And afterwards 7. *Novemb.* 1606. the ſaid *Tho. Bonham* at their aſſembly came before the Preſident and Cenſors, and they asked him if he would ſatisfy the College for his diſ-obedience and contempt, and ſubmit himſelf to be examined, and obey the cenſure of the College, who anſwered, That he had practiſed Phyſick, and would practiſe Phyſick within *London*, asking no leave of the College, and that he would not ſubmit himſelf to the Preſident and Cenſors, and affirmed that the Preſident and Cenſors had not any authority over thoſe who were Doctors of the Univerſity; For which cauſe, the ſaid 4 Cenſors, *ſc.* Dr. *Turner*, Dr. *Moundforde*, Dr. *Argent*, and Dr. *Dun*, then being Cenſors or Governours, *pro offenſis et inobedientia præd. adtunc et ibid. ordinaverunt et decreverunt, quod præd.* Tho. Bonham *in carcerem mandaretur ibid. remanſur. quouſque abinde per Præſident. et cenſores, ſeu gubernatores Collegii præd. pro tempore exiſten. deliberaretur*, And there then by their warrant in writing under their Common Seal did commit the Plaintif to the priſon of the *Counter* in *London*, &c. without bayl or mainpriſe, at the coſts and charges of the ſaid *Thomas Bonham*, until the ſaid *Tho. Bonham* by the warrant of the Preſident and Cenſors of the ſaid College, or their Succeſſors was delivered. And Dr. *Atkins* then Preſident, and the Cenſors, and *Bowden* and *Taylor* as their ſervants, and by the commandment of the ſaid Preſident and Cenſors, did carry the Plaintif with the warrant to the Goal, *&c.* which is the ſame impriſonment. The Plaintif replied and ſaid, That by the ſaid Act of 14 *H.* 8. it was further enacted, *And where that in the Dioces of* England, *out of* London, *it is not like to find always men able ſufficiently to examine (after the Statute) ſuch as ſhall be admitted to exerciſe Phyſick in them, that it may be enacted in this Preſent Parliament, That no Perſon from henceforth be ſuffered to exerciſe or practiſe Phyſick through* England, *until ſuch time that he be examined at* London *by the ſaid Preſident and* 3 *of the ſaid Elects, and to have from them Letters Teſtimonial of their approving and examination, Except he be a graduate of* Oxford *or* Cambridge, *which have accompliſhed all things for his form without grace:* And that the Plaintif in the year of our Lord 1595. was a Graduate, *ſc.* a Doctor in the Univerſity of *Cambridge*, and had accompliſhed all things concerning his degree for his form without grace, by force whereof he had exerciſed and practiſed Phyſick within the City of *London*, until the Defendants had impriſoned him, &c. upon which the
[116] Defendants did demur in Law. And this caſe was often argued by the Serjeants at Bar in diverſe ſeveral Terms; And now this Term the caſe was argued by the Juſtices, and the effect of their arguments who argued againſt the Plaintif (which was divided into three parts) ſhall be firſt reported. The firſt was, Whether a Doctor of Phyſick, of the one Univerſity or the other, be by the Letters Patents, and by the body of the Act of 14 *H.* 8. reſtrained to practiſe Phyſick within the City of *London*, &c. The ſecond was, If the Exception in the ſaid Act of 14 *H.* 8. hath excepted him or not. The third was, That his impriſonment was lawful for his ſaid diſobedience. And as to the firſt, they did relie upon the Letter of the grant, ratified by the ſaid Act of 14 *H.* 8. which is in the negative, *ſc. Nemo in dicta civitate*, &c. *exerceat dictam facultatem niſi ad hoc per prædict. Præſidentem et communitatem*, &c. *admiſſus ſit*, &c. And this propoſition is a general negative, and *Generale dictum eſt generaliter intelligendum*; and *nemo* excludeth all; and therefore a Doctor of the one Univerſity or the other, is prohibited within this negative word *Nemo.* And many caſes were put where negative Statues ſhall be taken *ſtrictè et excluſivè*, which I do not think here neceſſary to recite. Alſo they ſaid, that the Statute of 3 *H.* 8. *cap.* 11. which in effect is repealed by this act of 14 *H.* 8. hath a ſpecial proviſo for the Univerſity of *Cambridge* and *Oxford*, which being here left out, doth declare the intention of the makers of the Act, that they did intend to include them within this general prohibition. *Nemo in dicta Civitate*, &c. As to the two points they ſtrongly held, that the ſaid latter clauſe, And where that in the Dioceſes of *England* out of *London*, &c. this clauſe according to the words doth extend only to places out of *London*, and ſo much the rather, becauſe that they purview for *London* before, *Nemo in dicta Civitate*, &c. Alſo the makers of the Act, put a diſtinction betwixt thoſe who ſhall be licenſed to practiſe Phyſick within *London*, &c. for they ought to have the admittance and allowance of the Preſident and College in writing under their Common Seal; but he who ſhall be allowed to practiſe Phyſick throughout *England* out of *London* ought to be examined and admitted by the Preſident and 3 of the Elects, and ſo they ſaid, that it was lately adjudged in the Kings Bench, in an Information exhibited againſt the ſaid *Doctor Bonham* for practiſing of Phyſick within *London* for divers Months. As to the third point they ſaid, That for his contempt and diſ-obedience before them in their College, they might commit him to priſon, for they have authority by the Letters Patents and Act of Parliament, And therefore for his contempt

tempt and misdemeanor before them they may commit him. Also the Act of 1 *Mariæ* hath given them power to commit them for every offence or dis-obedience contrary to any article or clause conteined in the said grant or Act, But there is an expres Negative Article in the said grant, and (b) ratified by the Act of 14. *H.* 8. *Quod Nemo in dicta Civitate*, &c. *exerceat*, &c. And the Defendants have pleaded, that the Plaintif hath practised Physick within *London* by the space of one month, &c. And therefore the Act of 1 *Mariæ* hath authorized them for to imprison him in this case; for which cause, they did conclude for the Defendants against the Plaintif. But it was argued by *Coke* Chief Justice, *Warburton* and *Daniel* Justices of the Common Pleas to the contrary. And *Daniel* conceived, That a Doctor of Physick of the one University or the other, &c. was not within the body of the Act, and if he was within the body of the Act, that he was excepted by the said latter clause; but *Warburton* argued against him for both the points: and the Chief Justice did not speak to these 2. points, because that he and *Warburton* and *Daniel* did agree, that this action was clearly maintainable for 2. other points. But to the 2. other points he and the said 2. other Justices *Warburton* and *Daniel* did speak, *sc.* 1. Whether the Censors have power for the Causes alleged in their barr to fine and imprison the Plantif. 2. Admitting that they have power to do it, if they have pursued their power. But the Chief Justice before he argued the points in Law, because that much was said in the Commendations of the Doctors of Physick of the said College within *London*, and somewhat (as he conceived,) in derogation of the Dignity of the Doctors of the Universities, he first attributed much to the Doctors of the said College within *London*, and did confess that nothing was spoken, which was not due to their merits; but yet that no Comparison was to be made, between that private College, and any [118] of the Universities of *Cambridge* and *Oxford*, no more than between the Father and his Children, or between the Fountain and the small Rivers which descend from thence: The University is *Alma mater*, from whose breasts those of that private College have sucked all their science and knowledge (which I acknowledge to be great and profound) but the Law saith, *Erubescit lex filios castigare parentes*: the University is the fountain, and that and the like private Colleges, are *tanquam rivuli*, which flow from the Fountain, *& melius est petere fontes quam sectari rivulos.* Briefly, *Academia Cantabrigiæ & Oxoniæ sunt Athenæ nostræ nobilissimæ, regni soles, occuli & animæ regni, unde Religio, humanitas, et doctrina in omnes regni partes uberrimè diffunduntur.* But it is true, *Nunquam sufficiet copia laudatoris, quia nunquam deficiet materia laudis*; and therefore the Universities exceed and excel all private Colleges, *tanquam inter viburna cupressus.* And it was observed in the said Letters Patents, and the King, and the Parliament in the Act of 14 *H.* 8. in making of a Law concerning Physicians, for the more safety and health of men therein followeth the order of a good Physician (*Rex enim omnes artes censetur habere in scrinio pectoris sui*) for, *Medicina est duplex, removens, & promovens; removens morbum, et promovens ad salutem.* And therefore 5. manner of persons who more hurt the body of [117] men than the disease it self, are to be removed; 1. *improbi.* 2. *avari, qui medicinam magis avaritiæ suæ causa quam ullius bonæ conscientiæ fiducia profitentur*: 3 *malitiosi*: 4. *temerarii*: 5. *inscii*; and of the other part, 5. manner of persons were to be promoted, as appeareth by the said Act, *sc.* those who were, 1. *profound*, 2. *sad*, 3. *discreet*, 4. *groundedly learned*, 5, *profoundly studied.* And it was well ordained, That the professors of Physick should be profound, sad, discreet, &c. and not youths, who have no gravity and experience; for as one saith, *In juvene Theologo conscientiæ detrimentum, in juvene legista bursæ decrementum, in juvene Medico cœmiterii incrementum.* And it ought to be presumed, every Doctor of any of the Universities to be within the Statues, *sc.* to be *profound, sad, discreet, groundedly learned, and profoundly studied*, for none can there be Master of Arts (who is a Doctor of Philosophie) under the study of 7. years, and cannot be Doctor in Physick under 7. years more in the study of Physick: and that is the cause that the Plaintif is named in the Declaration, Doctor of Philosophy, and Doctor of Physick, *quia oportet Medicum esse Philosophum, ubi enim Philosophus desinit, incipit Medicus*: As to the 2. points upon which the Chief Justice, *Warburton*, and *Daniel* gave judgement. 1. It was Resolved by them, That the said Censors have not the power to commit the Plaintif for any of the Causes mentioned in the barr, and the cause and reason thereof shortly was, That the said clause which giveth power to the said Censors to fine and imprison, doth not extend to the said Clause, *sc. Quod nemo in dicta Civitate*, &c. *exerceat dictam facultatem*, &c. which prohibiteth every one to practise Physick within *London*, &c. without licence of the President and College: but extendeth only to punish those who practise Physick within *London pro delictis suis in non bene exequendo faciendo et utendo facultate Medicinæ*, by fine and imprisonment: So that the Censors have not power by the Letters Patents and the Act to fine and imprison any for practising of Physick within *London*, but only *pro delictis suis in non bene exequendo*, &c. for ill and not good use and practise of Physick. And that was made manifest by 5. reasons, called *vividiæ rationes*, because they had their vigour and life from the Letters Patents, and the Act it self. And the best Expositor of all Letters Patents, and Acts of Parliament, are the Letters Patents and the Acts themselves, by construction, and conferring all the parts together, *Optima Statuti interpretatrix est (omnibus particulis ejusdem inspectis) ipsum Statutum*; And *Injustum* [b] *est nisi tota lege inspecta una aliqua ejus particula judicare vel respondere.* The first reason was, that these two were two absolute, perfect and distinct Clauses, and as parallels, and therefore the one did not extend to the other; for the second beginneth, *Præterea voluit & concessit*, &c. and the branch concerning fine and imprisonment, is parcel of the second clause. 2. The first clause prohibiting the practise of Physick, &c. doth comprehend 4. certainties; 1. certainty of the thing prohibited, *sc.* practise of Physick; 2. Certainty of the time, *sc.* practise for one moneth; 3. Certainty of penalty *sc.* 5 *l.* 4. Certainty in distribution, *sc.* one

moyety to the King, and the other moyety to the College; and this penalty he who practiseth Physick in *London* doth incurr, although he practise and use Physick very well, and profitably for the body of man; and upon this branch the Information was exhibited in the Kings Bench. But the clause to punish *delicta in non bene exequendo*, &c. upon which branch the case at barr stands, is altogether incertain, for the hurt which may come thereby may be little or great, *leve vel grave*, excessive or small, &c. And therefore the King and the makers of the Act, cannot for so uncertain offence impose a certainty of time, or time of imprisonment, but leave it to the Censors to punish such offences, *secundum quantitatem delicti*, which is included in these words, *per fines, amerciamenta, imprisonamenta corporum suorum, & per alias vias rationabiles & congruas.* 2. the harm which accrueth by *non bene exequendo*, &c. doth concern the body of man; and therefore it is reasonable that the offender should be punished in his body, *sc.* by imprisonment; but he who practiseth Physick in *London* in a good manner, although he doth it without leave, yet it is not any prejudice to the body of man. But the Clause of *non bene exequendo*, &c. doth not prescribe any time certain, but at what time soever he ministreth Physick *non bene*, &c. he shall be punished by the said 2. branch: And the Law hath great reason in the making of this distinction, for divers Nobles, Gentlemen, and others come upon divers occasions to *London*; and when they are here they become subject to diseases, and thereupon they send for their Physicians into the Country, who know their bodies and the causes of their diseases; now it was never the meaning of the Act to barr any one of his own Physician; and when he is here he may practise and minister Physick to another by 2. or 3. weeks, &c. without any forfeiture; for any one who practiseth Physick
[[118]] well in *London* (although he hath not taken any degree in any of the Universities) shall forfeit nothing, if not that he practise it by the space of a month; and that was the Cause, that the time of a month was put in the Act. 4. The Censors, cannot be Judges, Ministers, and parties; Judges, to give sentence or Judgment; Ministers, to make summons; and Parties, to have the moiety of the forfeiture, *quia aliquis non debet esse Judex in propria causa, imo iniquum est aliquem sue rei esse judicem*; and one cannot be Jude and Attorney for any of the parties: *Dyer* 3 E. 6. 65. 38 E. 3. 15. 8 H. 6. 19. 20. 21. E. 4. 47. *&c.* And it appeareth in our Books, that in many Cases, the Common Law doth controll Acts of Parliament, and sometimes shall adjudge them to be void: for when an Act of Parliament is against Common right and reason, or repugnant, or impossible to be performed, the Common Law shall controll it, and adjudge such Act to be void; and therefore in 8 E. 3. 30. *Thomas Tregors* Case upon the Statue of *West.* 2. *Cap.* 38. and *Articuli super Chartas, cap.* 9. *Herle* saith, Some Statutes are made against Common Law and right, which those who made them would not put in execution: The Statute of *West.* 2. *Cap.* 21. giveth a Writ of *Cessavit haredi petenti super haredem tenent. & super eos quibus alienatum fuerit hujusmodi tenementum*: and yet it is adjudged in 33 E. 3. *Cessavit* 42. where the Case was, Two Coparceners Lords and Tenant by Fealty and certain Rent, one Coparcener had issue and dyeth; the Aunt and the Neece shall not joyn in a *Cessavit*, because that the heir shall not have a *Cessavit* for the cesser in the time of his ancestor. *F. N. B.* 209. *F.* and therewith agreeth *Plow. Com.* 110. and the reason is, because in a *Cessavit* the Tenant before Judgment may render the arrerages and dammages, and hold his Land again, and that he cannot do when the heir bringeth a *Cessavit* for the cesser in the time of his ancestor, for the arrerages incurred in the life of the ancestor do not belong to the heir: and because that it shall be against right and reason, the Common Law shall adjudge the said Act of Parliament as to that point void. The Statute of *Carliste* made 35 E. 1. enacteth, That the Order of the *Cistertians*, and *Augustines* who have a Covent and Common Seal, that the Common Seal shall be in the keeping of the Prior, who is under the Abbot, and 4 others of the most grave of the house; and that any deed sealed with the Common Seal, which is not so in keeping shall be void: and the opinion of the Court, (*Anno* 27 H. 6. *Annuity* 41.) was, that this Statute was void, for it is impertinent to be observed, for the Seal being in their keeping, the Abbot cannot seal any thing with it, and when it is in the Abbots hands, it is out of their keeping *ipso facto*; and if the Statute should be observed, every Common Seal shall be defeated upon a simple surmise, which cannot be tryed. Note Reader the words of the said Statute of *Carliste*
(*b*) which was made 35 E. 1. which is called *Statutum Religiosorum* are, *Et insuper ordinavit Dominus Rex & statuit, quod Abbates Cicester. & præmonstraten. ordin. religiosorum*, &c. *de cætero habeant sigillum Commune, & illud in Custodia Prioris Monasterii suæ domus, & quatuor de dignioribus & discretioribus ejusdem loci conventus sub privato sigillo Abbatis ipsius loci custod. depon. &c. Et si forsan aliqua scripta obligationum, donationum, emptionum, venditionum, alienationum, seu aliorum quorumcunque contractuum alio sigillo quam tali sigillo communi, sicut præmitt. custodit. inveniantà modo sigillata, pro nullo penitus habeantur omnique careant firmitate.* So the Statute of 1. E. 6. *cap.* 14. giveth Chauntries, &c. to the King, saving to the Donor, &c. all such rents, services, &c. and the Common Law doth controll it, and adjudge the same void as to services, and the Donor shall have the Rent, as a Rentseek distr. of Common right for it should be against common right and reason that the King should hold of any, or do service to any of his subjects, 14 *Eliz. Dyer* 313. and so was it adjudged *Mich.* 16 & 17 *Eliz.* in the *Common Pleas* in *Strowds* case. So if any Act of Parliament giveth to any to hold, or to have Conusans of Pleas of all manner of pleas arising before him within his Manner of *D.* yet he shall hold no plea, to which himself is party; for, as hath been said, *iniquum est aliquem sue rei esse judicem.* 5. If he shall forfeit 5*l.* for one month by the first clause, and shall be punished for practising at any time by the second clause, two absurdities would follow, 1. that one should be punished not only twice, but many times for one and the same offence, And the Divine saith, *Quod Deus non agit bis in idipsum*; and the Law saith, *Nemo debet bis puniri pro uno delicto.* 2. It should be asurd, by the first clause to punish practising for one moneth, and not for lesser time,

and

nd by the 2. to punish practising not only for a day, but at any time, so he shall be punished by the first branch for one moneth by the forfeiture of 5 *l.* and by the 2. by fine and imprisonment, without any limitation for every time of the moneth in which any one doth practise Physick. And all these reasons were proved by two grounds, or Maxims of Law; 1. *Generalis Clausula non porrigitur ad ea quæ specialiter sunt comprehensa.* And the Case between *Carter* and *Ringstead*, *Hill.* 34. *Eliz. rott.* 120. in the *Common Pleas*, was cited to this purpose, where the case in effect was, That *A.* seised of the Mannor of *Staple* in *Odiham* in the County of *Southampton* in Fee, and also of other Lands in *Odiham* aforesaid in Fee, suffered a Common Recovery of all, and declared the use by Indenture, That the Recoverer should stand seised of all the Lands and Tenements in *Odiham* to the use of *A.* and his wife, and to the heirs of his body begotten; and further, that the Recoverer should stand seised to the use of him, and to the heirs of his body, and died, and the wife survived, and entred into the said Mannor by force of the said general words. But it was adjudged, That they did not extend to the said Mannor which was specially named: and if it be so indeed, *a fortiori*, it shall be so in an Act of Parl. which (as a Will) is to be expounded according to the intention of the makers. 2. *Verba posterior a propter certitudinem addita ad propria quæ certitudine indigent sunt referenda.* 6 E. 3. 12. Sir *Adam de Clydrow* Knight brought a *Præcipe quod reddat* against *J. de Clydrow*, and the Writ was, *Quod justè*, &c. *reddat Manerium de Wicombe & duas carucatas terræ cum pert. in Clydrow*, in that case the Town of *Clydrow* did not relate to the Mannor, *quia non indiget*, for a Mannor may be demanded withou mentioning that it lyeth in any Town, but *cum pertinentiis*, although that it cometh after the Town, shall relate to the Mannor, *quia indiget.* *Vide* 3 E. 4. 10. the like case. But it was objected, That where by the second Clause it was granted, that the Censors should have *supervisum & scrutinium, correctionem & gubernationem omnium & singulorum Medicorum*, &c. they had power to fine and imprison. To that it war answered, 1. That the same is but part of the sentence, for by the entire sentence it appeareth in what manner they shall have power to punish, for the words are, *ac punitionem eorum pro delictis suis in non bene exequendo, faciendo, seu utendo illa facultate:* so that without Question all their power to correct and punish the Physitians by this clause is only limited to 3. cases, *sc. in non bene exequendo, faciendo, vel utendo*, &c. Also this word *punitionem*, is limited and restrained by these words, *Ita quod punitio eorundem Medicorem*, &c. *sic in præmissis delinquentium*, &c. which words, *sic in præmissis delinquentium*, limit the first words in the first part of this sentence, *ac punitionem eorum pro delictis in non bene exequendo.* 2. It shall be absurd, That in one and the same sentence the makers of the Act shall give them a general power to punish, without limitation; and a special mannor how they shall punish in one and the same sentence. 3. *Hill.* 38 *Eliz.* in a *Quo warranto* against the Mayor and Commonalty of *London*, it was holden, That where a grant is made to the Mayor and Commonalty, that the Mayor for the time being should have *plenum et integrum scrutinium, gubernationem, et correctionem omnium et singulorum Mysteriorum*, &c. without granting to them any Court, in which should be legal proceedings, that the same is good for search, by which discovery may be made of offences and defects, which may be punished by the Law in any Court, but it doth not give, nor can give them any irreguler or absolute power to correct or punish any of the Subjects of the kingdom at their pleasures. 2. It was Objected, That it is incident to every Court created by Letters Patents, or Act of Parliament, or other Courts of Record, to punish any misdemeanors done in Court, in disturbance or contempt of the Court, by Imprisonment. To which it was answered, That neither the Letters Patents nor the Act of Parliament hath granted to them any Court, but only an authority, which they ought to pursue, as it shall be afterwards said. 2. If any Court had been granted to them, they could not by any incident authority *implicitè* granted unto them for any misdemeanor done in Court, commit him to prison without bayl or mainprise, until he shall be by the Commandment of the President and Censors, or their Successors, delivered, as the Censors have done in this Case. 3. There was not any such misdemeanor for which the Court might imprison him, for he only shewed his case to them, to which he was advised by his Counsel, he may justify, which is not any offence worthy of Imprisonment. [119] (b)

The Second point. Admitting that the Censors had power by the Act, if they have pursued their Authority, or not? And it was Resolved by the Chief Justice, *Warburton*, and *Daniel*, that they have not pursued it for 6. causes, 1. By the Act the Censors only have power to impose a fine, or amercement; and the President and Censors do impose the amercement of 5 *l.* upon the Plaintif. 2. The Plaintif was summoned to appear before the President and Censors, &c. and did not appear; and therefore he was fined 10 *l.* whereas the President hath not any authority in that case. 3. The fines and amercement to be imposed by them by force of the Act, do not belong to them, but to the King, for the King hath not granted the fines and amercements to them, and yet the fine is appointed to be paid to them in *proximis Comitiis*, and they have imprisoned the Plaintif for non-payment thereof. 4. They ought to have committed the Plaintif presently by construction of Law, although that no time be limited in the Act, as in the Stat. of *West. cap.* 12. *De Servientibus, Ballivis*, &c. *qui ad compotum reddend. tenentur*, &c. *cum Dom. hujusmodi servientium dederit eis auditores compoti, et contingat ipsum in arreragiis super compotum suum omnibus allocatis, et allocandis, arrestentur corpora eorum, et per testimonium auditorum ejusdem compoti mittantur et liberentur proximæ gaolæ Domini Regis in partibus illis*, &c. in that case, although that no time be limited when the Accomptant shall be imprisoned, yet it ought to be presently, as it is holden in 27 *H.* 6. 8. and the reason thereof is given in *Fogassaes case*, *Plow. Com.* 17. that the generality of time shall be restrained to the present time, for the benefit of him upon whom the pain shall be inflicted, and therewith agreeth *Plow. Com.* 206. *b.* in *Stradlings case*. And a Justice of Peace upon view of the force, ought to commit the offender presently.

5 For

[120] 5. For as much as the Censors had their authority by the Letters Patents and Act of Parliament, which are high matters of Record, their proceedings ought not to be by word, and so much the rather, because they claimed authority to fine and imprison. And therefore if Judgment be given against one in the Common Pleas in a Writ of Recaption, he shall be fined and imprisoned; but if the Writ be Vicontiel in the County, there he shall not be fined or imprisoned, because that the Court is not of Record, *F. N. B. in bre. de Recaptione* so in 47 *F. N. B. A* plea of Trespasse *vi et armis* doth not lie in the County Court, Hundred Court, &c. for they cannot make Record of fine and imprisonment; and regularly those who cannot make a Record cannot fine and imprison. And therewith agreeth 27 *H.* 8. Book of Entries: The auditors make a Record when they commit the Defendant to prison; A Justice of peace upon view of the force may commit, but he ought to make a record of it. 6. Because the Act of 14 *H.* 8. hath given power to imprison until he shall be delivered by the President and the Censors, and their Successors, reason requireth that the same be taken strictly for the liberty of the Subject (as they pretend) is at their pleasure: And the same is proved by a Judgment in Parliament in this Case; For when this Act of 14 *H.* 8. had given power to the Censors to imprison, yet it was taken so literally, That the Gaoler was not bound to receive them which they committed to him, and the reason thereof was because they had authority to do it without any Court: And thereupon the Statute of 1 *Ma. cap.* 9. was made, that the Gaoler should receive them upon a pain, and none can be committed to any prison, if the Gaoler cannot receive him: but the first Act for the cause aforesaid was taken so literally that no necessary incident was implyed. And where it was objected, that this very Act of 1 *Mariæ* hath enlarged the power of the Censors, and that upon the word of the Act; It was clearly resolved, that the said Act of 1 *Mariæ* did not enlarge the power of the Censors to fine or imprison any person for any cause for which he ought not to be fined and imprisoned by the said Act of 14 *H.* 8. For the words of the Act of Queen *Marie* are according to the tenor and meaning of the said Act: Also shall send or commit any offender or offendors for his or their offence or dis-obedience, contrary to any article or clause contained in the said grant or Act to any Ward, Gaol, &c. But in this case *Bonham* hath not done any thing which appeareth within this Record, contrary to any article or clause contained within the Grant or Act of 14 *H.* 8. Also the Gaoler who refuseth shall forfeit the double value of
(*b*) the fines and amerciaments that any offender or dis-obedient shall be assessed to pay; which proveth that none shall be received by any Gaoler by force of the Act of 14 *H.* 8. but he who may be lawfully fined or amerced by the Act of 14 *H.* 8. and for that was not *Bonham*, as by the reasons and causes aforesaid it appeareth. And admit that the Replication be not material, and the Defendants have demurred upon it; yet forasmuch as the Defendants have confessed in the Barr, that they have imprisoned the Plaintif without cause, the Plaintif shall have Judgement: And the Difference is, when the Plaintif doth reply, and by his replication it appeareth that he hath no cause of action, there he shall never have Judgment. But when the Barr is insufficient in matter, or amounteth (as this case is) to a confession of the point of the action, and the Plaintif replieth, and sheweth the truth of the matter to enforce his case, and in judgment of Law it is not material; yet the Plaintif shall have Judgement; for it is true that sometimes the Count shall be made good by the Barr, and sometimes the Barr by the Replication, and sometimes the Replication by the Rejoynder, &c. But the difference is when the Count wanteth time, place, or other circumstance, it may be made good by the Barr, so of the Barr, Replication, &c. as appeareth in 18 *F.* 4. *16 b.* But when the Count wanteth substance, no Barr can make it good, so of the Bar, Replication, &c. and therewith agree 6 *E.* 4. 2. a good case, and mark there the words of *Choke*, *vid.* 18 *E.* 3. 34. *b.* 44 *E.* 3. 7. *a.* 12 *E.* 4. 6. 6 *H.* 7. 10. 7 *H.* 7. 3. 11 *H.* 4. 24 &c. But when Plaintif makes Replication, sur-rejoynder, &c. and thereby it appeareth, that upon the whole matter and Record the Plaintif hath no cause of action, he shall never have judgement, although that the Bar or Remainder be insufficient in matter, for the Court ought to judge upon the whole Record, and every one shall be intended to make the best of his own case. *Vid. Rigways* case in the 3 part of my *Reports* 52. And so these differences were resolved and adjudged between *Kendal* and *Heyer*, *Mich.* 25 & 26 *Eliz.* in the Kings Bench. And *Mich.* 29, & 30 *Eliz.* in the same Court between *Gallys* and *Burbry*. And *Coke* chief Justice, in the conclusion of his argument did observe 7 things for the better direction of the President and Commonalty of the said College in time to come. 1. That none can be punished for practising of Physick in *London*, but by forfeiture of 5 *l.* by the moneth, which is to be recovered by the Law. 2. If any practise Physick there for a less time than a month, that he shall forfeit nothing. 3. If any person prohibited by the Statute offend in *non bene exequendo*, &c. they may punish him according to the Statute within the month. 4 Those who may commit to prison by the Statute, ought to commit presently. 5. The
[121] fines which they set, according to the Statute, do belong to the King. 6. They cannot impose a fine, or imprison, without a Record of it. 7. The cause for which they impose fine and imprisonment ought to be certain, for the same is traversable; For although they have the Letters Patents, and an Act of Parliament; yet because the party grieved hath not other remedy, neither by Writ of Error, or otherwise, and they are not made Judges, nor a Court given to them, but have an authority only so to doe, the cause of their commitment is traversable in an action of false imprisonment brought against them; as upon the Statute of Bankrupts, their warrant is under the Great Seal, and by Act of Parliament; yet because the party grieved hath no other remedy if the Commissioners doe not pursue the Act and their Commission, he shall traverse, That he was not a Bankrupt, although the Commissioners affirm him to be one; as this Term it was resolved, in this Court in Trespasse between *Cutt* and *Delabarre*, where the Issue was, whether *William Piercy* was Bankrupt or not, who was found by the Commissioners to be a Bank-

Bankrupt: *à fortiori* in the Case at Bar, the Cause of the Imprisonment is traversable; for otherwise the party grieved may be perpetullay, without just cause, imprisoned by them: But the Record of a force made by one Justice of Peace is not traversable, because he doth the same as Judge, by the Statutes of 15 *R.* 2. and 8 *H.* 6. and so there is a difference when one maketh a Record as a Judge, and when he doth a thing by a special Authority, as they did in the Case at Barr, and not as a Judge. And afterwards, for the said two last Points, Judgement was given for the Plaintiff, *nullo contradicente.* And I acquainted Sir *Thomas Fleming*, Chief Justice of the King's Bench, with this Judgement, and with the Reasons and Causes thereof; who approved of the Judgement which we had given: And the same is the first Judgement upon the said Branch concerning Fine and Imprisonment which hath been given since the making of the said Charter and Acts of Parliaments, and therefore I thought it worthy to be reported and published.

Hill. 7 Jacobi. *In the Common Pleas.*

The Case of the City of *London.*

A *Habeas Corpus* was directed *Mich.* 7 *Jacobi*, out of this Court, to the Maior, Aldermen, and Sheriffs of *London*, to have the body of *James Waggoner*, who was arrested in *London*, and remained in the custody of them, or some of them: Sir *Thomas Camball* Knight, Maior of *London*, and the Aldermen, and *Sebastian Harvie* and *Will. Cockeyn*, Sheriffs of *London*, make such a return, That the City of *London est antiqua Civitas, quodque in eadem Civitate talis habetur, & toto tempore cujus contrarium memoria hominum non existit habebatur consuetudo, usitata & approbata*, viz. *quod si aliquæ consuetudines in dicta Civitate obtent' & approbat' in aliqua parte difficiles sive defectivæ existent, seu extiter. aut aliqua in eadem Civitate de novo emergentia ubi remedium prius non existit seu exstiterit ordinat' emendatione indigeant sive indigerunt, Major & Aldermanni Civitatis præd' pro tempore existent de assensu Communitatis ejusdem Civitatis remedium congru' bonæ fidei & rationi consonum, pro communi utilitate Civium dict' Civitatis, & aliorum fidelium Domini Regis nunc & progenitorum suorum ad eandem confluent. apponere possint & potuerunt ordinar. quoties & quando eis videbitur expediri, dum tamen ordinatio hujusmodi Domino Regi nunc & progenitoribus suis, & populo suo utilis, & bonæ fidei & consona sit rationi. Et ulterius significamus quod dicta consuetudo, & omnes aliæ* [b] *consuetudines Civitatis præd' à tempore præd'*, &c. *usitatæ, Authoritate Parliamenti Domini* Richardi [122] *nuper Regis Angliæ Secundi post Conquestum, apud* Westm. *anno regni sui septimo tent. nunc Majori & Communitati ejusdem Civitatis & successoribus suis ratificat' & confirmat' fuer'. Et nos præfat' Major & Aldermanni ac Vic' Com' Civitat'* Lond' *præd' ulterius certificamus, quod in Communi Concilio tent' secundum consuetud' Civit'* Lond', *in Camera* Guild-hald' *ejusdem Civitat. decimo quinto die* April. *anno regni Domini nostri* Jacobi *nunc Regis Angliæ*, &c. *quarto, per* Leonardum Halliday, *Militem, nuper Majorem Civitatis* Lond' *præd', & ejusdem Civitatis Aldermannos, de assensu Communitatis ejusdem Civitatis in eodem communi Concilio assemblat' exist' secundum præd' consuetudinem Civitatis præd' ordinat', inaditat' & stabilit' fuit, modo & forma, prout in Angl' verbis sequn'*, viz. Where by the ancient Charters, Customs, Franchises, and Liberties of the City of *London*, confirmed by sundry Acts of Parliament, no person, not being free of the City of *London*, may or ought to sell or put to sale any Wares or Merchandizes within the said City, or the Liberties of the same, by retail, or keep any open or inward Shop, or other inward Place or Room, for shew, sale, or putting to sale of any Wares or Merchandizes, or for the use of any Art, Occupation, Mystery, or Handicraft within the same. And whereas also *Edward*, sometime King of *England*, of famous memory, the Third of that name, by his Charter made and granted to the said City in the 15 year of his reign, confirmed also by Parliament, amongst other things granted, That if any Customs in the said City before that time obtained and used, were in any part hard or defective, or any things in the same City newly arising, where remedy before that time was not ordained, should need amendment, the Maior and Aldermen of the said City, and their Successors, with the assent of the Commonalty of the same City, might put and ordain thereunto fit Remedy, as often as it should seeme expedient to them, so that such Ordinance should be profitable to the King, for the profit of the Citizens, and other his People repairing to the same City, and agreeable to reason. And whereas by force of the said Customs, Franchises, and Liberties, and of the Charter last before mentioned, confirmed as is aforesaid by Parliament, The Lord Maior, Aldermen and Commons of the said City did the 12 day of *October*, in the third year of the reign of *Edward*, sometime King of *England* the Fourth, as a thing thought fit and convenient for that time (amongst other things) agree and ordain, That the Basket-makers, Gold-wier-drawers, or other Foreiners, contrary to the Liberty of the said City, holding open Shops in diverse places of the City, and using Mysteries within the [b] said City, should not from thenceforth hold Shops within the Liberty of the City aforesaid; but if they should hold any Shop, or dwell in the same Liberty, they should dwell at *Blanch Appleton*, and there hold Shops, so as they might have sufficient dwelling there; And where also the Lord Maior, Aldermen, and Commons of the same City did afterwards, the 16 day of *May*, in the 17 year of the reign of our late Sovereign Lord of famous memory, King *Hen.* 8th. as a matter thought fit and agreeable for that time, ordain, establish, or enact, That no manner of person or persons being

being eſtrange from the Liberties of the ſaid City, from thenceforth ſhould hold and keep any open Shop within the ſaid City or Liberties of the ſame, neither with any Latteſſes before, nor yet without Latteſſes (certain numbers of poor men occupying the feat of Botchers, Taylors, and Coblers only excepted) upon pain of Impriſonment, and alſo to forfeit and pay 40 *s.* to the uſe of the Commonalty of this City, as often as he or they ſhould doe the contrary. And where alſo the Lord Maior, Aldermen and Commons of the ſame City did afterwards the 20 day of *January*, in the ſaid 17 year of King *Hen.* 8. (reciting that where at a Common Councel holden the 16 day of *May*, in the 17 year of the reign of King *H.* 8. it was ordained and enacted, That no manner of perſon or perſons, being eſtrange from the Liberties of this City, from thenceforth ſhould hold or keep any Shop or Shops within this City or the Liberties of the ſame, neither with any Lateſſes before, or without any Lateſſes, upon pain of Impriſonment,) farther ordain and eſtabliſh, That if any perſon or perſons, being Foreiners, ſhould hold and keep any open Shop or Shops, as is aforeſaid, he ſhould forfeit for every time ſo doing 40 *s.* to be levied by Diſtreſs, to the uſe of the Comminalty of the ſaid City, by the Chamberlein for the time being, or other Officer of this City, and have alſo Impriſonment by the diſcretion of the Maior and Aldermen for the time being. Now foraſmuch as diverſe and ſundry Strangers and Foreiners from the Liberties of the ſaid City (nothing regarding the ſaid ancient Charters, Franchiſes, Cuſtoms or Liberties of the ſaid City, and Acts and Ordinances heretofore made according to the ſame, but wholly intending their private Profit) have of late years deviſed and practiſed by all ſiniſter and ſubtle means how to defraud the ſaid Charters, Liberties, Cuſtoms, good Orders and Ordinances; and to that end do inwardly, in private and ſecret places, uſually and ordinarily ſhew, ſell, and put to ſale their Wares and Merchandizes, and uſe Arts, Trades, Occupations, Myſteries, and Handicrafts within the ſaid City and the Liberties of the ſame, to the great detriment and hurt of the ſaid City, who pay Scot and
[123] Lot, bear Offices, and undergoe other Charges which Strangers and others not free are not chargeable withall, nor will perform. For Reformation of which Diſorders, and for avoiding of ſuch prejudice and damage as thereby groweth to the Freemen of the ſaid City, and is now more of late than was in any time heretofore ſuffered, and to provide for the common profit and good of the Freemen and Citizens of this City; It is therefore by the Lord Maior, Aldermen, and Commons in this Common Councel aſſembled, ordained and eſtabliſhed, That no perſon whatſoever (not being free of the City of *London*) ſhall at any time after the Feaſt of St. *Michael* now next enſuing, by any colour, way, or mean whatſoever, either directly, or indirectly, by himſelf, or by any other, ſhew, ſell, or put to ſale, any Wares or Merchandizes whatſoever, by retail, within the City of *London*, or the Liberties or Suburbs of the ſame, upon pein to forfeit to the Chamberlain of the City of *London* for the time being, to the uſe of the Maior and Commonalty, and Citizens of the ſaid City, the ſum of 5 *li.* of lawfull money of *England*, for every time wherein ſuch perſon ſhall ſhew, ſell or put to ſale any Wares or Merchandizes by retail, within the ſaid City, Liberties, or Suburbs thereof, contrary to the true intent and meaning thereof; and it is farther ordained and eſtabliſhed, That no perſon whatſoever, not being free of the City of *London*, ſhall at any time after the ſaid Feaſt of St. *Michael* now next enſuing, by any colour, way or mean whatſoever, directly or indirectly, by himſelf or other, keep any Shop or other place whatſoever, inward or outward, for ſhew or putting to ſale of any Wares or Merchandizes whatſoever by way of retail, or uſe any Art, Trade, Occupation, Myſtery, or Handicraft whatſoever, within the ſaid City, or the Liberties or Suburbs of the ſame, upon pein to forfeit the ſum of 5 *li.* of lawfull money of *England*, for every time wherein ſuch perſon ſhall keep any Shop or other place whatſoever, inward or outward, for ſhew, ſale or putting to ſale of any Ware or Merchandizes whatſoever by way of retail, or uſe any Art, Trade or Occupation, Myſtery or Handicraft whatſoever within the ſaid City, or Liberties or Suburbs of the ſame, contrary to the true intent and meaning thereof: All which Peins, Penalties, Forfeitures and Sums of money to be forfeited by virtue of this Act and Ordinance, ſhall be recovered by Action of Debt, Bill, or Plaint, to be commenced and proſecuted in the name of the Chamlain of the City of *London* for the time being, in the King's Majeſtie's Court to be holden in the Chamber of the *Guild-hall* of the City of *London*, before the Lord Maior and Aldermen of the ſame City, wherein no Eſſoin or Wager of Law ſhall be admitted or allowed for the Defendant. And that the Chamberlain of the ſaid City for the time being ſhall in all Sutes to be proſecuted by virtue of this Act or Ordinance againſt any Offender, recover the ordinary Coſts of Sute to be expended in and about the proſecution thereof: And farther, that one equal third part of all Forfeitures to be recovered by virtue hereof, (the Coſts of the Sute for the recovery of the ſame being deducted and allowed) ſhall be after the recovery and receipt thereof paid and delivered to the Treaſurer of *Chriſt*'s Hoſpital, to be imploied towards the relief of the poor Children to be brought up and maintained in the ſaid Hoſpital. And one other equal part, to him or them which ſhall give information of the Offences for which ſuch Forfeitures ſhall grow, and proſecute Sute in the name of the Chamberlain of the ſaid City for the recovery of the ſame (any thing in this Act to the contrary notwithſtanding.) Provided alwaies, That this Act or Ordinance, or any thing therein contained, ſhall not extend to any perſon or perſons for bringing or cauſing to be brought any victuals to be ſold within this City and the Liberties thereof, but that they and every of them may ſell victuals within the ſaid City and the Liberties thereof; any thing herein contained to the contrary thereof in any wiſe notwithſtanding. *Ulteriuſque nos præfat. nunc Major & Aldermann ac Vicecom. Civitatis præd' certificamus, quod ante adventum Brevis dicti Domini Regis nobis direct. & hic huic ſcedulæ annex.* Ja. Waggoner *in Brevi illo nominat. captus fuit in Civitat. præd. & in priſona dicti Dom' Regis nunc ſub cuſtod. noſtrum præfat. Vic. detent. fuit virtute cujuſd' Billæ original' de p' debiti ſuper demand' quinque librarum legalis monetæ Angl' verſus ipſum, 9 die menſis Sept. anno regis*

Domini

Domini Regis nunc septimo, ad Cur. præd. Dom. Reg. coram Humfredo Weld *Milite, nuper Majore, & Aldermannis Civitat. præd. in præd. Camera* Guildhald' *ejusd. Civitatis, secund. consuet. Civitat. præd. tunc tent. ad sectam* Cornelii Fish, *Camerarii Civitat.* Lond. *super Act. Communis Concilii præd. præd. 15 die* Apr. *an. 4. præd. ut præf. confect. affirmat', cujus quidem billæ orig. tenor sequitur in hæc verba, scil.* Cornel. Fish, *Camerarius civitat.* Lond. *qui 7 die* Sept. *anno regni Dom. nostri* Jacobi *nunc Regis Angliæ,* &c. *septim. & semper postea hucusque fuit & adhuc existit Camerarius dictæ civit', per* Robertum Smith *attornat. suum, petit versus* Jac. Waggoner *quinque libras legalis monetæ Angliæ quas ei debet & injuste detinet,* &c. *eo quod cum in communi concilio secund. consuet. civitat. præd. in camera* Guildhald' [124] *dictæ civitat. situat' in parochia sancti* Michael' *in* Bassishaw *in Warda de* Bassishaw Lond. *præd. decimo quinto die* Aprilis, *an. regni Dom. nostri* Jacobi *nunc Regis Angl',* &c. *quarto, vigore & authoritate communis concilii illius ordin. & stabilit. extitit, quod nulla p'rsona quæcunque non existens liber civitat.* Lond. *ad aliquod tempus post festum sancti* Mich. *tunc prox' sequen' per aliquem colorem, viam aut modum, quæcunque sive directè vel indirectè, per se vel per aliquem alium, ostenderet, venderet, aut ad venditionem poneret, aliqua mercimonia aut merchandisas quæcunque per retal' infra civitat'* Lond' *aut libertates aut suburb. ejusd. sub pœna forisfacere Camerario civit'* Lond' *pro tempore existen. ad usum Majoris & Commun. ac Civium dict' civitat. summam quinque librarum legalis monetæ Angliæ pro quolibet tempore quo tali persona ostenderet, venderet, aut venditioni exponeret, aliqua mercimonia aut merchandisas per retal. infra dict. civitat. libertat. aut suburb. ejusdem, contra veram intentionem actus communis concilii præd'. Cumque tunc & ibid. authoritate præd. ulterius ordinat. & stabilit. extitit, quod nulla persona quæcunque non existens liber civit.* Lond' *ad aliquod tempus post dictum Festum sancti* Mich. *tunc prox. sequent. per aliquem colorem, viam aut modum, quæcunque directè vel indirectè, per se vel per aliquem alium, teneret aliquam shoppam aut alium locum quemcunque intra vel extra, Angl.* inward or outward, *pro ostensione, venditione, aut positione aliquorum mercimoniorum aut merchandisarum quorumcunque ad venditionem per viam retail', Angl'* by way of retail, *aut uteretur aliqua arte, artific', occupation', myster', aut manuali occupatione, quibuscunque, Angl.* any art, trade, occupation, mystery, [a] or handicraft whatsoever, *infra civitat.* Lond. *aut libertat. aut suburb. ejusd. sub pœna forisfacer. summam quinque librarum legalis monetæ Angliæ, pro quolibet tempore quo talis persona teneret aliquam shoppam, aut alium locum quemcunque, infrà vel extrà, Angl.* inward or outward, *pro ostensione, venditione, aut positione aliquorum mercimoniorum aut merchandisarum quorumcunque ad venditionem per viam retail', aut uteretur aliqua arte, artificio, occupatione, mysterio, aut manuali occupatione, quibuscunque, Angl.* any art, trade, occupation, mystery, or handicraft whatsoever, *infra dict. Civitatem, aut libertat. aut suburb. ejusdem, contra veram intentionem actus præd'. Cumque tunc & ibidem authoritate præd. ulterius inactitatum extitit, quod omnes quæ quidem pœnæ, pœnalitatæ, forisfacturæ, & [b] pecuniæ summæ forisfaciendæ virtute dicti actus sive ordinis, Angl.* Ordinance, *recuperarentur per actionem debiti, bill', sive querel', commensand' & prosequend' nomine Camerarii civit.* Lond. *pro tempore existente, in curia regiæ Majestatis tenend' in camera* Guilhald. *civitat.* Lond. *coram Domino Majore & Aldermannis ejusdem civitat. in quibus null' essoign aut legalis vadiatio admitteretur aut allocaretur pro defend'. Et quod Camerarius dictæ civitatis pro tempore existent. in omnibus Sectis prosequend' virtute dict. act. sive ordinis, Angl.* or ordinance, *contra aliquem offensorem, recuperaret ordinar. custag. Sectæ, expendend. in & circa prosecutionem ejusdem. Et ulterius, quod una æqualis tertia pars omnium forisfact. recuperand. virtute dict. act. (custag. Sectæ pro recuperatione earum existent. deduct. & allocat.) post recuperationem & receptionem inde solveretur & deliberaretur Thesaurario Hospitalis* Christi *disponenda. Angl.* to be emploied, *erga opem pauper' puerorum educandorum & manutenendorum in dicto Hospitali. Et una alia æqualis tertia pars illi vel istis qui primum daret information. de offensis pro quibus tales forisfactur. surgerent, Angl.* should grow, *& prosequer. Sectam in nomine Camerarii dictæ civitatis pro recuperatione earund', aliquo in dicto actu in contrar. non obstante, prout per præd. actum communis concilii præd. plene liquet. Præd. tamen defendens, actum communis concilii præd. minime ponderans, nec pœnam in eodem contentam aliqualiter verens post dict. festum Sancti* Michaelis *in actu præd. mentionat. & ante affirmationem hujus billæ originalis, scil. dict. septimo die* Septembris, *anno regni Domini nostri* Jacobi *nunc Regis Angliæ,* &c. *septimo præd. infra dict. civitatem* London, *viz. in parochia Sancti* Christopheri London *non existens persona liber dictæ civitatis usus est manuali occupatione* of a Tallow Chandler *contra veram intentionem actus communis concilii præd. per quod actus accrevit præfat. querent. ad petend. exigend. & habend. de præfat. defend. dict. quinque libras modo petit. quas dict. defend. præfat. querent. nondum solvit, licet sæpius,* &c. *ad damnum dict. querent. quinque solidorum & inde producit Sectam,* &c. *super quam quidem billam original' partes præd. placitaverunt, & sic indeterminat. dependit,* &c. *Et hæc est unica causa captionis & detentionis præd.* Jacobi Wagonor *in prisona & sub custodia præd. quam una cum corpore suo coram dict. Justiciariis dicti Domini Regis apud Westmonaster. ad diem in brevi præd. content. parat. habemus, una cum dicto brevi, prout nobis interius per idem Breve præcipitur.*

In this Case it was resolved, that the said Custom of *London*, *That no person whatsoever, not being free of the City* London, *shall by any colour, way, or mean whatsoever, directly or indirectly, by himself or any other, keep any shop or any other place whatsoever, inward or outward, for shew or putting to sale of any wares or merchandises whatsoever by way of retail, or use any trade, occupation, mystery or handicraft, for hire, gain or sale, within the said City of* London, is, upon the whole matter [125] in the Return, a good Custom. And that such Constitution made according to the Custom alleged in the Return, upon pain of Forfeiture of 5 *li.* was also good. And as to that, 1. It was resolved, That there is a difference between such a Custom within a City, &c. and a Charter granted to the City, &c. to such effect; for it is good by way of Custom, but not by Grant. And therefore no Corporations made within time of memory can have such privilege, if it be not by Act of Parliament. So a Custom that Goods forein bought and forein sold within a City shall be forfeited, is good, as ap-

peareth *Dyer*, *Mich.* 10 & 11 *Eliz.* 279. But ſuch Privilege cannot begin by Charter. And therefore in the Fifth Part of my *Reports*, *Trin.* 41 *Eliz.* Between *Waltham* and *Auſtin* in the Common Pleas the Caſe was, That King *Henry* the Sixth granted to the Corporation of *Dyers* within *London*, power to ſearch, and if they found any Cloth died with *Logwood*, that the Cloth ſhould be forfeited; and it was adjudged, That by the Patent no forfeiture can be impoſed upon the Goods of a Subject; and therefore in the like caſes, *fortior & potentior eſt vulgaris Conſuetudo, quam regalis Conceſſio.* So it appeareth by the *Reg.* 105. *b.* The cuſtom of *Rippon* is, That the Archbiſhop of *York*, by reaſon of his Lordſhip of *Rippon*, ſhould have the like liberty in the ſaid Town time out of minde; that none in the ſame Town *uti debeat ſeu conſuevit officio ſive myſterio Tinctoris ſine licentia ipſius Archiepiſcopi.* But *Trin.* 44 *Eliz.* in an Action upon the Caſe between *Edw. Darcy*, Eſquire, Plaintiff, and *Thomas Allen*, the Caſe was, That Queen *Elizabeth* granted to the Plaintiff, that he ſhould have the ſole traffick with Playing-cards, and ſhould only bring them from beyond the Sea into this Kingdom; alſo that he ſhould have the only making of Playing-cards within this Realm, in ſuch ample manner as *Raſe Bows* had them before; and it was adjudged, that that Grant to make Playing-cards only, and to reſtrain trade and traffick was void, becauſe that trade and traffick is the life of every Commonwealth, and eſpecially of an Iſland. And it is true, traffick and trade cannot be maintained without order and government; and therefore the King may erect *Guildam mercatoriam*, that is, a Fraternity or Society, or Corporation of Merchants, to the end that good order be obſerved by them for the encreaſe and advancement of trade and merchandiſing, and not for the hindrance or diminution of it. And it is to know, That *Guildan* is a *Saxon* word, and doth ſignifie *ſolvere*, that is, That all this Fraternity ſhall be ſubject to pay Scot and Lot: and therefore at this day ſuch part of the County which is contributary amongſt themſelves to pay common charges is called the *Guildable*; and if there be any ſpecial Liberty, the ſame is called the Franchiſe. 8 *E.* 3. 37. *Jeffery at Hay* brought an Action of Treſpas againſt *William at Ford* and *Robert Gray*, that they wrongfully with force had broken his Fold at *Haſtings*: The Defendant pleaded, That *Johan de Frichborne* was and yet is ſeiſed of the ſaid Manor of *Haſtings* in Fee, and that the ſaid *Johan* and her Anceſtors, and all the Lords of the ſaid Manor whoſe Eſtate ſhe hath time out of minde, had this Franchiſe, to have a free Fold, *liberam Faldam*, through the whole Town of *Haſtings*; ſo that none of the Town of *Haſtings* ſhould have free Fold without agreement made with her; and if any did erect a Fold without agreement with her, *&c.* that the Lords for the time being had uſed to abate the ſame: And that *Jeffery at Hay*, the Plaintiff, ſet up a new Fold without leave or agreement; and that the Defendants, as Servants to the ſaid *Johan*, did abate the ſame, and came and disjoined and ſevered the hurdles. And there *Parning* Serjeant took two Exceptions to this Preſcription, 1. That it is in the Negative, *ſcil.* That none ought to have a Fold. 2. Becauſe that every one of common right ought to have a Fold in his own Land, and therefore it ſhall be againſt reaſon to put him from that which the Common Law giveth to him; and although he ſaid that the Lords have uſed to have a free Fold, the ſame is of common right alſo, and none can take that away which of common right is given to him: And the Exception was not allowed, becauſe the Preſcription doth contain an Affirmative with the Negative, and every Preſcription is againſt common right: Then the Plaintiff replied, that the Defendants have juſtified the abating of the Fold, by reaſon of the Seigniory of *Johan*. To which we ſay, That the place where the Fold is ſet, is out of the Lordſhip of *Johan*, &c. And it was holden no Plea, becauſe that *Johan* did claim the ſaid Franchiſe through the whole Town of *Haſtings*, as well out of her Lordſhip as within; whereupon the Plaintiff made another Reply, By which caſe it appeareth that although folding of Sheep is for the maintenance of Tillage (which is ſo much eſteemed and favoured in Law) yet by cuſtom and uſage a man may be barred thereof upon his own Land, and another man than he, of whom the Land is holden, may have it; And therewith agreeth 3 *E.* 3. 3. *John de Sedgeford*'s Caſe, where the Prior of *Trinity* of *Norwich* maketh the like Preſcription. *Mich.* 32 & 33 *Eliz.* in the King's Bench, Sir *George Farmor* brought an Action upon the Caſe againſt *Brook*, and ſhewed that he was ſeiſed of the Manor of *Torceſter* in the County of *Northampton* in Fee, and that all the Tenements of the ſaid Town are holden of the ſaid Manor, and ſhewed that time out of mind, *&c.* he, and all thoſe whoſe Eſtate he hath, had had a Bake-houſe parcel of the ſaid Manor maintained at their charge, and that this Bake-houſe was ſufficient to bake Bread for all the Inhabitants, and for all Paſſengers through the ſame Town; and the Bread ſo baked had uſed, *&c.* to be ſold at reaſonable Prices, and that no other perſon within the Town had uſed to bake any Bread to ſell to any perſon; And it was adjudged by the Lord Chief Juſtice, Sir *Chr. Wray*, and the whole Court, a good and reaſonable cuſtom; And yet this cuſtom doth reſtrain a man to exerciſe his Trade within a certain place. *Vide Regiſt.* 105, 127. 11 *H.* 6. 19. 9 *E.* 3. 4. There are divers cuſtoms in *London* which are againſt common right, and the rule of the Common Law, and yet they are allowed in our Books. And the rather, becauſe they have not only the force of a cuſtom, but are alſo ſupported and fortified by authority of Parliament. 1. They have a cuſtom concerning the Arreſt and Impriſonment of the body of a man; as the Creditor may arreſt the body of the Debitor before the day of paiment, to drive him to find Sureties, *Littl.* 5 *E.* 4. 30. 11 *H.* 6. 3. and 2 *Hen.* 7. 13. 2 *Hen.* 4. 12. 2. They have a cuſtom to enter the houſe of another, which is his Caſtle; and therefore the cuſtom of *London* is, That when a Chaplain or a Prieſt hath a Woman in his Houſe or Chamber, and one hath an ill ſuſpicion thereof, he who hath ſuch ſuſpicion may come to the Conſtable of the Ward or Beadle, and with him may enter into the Houſe or Chamber of the Chaplain or Prieſt, and commit the Offender to priſon, 2 *H.* 4. 12. 2 *H.* 7. 15. 3. By their cuſtom the Goods of a man in which he hath an abſolute property may be forfeited, as in the Caſe before of Forein bought and Forein ſold. 4. They have a cuſtom which doth alter

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alter the course of Justice, *scil.* where an Action is brought before one Judge, to remove the Plea before another, as 10 *H.* 6. 15. In an Action of Debt upon an Escape of a man taken by *Capias* upon a Statute Merchant at the Plaintiffe's Sute, The Defendant said, that the Custom of *London* is, that where a Plaint is entred before the Sherifs of *London*, that the Maior at the suggestion of the Plaintiff or Defendant may send for the Parties, and if it be found upon examination before the Maior; that the Plaintiff is satisfied, he may award that the Plaintiff shall be barred; and that the Plaintiff did enter a Plaint of the matter, and was examined before the Maior, and upon Examination it was found that the Party was paid, and that the Plaintiff took a Bond for the residue, therefore the Maior awarded that he should be barred; Ane it was adjudged, that the Custom was good, for that the Examination was pendant the Action; but contrary, if they prescribe to examin it after a Judgement. *Vide* 1 E. 4. 6. Executor charged in *London* upon a simple Contract, 15 *Eliz. Dyer*, in *London*, the Maior who is the Coroner shall not give the Judgement upon Utlagery, but the Record. And many Exceptions were taken to the Return, because that the Custom alleged in the beginning of the Return was not persued. For the Custom there alleged doth consist upon two general parts, *scil.* the Mischiefs and Remedies; the Mischiefs were three. 1. If any were difficult; 2. If defective; 3. If a new Case arise, which *emendatione indigeat*; the Remedy is, That the Maior and Aldermen, with the consent of the Commonalty, have power by the Custom *apponere remedium*, which Remedy ought to have five Qualities. 1. It ought to have fit proportion and congruity. 2. It ought to be *bonæ fidei consonum.* 3. It ought to be *rationi consonum.* 4. *Pro communi utilitate Civium & aliorum fidelium ad eandem Civitatem confluentium.* 5. *Quod sit utile Regi & populo.* And it was objected, that the said Constitution doth appoint a Remedy which hath but one of the said five Qualities; for it provideth only, (as appeareth by the expres words of the Constitution) for the benefit of the Freemen of the said City, *scil.* for avoiding of such Prejudice and Damages as groweth to the Freemen of the said City, *&c.* and to provide for the common profit and good of the Freemen and Citizens of this City, It is therefore, *&c.* by which it appeareth that this Remedy was only made for the Freemen of the City, and so not according to the Custom; and the Exception was not allowed, because it appeared to the Court, that this Remedy had all the five Qualties, and therefore it was resolved, that the same needed not to be added by the Party. *Vide* 46 *E.* 3. 16. no price of money shall be expressed in the Writ, because it appeareth of it self, 12 *H.* 4. 17. the Son within age bringeth an Assise of Mortdancester, he needeth not adde, that it is within the time of limitation, because it appeareth. *Vide Plow. Com. Partridge*'s Case, 87. for the same ground, and *Vide* 26 *H.* 6. Gard 58, *&c.* But for the better understanding of the true reason of the resolution in this Case; First, It was observed, That one may be *Liber homo*, that is, a Freeman of *London* by three waies, *scil.* 1. By Service, as he who serveth his Apprentiship; 2. By Birthright, as he who is the Son of a Freeman of *London*; 3. By Redemption, that is, by allowance of the Court of the Maior and Aldermen, and all these three waies are allowed by the Custom of *London*, and by no other means can a man become a Freeman of *London*: for none can be made free of the City of *London* by Charter: And therefore it appeareth in *Rot. Pat.* 32 *E.* 3. in the Tower of *London*; That King *Ed.* 3. granted to *John Falcount de Luca* Apothecary of the City of *London*, *Quod ipse omnibus libertatibus quas Cives Civitatis præd. habent in eadem Civitate & alibi infra regnum Angliæ nostrum, habeat, gaudeat, & utatur; & quod de tribus denariis de libra, & omnibus aliis præstationibus & custumis quas aliegenæ de bonis & merchandisis suis infra reg. Angliæ solvere tenentur, de propriis bonis & merchandisis ipsius* Johannis *infra idem regnum ad totam vitam suam sit quietus, & quod plus quam alii Cives nostri* London *indigenæ pro custumis merchandisarum & aliorum bonorum suorum nobis solvunt solvere non teneatur, nec ad hoc aliqualiter compellatur.* But all these words do not make him a Freeman of *London*; For he ought to attain unto it by one of the said three waies, according to the said custom; And it was said, That he was the first Apothecary that ever was within this Kingdom. And it was resolved, That it appeareth that the Remedy appointed by the said Constitution hath all the said five Qualities. 1. *Quod Remedium præd. fuit congru.* that is, apt and proportionable to the Offence. For it appeareth by Act of Common Councel in 3 *E.* 4. which inflicteth the Penalty of 40 *s.* upon a Foreiner who holdeth open Shop, *&c.* that he who keepeth an inward Shop is a greater Offender then he who keepeth an open Shop; for *London* is a Market every day, except only the Sabbath-day, but secret places in corners, as the Case of the said *James Wagoner* is, is more dangerous and offensive then outward Shops, for there he may use deceit, and is not subject to any Search; *Qui malè agit odit lucem*, and, *omnia delicta in aperto leviora sunt.* In 11 *H.* 7. 19. The Prior of *Dunstable* brought an Action upon the Case against *J. B.* Butcher, and declared, that he was Lord of the Town of *D.* and that he, *&c.* had a Market twice in the week, and the Correction of the Market; and that all Butchers or others who sell Meat or other Commodities which came to the said Market, that they ought to sell the same in the High-street of the said Town, upon the Prior's stalls there, paying a penny to the Prior; And that the Defendant is a Butcher, and sold his Meat such a Market-day secretly within his own house, and had procured others so to doe, by which, *&c.* the Defendant pleaded that he was a Housholder in the said Town of *D.* and all those who are Housholders in the said Town have time out of mind, *&c.* used to sell their Wares every Market-day in their own Houses, or where ever else they pleased; And there *Cotesmore* who gave the Rule in the said Case, and the Reason of it, said, This Prescription is not to the purpose; For if the Prior had a Market within the Town, and is Lord of the Town, you cannot prescribe to sell Meat in your own Houses upon the Market-day; For the Market cannot be but in an open place; and the Prior then should lose the benefit of his Market, if they might sell their Wares in their Houses; And also where he hath the Correction of the Market, and to see that the things sold be lawfull and vendible, it cannot be tried by his Officers if it be not in open Market;

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and alſo he ſhould loſe his Toll of the things which are ſold; ſo that when the Market doth belon to the Prior, which ought to be holden in the Maket-place appointed for that purpoſe, he cann hold a Market in his own houſe, but in the common place, upon the Market day; for whi cauſe, *&c.* And as it hath been ſaid, *London* hath a Market every day in the week, except the Sa bath. *Vide Mich.* 32 & 33 *Eliz.* in the Fifth Part of my *Reports*, 65. A Conſtitution in *London* That all Broad-cloth by Citizen or Foreiner ſhall be ſold at *Blackwell-hall*, ſo that it may appear t be ſaleable: And note there a penalty inflicted for the reſtraint of a lawfull Act, but here, of a
[b] unlawfull. And therefore if a Foreiner who keepeth open Shop ſhall forfeit 40 *s.* he who is a Fo reiner and doth offend in ſecret Corners is worthy to forfeit 5 *li.* And it was alſo obſerved, Tha the value of an ounce of Silver after 3 E. 4. hath been raiſed. Alſo it was *remedium congruum* i reſpect of the manner of Puniſhment, *ſcil.* by impoſing of a pecuniary pain, and not of a corpora pain: And therewith agreeth the ſaid Caſe of *Blackwell-hall*, *Mich.* 32 & 33 *Eliz.* and *Trin.* 38 Eliz in the Fifth part of my *Reports*, *Clerk*'s Caſe, A Conſtitution cannot be made upon a pain of Im priſonment; and the Caſe cited before of *Trinit.* 41 *Eliz.* between *William* and *Auſten*, a Conſtitu tion cannot be made upon pain of Forfeitur of Goods: therefore it ought to be upon a reaſonable pecuniary pain, or not at all. 2. *Remedium fuit bonæ fidei conſonum*; for the remedy is to ſup preſs that which is *mala fide* in deceipt to defraud the ſaid Cuſtom. 3. The remedy *fuit rationi con ſonum*; for the rule of Law and Reaſon is, *quod clam delinquens magis punitur quam palam.* 4. The remedy was *pro utilitate Civium & Aliorum.* 1. *Civium*, for Foreiners are not ſubject to Scot and Lot, *&c.* 2. *Aliorum*, for the Confluence of People from all parts of the Realm to *London* doth in troduce three great inconveniencies; 1. *Depauperationem*, *ſcil.* impoveriſhing of all the good Towns of *England*. 2. *Depopulationem*, Depopulation of Towns in every Country. 3. *Deſtructionem*, Deſtruction in the end of all Trades and Tradeſmen in every part of the Realm. 4. *Civium & aliorum*, by the Peſtilence, by reaſon of the multitude of People, and peſtring of the Air, which is dangerous, not only to the Subjects, but to the King himſelf, and the great Lords who attend up on his royal perſon. 5. The remedy was, *utile Regi & populo*; not only for avoiding the Peſti lence, as before is ſaid; but alſo, if *London* ſhould daily increaſe, it would be in time ſo populous, that it would not become governable by the Magiſtracy of the City: And as, when the City of Lon don (which as it were the Epitome of the whole Kingdom) is not well governed, all the parts of the Kingdom find the inconvenience thereof; ſo when this City is well governed, all parts of the Kingdom are kept in better order, which is profitable both to the King and People: Alſo the City would become ſo populous, that it would not be ſubject to ſearch, by which means fraud and deceit would increaſe in all Wares and vendible Commodities, not only to the prejudice of the City it ſelf, but to the King and the whole Realm. Secondly, It was objected, That the ſaid Return doth con ſiſt much in recital, which ought to be directly and certainly alleged. To which it was anſwered and reſolved, That this is not upon a Demurrer in Law, but a Return upon a Writ of Privilege,
[128] upon which no Iſſue can be taken, or Demurrer joined, neither upon our Award doth any Writ of Error lie, and therefore the Return is no other, but to enform the Court of the truth of the matter, in which ſuch a preciſe certainty is not required as in pleading. Thirdly, It was objected, That by the Statutes of 9 E. 3. *c.* 1. & 2. 25 E. 3. *c.* 2. 27 E. 3. *c.* 11. *&c.* it was enacted, That every one might ſell any Commodities, or things ſaleable in any City, *&c.* in groſs, or by retail: And that every Statute, Charter, Letters Patents, Proclamations, Uſage, Allowance, or Judgement to the contrary are void. To which it was anſwered and reſolved; 1. That the Statutes extend only to Merchants Aliens, and Denizens, which import and export vendible things, and do not extend to take away the Cuſtom of a City of forein bought and ſerein ſold, as it was reſolved, as above, *Mich.* 10 & 11 *Eliz.* in the Caſe of the City of *York*; And ſee the Statute of 2 *Rich.* 2. *cap.* 1. which reſtraineth the Sale of Wares by retail, *&c.* by Merchants Aliens, *&c.* 2. Theſe Statutes do not extend to Tallow-Chandlers, or other ſuch like Artificers, nor to any Manufactures made by them within the Realm. 3. It appeareth by the Judgement of the whole Parliament, *Anno* 7 *Hen.* 4. *cap.* 9. That notwithſtanding all the ſaid Statutes, it was not lawfull within the City of *London* (which Charters are eſtabliſhed and confirmed by many Acts of Parliament) for any, be he Merchant Alien, Denizen, or other Leige man whatſoever, who was a Stranger or Foreiner to the Liberty of the City of *London*, *ſcil.* who was not a Freeman of the ſaid City, to ſell any Mer chandizes by retail, *&c.* within the ſaid City. And by the ſame Act it was ordained and eſta bliſhed, That as well the Drapers and Sellers of Cloths, as other Merchants, with other Mer chandizes, Wine, Iron, Oyle, Wax, and other things appertaining to Merchandize, be free, to ſell ingroſs their Wares, *ſcil.* Cloaths, Wool, Iron, Oyle, Wax, and other their Merchandizes, as well to any of the King's Subjects as to the Citizens of *London*, notwithſtanding any Liberty or Franchiſe granted to the contrary, which Act had been made in vain, if the City of *London* had been reſtrained by the ſaid former Acts. But becauſe the ſaid Act did tend to the great hin drance of the Maior and Citizens aforeſaid, and very like to be the deſtruction of the Citizens, and againſt their Grants and Confirmations. At the next Parliament, *ſcil.* *Anno* 9 *H.* 4. an Act of Parliament not printed was made, which followeth in theſe words. *Item*, The Commons pray, That as diverſe Kings of *England*, your Progenitors and Predeceſſors, our Sovereign Lords, by their Charters confirmed by you by authority of Parliament amongſt other Franchiſes and Liberties to the Mayor and Citizens of *London*, and their Succeſſors, it was granted, That no Merchant E
[b] ſtranger to the Liberty of the City ſhould ſell any Merchandizes within the Liberties of the ſaid City to other Merchant Stranger, nor ſuch Merchant Stranger ſhould buy of other Merchant Stran ger any Merchandizes, under forfeit of the ſaid Merchandizes: The which Liberties and Franchiſes the Maior and Citizens of *London* which now are, and their Predeceſſors, by Authority of the ſaid

Grants

Grants and Confirmations have had and enjoied till your last Parliament holden at *Westminster*, In the which, by authority of the same Parliament the said Article of their said Liberty was revoked, and made void by Statute; Provided, That as well Drapers and Sellers of cloth, as other Merchants, with their divers Merchandizes, as Wine, Iron, Oil and Wax, and other things belonging to Mercandizes, as free to sell, ingross their Cloths and other Merchandizes aforesaid, as well to any the King's Liege people, as to the Citizens of *London*, notwithstanding any Franchise or Liberty to the contrary, to the great prejudice of the Maior and Citizens aforesaid, and the likely destruction of the said Citizens, contrary to the Grants and Confirmations aforesaid: That it would please you our Sovereign Lord, with the assent of the Lords Spiritual and Temporal in this Parliament, to repeal and make void the said Statute in your last Parliament touching that Article: So that the said Maior and Citizens; and their Successors, be entirely restored to the said Liberties and Franchises by Statute: So that from henceforward no Merchant being a Stranger to the Liberty of the said City sell any Merchandizes within the Liberty of the said City to other Merchant Stranger; nor that such Merchant Stranger buy of any other Merchant Stranger such Merchandizes within the Liberty of the said City without Forfeiture thereof. Saving and reserving to all Lords, Knights, Esquires, and all other Liege Denizens of our Sovereign Lord the King, power at their will to buy within the Liberty of the said City of any Merchant Stranger, Merchandizes in gross to their own use, so that they do not sell them again to any other. The King will, That the Citizens of *London* have their Liberties and Franchises touching this Article, as entirely as they had before the last Parliament holden at *Westminster*: the Statute made at the said Parliament nowithstanding.

Note, Reader, this Act is not only a good exposition and explanation of the former Statutes touching this matter; but also a good demonstration of the custom of the Liberties of the City of *London* in these Points. In *London* a Citizen and Freeman may by their custom devise in Mortmain, notwithstanding the Statute of Mortmain be to the contrary: And so in the like cases. *Vide* 8 *H.* 7. 46. 9 *H.* 6. 58. 7 *H.* 6. 1. 45 *E.* 3. 26. 28 *Ass.* 25. 5 *H.* 7. 10. 11 *H.* 7. 21. 23 *Eliz. Dyer*, 373. for all the customs of *London* are established and confirmed by Act of Parliament, as it appeareth by this Retorn. And it was observed that in the Case at Barr, within the said Retorn there are Five general Parts; 1. The Custom; 2. The general Act to enable and preserve this Custom, which was before all the said Statutes. 3. A particular Charter, *Anno* 15 *Edwardi* 3. which of it self was not sufficient, and therefore it was established and confirmed by Act of Parliament. 4. Former Precedents of constitutions in the like cases, *viz.* in 3 *E.* 4. & 17 *H.* 8. 5. The Constitution upon which the Action was brought in *London*. But the Court took advisement upon one part of the Retorn, by which it is added, *Quod* Jacobus Wagoner *usus est manuali occupatione de Tallow Chandler*, and doth not shew that he did sell any Candles, *&c.* for if he maketh them for his own use, without selling any for lucre or gain, he may well so doe: as every one may bake or brew for his own use, without selling Bread or Bear: But it seemeth it is implied by the said Averment, that the same is his Trade by which he liveth by sale of his Commodities of his Trade, and not only to make them for his own use; for it is not properly said that one useth a manual Occupation, when he maketh no more than for himself; as he who baketh or breweth for his own use, it is not properly said that he useth the manual Occupation of a Brewer or Baker, and that appeareth by the Statute of 5 *Eliz. Cap.* 4. for there it is enacted, *That every person being an Housholder and four and twenty years old*, &c. *and using and exercising any art, mystery, or manual occupation, shall*, &c. *have and retain*, &c. *an Apprentice*, &c. But without question he who useth the making of any Manufacture for his own use, as making of Candles, *&c.* cannot retain an Apprentice within the Statute of 5 *Eliz.* So in another part of the Act *It is enacted*, *That it shall not be lawfull to any person or persons*, &c. *to set up, occupy, use or exercise any craft, mystery or manual occupation, except he shall have been brought up therein seven years at the least as an Apprentice*, &c. And yet he who baketh, breweth, maketh Candles, *&c.* for his own use, is not said in Law to use any manual Occupation: and upon this branch, and much to this purpose, a Judgement was given in the Court of Exchequer, and afterwards affirmed in a Writ of *Error* in the Exchequer-chamber, *Mich.* 6 *Jacobi*, and the Case worthy to be known was such. *Taylor* did inform in the Exchequer upon the Statute of 5 *Eliz. cap.* 4. *tam pro Domino Rege, quam pro seipso*, against *Shoile*, that he had used the Art and Mystery of a Brewer, *&c.* for divers months, contrary to the said Act, and averred that the Defendant did not use or exercise the said Art or Mystery at the time of the making of the said Act, nor had been an Apprentice for seven years at the least in the Art and Mystery of a Brewer, according to the said Act, *&c.* The Defendant did demurr in Law upon the Information, and Judgement was given against him by the Barons of the Exchequer. Upon which Judgement a Writ of *Error* was brought in the Exchequer-chamber, and *Mich.* 6 *Jacobi*, the matter was argued by Counsel on both sides; and two *Errors* were assigned, one, that a Brewer is not within the said Branch of the said Act, upon which the Information is conceived, for the words are, *That it shall not be lawfull to any person or persons other than such as now do lawfully use or exercise any art, mystery or manual occupation, to set up, use or exercise any art, mystery or occupation, except he shall have been brought up therein seven years at the least as an Apprentice:* And it was said, that the Trade of a Brewer is not any Art, Mystery, or manual Occupation within the said Branch, because it is easily and presently learned, and needeth not seven years Apprentiship to be instructed in it, for every Huswife in the Country can brew; and the Statute of 22 *Hen.* 8. *cap.* 13. doth declare, that a Brewer is not an Handicraft Artificer. The other *Error* was, That the said averrement was not sufficient, for the averrement ought to be as general as the exception in the Statute is, *sc.* That the Defendant did not use any Art, Mystery or Occupation, at the time of the making of the said Act;

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for by their pretence, if he exercise any Art, Mystery, or manual Occupation, then, as a Taylor, Carpenter, *&c.* he may now use any Art, Mystery, or manual Occupation whatsoever. As to the first, It was resolved, That the Art of a Brewer, *scil.* to keep a common Brew-house to sell Beer to any other, is an Art, Mystery, and manul Occupation within the said Branch of the Act; for in the beginning of the Act it is enacted, *That no person shall retain for less time than a whole year in any of the Sciences, Crafts, Mysteries, or Arts of Clothing*, &c. *Bakers, Brewers*, &c. *Cooks*, &c. So that by the Judgment of the same Parliament the Trade of a Brewer is an Art and Mystery: which words are in the said Branch upon which the Information was grounded. And it was resolved, that he who breweth or baketh, *&c.* for his own use, doth not use or exercise the Art, Mystery, or manual Occupation against the said Act, for the said words implie, that he so use or exercise the Art, Mystery, or manul Occupation, that by sale of the Commodities of his Occupation he get his living, but to say that it is not any Art, Mystery, or manual Occupation, because that every Housewife breweth for her private use, and also she baketh and dresseth meat, *&c.* and yet none can keep a common Bake-house, or Cook's shop to sell to others, if he hath not been an Apprentice, *&c.* according to the said Act, for they are expresly named also in the Act, as Arts and Mysteries: and the Act of 22 *H.* 8. explaineth, That Brewer, Baker, Chirurgian, or Scrivenor alien, are no Handicrafts men within the purview and intention of certain penal Laws, but the same doth not prove that they are not Arts or Mysteries; for Art or Mystery is more general then Handicraft, for that is restrained to Manufactures, but not within the penalty of the said Statute, and it is no Question, that in truth they are Arts, Mysteries, or manual Occupations. As to the second, It was resolved, That the intent of the Act was, That none should take upon him any Art, Mystery, or manual Occupation, but such in which he had knowledge: And therefore the Statute intendeth, That he who useth any Art, Mystery, or manual Occupation at the time of the Act, might use the same Art or Mystery; for, *quod quisque norit in hoc se exerceat*; and the words of the said Branch are, *as now do lawfully use*, &c. And it was said, that it was very necessary that Brewers should have skill and knowledge in brewing good and wholesom Beer, for that the same doth much conduce to mens health. And so the first Judgement was affirmed. And in this Case at the Barr, as well by the Serjeants, as by the Justices in their Arguments, much was said of the Antiquity of the City of *London*. *Ammianus Marcellinus*, who wrote about 1200 years past, saith, that then it was *Oppidum vetustum*. *Cornelius Tacitus* (which married the Daughter of *Cornel. Lucius Agricola*, and who was in this Kingdome with *Agricola* seven years,) saith, *Quod* Londinum *tempore Neronis* (which is above 1500 years ago) was *Copia negotiatorum & commeatu maxime celebre.* And omitting all that *Stephanides* (who wrote in the reign of *Hen.* 2.) hath said of the Honour and Antiquity of this City, I say, *Quod haec est Camera Regis, Cor Reipublicæ, & tanquam Epitome totius regni.*

Pasch. 7 Jacobi *Regis.*

The Case of *Thetford* School.

[*b*] UPon a private Bill exhibited into the Parliament for erection of a Free-School, maintenance of a Preacher, and of four poor people, *sc.* two poor men, and two poor women, according to the Will of Sir *Tho. Fulmerston* Knight, a Question was moved by the Lords, and was such; Land of the value of 35 *li. An.* 9 *Eliz.* was devised by Will in writing to certain persons and their heirs, for the maintenance of a Preacher four daies in the year; of a Master and Usher of a Free Grammar-School, and of certain Poor people, and special distribution was made by the Testator himself in the same Will amongst them of the Revenues, *scil.* To the Preacher a certain sum, and certain sums to the School-master and Usher, and to the Poor people, amounting in the whole to 35 *li. per annum*, which was the yearly profit of the Land at that time, and afterwards the Lands became of greater value; *viz.* to the value of 100 *li. per annum.* Now two Questions were moved.

1. If the Preacher, School-master, Usher, and Poor, should have only the certain sums appointed to them by the Founder, or that the Revenue and Profit of the Land should be imploied to the increase of the Stipend of the Preacher, School-master, Usher, and Poor?

[131] 2. If any Surplusage doth remain, How it should be imploied?

And it was resolved upon hearing of Councel Learned on both parts several daies at *Serjeants Inn*, by two Chief Justices, and Justice *Walmsley*, (to whom the Lords referred the consideration of the Case) That the Revenue and Profit of the said Lands should be imploied to the encrease of the Stipend of the Preacher, School-master, *&c.* and Poor, and if any Surplusage doth remain, it should be expended for the maintenance of a greater number of Poor, and nothing should be converted by the Devisees to their own Uses. So in the Case in Question, where Lands in *Cranston* in the County of *Norfolk* were devised by Sir *Richard Fulmerstone* to his Executors to find the said Works of Piety and Charity, with such certain distribution as is aforesaid: and now the value of the Manor was greatly encreased, that it shall be imployed in performance and increase of the said Works of Piety and Charity, instituted and erected by the Founder. For it appeareth by his distribution of the Profits, that he did intend that all should be imploied in the Works of Piety and Charity, and nothing should be converted to the private use of the Executors, or their Heirs. And this

this Reſolution is grounded upon evident and apparent reaſon; for as if the Lands had fallen in the value, the Preacher, School-maſter, *&c.* and poor People ſhould loſe, ſo when the Lands do increaſe in value by the ſame reaſon they ſhall gain. And they ſaid, That this Caſe did concern the Colleges in the Univerſities of *Cambridge* and *Oxford*, and other Colleges, *&c.* For in old time, when Lands were of ſmall value (Victuals then being cheap,) and were given for the maintenance of poor Scholers, *&c.* every one 1 *d.* or 1 *d. ob.* a day, that then ſuch ſmall allowance was competent in reſpect of the price of Victuals, and the yearly value of the Land; and now the Price of Victuals being encreaſed, it ſhall be injurious to allow a poor Scholar a 1 *d.* or 1 *d. ob.* a day, which cannot keep him, and to convert the reſidue to private uſes, where in right it ought to be imploied to the maintenance and increaſe (if it may be) of ſuch Works of Piety and Charity which the Founder hath expreſſed, and nothing to any private uſe; for every College is ſeiſed *in jure Collegii, ſcil.* to the intent that the Members of the College, according to the intent of the Founder, ſhould take the benefit thereof, and that nothing ſhould be converted to private uſes. *Panis egenium vita pauperum, & qui defraudat eos homo ſanguinis eſt.* And afterwards, upon Conference had with the other Juſtices, they were of the ſame opinion: and according to their opinions the Bill paſſed in both Houſes of Parliament, and afterwards was confirmed by the King's aſſent. Note, Reader, there is a good Rule in the Act of Parliament called, *Statutum Templariorum. Ita ſemper quod pia & celeberrima voluntas Donatoris in omnibus teneatur & expleatur, & perpetuo ſanctiſſime perſeveret.* [b]

Paſch. 8 Jacobi. *In the Common Pleas.*

Turnor's Caſe.

IN *Mich.* Term 6 *Jacobi, Rott.* 1811. *Edward Turnor*, Gent. Executor of *E. Turnor*, brought an Action of Debt againſt *Ed. Lawrence* and others, Adminiſtrators of *Richard Booker*, upon an Obligation of 100 *li.* made by the ſaid *Rich. Booker* to *E. Turnor* the Teſtator: the Defendants pleaded in bar a former Judgement in the King's Bench upon two ſeveral Bills, which amounted to 60 *li.* &c. And farther ſay, That at another time, *ſcil.* at the Court of our Sovereign Lord the King holden at the City of *Ciceſter* in the *Guildhall* of the ſaid City, before *Robert Adams* then Maior of the ſaid City, on Monday, *viz.* the 23^d^. day of *Febr.* in the Fourth year of the ſaid King, *Thomas Billet* did complain againſt the ſaid *Ed.* and the other Defendants, Adminiſtrators of the ſaid *Rich. Booker*, of a Plea, That the ſaid *Edward*, &c. ſhould pay to him 100 *li.* which he then unjuſtly detained from him; whereupon at the ſame Court the ſaid *Ed. Lawrence*, &c. were demanded, and appeared by *Robert Smith* their Atturney, and then ſaid, That they could not deny the Action of the ſaid *Tho. Billet*, nor but that the ſaid Writing Obligatory by which the ſaid *Tho. Billet* did require the ſaid Debt, was the Deed of the ſaid *Richard Booker*, nor but that the ſaid *Richard Booker* in his life time did owe the ſaid *Tho. Billet* the ſaid Debt of 100 *li.* in manner and form as he had declared againſt them: whereupon in the ſame Court Judgement was given for the ſaid *Tho. Billet:* and pleaded another Judgement for 60 *li.* in the ſame Court at the Sute of *John Githens:* and pleaded divers other former Recoveries in Actions of Debt in the ſame Court againſt the ſame Adminiſtrators, amounting in the whole to 514 *li.* and 8 *d.* and that they have not Goods and Chattels of the Inteſtate in their hands, *præterquam Bona & Catalla quæ non attingunt ad valentiam* 514 *li. verſus ipſos in forma præd. recuperat.* which are chargeable and liable to the ſaid ſeveral Executions. The Plaintiff replieth and ſaith, That the Recovery of the ſaid *John Githens* was by fraud and covin, *&c.* to defraud and deceive the ſaid *Ed. Turnor* of the ſaid Debt: upon which they were at iſſue to be tried by the Country: And as to the ſaid Recovery of the ſaid 100 *li.* againſt the Defendants, that the Defendants after the death of the ſaid *Richard Booker*, and after the ſaid Recovery, and before the original Writ brought, 24 *Febr.* in the Fourth year of the King that now is, have paid to the ſaid *Tho. Billet* 60 *li.* parcel of the ſaid 100 *li.* recovered by him as is aforeſaid, in full ſatisfaction and diſcharge of the ſaid Judgement, with which paiment the ſaid *Thomas Billet* held, and yet holdeth himſelf contented and ſatisfied; and then and there offered, and yet offereth to releaſe the ſaid *Ed. Lawrence*, &c. the ſaid 100 *li.* or to acknowledge ſatisfaction thereof in the ſaid Court of our Lord the King at *Ciceſter*, at the charges of the ſaid Adminiſtrators: But the ſaid *Edward*, &c. deceitfully, and to the intent to defraud and deceive the ſaid *Ed. Turnor* Executor of his juſt Debt, do deferr to acknowledge ſatisfaction of the ſaid 100 *li.* &c. or of the ſaid Judgement to be releaſed; and ſuffer the ſaid Judgement to remain in force and ſtrength to the intent aforeſaid; and pleads the like Plea to the other Recoveries; whereupon the Defendant doth demurr in Law; And the Point in Law was, When a Judgement is given againſt an Adminiſtrator or Executor, for a juſt Debt due by the Inteſtate or Teſtator, if the ſaid ſubſequent agreement ſhall avail the Plaintiff or not? And it was objected, That foraſmuch as the Judgement was obtained *bona fide* for a juſt and true Debt, the ſubſequent agreement cannot make the Recovery covenous, and ſo long as the ſame remaineth in force, if the Executors have not other Goods and Chattels in their hands above that Judgement, they are not bound by Law to pay any other Debt, and Covin cannot be alleged in doing of a lawfull act; As in a Writ of Dower againſt a Diſſeiſor, if the Tenant plead in abatement of the Writ an Entry by the Diſſeiſee, the Demandant ſhall not be admitted to averr the Entry [132] [b]

to

to be by Covin to abate his Writ, becauſe the Entry is congeable and lawfull, and mixt with no wrong, as it is holden in 15 E. 4. 4. but if a woman have lawfull title of Dower, and cauſeth another to diſſeiſe the Tenant, againſt whom ſhe recovereth upon good title, it ſhall not bind the Diſ-
[133] ſeiſee, as it is holden 44 E. 3. 45. The ſame Law of him who is put to his *Formedon*, or other real Action; and the reaſon is, becauſe the Demandant's Right is mixt with Covin or Wrong, which is an ill herb, and maketh the whole act tortious. *Vide* 25 *Aſſ. p.* 1. 22 *Aſſ. p.* 92. 27 *Aſſ. p.* 74. 41 *Aſſ. p.* 28. 44 *Aſſ. p.* 29. 11 *H.* 4. 60, 61. 15 E. 4. 4. 11 E. 4. 2. 7 *H.* 7. 11. 1 H. 8. 5, 19 *H.* 8. 13. But it was anſwered and reſolved, and ſo adjudged, That the Plaintiff ſhould recover; For an Executor or Adminiſtrator ought to execute his Office, and adminiſter the Goods of the deceaſed, lawfully, truly, and diligently: Lawfully, in paying of all his Duties, Debts, Legacies, in ſuch precedency and order as they ought to be paid by the Law: Truly, to convert nothing to his own uſe; for an Executor or Adminiſtrator hath not the Deceaſed's Goods to his own uſe, but in another Right, and to another Uſe, and ought not, by any Practice or Device, barr or hinder any Creditor of his Debt, but ought truly to execute his Office according to the truſt which is repoſed in him: Diligently, *quia negligentia ſemper habet Comitem infortunium.* Then in the Caſe at Barr, when the Adminiſtrators compound with one who hath a Judgement of 100 *li.* for 80 *li.* and the Plaintiff offereth to releaſe and acknowledge ſatisfaction, and he deferreth it to the intent that the Judgement ſtand in force, by which the Plaintiff ſhall be defrauded of his true Debt, and the Adminiſtrators convert the Deceaſed's Goods to their own uſe, which is altogether againſt their Office, and the truſt repoſed in them; And therefore be the Agreement precedent before the Recovery, or ſubſequent after the Recovery, all is one as to the Creditor, who is a third perſon, for he is defrauded as well by the ſubſequent Agreement, as by the Agreement precedent, and thereby the Adminiſtrators, againſt their office and truſt repoſed in them, ſhould make a private gain, where they ought not, and the Creditor, who is a Stranger, ſhould loſe his Debt, which by the Law is due to him: and an Agreement made betwixt two ſhall not hurt or prejudice a third perſon. And *Goodale*'s Caſe, in the Fifth part of my *Reports*, was cited, and applied to this Caſe. And if any prejudice doth accrue to the Adminiſtrators in this Caſe, it is their own fault, for *Billet* the Plaintiff would have releaſed to them, and acknowledged ſatisfaction, but they deferred the ſame, to the end by this means to barr the Plaintiff of his juſt and true Debt.

2. It was reſolved, That the Barr as to all the Recoveries pleaded in the Court of *Ciceſter* was inſufficient, for the validity of the ſaid Recoveries was all the life and force of the Barr: and, 1. It doth not appear, that the Maior hath Juriſdiction or Power to hold a Court, either by Preſcription or Patent. 2. It appeareth by the Declaration in the ſaid Court, that the Action of Debt was brought for 100 *li.* without making mention of any Obligation, and therefore it ought not to be intended,
[*b*] that there was any Obligation, and then the ſaid Adminiſtrators were not chargeable in an Action of Debt upon a ſimple Contract; And although the Defendant in his Barr doth confeſs that the Debt was by Obligation, yet it ſhall not make the Declaration good: For when the Declaration wanteth circumſtance of time, or place, *&c.* it may be made good by the Barr: But when a Declaration, Barr or Replication, *&c.* wanteth ſubſtance, it cannot be made good by the others Plea. And ſo you will better underſtand your Books in 18 E. 4. 16. *b.* 22 E. 4. 4. *b.* 6 E. 4. 2. 11 *H.* 7. 24. 6 *H.* 7. 10. 5 *H.* 7. 12. 38 *H.* 6. 17, 18, 19. 18 E. 3. 30. 38 E. 3. 34. *b. Plow. Com.* 229. *Vide F. N. B.* 21.

3. It was reſolved, That in the Caſe at Barr, if the Replication had been inſufficient, *ſc.* that the ſaid Agreement ſubſequent ſhould not avail the Plaintiff; yet upon the whole Record the Plaintiff ſhall have Judgement, becauſe the Barr was inſufficient in matter. And a difference was taken, when by the Replication it appeareth that the Plaintiff hath no cauſe of Action, there the Plaintiff ſhall never have Judgement, although the Barr be inſufficient; As in Debt upon a Bond to perform Covenants in an Indenture, the Defendant pleads performance of all the Covenants generally, where it appeareth that divers of them are in the Negative or Disjunctive, and ſo the Plea in the general Affirmative is inſufficient; yet if the Plaintiff reply, and ſhew a Breach of one of the Covenants, which upon his own knowing is no Breach, upon which the Defendant doth demurr, Judgement ſhall be given againſt the Plaintiff, becauſe upon the whole Record it appeareth that the Plaintiff hath no cauſe of Action; for the Bond is endorſed with Condition to perform the Covenants, ſo that the Plaintiff hath no cauſe of Action till there be a Breach of Covenant, and upon the Plaintiffe's own ſhewing there is not any Breach which is ſufficient in Law to give the Plaintiff cauſe of Action; and it ſhall be alwaies intended, that a man will ſhew that which is beſt for himſelf: But when the Defendants Barr is inſufficient in ſubſtance, and the Plaintiff replieth, and ſheweth the truth of his Caſe, whereby he ſheweth no matter againſt himſelf, but matter explanatory, or perhaps not material, there the Court ſhall adjudge upon the whole Record, and (the Declaration being good) for the inſufficiency of the Barr, without any regard had to the Replication, Judgement ſhall be given for the Plaintiff: As if a man plead a Grant by Letters Patents in barr which are not ſufficient: The Plaintiff by Replication ſheweth another clauſe in the ſaid Letters Patents, which clauſe is not material, and the Defendant doth demurr in Law, in this Caſe Judgement ſhall be given againſt the Defendant: and ſo of the like. And ſo you will better underſtand your Books in 7 E. 4. 28. *Tilly* and *Woodye*'s Caſe, 11 *H.* 7. 28. and the other Books aforeſaid; and other Books vouched in Doctor *Bonham*'s Caſe.

Paſch.

Pasch. 8 Jacobi *Regis, in the Kings Bench.*

Mary Shipley's Case.

TRinit. 4 *Jacobi rot.* 28. in the *Kings Bench*, *Mary Shipley* brought an Action of Debt upon a Bond of 200 *l.* against *Christopher Beane* and *Anne* his wife, Executrix of *Francis Hasilwood* the Obligor; the Defendants pleaded Fully administred, and so nothing in their hands. The Plaintif replyed, that they had Assets. The Jurors found that there were Assets to the value of 172 *l.* and Judgment was given to recover the whole debt of 200 *l.* and costs and damages of the goods of the Testator, if, &c. and if not, then the damages of their own proper goods. Upon a Writ of *Error* brought upon the same Judgment in the Exchequer Chamber, the said Judgment was affirmed *Hill.* 7 *Jac.* For upon the barr, the effect of which, is nothing in their hands, the Plaintif might have prayed her judgment presently; for thereby he confesseth the debt, but he cannot have execution till the Defendants have goods of the deceased: as in a Writ of Mesne, if the Defendant pleadeth, not distreined in his default, he may pray Judgment presently, for this plea shall serve him to no purpose, but to save him from damages. *Vid.* 11 *H.* 4. 52. So in a *Warrantia Chartæ* against the heir, the Defendant pleadeth that he hath nothing by descent, &c. the Plaintif shall thereupon recover *pro loco et tempore.* So in debt against the heir, if he pleadeth nothing by descent, &c. the Plaintif may have judgement presently, and a *scire facias* when Assets do descend. *Vid. Old N. Brev. in Warrantia Chartæ*, and 21 E. 3. *Br. tit. Warrantia Chartæ* 30. But the tryal in the case at barr is a good direction to the Sherif what he is to do; but yet the same shall not alter the judgment of the Law; and it is the better form, and more agreeable to Law to have judgment for the whole, than of parcel of the debt, according to the Assets found. See *Syms* case before for this matter. [134] [b]

Pasch. 8 Jacobi, *in the Common Pleas.*

Sir John Nedham's Case.

ARthur *Post*, and *Kather.* his wife Administr. of *Eliz. Weldishe*, brought an action of debt against Sir *John Nedham* (which began *Mich.* 7. *Jacobi, rot.* 332) upon an Obligation of 200*l.* made to the said *Eliz.* To which *Katherine* administration of all and singular the goods which were the said *Eliz.* at the time of her death, were at *Rochester*, by *William* Bishop of *Rochester* after the death of the said *Elizabeth* committed the 5 of *Feb.* 1605. The Defendant pleaded, That after the death of the said *Eliz.* and before the committing of the said Administration, *sc.* 13 *Maii* 1604. The Dean and Chapter of *Canterbury* being Gardians of the spiritualties *sede vacante* of the Archbishop of *Canterbury*, committed administration of the goods, &c. of the said *Eliz.* because the said *Eliz.* the time of her death had *bona notabilia* in several Dioceses of the Province of *Canterbury*, which administration committed by the said Dean, &c. doth yet remain in force, and demanded Judgment of the action. The Plaintif replieth, That after the said administration granted by the said Dean, &c, to the Defendant, and before the purchase of this original writ, *sc.* 4 *No.* 1607. before D. *Bennet* Commissary of the Prærogative Court of *Canterbury*, at the sute of the said *Katherine* against the said Defendant, the administration granted to the Defendant was pronounced and declared *pro nulla & invalida ad omnem juris effectum:* upon which the Deft. did demur in Law. And in this case 3 points were resolved. 1. For as much as the Defendant hath not shewed in his barr, that the Intestate hath *bona notabilia* in certain, for this cause it shall be taken that the administration was granted, where the Intestate had not *bona notabilia* in several dioceses: But yet it was agreed, That such administration was not void, but voidable, as it was adjudged in *Hugh Veres* case, in the 5 part of my reports. 2. It was objected, That forasmuch as the administr. granted to the Defendant was not void, but voidable, so long as they were in force the inferiour Ordinary ought not to have committed administration, for the prerogative administration granted by the Archbishop, and the administration granted by the inferiour Ordinary cannot stand together; for thereupon confusion will ensue; and therefore the administration granted by the inferiour Ordinary was void; And although that afterwards the said prerogative administration was revoked, it shall not make the other administration of better effect than it was at the time it was granted, *quia quod ab initio non valet tractu temporis non convalescit.* But it was answered and resolved, That now in as much as the Eccleasiastical Judge hath pronounced, and declared the Letters of administation granted to the Defendant *pro nulla & invalida ad omnem juris effectum*, we must give credit to them, that the same was for causes not appearing to us void *ab initio Vid.* 17 *Eliz. Dyer* 339. the like cause upon the same reason. Also the Administration is but an Authority, because he hath nothing to his own use, but all to the use of another, and an authority may ex- [135] [b]

pect and commence *in futuro*, and therefore it shall be suspended until the other be repealed or declared void. And it was said, that there are 3 kinds of Executors, The first appointed by the Law, and therefore it is called Lawful, as the Bishop: the second appointed by the Testator, and therefore it is called Testamentary, as an Executor. The third appointed by the Bishop, and therefore he is said Datif, as an Administrator. And it is to be observed, That the Bishop who is Executor appointed by the Law, is not permitted by Law to make a release of any debt, or gift of any goods; for he hath a special property in the deceaseds goods for the benefit of the dead, and nothing to his own use: And that appeareth in *9 Eliz. Dyer* 255. That the Ordinary hath not power to give authority to another to sell the desceaseds goods, because he himself hath but an authority; And the Statute of *West.* 2. *cap.* 19. *Bona deveniunt ad manus Ordinarii disponenda*, that is, for the good of the deceased, and as to this purpose he is like to an administrator, *durante minore ætate*, who hath a special power committed to him to dispose of the deceaseds goods for his benefit, and nothing in prejudice of the Executor, as it is holden in *Princes* case in the 5 part of my *Reports*. So the Lord who taketh a surrender of Lands holden by Copy of Court Roll, to the use of another, hath a power to grant the same only according to the use of the surrender, and not to a stranger, as it is holden in the 4th part of my Reports in *Westwicks* case *Vid.* 7 *H.* 4. 18. the Ordinary shall not have an action of Trespasse for carrying away the goods before an actual possession of them (as Executors or Administrators may have) but before possession the Ordinary may sue for them in the spiritual Court. And *Fitzherbert* in abridging of the case, *tit.*
[136] *Trespasse 79. ex hoc sequitur*, That the Ordinary shall not have an action of debt, as Ordinary. 3. It was resolved, That the committing of administration by the Archbishop of *Canterbury* to the Obligor, it shall not extinguish the debt, but the debt doth remain. But if the Obligee maketh the Obligor his Executor, it is a Release in Law of the debt, because it is the Act of the Obligee himself, and therewith agreeth 8 E. 4. 3. 21 E. 4. 2. *b.* &c. in the same manner as if a woman Obligee taketh the Obligor, or one of the Obligors, for her Husband, it is a Release in the Law of the debt, because it is the Act of the Obligee her self, and therewith agreeth 11 *H.* 7. 4. & 21 *H.* 7. 29. But if a woman Executrix taketh the debtor to Husband, it is no release in Law, because she hath the debt, in an other right, and if it shall amount to a release in Law, it shall be a *devastavit*, which is a wrong, which the Law will not suffer. And so it was adjudged in the Kings Bench, *Mich.* 30. & 31. *Eliz.* where in debt against a woman Executrix, she pleaded fully administred, and it was found that the Defendant had taken the Obligor to Husband, and that the Husband was dead, and it was adjudged to be no release in Law, nor the debt extinct, but only suspended during the Coverture: Note, *Fleta lib.* 2. *cap. de Testamentis. De bonis defuncti trina debet esse dispositio*; 1. *Necessitatis, ut funeralii.* 2. *Utilitatis*, that every one shall be paid in such precedency as it ought to be. 3. *Voluntatis*, as Legacies.

Pasch. 8 Jacobi. *In the Common Pleas.*

Sir Francis Barrington's Case.

[*b*] BEtween *Richard Chalke* Plaintif in a Replevin, and *William Peter* and *Nicholas White* Defendants, which began *Hill. 6. Jacobi, rot.* 157. upon a very long and impertinent pleading, the case was such. Sir *Robert Rich* Lord *Rich* was seised of the Forrest or Chase of *Hatfield* (whereof the place where, &c. was parcel) in fee, and by his deed indented, bearing date 30 *Janu.* 19 *Eliz.* for good consideration granted to Sir *Thomas Barrington* Knight, and his heirs, *omnes bosci arbores tam marem. subboscos & spinas quam alia genera quorumcunque, adtunc crescent. stant. et existent. simul cum omnibus arboribus*, called Timber Trees, *boscis, subboscis, et spinis quibuscunque, quæ ad aliquod tempus extunc imposterum forent, crescent. stant. removant. sive existent. in et super illis partibus foreste præd. communiter vocat.* Bushend Quarter, *and the Quarter called* Takeley Quarter (except the land and soil of the same wood) with liberty to enclose them, and to hold them inclosed for the preservation of the Spring of wood which should be for such time, as by the Laws and Statutes of the Realm is appointed and enacted, and not otherwise, without molestation or interruption of the said Lord *Rich* his heirs or assigns, and to exclude the Deer and all other Cattel out of the wood so inclosed, and to have the herbage and feeding thereof as any owner of
[137] the wood ought to do by the Laws and Statutes of the Realm, without interruption of the said Lord *Rich*, his heirs or assigns. And that the Plaintif is seised of a house and six acres of Land in *Hatfield*, in fee, and that he hath Common appurtenant for all Cattel levant and couchant, &c. in and through the whole Forrest or Chase of *Hatfield*; which grant made by the Lord *Rich*, was in performance of an award made between the said Lord *Rich*, and Sir *Tho. Barrington*, by the Lord *Burgley* Lord Treasurer of *England*, *Thomas* Earl of *Sussex*, Sir *William Cordel* Master of the Rolls, and Sir *Guilbert Gerrard* Attorney General, which Arbitrament and grant was confirmed and established by Act of Parliament, *Anno* 27 *Eliz.* with a saving to all strangers, &c. And that the said Sir *Tho. Barrington* died, after whose decease the said wood descended to Sir *Francis Barrington*, as to his son and heir, who 1 *Feb.* 1 *Jacob.* cut down the trees in the place in which, and carried them away to his own use, and 10 *Martii* following inclosed the same for the preservation

ſervation of the Spring, and ſo hath kept it for the preſervation of the Spring, according to the Laws and Statutes of the Realm. And the Defendants did demurr in Law: And if the Plaintif was barred of his Common or not was the Queſtion. And in this caſe the Defendant pleaded the ſaid Arbitrament, and the ſaid Act of Parliament at large; but to no purpoſe, for without Queſtion, neither the Arbitrament nor the Act (in reſpect of the ſaving) can bar the Plaintif of his Common: But all the doubt of the caſe doth ariſe upon 2 Acts of Parliament not pleaded, *ſc.* the Act of 22 E. 4. *Cap.* 7. and the Act of 35 *H.* 8. *cap.* 17. And 1. it was objected, That the Act of 22 E. 4. hath barred the Plaintif of his Common; for by the ſame Act it is enacted, That if any of the Kings Subjects having woods of his own, growing in his own ground, within any Forreſt, Chaſe, or purlieu, &c. cauſe to be cut the ſame wood, or any part thereof, by licenſe of the King, or his heirs, in his Foreſts, Chaſes, or purlieus, or without licenſe, in the Forreſt, Chaſe or purlieu of any other perſon, or make ſale of the ſame wood; Be it lawful for the ſaid Subjects poſſeſſors of the ſame ground whereupon the wood ſo cut did grow, and to other perſons to whom ſuch wood ſhall happen to be ſold, immediately after the wood ſo cut to coppice and encloſe the ſame ground with ſufficient hedges, able to keep out all manner of Beaſts and Cattel out of the ſame ground, for the preſerving of their young Spring: And the ſame hedges ſo made the ſaid Subjects may keep them continually by the ſpace of 7 years next after the ſame incloſing; and there is no Saving in the Act for the Commoners; and therefore (as it was urged) they ſhall be excluded of their Common for 7 years; for that every one is party and privy to the Act of Parliament; And the Rights and Intereſts of thoſe which are not ſaved by the Act of Parliament are bound; And the makers of the Act have greater regard to the preſervation of the Spring of the woods for the Commonwealth in maintenance of Timber and woods, than to the Common in the [b] woods of Subjects within Forreſts or Chaſes after a reaſonable time, till the Spring be of ſuch growth that beaſts or Cattel cannot hurt or hinder it. And theſe words, To incloſe the ſame land with ſufficient hedges able to exclude all manner of Beaſts or Cattel out of the ſame ground, were very ſtrongly urged to prove the intent of the makers of the Act, to exclude not only the Beaſts of the Forreſt, or Chaſe, but alſo Cattel of Commoners; for Beaſts of the Forreſt are not called Cattel; and the words are, able to exclude all manner of Beaſts and Cattel out of the ſame ground; which general words extend to Beaſts and Cattel of the Commoner. To which it was anſwered by the Plaintifs Councel, 1. That the ſaid Act of 22 E. 4. doth not extend to this caſe, becauſe the Statute extendeth only to thoſe who are Owners of the ground; for the words of the Act in divers parts thereof are, growing upon their proper ground. And in this caſe Sir *Francis Barrington* hath but a profit apprender in anothers ground, for the ground remaineth to the Lord *Rich.* 2. It was anſwered, That the Statute of 35 *H.* 8. *cap.* 7. which is in the Negative, That it ſhall not be lawfull to any perſons which have or ſhall have any woods wherein any ought to have any Common, &c. to ſell and cut down the ſame woods (except it be to his own uſe and occupation) until ſuch time as the 4 part of the ſaid ground or ſoil, &c. be divided, &c. fenced and incloſed, &c. *Et leges poſteriores, priores contrarias abrogant.* To which it was anſwered by the Defendants Councel, That Sir *Francis Barrington* was out of this prohibition, and within the execution of this branch; for he hath taken the ſaid wood to his own uſe; And he who taketh a wood wherein others have Common is out of the prohibition of this Act. And now this term the caſe was argued at the Bench by the Judges, and in this caſe theſe points were reſolved. 1. That Sir *Francis Barrington* hath an inheritance as profit apprender in *alieno ſolo*, and that the ſoil doth remain to the Lord *Rich.* 2. That the Statute of 22 E. 4. ſhall extend to Sir *Francis Barrington*, notwithſtanding that he hath not the ſoil; for the words are, that it be lawful for the ſaid Subjects poſſeſſors of the ſame ſoil, or to other perſons to whom ſuch wood ſhall be ſold; And the ſaid grant for the conſiderations in the ſaid award, mentioned to Sir *Tho. Barrington* and his heirs, was a perpetual ſale to him within the words and intent of the Act. 3. The ſaid Act doth not extend to the wood of a Subject, in which another hath Common, but only to ſeveral woods: For by the Common Law, he who hath a wood in which another hath Common cannot [138] encloſe it, to exclude the Commoner of his Common, be it in Forreſt or Chaſe, or out of Forreſt and Chaſe. But he who hath a ſeveral wood in a Forreſt may after the cutting incloſe it for three years *parvo foſſato & baſſa haia ſecundum aſſiſam foreſtæ*, as it appeareth by the *Ad quod damnum* in the Regiſter 257. Then it appeareth by the ſaid Act, that it extends only to ſeveral woods; for the ſame reciteth, That where Subjects have cut their woods, &c. could not before encloſe their ground to preſerve the germens longer than 3 years, which proveth what the Common Law was before in ſuch caſe; but without queſtion the ſame extendeth only to ſeveral woods; for none could incloſe a wood wherein another had Common for a day, &c. But now this Statute hath enlarged the time until 7 years, and hath hightned the hedges; for whereas before he could not encloſe the ſame *parvo foſſato & baſſa haia*, he may now make *magnam & altam haiam*, ſufficient to exclude all manner of Beaſts and Cattel. 4. It appearth by the preamble, between what perſons, and for and againſt what perſons this Act was made; And the parties to this great Contract by Act of Parliament are the Subjects having woods, &c. within Foreſts, Chaſes, or purlieus of one part, and the King and other Owners of Forreſts, Chaſes. and purlieus of the other part, ſo that the Commoners are not any of the parties betwixt whom this Act was made: And therefore the Caſe well argued in 21 *H.* 7. 1. Between the Prior of *Caſtleacre* and the Dean of St. *Stephens*, and left at large in the printed Reports, was afterwards adjudged, as appeareth by the Record thereof, which began *Paſch.* 18 *H.* 7. *Rot.* 416. That the Act of 2 *H.* 5. being made between the Kings and Priors Aliens, by which the Priors Aliens were given to the King, did not extinct the annuity of the Prior of *Caſtleacre* which he had out of a Rectory parcel of a Priory Alien, although that

there was not any ſaving in the Act. And *Mich.* 25 & 26 *Eliz. Boſwells* caſe in the Court of Wards, where it was reſolved, That when an act of Parliament maketh any conveyance good againſt the King, or other perſon certain, it ſhall not take away the right of any other although there be not any Saving in the Act. 5. If the Act had extended to wood in which others had Common; yet the concluſion doth reſtrain the generalty of the precedent words; for the Statute doth not give an abſolute and indefinite power to the owners of the wood to encloſe, &c. but to encloſe the ground, to keep it encloſed, and to repair it, without ſuing the Kings License, or other perſons, or their Officers of the ſame Foreſts, Chaſes, or purlieus, ſo that the ſame concluſion doth limit the precedent words only againſt the King, and other owners of Foreſts, Chaſes, and purlieus; but no word in the whole Act doth give authority to them to encloſe againſt any Com-
[b] mon. And where it was ſaid, that this word Cattel cannot be applied to Beaſts of the Foreſt; It was anſwered, that they be fitly and properly ſaid Beaſts and Cattel of the Forreſt. And ſo is it ſaid in the preamble of this very Act, Beaſts and Cattle of the Forreſt. And it is to know, That there are five manner of Beaſts of Foreſt, *ſc.* Hart, Hind, Hare, Wild Bore, and Wolf; and 5 manner of Beaſts of Chaſe, *ſc.* the Buck, Doe, Fox, Martin, and Roe; and Beaſts and Fowls of Warren are, Hare, Coney, Feaſant, Patridge. See Regiſter 96. 43 E. 3. 13. 38 E. 3. 10. 3 H. 6. 12, 15. *Liber Dentries Treſpaſſe in Hunting*, 585. 12 H. 8. 9. *Holinſheds Chronicle* 306. *num.* 30. 6. It was reſolved, That the ſaid clauſe of the Act of 35 H. 8. in the Negative doth reſtrain only the Owner of the wood to cut his own wood upon a penalty, and without queſtion doth not exclude the Commoner of his Common: And the ſaid words (except it be to his own uſe or occupation) ſerve to exclude the Owner out of this penalty, are to be intended of his own proper neceſſary uſe; as for to repair his houſe, or to burn in his houſe, &c. Then there is another clauſe which prohibiteth the Commoner that after the ſaid felling (that is to ſay, after the diviſion and felling, for the diviſion of the 4th. part ought to preceed the felling) in any ſuch part, that is in the fourth part, ſo divided, no Beaſts or Cattel during ſeven years ſhall be ſuffered to feed there, upon penalty, &c. And the Lord is excluded to feed with his Cattel during the 7 years: And after the 7 years, (until a new felling, according to the Act) the Commoner ſhall have his Common again. And it is to be marked, That by the Statute of 22 E. 4. the owner of the wood ought firſt to cut the wood, and after encloſe: And by the Statute of 35 H. 8. he ought firſt to encloſe, and within 4 moneths cut the wood. 7. It was reſolved, That the Statute of *Weſt.* 2 *de malefactoribus in parcis*, *Charta de Foreſta*, and thoſe Acts of 22 E. 4. and 35 H. 8. are generally Laws concerning all perſons, whereof the Court *ex Officio* ought to take notice, and ſo much the rather, becauſe that this Act of 22 E. 4. doth concern the King.

Paſch. 8 Jacobi *Regis. In the Common Pleas.*

Doctor *Drurie's* Caſe.

Owen Bray brought a Writ of *Audita Querela* againſt *John Drury* Doctor of the Civil Law, ſetting forth, That where the ſaid Doctor *Drury Mich.* 5 *Jac.* in this Court had recovered againſt the ſaid *Owyn* a debt of 200 *l.* and 33 *s.* 4 *d.* for damages and coſts: And where the ſaid
[b] *Owyn*, becauſe he came not into Court to ſatisfie the ſaid debt and damages, was put in Exigent, and thereupon 19 *May Anno* 6. was outlawed: And that the ſaid *Owyn* by force of a Writ of *Capias Vtlagatum*, at the ſute of the ſaid *John Drury* was taken and impriſoned, and in execution for the ſaid debt and damages, and ſo being in execution was delivered out of priſon by the Sherif from the ſaid execution, and ſuffered to go at large, &c. The Defendant pleaded, That after the ſaid eſcape, and before the bringing of the ſaid Writ of *Audita querela*, *ſc.* Mich. 6 *Jac.* The ſaid Writ of *Capias Utlagat.* was awarded out of the Court retornable *Craſtin. animarum*: At which day the Sherif did retorn *Non eſt inventus*; and thereupon the ſame day the ſaid *Owyn* appeared, and demanded Oyer of the Exigent, which was read to him; and thereupon it appeared that the Retorn of the ſaid Writ of Exigent was incertain; and thereupon he prayed, *quod utlagaria prædicta in forma præd. promulgata et habita adnullaretur, evacueretur, et pro nullo penitus teneretur: ſuper quo viſo brevi præd. et per Juſticiar. hic tunc plene intellecto, eiſdem Juſticiariis hic tunc conſtabat, quod allegatio prædicti* Owyni *in exonerationem ſuam de utlagaria prædicta vera extitiſſet; Ideo tunc conſideratum fuit in eadem Curia hic quod idem* Owynus *occaſione utlagariæ præd. in aliquo non moleſtaretur nec gravaretur, ſed iret inde quietus prout per record. inde in eadem Curia hic reſiden. plenius liquet. Et ſic idem* Johannes Drury *dicit quod non habetur aliquod tale recordum*
[142] *utlagariæ prædicti. quale præd.* Owynus *per breve et narrationem ſuam præd. ſuperius ſupponit: et hoc paratus eſt verificare: unde petit judicium ſi ipſe ab executione ſua præd. de debito et damnis præd. verſus* Owynum *habend. præcludi debeat*, &c. And upon that the Plaintif did demur in Law. And it was objected that the ſaid Outlawry was not void, but voidable, and that at the time of the eſcape (by which the ſaid Dr. *Drury* was entituled to an action of debt upon the eſcape againſt the Sherif) the Outlawry was in force, and the Sherif ſhall never take advantage of an Error in the proceeding againſt the Defendant, but ſhall be charged for the eſcape, notwithſtanding the Record be erronious. And ſo was it adjudged in the Exchequer, *Trinit.* 31 *Eliz.* by Sir *Roger Manwood*, and *William Gervys*, 18 *Aug.* 28 *Eliz.* acknowledged a Recogniſance of 200 *l.* in the Chancery to *George Ognell*, Upon which Recogniſance *George Ognel*, 16 *Jan.* 29 *Eliz.* ſued a *Scire facias* out of the Chancery againſt the ſaid Recognizors, upon which *Nihil* was returned; and ſo upon another

ther *Scire facias*, whereupon *Mense Pasch.* 29 *Eliz.* Judgment was given, *sc. Ideo consideratum fuit per Curiam, quod pred.* Georgius *recuperaret versus prædictos* Ed. Fr. & Will. 200 *l.* &c. And that the said *George* have execution against them, whereupon he sued forth a *levari facias*, upon which it was returned, that they had nothing, For which the Court did award a *Capias ad satisfaciend.* retornable *Octab. Hill.* directed to the Sherif of *Norfolk*, *Clement. Paston* Esq; the Sherif of the same County; by force whereof the said Sherif did arrest the said *Francis Woodhouse*, and *William Gervys*, 16 *Jan.* 30. *Eliz.* And that the said *Francis Woodhouse*, at the time of the said arrest was in prison under the custody of the said Sherif being attainted of felony; and afterwards the said *Francis* and *William* did escape out of the custody of the said Sherif; upon which escape *George Ognell* brought an action of debt against the said *Clement Paston*, being an accomptant in the Exchequer. And in this case it was resolved, that the awarding of the *Capias ad satisfaciend.* was erronious; for by the Law the bodies of the Recognizors were not lyable to the execution; And yet, because the Sherif cannot take advantage of the Error, it was adjudged that he should answer for the escape; And therewith agreeth 21 *E.* 4. 23 *b.* But it was adjudged that in the case at Bar, the *Audita querela* doth not lie; And in this Case two points were resolved. 1. A difference was taken and agreed between a Collateral thing executory, and executed; For when an erronious judgment is given, and afterwards the judgment is reversed by a writ of Error, collateral Acts executory are barred thereby. As if a man have judgement in a *Quare impedit*, and hath a Writ to the Bishop, and the Bishop refuseth to admit the Plaintifs Clerk, the Plaintif upon this collateral refusal may have a Writ of *Quare non admisit*; but if the Defendant doth reverse the Judgment in a Writ of Error, And afterwards the Plaintif in the *Quare impedit* bringeth a Writ of *Quare non admisit*, the Defendant may plead *nul tiel Record. Vid.* 26 *E.* 3. 25. by *Wilby* and *Hill.* So it was resolved, That if *A.* be in execution at the sute of *B.* upon an Erronious Judgment, and afterwards escape, and afterwards the Judgment be reversed by a Writ of Error, the Action upon the escape is gone; for he may plead *Nul tiel Record*, because that without a Record the Action is not maintainable; but yet it is true, that till the Erronious Judgement or Execution be reversed by a Writ of Error, the Sheriff or Gaoler shall not take benefit thereof; for there he cannot plead *Nul tiel record*, because that till it be reversed, it remaineth of force, although there be apparent Error, as it is holden in 34 *H.* 6. 2 *b.* and 22 *E.* 4. 23. *b.* But in the same case, If the Plaintif bring an Action of Debt against the Sherif or Gaoler upon the escape, and hath Judgement and execution, and afterwards the first Judgement is reversed; yet for as much as this Judgement upon this collateral thing is executed, notwithstanding the Reversal of the first, it remaineth in force, as it appeareth in the like case 7 *H.* 6. 42 *a.* where the Case in effect is, That the Conusee of a Statute Staple in a Detinue of the said Statute upon Garnishment, doth recover by erronious Judgment against the Garnishee, and hath the Statute delivered to him; The Garnishee bringeth a Writ of Error, and the Conusee sueth execution upon the Statute and hath it: there it is holden, that although that the Garnishee doth reverse the Judgment, yet for as much as the Statute is now executed, this execution shall not be avoided by the reversal of the Judgement; for the Judgment was only to have the Statute delivered, and the execution of the Statute is a thing executed, not depending upon the Judgement. So if a man recovereth by erronious Judgement, and presenteth to a Benefice, or entreth into the perquisite of a Villein, and afterwards the Judgement is reversed by Writ of Error, because that these collateral things are executed, they shall not be devested, as it is holden in 4 *H.* 7. 11. and there *fol.* 12. *a.* *Brian* saith, That it was adjudged, That if the Defendant pleaded that the Plaintif is Outlawed, and the Plaintif pleadeth, *quod non habetur aliquod recordum*, &c. and the Defendant hath day to bring in the Record, and before the day the Record is reversed, the Justices certifie *nul tiel record*; and therewith agreeth 6 *Eliz. Dyer* 228. So in the Case at Bar, for as much as the Record is defeated and voided before that the Defendant be driven to plead, he may well plead *Nul tiel record*, *Vide* 13 *E.* 3. *Barr.* 253. But if 2. Judgements be given, and the last doth meerly depend upon the first as upon a foundation, there if the first fundamental [143] Judgement be reversed by writ of Error or Attaint, the latter (which appeareth in the Record to be dependent upon it) shall be reversed also, as in *Assise & Redisseisin*: So of a Judgement upon the Original, and another Judgement in a *Scire facias*, The same Law of one Judgement given against the Tenant, and another against the Vouchee and the like, 43 *E.* 3. 3. 13 *E.* 4. 4. 8 *H.* 4. 4. 4 *E.* 3. 36. 8 *H.* 7. 10. 11 *H.* 4. 4. 11 *H.* 4. 6. 4 *E.* 4. 29. 6 *E.* 4. 9. 9 *H.* 6. 38. *b.* 10 *H.* 6. 6. And *vide* 26 *E.* 3. 35. that by the Reversal of the Judgement given in a *Quare Impedit*, the Judgement given in a *Quare non admisit* is also reversed.

[b]

2. There is a difference between mean acts done in the execution of Justice, which are Compulsive, and acts which are Voluntary: And therefore, if erronious judgement be given in Debt, and the Sherif by force of a *Fieri fac.* sell a term of the Defendants, and afterwards the Judgement is reversed by a Writ of Error, yet the term shall not be restored, but only the sum, &c. because the Sheriff was commanded and compelled by the Kings writ to sell it, &c. But if a *Capias Utlagatum* be awarded, whereby the Sheriff is commanded to take the body, &c. *& bona & catalla, que per inquisitionem invenerit in manus nostras capias ut de vero valore*, &c. And by force of the Writ the Sheriff taketh the goods and Chattels of a man Outlawed and selleth them, and afterwards the Outlawry is reversed, the party shall be restored to his goods and chattels, because the Sheriff was not commaded nor compelled by the Kings writ to sell them; and therewith agreeth 5 *Eliz. Dyer* 223. *Proctors Case.* And according to this Resolution it was adjudged in the Common Pleas, between *Amner* and *Loddington*, and afterwards *Mich.* 26 & 27 *Eliz.* in a Writ of Error affirmed in the Kings Bench.

3. There is a difference between a Recovery upon eigne title, and reverſal of a Record by a Writ of Error: And therefore if *A.* a woman doth recover Dower in antient demeſn againſt *H.* and hath execution, the Tenant doth reverſe the Judgment in a Writ of Falſe Judgment, and becauſe the woman hath holden the Lands for 2 years between the firſt Judgement and the Reverſal, it was inquired of the yearly value of the Land, and taxed the 2. years to 20 marks, and thereupon the Tenant ſued a *Scire facias* againſt the woman to have execution of the 20 marks: In barr of which the Wife pleaded, That ſhe had brought her Writ of Right Cloſe in the nature of a *Cui in vita*, againſt *H.* the now Plaintif, and proceſs continued till ſhe recovered the Land by eigne title, and demanded Judgement, if of the iſſues and profits of the Lands by any Judgement after had, *H.* ſhould have execution. But it was adjudged, That for as much as the Judgement given for *H.* doth remain in force, by force of which he ſhall have the ſaid 20 marks as da-
[b] mages ſevered from the Land, and the Recovery in the *Cui in vita* doth not referr to them, for this Cauſe although *A.* had recovered by eigne title, *H.* ſhould have execution of the damages, 20 E. 3. *Scire facias* 123. in *Harberts Caſe*.

4. The Caſe at barr is ſtronger, becauſe that the Judgement to avoid the ſaid Outlawry is declaratory, which declareth the Outlawry to be void, and the proceeding therein to be without warrant, and all that without a Writ of Error, becauſe that there is a nullity in the Outlawry, for as much as the Writ of Exigent which is the warrant to proceed to Outlawry wanteth ſubſtance, and by Conſequence it was no warrant in Law, and therefore when the ſame is ſo declared by the Judgment of the Court, it is void *ab initio*. *Vide Proctors Caſe*, 5 *Eliz. Dyer* 223. In 38 *H.* 6. 4. & 12. One who had Privilege in the Common Pleas was arreſted in *London*, and before Judgement the Defendant delivered a Writ of *Superſedeas* in the inferiour Court, and notwithſtanding the Recorder proceeded to Judgement, and thereupon his body was taken in execution: And afterwards his body was brought into the Common Pleas by a Writ of *Habeas Corpus cum cauſa*; and becauſe that after the *Superſedeas* there was a nullity in the proceeding as well to Judgment as to execution, the Court awarded, that the party ſhould be diſcharded of the Execution, and ſo he was diſmiſſed without ſuing forth of any Writ of Error; for by this declaratory Award, the Judgement and execution are utterly void. And ſee 17 *Eliz. Dyer* 339. Adminiſtration is Committed to the Wife of the goods, &c. of the Husband, who recovereth Debt as Adminiſtratrix, depending which ſute, the Son of the Inteſtate by Covin betwixt him and the Defendant, doth procure a new Adminiſtration to him and his Mother, no cauſe of Revocation of the firſt being expreſſed in the ſecond, and after Judgement doth Releaſe to the Defendant; the Wife ſueth execution, and the Defendant upon this Releaſe bringeth an *Audita querela*, and the Defendant pleaded the matter above and ſentence declaratory, that the 2. Adminiſtration was void, and it was adjudged for the Defendant. But if the Letters of Adminiſtration had been good, and the Adminiſtrator maketh a Releaſe, and afterwards the Letters of Adminiſtration are repealed, there the Releaſe is good: So there is a difference between a Sentence declaratory, by which the Letters of Adminiſtration are declared to be void; and a Sentence of Repeal, which allow them good till they are repealed.

Note Reader, where it ſaid in the firſt difference; That collateral things executed by execution upon eſcape, or upon the Statute recovered in the Writ of *Detinue* in 7 *H.* 6. 42. *a.* ſhall not be avoided by the Reverſal of the firſt Judgement, the ſame is true; And yet I conceive, That he ſhall
[144] have remedy upon the Reverſal of the Judgement by *Audita querela*, becauſe that the cauſe and ground of the Collateral Action is diſproved and avoided, by the Reverſal of the firſt Judgement: and the firſt Plaintif reſtored to his former Action, upon which he may have his juſt and due remedy. And it is like to the caſe in *Dyer* 3 *Eliz.* 203. Executors have Judgement in an Accompt, and have the Defendant in execution for Arrerages; now the Teſtament is annulled becauſe the Teſtator is an Ideot, and the Record Spiritual was removed into the Chancery by Writ, and ſent into the Kings Bench, where the Action was brought, and thereupon the Defendant brought an *Audita querela*, becauſe the Will was diſapproved: And it was reſolved in the Exchequer Chamber, *Anno* 35 *H.* 8. (as I have heard it appear by the Record) that the *Audita querela* did well lye.

Trin. 8 Jacobi. *In the Common Pleas.*

Davenport's Caſe.

[b] *Robert Bradſhaw* brought a *Quare Impedit* againſt *John Davenport*, *George Wood* Clerk, and the Biſhop of *Lincoln*, of the Vicarage of the Church of *Orton* upon Hill, in the County of *Leiceſter* (which began *Trinit.* 7. *Jacobi*, *rot.* 108.) And the Caſe was ſuch, *George Haſting* Earl of *Huntington* was poſſeſſed of the Church of *Orton*, to which the Advowſon of the ſaid Vicarage was appendant, for 25 years, and by his Deed *Maii* 19 *Eliz.* granted to *Robert Bradſhaw* now Plaintif, as he alleged in his Count, *primam et proximam advocation. et donationem præd. vicariæ de Orton cum eadem prim. & proxim. extunc vacare contigeret per aliquas vias ſeu media quæcunque, ſi eadem contigeret fore vacua durante termino annorum ad tunc in eſſe. de rectoria de Orton conceſſ. præfato Comiti per præfatum nuper Epiſcopum Oxonien.* The Defendants pleaded, That after the ſaid grant of the next voydance, the ſaid Earl ſo being of the ſaid Rectory to which, &c. poſſeſſed, dyed

dyed thereof poſſeſſed inteſtate, after whoſe death, *ſc.* 1 *Maii* 1605. Adminiſtration of his goods were Committed to *Henry* now Earl of *Huntingdon*; and afterwards the ſaid now Earl, 9 *Feb.* 3 *Jacobi*, did ſurrender his term in the ſaid Rectory, to which, &c. to the Biſhop of *Oxford* then in Reverſion, which he accepted, *per quod præd. terminus annorum de & in rectoria præd. cum pertin. ad quam* &c. *determinavit*, and the Biſhop demiſed the ſaid Rectory, with the appurtenances, to *Davenport* one of the Defendants, for his life, and afterwards the ſaid Vicarage became void, &c. upon which the Plaintif did demur in Law. And the ſole Queſtion of this Caſe was, If by the ſaid ſurrender the ſaid grant of the next avoidance was void or not. And it was Objected, That the ſaid grant [145] of the next avoidance was upon expreſs limitation, If the Vicarage became void during the term then in being, and by the Surrender the term was drowned and extinct: ſo that the Vicarage became not void during the term, becauſe it fell after the ſurrender; But if the limitation had been during the years, there it had been otherwiſe, for the years cannot determine but by effluxion of time. But it was anſwered and Reſolved, That notwithſtanding the Surrender, yet the Plaintif ſhould have the next avoidance, and that for 3. cauſes. 1. The ſaid limitation doth imply no more, than the Law would have ſaid; for if Tenant for years granteth the next avoidance, the Law doth imply this limitation, If the Church do become void during the term. And therefore *Expreſſio eorum quæ tacitè inſunt nihil operatur.* 2. The grantor himſelf ſhould derogate from his own grant, and ſhould make it void at his pleaſure, and that is againſt the Rule of Law, *ſc.* That the grant of every one ſhall be taken ſtronger againſt himſelf, and moſt beneficially for the grantee. And as to that the notable caſe of *Thurſtan* of *Holland*, Parſon of *Preſton*, in 6 E. 3. 54, & 55. was cited, where the Caſe was; That in the time of *R.* 1. debate was betwixt the Abbot of *S.* and *Theobald C.* upon the Advowſon of the Church of *Preſton*, and thereupon they agreed; and betwixt them a fine was levied 15 *Mich.* 6 *R.* 1. before the Archbiſhop of *Canterbury*, and the Biſhop of *Rocheſter*, then Juſtices of the Common Pleas, betwixt the aforeſaid Abbot and the ſaid *Theobald*; By which fine the Abbot did grant the Advowſon to *Theobald*, and to his heirs for ever, ſo that at every preſentation by *Theobald* or his heirs, the Clerks ſo preſented, &c. ſhould pay to the Abbot and his Succeſſors for ever 10 marks *per annum*, which accord was made in the preſence of the Ordinary of the place, who aſſented to it, at which time the Church of *Preſton* was void; and upon that fine the Succeſſors of the Abbot of *S.* brought a Writ of Annuity againſt the ſaid *Thurſtan de Holland* Parſon of *Preſton*; And there Serjeant *Parning* took exception to the Count, that for as much as the grant of the Annuity is in a ſpecial manner to be paid by the Clerks which ſhould be preſented by *Theobald* or his heirs, that the Plaintif ought to have ſhewed in his Count, that the Defendant was preſented by the ſaid *Theobald* or his heirs. To which *Sadler* ſaid, We intend that the perſon ſhall be charged by which he is preſented. And *Herle* chief Juſtice which gave the Rule, ſaid, That had *Theobald* aliened the Advowſon, the Annuity ſhall not be thereby extinct. By which caſe it appeareth, That although that *Theobald* had aliened the Advowſon, and although that the Annuity in the body of the grant is limited to be paid by the preſentees of *Theobald* or his heirs, yet the preſentee of his alienee, ſhall pay the ſame, for otherwiſe by his own grant he ſhall defeat the Annuity which himſelf hath granted.

Note Reader, in this Caſe of 6 *E.* 3. there are divers things worthy of obſervation, and amongſt them the Antiquity of the Common Pleas; for it appeareth thereby that the ſame was a Court long time before the Statute of *Magna Charta*, made in 9 *H.* 3. as it appeareth alſo in 26 *Aſſ. p.* 24. where it appeareth that King *Hen.* 1. made Letters Patents of Confirmation to the Abbot of *B.* of all uſages; and that they ſhould have Conuſans of all manner of Pleas, ſo that the Juſtices of one Bench, nor the other, nor Juſtices of Aſſiſe, ſhould nothing intermeddle, &c. which is a direct proof, that in the time of *Hen.* 1. there were Courts of the one Bench and the other, and alſo Juſtices of Aſſiſe, &c. 3. The term for the benefit of the grantee hath to ſome reſpect continuance, and therefore if Leſſee for years granteth a Rentcharge, and afterwards ſurrendereth, yet for the benefit of the grantee the Term hath continuance; although in truth it be determined: and therewith agreeth 5 *H.* 5. 10. But it is true, that the Leſſee himſelf by his Surrender may prejudice himſelf of an encreaſe of an eſtate to be made to himſelf, as it is reſolved in 35 *H.* 8. *Expoſition de parols*, 44. *Vide* the Rector of *Cheddingtons Caſe*, *M.* 38. *Eliz.* in the Firſt part of my *Reports*, 184.

Mich. 7 Jacobi.

The 6. Carpenters Caſe.

IN an Action of Treſpaſs by *John Vaux* againſt *Tho. Newman*, Carpenter and 5 other Carpenters, of breaking his houſe, and for an aſſault and battery, 1 *Sept.* 7. *Jac.* in *London* in the Pariſh of St. *Giles Criplegate*, in the Ward of *Criplegate*, &c. and upon the new aſſignment, the Plaintif did aſſign the Treſpaſs in a houſe called the *Queens head*. The Defendants to all the Treſpaſs but the breaking of the houſe pleaded Not guilty; and as to the breaking of the houſe, he ſaid, That the ſaid houſe *præd. tempore quo*, &c. *& diu antea & poſtea* was a Common Wine Tavern of the ſaid *John Vaux*, with a Common ſign at the door of the houſe, &c. by force whereof the Defen-

Defendants, *præd. tempore quo, viz.* at 4. of the Clock afternoon, the door thereof being open did enter, and did there buy and drink a quart of Wine, and there paid for the ſame, &c. The Plaintif by way of Replication did confeſs, that the ſaid houſe was a Common Tavern, and that they did enter, and bought and drank a quart of wine; but further he ſaid, that one *John Ridding*, ſervant of the ſaid *John Vaux*, at the requeſt of the ſaid Defendants, did there then deliver them another quart of wine, and a penny worth of bread, amounting to 8*d.* and there they did drink the ſaid wine, and eat the ſame bread, and upon requeſt did refuſe to pay for the ſame. Upon which the Defendants did demurr in Law: And the only point in this caſe was, If the denying of payment for the wine, or the non-payment, which is all one, (for every non-payment upon requeſt, is a denying in Law) doth make the entry into the Tavern tortious. And firſt, It was reſolved, When entry, authority, or Licence is given to any one, by the Law, and he doth abuſe it, he ſhall be a treſpaſſer *ab initio*: But where an entry, authority, or licence is given by the party, and he abuſeth it, there he ſhall be puniſhed for his abuſe, but ſhall not be a Treſpaſſor *ab initio*. And the reaſon of this difference is, That in the caſe of a general authority, or licence of Law, the Law will adjudge by the ſubſequent act, *quo animo*, or to what intent he doth enter, for *acta exteriora indicant interiora ſecreta. Vide* 11. H. 4. 75. *b.* But when the party giveth an authority, or licence himſelf to do a thing, he cannot for any ſubſequent cauſe puniſh that which is done by his own licence or authority; and therefore, the Law giveth authority to enter into a Common Inn, into a Tavern, to the Lord to diſtrein; to the owner of the ground to deſtrein for damage feaſance; to him in the Reverſion to ſee if waſte be done; to the Commonner to enter upon the Land to ſee his Cattel, and other the like: *Vide* 12 E. 4. 8. *b.* 21 E. 4. 19. *b.* 5 H. 7. 11. 9 H. 6. 29 *b.* 11 H. 4. 57. *b.* 3 H. 7. 15. 28. H. 6. 5. But if he who entreth into the Inn or Tavern doth a Treſpaſs, as, if he carrieth away any thing; or if the Lord who diſtreineth for Rent, or the owner for damage feaſance, doe work or kill the diſtreſſe; or if he who entreth to ſee waſt breaketh the houſe, or continueth there all night; or if the Commoner cutteth down a tree, in theſe and the like caſes the Law will adjudge that he entreth for this purpoſe, and becauſe that the act which doth demonſtrate the ſame is a treſpaſs, he ſhall be a treſpaſſer *ab initio*, as it appeareth in all the ſaid books. So if a Purveyor taketh my cattel by force of a Commiſſion, for the Kings Houſe, it is lawful; but if he ſelleth them in the market, then the firſt taking is wrongful; and therewith agreeth, 18 H. 6. 19 *b. et ſic de ſimilibus.*

2. It was Reſolved by the whole Court, That the Not doing cannot make the party who hath authority, or licence by the Law, to be a treſpaſſer *ab initio*, becauſe that Not doing is no treſpaſs; and therefore if the Leſſor deſtreineth for his Rent, and thereupon the Leſſee doth tender him the Rent and Arrerages, &c. and requireth his beaſts again, and he will not deliver them, this not doing cannot make him a Treſpaſſor *ab initio*; and therewith agreeth 33 H. 6. 47. *a.* So if a man taketh Cattel damage feaſant, and the other doth offer him ſufficient amends, and he refuſeth to deliver them back, if he ſueth a *Replevin*, he ſhall recover damages only for the deteining of them, and not for the taking, for that was lawful; and therewith agreeth F. N. B. 69. *grant.* E. 1. *Replevin* 27. 27 E. 3. 88. 45 E. 3. 9. So in the caſe at barr, for not paying for the wine the Defendants ſhall not be Treſpaſſors, for the denying to pay for the ſame is no treſpaſs; and therefore they cannot be Treſpaſſors *ab initio*; and therewith agreeth directly in the point, 12 *Edw.* 4. 9. *b.* For there *Pigot* Serjeant putteth this very caſe, If one commeth into a Tavern to drink, and when he hath drunk he goeth away, and will not pay the Taverner, the Taverner ſhall have an Action of Treſpaſs againſt him for his entry. To which *Brian* Chief Juſtice ſaid, That the ſaid caſe which *Pigot* hath put, is not Law, for it is no treſpaſs, but the Taverner ſhall have an Action of Debt. And there before *Brown* held, That if I bring cloaths to a Taylor to have a gown made, if the price be not agreed before how much he ſhall have for the making, he ſhall not have an Action of Debt againſt me; which is meant of a general Action of Debt, but the Taylor in ſuch a caſe ſhall have a ſpecial Action of Debt; *ſc.* that *A.* did put Cloath to him to make a gown thereof for the ſaid *A.* and that *A.* ſhould pay him as much for the making, and all neceſſaries, as he ſhould deſerve, and that for the making thereof and the neceſſaries, he deſerveth ſo much for which he bringeth the Action of Debt: and in this caſe the putting of the Cloath to the Taylor to be made a gown is ſufficient evidence to prove the ſaid ſpecial Contract, for the Law doth imply it: and if the Taylor doth overvalue the making, or the neceſſaries, the Jury may mitigate the ſame, and the Plaintif ſhall recover ſo much as they find, and ſhall be barred for the reſidue. But if the Taylor (as they uſe) maketh a Bill, and he himſelf doth value the making and the neceſſaries thereof, he ſhall not have an Action of Debt for his own values, and declare of a Reteiner of him to make a gown, &c. for ſo much, if it be not ſpecially agreed. But in ſuch caſe he may detain the garment until he be ſatisfied; as the Hoſtler may the Horſe. *Vide Br. Diſtreſs.* 70. and all that was reſolved by the Court. See the book in 30 *Aſſ. p.* 38. *John Matrevers Caſe.* It is holden by the Court, that if the Lord, or Bailif come to diſtrein, and before the diſtreſs the Tenant tendreth the arrerages upon the Land, there the diſtreſs taketh for the ſame is tortious. The ſame Law for damage feaſance, if before the diſtreſs he tender ſufficient amends; and therewith agreeth 7 E. 3. 8. *b.* in the Mr. of St. *Marks Caſe*: and ſo is the opinion of *Hall.* to be underſtood in 13 H. 4. 17. *b.* which opinion is not well abridged in *title Treſpaſs*, 180. Note Reader this difference, That tender upon the Land before a diſtreſs, maketh the diſtreſs tortious; tender after the diſtreſs and before the impounding, maketh the deteiner, and not the taking wrongful; tender after the impounding maketh neither the one nor the other wrongful; for then it comes too late, becauſe that then the cauſe is put to the tryal of the Law, to be there determined. But after that the Law hath determined it, and the Avowant hath return irrepleviſable, yet if the Plaintif maketh him a tender, he may have an Action of *Detinue* for the

the Detcinor after: or he may upon ſatisfaction acknowledged in Court have a Writ for the Delivery of his Goods: and therewith agreeth the ſaid Book of 13 *H.* 4. 17. 14 *H.* 4. 4. *Regiſter Judic.* 37. 45 *E.* 3. 9. and all the Books before. *Vide* 14 *E.* 4. 4. *b.* 2 *H.* 6. 12. 22 *H.* 6. 57. *Dr. and Student, lib.* 2. *cap.* 27. *Br. Diſtreſs* 72. and *Pilkinton's* Caſe, in the Fifth Part of my *Reports*: and ſo all the Books which *prima facie* ſeem to diſagree, are upon full and pregnant reaſon well reconciled and agreed.

Mich. 8 Jacobi. *In the Common Pleas.*

Edward Altham's Caſe.

Thomas Lawrence, and *Mercy* his Wife, brought a Writ of Dower againſt *Edward Altham*, and *Margaret* his Wife, and make Demand to be endowed of the third part of 100 acres of Land, 10 acres of Meadow, and 60 acres of Paſture, with their appurtenances, in *Goldsfield*, in the County of *Eſſex*, as the Dower of the ſaid *Mary*, of the endowment of *Thomas Naſh* the elder, her late Huſband: The Tenant pleaded in barr, That the ſaid *Thomas Naſh* was ſeiſed of the Tenements aforeſaid in Fee, and held the ſame in Socage. And afterwards, 10 *Aprilis* 1592. by his Will in writing deviſed the ſaid Tenements whereof, *&c.* to *Zachary Naſh* his younger Son for the term of his life, and afterwards died thereof ſeiſed, after whoſe death the ſaid *Zachary* did enter, and was thereof ſeiſed for the term of his life, and the Reverſion of the ſame Tenements did deſcend to *Tho. Naſh* Son and Heir of the ſaid *Thomas* the Husband, and afterwards the ſaid *Mercy* one of the Demandants in her Widowhood when ſhe was ſole, *ſcil.* 27 *Aprilis*, 35 *Eliz.* by her Deed did remiſe, releaſe, and for her, her Heirs, Executors and Adminiſtrators, for ever quite claime to the ſaid *Thomas Naſh* the Son, all and all manner of Actions, as well real as perſonal, Sutes, Quarrels and Demands whatſoever, which the ſaid *Mercy* or her Executors ever had or have, then had or have, or at any time after could have againſt the ſaid *Thomas Naſh* the Son, by reaſon of any Thing, Cauſe, or Deed whatſoever from the beginning of the World unto the day of the date of the ſaid Deed of Releaſe: And afterwards the ſaid *Thomas* the Son died ſeiſed of the ſaid Reverſion; after whoſe death the ſame deſcended to the ſaid *Margaret*, the Wife of the ſaid *Edw. Altham*, the other of the Tenants; and afterwards the ſaid *Zachary* died, and the ſaid *Margaret* entred, *&c.* And the Demandants did demand Oyer of the Deed, which was read to them in theſe words, *Omnibus Chriſti fidelibus ad quos*, &c. as appeareth before at large. And the Demandants did reply and ſay, That the ſaid *Thomas Naſh* the Father was ſeiſed in his demeſn as of Fee, as well of the Tenements whereof, *&c.* in *Gosfield* aforeſaid, as of two Meſſuages, and 200 acres of Lands in *Wethersfield* aforeſaid, and by his Will in writing deviſed the ſaid Tenements whereof, *&c.* in *Gosfield* to the ſaid *Zachary Naſh* as is aforeſaid, and afterwards died; after whoſe death the ſaid *Tho. Naſh* the Son entred into the ſaid Tenements in *Wethersfield* as Son and Heir, and was ſeiſed thereof in Fee: and the ſaid *Zachary* did enter into the ſaid Lands in *Gosfield*, &c. and that the ſaid *Zachary* was at the time of the death of the ſaid *Thomas* the Father, of the age of three years; for which the ſaid *Mercy*, as Gardian by Nurture, did enter into the ſaid Tenements in *Gosfield*, and that afterwards, and before the ſaid Releaſe, it was concluded and agreed by the ſaid *Mercy* when ſhe was ſole, and the ſaid *Thomas Naſh* the Son, That the ſaid *Mercy* ſhould releaſe to the ſaid *Thomas Naſh* the Son all her Dower of the Tenements in *Wethersfield* aforeſaid, *&c.* And that the ſaid *Thomas* the Son ſo ſeiſed of the ſaid Tenements in *Wethersfield*, and the ſaid *Mercy* ſo poſſeſſed of the Tenements in *Gosfield*, ſhe made the ſaid Releaſe, *&c.* And afterwards the ſaid *Zachary* died, *&c.* (upon which the Tenants did demurr in Law.) And in this caſe two Queſtions were moved and argued at the Bar and Bench. The firſt was, If the ſaid Releaſe made by the Wife to him in the Reverſion expectant upon an Eſtate for life, ſhall extinguiſh her Dower. The ſecond was, If the ſaid forein Concord and Agreement of the Parties ſhall qualifie the force of any of the words of the Releaſe. As to the firſt, The ſaid Deed of Releaſe was divided into three parts; in the firſt was conſidered the words of the Releaſe; in the ſecond, the words of Qualification; and in the third, the words of Relation. As to the words of the Releaſe they appear to be of two ſorts, the one general, the other ſpecial: The general do contain four words, Actions, Sutes, Quarrels, and Demands. The ſpecial do contain three, Dower, Title, and Action of Dower. The words of Qulification are, *Mihi contingent per mortem dicti Thomæ nuper viri mei, de aliquibus terris & tenementis ſuis in Wethersfield præd.* The words of Relation or Relative words are, *quæ vel quas ego præfat. Marcia, vel executores mei verſus ipſum Thomam*, &c. *unquam habui, habeo, ſeu quovis modo in futurum habere potero ratione alicujus rei*, &c. As to the firſt word (*Actiones*,) It was reſolved, That in this caſe the Releaſe of all Actions real to *Thomas* the Son, having but a Reverſion expectant upon a Freehold, did not extinguiſh the Dower, becauſe that *Actio eſt jus proſequendi in judicio quod alicui debetur*, as it is deſcribed in Dyer 4 & 5 *Ph. & Mar.* 217. out of *Bracton, lib.* 3. *cap.* 1. And the Wife cannot follow againſt *Tho.* [b] the Son, to recover her Dower by Judgement, becauſe he is not Tenant to the *Præcipe*, nor can render Dower to her, for at the time of the Releaſe *Zachary* was Tenant of the Freehold, and *Littl. chap. Releaſe*, 115. holdeth, That in Actions real, which ought to be ſued againſt the Tenant of the Freehold, if the Tenant hath a Releaſe of actions reals of the Demandant, made to him before the Writ brought,

and he pleadeth the ſame, It is a good Plea for the Demandant to ſay, that he who pleadeth the Plea had nothing in the Freehold at that time of the releaſe made, for then he had not cauſe to have any Action real againſt him. And therefore *Coke* Chief Juſtice ſaid, That the opinion in 14 *Hen.* 6. 11. was of great doubt, *ſcil.* That if one releaſeth to him in the Reverſion expectant upon an Eſtate for life all Actions real, and afterwards the Tenant for life is impleaded, and prayeth in aid of him in the Reverſion, or voucheth him, or is received, in theſe caſes (as it is there ſaid) although that the *Præcipe* be not begun againſt him; yet foraſmuch as by the Receipt or Voucher, he is become Tenant to the *Præcipe* of him who made the Releaſe, and ſhall be bound by the Judgement, he ſhall have the advantage to plead the Releaſe of all Actions real: But the Doubt is, becauſe that at the time of the Releaſe made he had not cauſe (as *Littleton* ſaith) to have any action againſt him: But without queſtion after Receipt or Entry into the Warranty by the Vouchee, a Releaſe by the Demandant to the Tenant by receipt, or the Vouchee, is good, becauſe the one and the other at the time of the Releaſe made was Tenant in Law to the Demandant: but a Releaſe to them by a Stranger is not good: *Vide* 7 *E.* 3. 46. 18 *E.* 3. 12. 8 *H.* 4. 5. 7 *E.* 4. 13. 20 *H.* 6. 29. 22 *H.* 6. 12. 5 *H.* 7. 41. *Litt.* 114. *b. Vide* the Firſt Part of my *Reports* 87. *& lib.* 3. *fol.* 29. But if the Wife had releaſed *totum jus*, all her Right to him in the Reverſion, her Dower had been extinct, becauſe that her Dower doth accrue to the Demandant, not only out of the Eſtate for life, but alſo out of the Reverſion. And that was affirmed for good Law, as well at the Barr by both Parties, as at the Bench, according to the book of 16 *Edw.* 3. cited in *Hoe's* Caſe, in the Fifth Part of my *Reports:* For when the Right which is the Foundation and the Principal is releaſed, by conſequence the Action, which is but a mean to recover it, *ſcil.* that is, the Right of proſecuting is alſo releaſed. And the ſame appeareth in 9 *H.* 6. 47. 10 *H.* 4. 6. 21 *H.* 7. 23. 19 *H.* 6. 4. and therefore (Right) is well divided in *Plow. Com.* in *Nichols* Caſe, 487. where it appeareth, that a Right is ſix fold, *ſcil.* 1. A Right of recovering, that is, of proſecuting. 2. Right of entring. 3. Right of having. 4. Right of retaining. 5. Right of perceiving. 6. Right of poſſeſſing. And therefore when a man releaſeth all his Right generally, all his Rights are thereby releaſed; But if the Diſſeiſee releaſeth to the Diſſeiſor all Actions, that is, Right of recovering or proſecuting in Judgement, his Right of Entry is not thereby releaſed: For when a man hath divers means to come to his Right, he may releaſe one of them ſpecially, and yet take benefit of the other. And therewith *Littl.* agreeth 115. *b.* and 19 *Aſſ. p.* 3. 19 *H.* 6. 4. 21 *H.* 6. 23. 21 *H.* 7. 23. But when a man hath not any means to come to the Land but by way of Action, there if he releaſeth all Actions, his Right incluſively by Judgment of Law is gone, becauſe by his own Act he hath barred himſelf of all means and remedy to recover or attain thereunto: For a Releaſe of all advantages upon accompt is a good Barr in an Action of Debt upon the accompt. 9 *E.* 4. 49. And therefore if the Diſſeiſee doth releaſe all Actions to the Heir of the Diſſeiſor, thereby his Right in Judgment of Law is gone. But if the Heir of the Diſſeiſor maketh a Leaſe for life, the Remainder in fee, and the Diſſeiſee doth releaſe to the Tenant for life all Actions which he hath againſt him, and afterwards the Tenant for life dieth, the Diſſeiſee notwithſtanding this Releaſe ſhall have an Action againſt him in the Remainder, for he doth releaſe but the Action, and the Act in Law will never extend the Act of the Party farther than his expreſs words. As if the Lord diſſeiſeth his Tenant, and maketh a Leaſe for life, this Releaſe in Law ſhall be but for the life of the Leſſee; and ſo it is true, that *Fortior & potentior eſt diſpoſitio Legis quam hom'. Ipſe etiam Leges cupiunt ut jure regantur.* But if the Diſſeiſee releaſeth all Actions to the Diſſeiſor, and afterwards the Diſſeiſor dieth ſeiſed, and afterward the Diſſeiſee dieth, there a Writ deſcendeth to the Heir of the Diſſeiſee, becauſe that, notwithſtanding the Releaſe, a Right remaineth. *Vide* 21 *H.* 6. 1. the opinion of *Newton*: And it was obſerved, That an Action is a Right of proſecuting in Judgment, and therefore by the Judgment the Action is determined; for the Judgment is the end of the Action (*jus proſequendi in judicio*) and therefore a Releaſe of all Actions is no Bar of Executions; and therewith agreeth 26 *H.* 6. *Execution* 7. and *Br. Releaſes* 87. and 19 *H.* 6. 4. and *Littl.* 116. *b.* But in a *Scire facias* grounded upon a Judgment, a Releaſe of all Actions is a good Plea, becauſe he ſhall have a new Judgement; and therefore there it may be well ſaid, *jus proſequendi in judicio*; And therewith agreeth 18 *E.* 4. 7. Then the words farther are, *quod alicui debetur*, that is, which is due to any, ſo that by releaſe of all Actions real and perſonal, all Actions are only releaſed in which the Plaintiff ſhould recover any thing in the realty or the perſonalty which is due to him, which is included in theſe words, *quod ſibi debetur.* And therefore if a man be outlawed in a perſonal Action by Proceſs upon the Original, and bringeth a Writ of Error, and he pleadeth againſt him a Releaſe of all Actions perſonal, the ſame is no Plea; for by the ſaid Action he ſhall recover nothing which is due to him, but he ſhall only reverſe the Outlawrie or diſcharge himſelf of his diſability. So that the ſaid Writ of Error doth not agree with the ſaid deſcription of an Action; for it is not *jus proſequendi in judicium quod ſibi debetur:* But in ſuch caſe a Releaſe of Writ of Error is a good Plea: And therewith *Littleton* agreeth, 106. *b.* and the Book in 11 *Hen.* 4. 6. where the Caſe was, *Treſcullard* brought a Writ of Error againſt *F.* Son and Heir of *John Penros*, upon a Judgement had againſt him in a Writ of Rediſſeiſin, at the Suit of the ſaid *John Penros*, and alſo of an Outlawry thereupon had againſt him for that cauſe, and aſſigned two Errors; one becauſe the Sheriff took the enqueſt in the Town, and not upon the Land, according to the Statute. 2. Becauſe the Sheriff made a Precept to one Bayly to ſumtnon the Jury, who returned a pannel, which was removed as parcel of the Record; and the Sheriff took the Enqueſt by ſome who were not returned by the Baily. And there *Hull*, as to the firſt Error ſaid, That if the Sheriff cauſe the Jury to view the Waſte, he may take the Enqueſt at another place, ſo here. And as to the ſecond Error he ſaid, That the Sheriff may vary from the return of the Baily; for the Sheriff himſelf is the perſon who maketh the

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Array,

Array, who is also a Judge in this case. *Gascoign*, If the Sheriff had not made the Precept, and the Return by the Baily had not been made parcel of the Record, it should be as you say; but he hath sent this Return as parcel of the Record, whereby he affirmeth the Return of the Baily; and if he had made Process against the Jury by *Habeas corpora*, and had taken the Enquest by others, the same is Error, which *Huls* granted; and *Rolf* of Councel with the Defendant in the Writ of Error pleaded, that after the Judgement the Plaintiff in the Writ of Error should not be received to assign Error, for after the Judgement the Plaintiff in the Writ of Error, by his Deed which is here, did release to the said *John Penros* who recovered in the Writ of Redisseisin all his right in the Land, and all Actions and Demands; and although that both the Errors were assigned in the principal Record, and thereof by the Release he is stopped to assign Error; and although the Outlawry was good in Process, yet because the Record and the Judgement are the original of the Process of the Outlawry; therefore if there be Defect in the Original Judgement, the Outlawry which is also depending upon it, is also reversible by *Gascoign*, (which *Hulls* affirmed) for which cause he did reverse the Utlagarie, notwithstanding the Release. Which Judgement agreeth with *Littleton*, and is worthy observation in the principal point of Judgement. So if the body of a man condemned in Debt be in Execution, and the Plaintiff releaseth to him the Debt, and all Executions, and the Defendant releaseth to the Plaintiff all Actions, yet upon the Release of the Plaintiff, he shall have an *Audita querela*; for thereby he shall recover nothing, but shall discharge his body of Imprisonment. But if the Plaintiff after Judgement release to the Defendant all Actions, and afterwards his body is taken in Execution, he shall not have an *Audita querela* thereupon, for an Execution is no Action, as hath before been said; and therewith agreeth 11 *H.* 4. *Release* 53. Also it was observed, That upon these words, (*quod alicui debetur*,) That in some case a Debt or Duty shall be barred by a Release of all Actions, although that no Action at that time lieth for the Debt: As if a man be bounden to another in a certain sum to be paid at the Feast of Saint *Michael* next following, if the Obligee before the Feast releaseth to the Obligor all Actions, he shall be barred for ever of the Duty, for it is *debitum* presently, although it be not presently payable. And therefore, if one be bounden to another in 40 *li.* to be paid at the Four usual Feasts of the year, and three of the Feasts are past, in this Case for 30 *li.* there is *debitum & solvend'* also, and yet the Obligee shall not have an Action of Debt till the last Feast be past, and notwithstanding that a Release of all Actions before the last Feast shall discharge the whole; But if a man leaseth his Land unto another for term of years, rendring 40 *li.* rent, to be paid at the Four usual Feasts by equal portions, in this case if one Feast be past, he shall have an Action of Debt presently, and shall not tarry till all the days be past, for there the Duty doth accrue upon the receiving of the Profits of the Land, and till the Feast incurred in which it is to be paid, there is neither *debitum* nor paiment, and therefore there a Release of all Actions before the Feast is no Bar, but in respect of the several perception of the Profits of the Land, the Rent after every Feast is demandable by Action of Debt: And there study the cause of difference made in *Littl.* 117. (which was never added by *Littleton* himself) is well explained. And therewith agreeth 7 *H.* 6. 26. 45 *E.* 3. 8. *Lit.* 5 E. 4. 41. 13 *H.* 4. *Avowrie* 240. *Vide* 3 *Ma. Dyer* 113. 5 *Ma. Dyer* 108. upon *Assumpsit* or Covenant in which Damages are to be recovered, an Action lieth after the first day, and *F. N. B.* 267. and 16 *E.* 3. *Fieri fac.* 4. That upon a Recognizance, which is a Judgement in Law, Execution lieth after the first day, and so all the Books are well reconciled and agreed; for which Cause it was concluded in the Case at Bar, That by the Release of all Actions made to him in the Reversion, the Dower of the Wife was not barred, because that at the time of the Release she had no cause of Action against him. As to this word (*Querelas*) it is to know, that (*Querels*) do extend not only to Actions as well real as personal, as it is holden in 9 *E.* 4. 44. but also to the Causes of Actions and Sutes, as it is holden in 39 *H.* 6. 9. So that by release of all *Querels* not only Actions depending in Sute, but Causes of Action and Sute also are released. And so it is where one doth release to another all Actions, not only Actions depending, but also Causes of actions are released. *Vide* 35 *H.* 6. 57. 4 & 5 *Phil.* & *Mar.* 117. *b. Trinit.* 4 *Eliz. Rott.* 1027. And this word *Querela* is derived *à querendo*, *unde etiam Querens* who is the Plaintiff, and *Querels*, Controversies and Debates are *Synonima*, and of one signification. And for this word (*Sectas*) it is to know that by Release of all Sutes Executions are barred, for none shall have an Execution without Sute and Prayer; and therewith agreeth 9 *H.* 6. 4. 26 *H.* 6. *Execution* 7. and *Br. Releases* 87. So by Release of all Duties, as well Executions as Actions are released. But a Release of Sute or Querel is not in this Case any Barr of Dower, no more then by a Release of them, a Covenant before the Breach thereof is released, because that the Covenantee hath not Cause of action or sute before the Covenant broken. As to this word (*titulum*) (which is mentioned in the particular Case) it hath two significations, one properly and strictly, as for a Title for which no Action lieth, as for a Condition broken, or upon Alienation in Mortmain, *&c.* and so it is taken in *Plow. Com.* in *Nichols* Case, 484. In another signification it is taken largely, and in this sense, *Titulus est justa causa possidendi quod nostrum est*, and signifieth the Title which one hath to Land, as by Fine, Feoffement, or by Descent, *&c.* And therefore when the Plaintiff maketh a Title in an Assize, the Tenant may say, that the Assize came upon the Title, which is as much as to say upon the particular Conveyance, *&c.* which he maketh to the Land, *&c.* and it is called *Titulus à tuendo*, because by the same he defendeth his Land, *& plerumque constat ex munimentis quæ muniant & tuentur causam.* By Release of all Title to Land, *&c.* all his Right is extinct, for it shall be taken strongest against him, and in the largest sense. So when a man hath Title in the proper Lease, either by a Condition, or by an Alienation in Mortmain, the Release of all his Right doth extinct this Title, for he hath a Right of possessing; and therewith agreeth 6 *H.* 7. 8. *a.* And the *English* Poet saith,

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For true it is, that neither fraud nor might
Can make a title where there wanteth right.

The laſt of the four general words in the Deed is (*demanda*) *quod eſt vocabulum artis*: And if one doth releaſe to another all Demands, the ſame is (as *Littleton* ſaith, 117. *a.*) the beſt Releaſe to him to whom the Releaſe is made, that he can have, and ſhall enure moſt to his advantage; for thereby not only all Demands, but alſo all Cauſes of demand are releaſed. And there are two manner of Demands, *ſcil.* in Deed, and in Law; in Deed, as in every *Præcipe* there is an expreſs Demand, and thereupon in real Actions he is called Demandant; in Law, as every Entry into Land, diſtreſs for Rent, taking or ſeiſure of Goods, and the like acts in *Pais*, which may be done without any words, are Demands in Law. And as a Releaſe of Sutes is larger and more beneficial than a Releaſe of Querels, or of Actions; ſo a Releaſe of all Demands is more large and beneficial than any of them, for thereby is releaſed all that by the other is releaſed, and more. By Releaſe of all Demands, all Frank-tenements and Inheritances executory are releaſed, as Rents, and the like, *&c.* 20 *Aſſ. p.* 5. 14 *H.* 8. 9, 10. By Releaſe of all Demands all Executions are releaſed, 26 *H.* 6. *Execution* 7. 19 *H.* 6. 4. *Litt.* 117. 40 *Ed.* 3. 51. by Releaſe of all Demands to the Diſſeiſor, the Right of Entry to the Land, and all that is contained in it is releaſed, 6 *H.* 7. 15. So it is reſolved by all the Judges in *Chauncy's* Caſe, 34 *H.* 8. *br. Releaſe* 90. that he who releaſeth all Demands excludeth himſelf from all Actions, Entries and Seiſures. *Litt. cap. Warranty* 170. holdeth, That if Tenant in tail doth enfeoff his Uncle, who enfeoffeth another in Fee with Warranty, if afterwards the Feoffee by his Deed releaſeth to his Uncle all manner of Warranties, or all manner of real Covenants, or all manner of Demands, by ſuch Releaſe the Warranty (which is a Covenant real and executory) is extinct, and the reaſon of all the ſame was, becauſe that by Releaſe of all Demands all the means and remedies, and the cauſes of them which any one hath to Lands, Tenements, Goods and Chattels are extinct; and by conſequence the right and intereſt to the thing it ſelf. For which cauſe in the Caſe at Barr it was reſolved, That by the Releaſe of all Demands to him in the reverſion, if the Deed of Releaſe had not gone farther, the Dower of the ſaid *Marcy* had been barred. Note, Reader, although that a Releaſe of all Demands be of ſo great extent, yet it doth not extend to ſuch Writs, by which nothing is demanded neither in Fact, nor in Law, but lie only to retain the Plaintiff by way of diſcharge, and not by way of demand, as appeareth before by the Judgement in *Treſcullard's* Caſe, 11 *H.* 4. 6. where a Releaſe of all Demands is no Barr in a Writ of Error to reverſe an Outlawrie, and ſo of the like. *Vide* 40 *E.* 3. 22. 13 *R.* 2. *Avowrie* 89. 18 *E.* 3. 59. 14 *H.* 4. 4. *&c.* where by Releaſe of all Demands future incidents are releaſed, and where not. And ſee *Com.* 484. in *Nichols* Caſe for this word (*intereſt.*) Now as to the ſecond part of the Deed, *ſcil.* to the words of qualification, it was reſolved, That as well the firſt words, as the ſubſequent words ſpecial, extend only to releaſe all Actions, Sutes, Quarels, Demands, Title and Dower, *&c. de aliquibus terris & tenementis ſuis in* Wethersfield, and not to any Lands or Tenements in *Goſfield*, for the ſaid latter words,
[b] *mihi contingent per mortem dicti Thomæ*, &c. do qualifie the ſaid general words and do reſtrain all the firſt words to the Lands or Tenements in *Wethersfield*, and that for three Reaſons: 1. Becauſe that all the ſaid three parts of the Deed, *ſcil.* the words of Releaſe, the words of Qualification, and the words of Relation are but one point and one ſentence; for this conjunction (*necnon*) doth conjoin the general words to the words of qualification, and the relative words refer to all the words, as well general as ſpecial, and alſo to the words of qualification. 2. If the general words ſhall ſtand without any qualification, then the ſpecial words ſhall be altogether vain and of no effect, *& mala expoſitio eſt quæ corrumpit textum.* The third and the principal reaſon is upon a Maxim and Principle in Law, *ſc. Quando carta continet generalem clauſulam, poſteaque deſcendit ad verba ſpecialia, quæ clauſulæ generali ſunt conſentaneæ, interpretanda eſt carta ſecundum verba ſpecialia.* The ſame rule almoſt word for word is put and argued on both ſides. *Vide* 7 *E.* 3. 10. *a. Margery Mortimer's* Caſe, *ſc.* where a Deed ſpeaketh by general words, and afterwards deſcendeth to ſpecial words, if the ſpecial words agree to the general words, the Deed ſhall be intended according to the ſpecial words: As if a man grant a Rent *in manerio de D. percipiend.* in 100 Acres of Land, parcel of the ſame Manor, with clauſe of Diſtreſs in the 100 acres, the rent ſhall iſſue out of the 100 acres only, and the general words ſhall be conſtrued according to the ſpecial words: ſo it is there alſo ſaid, If a man granteth a Rent, (and goeth no farther) theſe general words ſhall create an Eſtate for life, but if the *Habendum* be for years, the ſame doth qualifie the general words; and all this appeareth in the ſaid Book of 7 *E.* 3. So if a man giveth Lands to one and his Heirs, *Habendum* to him and the Heirs of his body, he ſhall have but an Eſtate in tail, and no Fee expectant; for the *Habendum* doth qualifie the general words precedent; and therewith agreeth 35 *Aſſ. p.* 14. 37 *Aſſ. p.* 5. *Perkins* 35. *b.* againſt the opinion *obiter in* 21 *H.* 6. 24. But if a man giveth Lands in the Premiſes to one and the Heirs of his body, *Habendum* to him and his Heirs, he hath an Eſtate tail, and a Fee-ſimple expectant; for that ſtandeth upon another Rule and Principle of Law, *ſcil. generalis clauſula non porrigitur ad ea quæ antea ſpecialiter ſunt comprehenſa:* And therefore when the Deed at the firſt doth contain ſpecial words, and afterwards concludes in general words, both words as well general as ſpecial ſhall ſtand: And it is well ſaid in 35 *H.* 8. *Dyer* 56. ſubſequent words may qualifie and abridge, but not de-
[*155] ſtroy the general words precedent. *Vide* 33 *H.* 8. *fol.* 50. 21 *Aſſ. p.* 10. *&* 2 *E.* 3. 33. *b.* To the laſt part of the Deed, *ſcil.* the relative words, (*quæ vel quas,*) &c. It was reſolved, that they refer as well to Actions, *&c.* and Demands, as to the ſpecial words, for it ſhould be againſt reaſon that they ſhould refer to general words, which are more remote, and not to the words of qualification which are immediate, and next to them: And the ſame is ſo clear and perſpicuous of it ſelf,

that

that it is not worthy any argument, or proof, to confirm it. For the ſecond Point of the caſe it was reſolved, That the ſaid forein and collateral Averrement out of the ſaid Deed was not of any force or effect in Law; for every Deed doth conſiſt upon two parts, *ſcil.* matter in Fact, and upon the Conſtruction of the Law. Matter of Fact is to be added by the Party, and triable by the Jurors: The other, being matter in Law, is to be diſcuſſed by the Judges of the Law, and *quemadmodum ad quæſtionem facti non reſpondent Judices; ita ad quæſtionem juris non reſpondent Juratores.* And therefore if *A.* levieth a Fine to *William* his Son, to have and to hold to him and his Heirs, upon this Fine the Judge cannot make queſtion for any matter of Law; but now the Party cometh and addeth matter in Fact; and ſaith, That *A.* hath two Sons named *William*, an elder, and a younger, and his intent was to levy the Fine to *William* the younger, this Averrement out of the Fine is good of this matter of fact, which well ſtands with the words of the Fine, and ſhall be tried by the Country; and therewith agreeth 47 *E.* 3. 16. But if a man by Deed giveth Goods to one of the Sons of *I. S.* who hath diverſe Sons, here he ſhall not averr which Son he intended; for by Judgement of Law upon this Deed, the Deed is void for the incertainty, which cannot be helped by Averment. *Vide* 11 *E.* 4. 3. So if a man levy a Fine of the Manor of *S.* or of the manor of *D.* to two and their Heirs, and in truth there is the Manor of North *S.* and South *S.* or great *D.* and little *D.* in this caſe iſſue may be taken out of which Manor the Conuſor intended to paſs, for the ſame is matter of fact not apparent in the Fine, whereof the Judge cannot take Conuſans; but it ſtands well with the Fine, and ſhall be tryed by the Jury, and therewith agreeth 12 *H.* 7. 7. 26 *H.* 8. 6. *a.* 19 *E.* 2. *Grants* 93. but where the words are in the limitation of the Eſtate to two *& hæredibus*, the ſame is apparent in the Fine, and by Judgement of Law theſe words *hæredibus* are uncertain and void, as it is adjudged in 22 *H.* 15. *Vide* 19 *H.* 73. 20 *H.* 6. 35. 22 *E.* 4. 6. *b.* and no Averment *debors* can make that good, which upon conſideration of the Deed is apparent to be void. So if a man maketh a Feoffement to one and his Heirs, no Averment can be that the intent of the Party was, that the Feoffee ſhould have but an Eſtate to him and the Heirs of his body, for ſuch Averment is againſt the Judgement of the Law, which appeareth to the Judges upon the view of the Deed; ſo in the Caſe at Barr, if the general word *(demanda)* had in Law by the Judgement of the Judges upon the conſideration of the whole Deed of Releaſe barred her of her Dower, no forein or collateral Averment out of the Deed could qualifie or abridge the force and operation of the ſaid word, but ought to be qualified by apt words contained in the Deed, as in this caſe it was. And afterwards Judgement was given for the Demandant. [b]

Mich. 8 Jacobi *Regis.*

Arthur Blackamor's Caſe.

AN original Writ was brought in *London: Jacobus Dei gratia Angliæ*, &c. *Præcipe* Leventhorp Frank *nuper de* Hatfield Brodock *in Comitatu* Eſſex *generoſo*, *alias dict.* Leventhorp Frank *de* Hatfield Brodock *in Comitatu* Eſſex *generoſo quod reddat* Arthuro Blackamore, John Whittingham, 100 *li. quas ei debet, & injuſte detinet*, returnable *menſe Michaelis*; the Entry of the *Capias*, *Alias*, *& Pluries*, was according to the ſaid original; but in the Exigent and Proclamation, and the Entry thereof, the Defendant (as the truth was) was named *Knight*, and in *Eaſter* Term 8 *Jac.* he put in a *Superſedeas* by the name of *Knight*, and ſo the Plaintiff did declare againſt him: And the Defendant did imparl til *Trinity* Term following, in which Term Judgement was given againſt him by default by the name of *Knight*. And this *Mich.* Term, a Writ of Error was brought, and it was moved by *Houghton* Serjeant, that the ſaid original might be amended, becauſe that *John Bunbury* the Plaintiffe's Atturney drew a note or title of the Writ in this form; London. Leventhorp Frank, *nuper de* Hatfield *in Comitatu* Eſſex, *militi, alias dict.* Leventhorp Frank *de* Hatfield Brodock *in Comitatu* Eſſex *generoſo*, &c. as above, and delivered this note or title to the Curſitor of *London*, and he miſtook it in this, that where in the firſt name he ought to be named *Knight*, in the firſt name the Curſitor named him *Gent.* as he was named in the Obligation, and the ſame was the true caſe, as appeareth by Examination of the Curſitor, and of the ſaid Atturny upon their Oaths, and upon view of the roll or title in full Court. And whether the ſame was amendable or not by this Court, the original being out of another Court, *ſcilicet*, the Chancery, was the queſtion. And the Caſe was well argued at the Barr by Councel of the part of the Plaintiff, and on the Defendant's part. And at length it was reſolved by the whole Court, That the Record ſhould be amended by the Curſitor, and made according to the note or title delivered by the Atturney to him. And for the better underſtanding of the Law, and of the true reaſon of the rule of our Books in this and other caſes of amendments. 1. It is to ſee if in this caſe the ſaid original Writ were amendable by the Common Law, or by any Statute, and by what Statute. And it was reſolved, That an original Writ was not amendable by the Common Law in the caſe of a common perſon. *Vide* 13 *E.* 3. *Amendment* 63. which was before any Statute made concerning Amendments, *&c.* and 16 *E.* 3. *Vouchet* 49. 29 *E.* 3. *Amendment* 68. But in the King's Caſe, in a *Quare Impedit*, where the Writ of *Quare Impedit* was *præſantere*, for *præſentare* after exception taken to it, and before anſwer, by the advice of the Chancellor (out of which Court this Writ iſſued) and of the [156] [b]

Judges of the Kings Bench, the writ was amended in the Chancery, and the Defendant was put to anſwer to it by the award of the Court. *Vide* 4 *H.* 6. 16. *&* 40 *Aſſ. p.* 26. And where there appeareth in 20 *E.* 4. 7. 10 *H.* 7. 25. diverſity of opinions, whether there were any amendment at the Common Law or not, It is without queſtion, That at the Common Law, a fault of entry of a Continuance, or of an Eſſoign, which was the miſpriſion of the Court it ſelf, in the form of entry was amendable by the Court; as it appeareth by 5 *Edw.* 3. 25. where *W.* brought a *Præcipe* againſt *B.* who vouched to warranty *C.* who entred into the warranty and pleaded to iſſue: and a *Venire facias* iſſued, and the Jury was reſpited; and in the Roll it was entred, *Jur. inter B. & C.* (which was between the Tenant and the Vouchee) in ſuch a plea, *ponitur in reſpect.* where the entry ought to be, *Jur. inter W. & C. quem B. vocavit ad warrant.* and becauſe this miſpriſion of entry in the Roll was taken to be the default of the Court, it was (as in the caſe of an Eſſoign) amended by the Court. So in 10 *E.* 3. 20. *a.* The miſpriſion of the Court in the entry of an Eſſoign was amended by the Court. And 12 *E.* 3. *Amendment.* 62. *acc.* which books were before any Statute of Amendment. *Vide* 2 *H.* 4. 4. 18 *E.* 3. *Amendment* 56. 19 *E.* 3. *tit. Amendment.* And at the Common Law, variance in any part of the Record of the Original was amendable by the Common Law, as
[157] it is ſaid in 7 *H.* 4. 45. So by the Common Law, the Judges might amend as well their Judgment, as any other part of the Record, and in the ſame Term, for during the Term the Record is in the breſt of the Judges, and not in the Roll, *Vide* 7 *H.* 6. 29. 9 *E.* 4. 3. 2 *H.* 3. 11. But at the Common Law, the miſpriſion of Clerks in another Term in the proceſs was not amendable by the Court, for in another Term the Roll is the Record; and therefore by the Statute of 14 *E.* 3. *cap.* 6. (which was the firſt Act of Amendment) it is enacted, by the miſpriſion of Clerks in every place whereſoever it be, no proceſs ſhall be annulled or diſcontinued by miſtaking in writing one letter, or one ſyllable too much, or too little, but as ſoon as the thing is perceived by challenge of the party, it ſhall be haſtily amended in due form, *&c.* But this Statute doth not extend but to amendment of the miſtaking of the Clerk in proceſs to be amended in due form: For 15 *E.* 3. *Amendment* 58. which was the next year after the Statute made, in *Detinue* of 3 writings, by omiſſion of one writing in the Continuance, all the proceeding was diſcontinued, notwithſtanding the new Statute, *ſc.* 14 *E.* 3. which gave that the proceſs ſhould be amended, *Vide* 45 *E.* 3. 19. And this Statute doth extend to a Judicial writ, or proceſs, as in Treſpaſs the *Niſi prius* was to the damages of *C. l.* where the Record was *C. l.* and the Jury at the *Niſi prius* found 20 *l.* and the writ of *Niſi prius* was amended by force of this Statute, and made *C. l.* according to the Record, 2 *H.* 4. *Vide* 40 *E.* 3. 15. 36. 19 *H.* 6. 15. 3 *H.* 4. 8. *&* 11. 47 *E.* 3. 14. 7 *E.* 4. 15. 9 *H.* 7. 8. 4 *H.* 6. 6. But this Statute doth not extend to an Original writ, nor to the writ which is in the nature of an Original, for the ſame is not included within this word (*proceſs.*) And therefore *Finchden* ſaith in 41 *E.* 3. 14. *a.* if an Original writ want form it is abateable, becauſe the Original is made in one place and pleadable in another; and by conſequence cannot be amended; otherwiſe it is of a Judicial writ. *Vide* 11 *H.* 4. 70. A Protection ſhall not be amended in the Common Pleas, becauſe it is made in another Court. So it is holden in 4 *H.* 6. 4. *a.* Every Original writ ſhall abate for want of form (as if the Wife be named before the Husband) as well as if it want matter, without any amendment: But a Judicial writ ſhall not abate for want of form, if it have ſufficient matter, 3 *H.* 4. 4. An Original, or that which is in the nature of an Original ſhall not be amended; and therewith agreeth 29 *E.* 3. *Amendment* 68. in *Wagams Caſe.* 22 *E.* 4. 47. *Vide* 8 *H.* 6. 37. So in 46 *E.* 3. *Amendment* 53. in a writ of *Entre ſine aſſenſu Capituli* brought by an Abbot againſt *R.* who pleads *Non dimiſit, &c. & de hoc ponit ſe ſuper patriam, & prædictus R. ſimiliter*; where it ſhould be,
[*b*] *& præd. Abbas ſimiliter*, and the Jury was diſcharged, and it was not amended, for it was not within the Statute which gave that the proceſs ſhould be amended in due form; and therefore the parties repleaded. And it is to know, That this word (*proceſs,*) which is the only word in this Statute which is to be amended, is taken in Law in 2 ſignifications, in one largely, and in another ſtrictly; and in the large ſenſe it is taken for all the proceedings in all real and perſonal actions, and in all Criminal and Common Pleas: *& proceſſus derivatur à procedendo ab originali uſque ad finem. Vide Britton* 138. And in this ſenſe it is taken in the *Regiſter Original* 128. *a.* in the writ *De continuando proceſſum poſt mortem Capitalis Juſtic.* in a writ of *Oyer* and *Terminer*, within which words (*proceſſus*) as it there appeareth, is included not only the Judicial proceſs, but alſo the Commiſſions, Indictments, Rolls, *& alia memoranda*: And in another ſenſe this word (*proceſſus*) is taken more ſtrictly, *ſc.* for the proceeding after the Original out of the plea Roll before Judgement, and that appeareth in the writ of Error in the *Regiſter* 216. and *F. N. B.* the words of which are, *Quia in recordo & proceſſu, ac etiam in redditione Judicii, &c.* where *recordum* doth contain the Plea Roll, *proceſſus* all the proceeding out of it untill the Judgement. See the writ of *Certiorari* in the *Regiſter* 167. *a.* And in this ſenſe all actions real, perſonal, and mixt, and not in Pleas of the Crown, is the ſaid Act of 14 *E.* 3. to be intended. And the ſame appeareth by the ſaid book in 46 *E.* 3. *Amendment* 53. for the miſpriſion was in the Plea Roll, and therefore it was not amended; and 46 *E.* 3. 19. in *Treſpas.* diſtreſs iſſued *Quindena Trin.* retornable *Quind. Mich.* and the Roll was, *de Quinden. Trin. ad Quinden. Hillar.* and at *Quindena Mich.* it was pleaded to iſſue, and found for the Plaintiff, and the Defendant ſhewed this matter in arreſt of Judgment; and the Juſtices would not amend the Roll (which there is called the original) but awarded the parties to plead again. But in 18 *E.* 3. *Amendment* 56. the miſtaking was in the entry of the Eſſoign, which was out of the Record or Plea Roll, and the ſame was part of the proceſs, that is, proceeding amendable by the ſaid Act; and that appeareth more fully after. But upon this Statute there were divers opinions in divers points, *ſc.* If the Juſtices before whom the plea ſhall be depending by adjournment, Error, or otherwiſe (*Vide* 17 *E.* 3. *Aſſ. p.* 2.) ſhall have power to amend

amend the miſtaking of the Clerk in proceſs in writing one letter or ſyllable: and alſo, if they might amend it as well after Judgement, as before; and theſe doubts were declared and explained by the Statute of *9 H. 5. cap. 4. & 4 H. 6. cap. 3.* to extend to all the Juſtices, and as well after, as before Judgement: And alſo great doubt was conceived upon theſe words, *(writing one letter or ſyllable too much or too little,)* if a word may be amended: and 40 E. 3. 34. *b. Belknap* ſaith, That the Statute of 14 E. 3. *cap. 6.* that a letter or ſyllable too much or too little in a word may be amended, but where there wanteth a word, the Statute ſpeaketh nothing. *Thorp*, It was heretofore debated here before us, If a word fail in the Record, if it might be amended, as if it had failed but in a ſyllable or letter; and Sir *Hugh Green* and I went together to the Council, and they were 24 of the Biſhops and Earls, and we demanded of them who made the Statute, if the Record might be amended; and the Archbiſhop, or Metropolitan ſaid, That it was a nice demand, and a vain queſtion of them, if it might be amended or not: For he ſaid, that it might be as well amended in this caſe as if it were but one Letter: for if a letter or ſyllable fail in a word, it is no word; wherefore if all the word fail it may be amended as well as if it failed but of a letter, or of a ſyllable; for there is no more difference in the one caſe then in the other. And 39 E. 3. 21. the Queſtion alſo was, if a word might be amended by the Statute of 14 E. 3. And there *Thorp* ſaid, That it ſhall be amended by the Statute, for heretofore we were in doubt of it; and becauſe there was diverſity of ſumoſme in a writ, it was brought for the ſame cauſe into a Parliament; and the Lords who made the Statute ſaid, Their meaning was that in all theſe caſes the proceſs ſhould be amended. *Note*, when it is ſaid in 40 E. 3. That the Juſtices went to Council; it appeareth by 39 E. 3. that they went to the Parliament to know the opinion of thoſe who made the Law, 11 H. 4. 70. In a *Præcipe* the original was, *Mich. de T.* and the mean proceſs was, *Mich. T.* and *(de)* omitted, and a Protection was caſt by the name of *Mich. G.* and the main proceſs was amended by the Statute of 14 E. 3. and that a word ſhall be amended, within theſe words letter, or ſyllable, and ſo much the rather, becauſe that *(de)* is a word and ſyllable alſo; but the Protection was not amended, becauſe it was made in another Court. 7 H. 6. 45. conceiveth, that a tittle ſhall be amended within theſe words, letter or ſyllable. To put out all which doubts, and to enlarge the power of the Juſtices in Amendments, the Statute of 8 H. 6. *cap.* 12. was made, and the ſame ſtandeth upon 2 general parts, *ſc.* 1. againſt Corrupting and falſifying of Records, by raſing, enterlining, *&c.* which Clauſe doth not concern the caſe in Queſtion. 2. againſt the miſtaking of Clerks (by force of which the Amendment was in the caſe at barr) the words of which branch are, *And that the Kings Judges of the Courts, and places in which any Record, proceſs, word, plea, warrant of Attorney, writ,* (Original, or Judicial, [b] for ſo the Statute ſpeaketh in the firſt clauſe) *pannel, or return, which for the time ſhall be, ſhall have power to examine ſuch Record, proceſs, word, plea, warrant of Attorney, writ, pannel, and return by them and by their Clerks, and to reform and amend in affirmance of the Judgment of ſuch Records and proceſſes, all that to them, in their diſcretion, ſeemeth to be the miſpriſion of the Clerks in ſuch Records, proceſs, word, plea, warrant of Attorney, writ, pannel, and return,* &c. *So that by ſuch miſpriſion of the Clerk, no Judgment ſhall be reverſed, or annulled.* Note Reader, where the Act of 14 E. 3. ſpeaketh only of proceſs, this Act of 8 H. 6. is of far greater extent, for it extendeth to proceſs, and to 7 other things, *ſc.* 1. to any Record, 2. word, 3. plea, 4. warrant of Attorney, 5. to a Writ Original and Judicial, (as appeareth by the firſt branch) 6. pannel, 7. return: ſo that the power of the Juſtices as to amendments is by this Statute greatly enlarged. Alſo, 1. this Statute giveth them power of Examination; 2. of Reformation and Amendment; 3. the Statute expreſſeth the matter they reform and amend; *ſc.* all that which to them in their diſcretion ſeemeth to be the miſpriſion of Clerks in ſuch Records, proceſs, word, plea, warrant of Attorney, writ, pannel, and return. As to the firſt, they have power to examine ſuch Records, proceſs, *&c.* in 2 manners: 1. by themſelves; 2. by their Clerks; As to the power of Reformation and Amendment, they have power onely to doe it in affirmance of the Judgments of ſuch Records, and proceſſes; but although that their power be thus enlarged, yet the miſpriſion of the Clerk (as it was in the Act of 14 E. 3.) is onely to be amended. And becauſe that there appeareth *prima facie*, great incertainty in our books concerning Amendments, (whereas in truth there are not any more certain Rules in the Law, if they are well obſerved and underſtood, then in caſe of Amendment) it ſhall be neceſſary briefly to collect them out of the books at large touching the Conſtruction of this Statute. And becauſe the principal Caſe was of the amendment of an Original; 1. It ſhall be ſhewed in what caſes the miſpriſion of the Clerk in Original writs ſhall be amended within this Statute, and in what not. Every Original writ ſtandeth upon 2 parts; one upon an Artificial form, according to the *Regiſter*, and that the Clerk ought to doe by his knowledge and skill, without any inſtruction of the party: the other upon the true inſtruction of the party, of the truth and particularity of his caſe, requiſite to the compoſing of the writ, and that the Clerk cannot doe without the party: ſo that an Original writ may be vitious, by miſpriſion either of the Clerk, [159] or of the party: By miſpriſion of the Clerk in 5 manners: 1. by miſtaking of the legal form; 2. by miſtaking of one word which is not any Latine for another; 3. by omiſſion or addition of words; 4. by miſtaking of the Record, ſpecialty, writing, copy, inſtruction, note or titling of the writ delivered to the Clerk, or taken by the Clerk for framing of the Writ; 5. by miſtaking of the Clerk or Officer, in negligent keeping, or voluntary defacing, *&c.* of a Record, *&c.* And becauſe that the Caſe of Amendment in the caſe at barr was not for any miſtaking of the Obligation upon which the writ was grounded (for he hath purſued the ſame in all) in which Obligation the Defendant was named Gentleman, as he was in the writ; But the miſpriſion of the Clerk of the Chancery was, in that he did not follow the note or inſtruction in writing delivered to him, *ſc.* to name the Defendant Knight *in primo nomine*, becauſe that after the making of the Obligation, he was made Knight: This difference is firſt to be obſerved: That if the Original writ wanteth legal form, the

the ſame is ſuch a miſpriſion which is not amendable by this Act. For the Officers and Clerks of the Chancery are bounden by the duty of their offices to have skill and knowledge in the true form of Original writs (which are the foundations upon which the whole Law doth depend) and therefore, if defect of form of Original writs ſhall be neglected, Ignorance, the Mother of Error and Barbarouſneſs, will follow, and in the end all will be involved in Confuſion, in ſecluſion of the antient Law of the Land; for in this Caſe it is true, *forma dat eſſe*; and therefore it was never the meaning of the makers of the Act within theſe general words, (miſpriſion of the Clerk in Original writ) to extend the ſame to miſpriſion of the form of the Original writ, which would introduce ſo great inconvenience; and therewith agreeth a Notable Judgment, in 22 E. 4. 21 & 22. in *Eliz.* Hatleys Caſe, where a writ of Debt was brought againſt Executors for a debt due by the Teſtator in the *Debet & Detinet*, where by the form of the *Regiſter* it ought to be in the *Detinet* only, and there it is reſolved by the whole Court, that it ſhall not be amended; for the difference is taken and reſolved, between Negligence, and want of knowledge of the Clerk, or negligence, that is, the overſight of the Clerk in miſtaking, as if he hath an Obligation or Copy of an Obligation, and doth not follow it, the miſtaking, that is, overſight and negligence in this caſe, and in all like caſes, ſhall be amended by the Statute of 8 *H.* 6. But ignorance, or not knowing, (for *ſcientia ſciolorum eſt mixta ignorantia*) of the Clerk in the legal form, and courſe of the Original, is not a miſpriſion amendable
[b] by the ſaid Statute. So if a writ be *Præcipe quod ſolvat*, for *Præcipe quod reddat*, or *Warr. Chart. unde pactum habet*, for *unde Chartam habet*, theſe are faults of form, and therefore are not amendable by this Act. And for the firſt part of this difference, as to the Copy of the Obligation, it is holden in 38 *H.* 6. 4. That where the Clerks of the Chancery uſe to take titling of the matter which the party ſhews them, If the party to have a *Formedon in the deſcender* ſhew to the Clerk how that the Land deſcended to one as ſon and heir of the donors, and the Clerk draweth the writ, that the Land deſcended to him as ſon, (and omitteth heir) if the Clerk ſheweth his titling and will teſtify the ſame, it ſhall be amended in the Common Pleas, and that is, by the ſaid Statute of 8 *H.* 6. *Vide* 22 E. 4. 48. 38 *H.* 6. 39. & 11 *H.* 7. 41. *b.* do agree to the Caſe of Copy. But if the writ wanteth legal form, it is not amendable, *Vide* 14 *H.* 4. 10, 11. 27 *H.* 6. 6. 11 *H.* 6. 14. 34 *H.* 6. 26. 28 *H.* 6. 11. and upon this reaſon it hath been often adjudged after this Statute of 8 *H.* 6. that falſe Latine in an Original writ ſhall not be amended, becauſe it wanteth legal form, and is to be imputed to the ignorance of the Clerk, 9 *H.* 7. 16. as *bos breve*, for *boc breve*: And the Common Law is Curious in keeping the form of the *Regiſter*; and therefore it is adjudged in 6 E. 3. 37. That where a treſpaſs done by divers is joynt or ſeveral, at the will of the Plaintiff; yet in an action againſt *John* Gardien of the Hoſpital of *B.* and Frere *Rob. L.* and Frere *Rich. F.* becauſe that this is the default of the Clerk for fault of form, that theſe Freres are not named Confreres, as it ought to be by the form of the *Regiſter*, the writ ſhall abate againſt them all, although the Gardien be well named. But in Treſpaſs againſt 2. Miſnoſmer of one of the Defendants ſhall not abate the whole writ, but it ſhall ſtand againſt the other who is well named; For there *Herle* took the difference, when the Writ doth abate by the plea of the one for want of form, although the others have pleaded to iſſue, the Writ ſhall abate againſt them all; but although that one may abate the Writ for matter in fact, as by reaſon of miſtaking of his name, the Writ ſhall ſtand againſt the others. *Vide* 2 *H.* 7. 16. 11 *H.* 7. 5, 6. 21 *H.* 7. 31. 7 E. 4. 10. 5 E. 4. 2. 11 *Aſſ.* 15. 12 *Aſſ. p.* 14. 27 *Aſſ. p.* 45. 9 *H.* 6. 36. 12 E. 3. *brev.* 670. 12 E. 3. *brev.* 481. 27 *H.* 8. 26. *b. Plow. Com. in the Aſſiſe of Freſh force.*

As to the ſecond manner of miſpriſion in negligent writing of a word which is not any Latine, the ſame is amendable, as *imaginavit*, for *imaginatus eſt*, it ſhall be amended, as it is adjudged in 11 *H.* 6. 3. 17. So was it adjudged in 3 E. 6. as Serjeant *Bendloes* reporteth, That where in a writ of *Aiel* the writ was *avæ*, for *aviæ*, it was amended.

[160] And as to the third manner of miſpriſion in negligent omiſſion or addition of a thing which it appeareth he himſelf ought to have added, or omitted of Courſe; as for leaving out *Dei gratia* in the King's Stile, it ſhall be amended, 22 *H.* 6. 8. So 3 E. 6. as Serjeant *Bendloes* reporteth, theſe words in a *Partitione faciend.* (*oſtenſur. quare non fecerit*) were left out, and was amended. *Vide* 35 *H.* 6. 6. 10. 2 *H.* 7. 11. 9 *H.* 7. 19. for addition of that which is apparent ought to be left out. But omiſſion, or addition of any thing which altereth the form of the writ, is not amendable, as addition, or omiſſion of *Detinet*, as it appeareth in 11 *H.* 6. 14. or addition of *debet*, as appeareth in 22 E. 4. 21, 22.

As to the fourth manner of miſpriſion, *ſc.* of the Record or Specialty, *&c.* See 21 *H.* 6. 8. 22 *H.* 6. 43. 37 *H.* 6. 6. 34. 19 *H.* 6. *Amendment* 47. 8 E. 4. 4.

As to the fifth manner of miſpriſion, in negligence of a Clerk or Officer, not in writing, *&c.* but in negligent keeping of the Records, or in voluntary defacing of them, whereby the Record becomes imperfect, or erronious: in *Trinit.* 24 *Eliz.* the Caſe was, That *Henry Fitz-allein* late Earl of *Arundel*, in the reign of Queen *Mary* ſuffered a Common Recovery of divers Mannors, and of Lands and Tenements in the County of *Suſſex*, and the Original writ upon which the Recovery was had, being greater and broader then the other writs of the ſame file, by the negligence of the Officer through often handling of it, a great part of this writ, which was more ſpacious then the reſt was obliterate, and worn out, ſo that but one Letter of many of the names of divers of the Mannors could be perceived, but the names of the Mannors were truly recited as well in the Count (which always doth briefly recite the writ), as in the *Habere facias ſeiſinam*? and whether this Original was amendable, or not, was a great Queſtion between *Philip Howard* Earl of *Arundel*, cozin and heir of the ſaid *Henry* Earl of *Arundel*, and the Lord *Lumley*, to whom the ſaid *Henry* Earl of *Arundel* had conveyed divers of the ſaid Mannors, *&c.* And to reſolve this Queſtion, Sir *Chriſtophe* *Wray*,

Wray, Chief Justice of *England*, Sir *Ed. Anderson*, Chief Justice of the Common Pleas, Sir *Roger Manwood*, Chief Baron of the Exchequer, and all the other Justices of *England*, assembled themselves together. And it was resolved by them all *una voce*, That the original Writ should be amended according to the other parts of the Record, *scil.* the Count, and the *Habere facias seisinam*; and that this misprision and negligence of the Clerk in keeping of the original Writ should be amended by the said Statute of 8 *H. 6.* for here doth not appear any want of Knowledge in the the Clerk, but misprision and negligence in keeping of the Writ, which is a misprision within the letter and meaning of the Act; and the rather in this Case, because it was in a Common Recovery suffered by assent of the Parties for assurance of Lands. And although it is enacted, That if any [b] Record, or parcel thereof, Writ, Return, Pannel, Process, or Warrant of Atturney in the King's Courts, *&c.* are voluntarily stoln, carried away, withdrawn, or avoided by any Clerk, that it shall be felony, the same doth not prove, That if the original Writ, or other part of the Record be voluntarily stolen, *&c.* that the same cannot be supplied and amended by the other parts of the Record: For it was resolved that in both Cases, as well where the Record becometh imperfect and erroneous by voluntary offence of the Clerk, as by his careless negligence, for all is in the general word, Misprision of the Clerk. But if such part of the Record which is so stolen, *&c.* or which appeareth not, cannot be supplied by the other parts of the Record, nor by any Exemplification made of the Record, then it cannot be amended: And see the first Clause of this Act of 8 *H. 6.* giveth remedy amongst others, where any subtraction or diminution is of any Record, Process, Warrant of Atturney, Original Writ, *&c.* And according to this Resolution a Fine was amended of *Mich.* 8 *Jac.* as appeareth by the Order and Rule of the Court following.

Crompton. *Mich.* 8 Jacobi *Regis.*

London, ss. *In fine levat. in Cur. hic in Octab. Sancti* Hillarii, *Anno regni Dom.* Eliz. *nuper Regine Angliæ* 16. *inter* Robertum Tyrwhite, *Militem, & al. Quer. &* Edmund' Dighton, *Armiger. & al. defore. de Maneriis de Magna* Sturton, *Parva* Sturton, *& al. in Com. præd. Quia constat Cur. super visu pedis ejusdem Finis, quod per humiditatem aeris, & pluviam super illam descenden' idem pes Finis adeo obliteratus est, & multæ lineæ ejusdem totalit. deletæ, ita ut legi non possunt; tamen per Breve de Coventione, & Dedimus potestatem de cognitione inde capiend. ac per concordiam & notam ejusdem Finis satis liquet & apparet quæ fuerunt verba in eodem pede prius script. Ideo ordinat. est, quod præd. pes Finis cum Proclam. superinde indorsat. per Chirographar. de novo rescribatur, ita quod concord. cum præd. Brevi de Convent. Dedimus potestatem, Concordia, & nota ejusd. Finis, & cum aliis Proclam. indorsat. super pedes Finium ejusd. Term. Et quod præd' pes Finis sic obliterat. à filac. inde abstrahatur. Et præd' pes Finis sic de novo rescript. in loco ejusdem affiletur.*

And this briefly shall suffice for amendment of Misprision of the Clerk in an Original Writ. And as to the Case at Bar, the Rule of the Court was in these words: *Crompton. Ordinatum est per Cur. hic super auditu Concilii utriusque partis & examinationem Clerici Curfistar. London & Attornat. Quer.* [161] *super Sacrament. sua in Cur. hic, quod hæc additio (Generoso) nomini Defend. in priori parte Brevis original. de debito* 100 *li. inde retorn. & affilat. in Banco hic mense Michaelis anno regni Regis nunc septimo, & omnes misprisiones in Recordo & process. ejusd. placiti proinde subsequen. emendentur, & fiant (Militi) secundum instructiones in script. prius deliberat. præfat. Curfistar.* viz. *præd. Breve original. per præfat. Curfistar. & Recordum, & process. præd. per Philizar. hujus Curiæ.*

The next word in the Act of 8 *H. 6.* is (Record,) and the first part of the Record is the Count; and briefly, a Count which wanteth substance shall not be amended in another Term, as appeareth 7 *H. 6.* 26. 35 *H. 6.* 37. 38 *H. 6.* 1. 7 *Ed.* 4. 26. 9 *Ed.* 4. 5. 33 *H. 6.* 2. *Vide* 38 *H. 6.* 33. and 30 *H. 8. Br. Amendment* 80. for the King's Case.

But it is enacted by the Statute of 36 *E. 3. cap.* 15. That for the ancient forms and terms of Declarations no man be prejudiced, so that the matter of the Action be fully shewed in the Declaration and the Writ. *Vide Eveleighe's* Case, 13 *Eliz. Dyer* 299. by the Statute of 36 *E. 3. c.* 15. the Declaration having substance shall not abate for form. *Vide* 28 *H. 6.* 8. In a Writ brought by *John Gargrave* against *Tho. Beamond*, upon an Obligation, and the Obligation was, *Noverint*, &c. *me* Thomam Beamond, *teneri*, &c. *Jo. Gargrave* (without addition) And the Writ was, *Præcipe*, &c. *quod reddat* Johanni Gargrave *Armigero*, with addition, and it was moved, that it might be amended by the Statute, for it is the misprision of the Clerk: But it was adjudged, That the Writ should abate for this Variance, and shall not be amended as it should if it were on the Defendant's part; For where the surplusage is on the Plaintiffe's part, as well in the Writ as in the Count, a man cannot amend his own Count. And this Judgment was after the said Statute of 8 *H. 6.* which proveth that the said first Clause of this very Act, which speaketh of addition or diminution, *&c.* extendeth only to corruption and misdemeanor in addition or diminution, and in vitiating of a Record, and not where it is done *in rei veritate*, although it be by misprision. *Vide* 4 *E.* 4. 14. A space in the Declaration for the place where the Obligation was made, was not amendable in another Term. And this which hath been said of a Count shall suffice.

Other parts of the Record are, Plea in Bar, Replication, *&c.* And regularly matter of substance in them, and especially matters of Fact shall not be amended in another Term, as omission of Averment, *Et hoc paratus est verificare*, &c. For in some Cases, as in Avowry, it is not of necessity. But colour, which is of course, and in which there is Misprision of the Clerk, shall [b] be amended. And the Record in another Term may be amended by the paper Book of the Office, for it was the Misprision of the Clerk in the entring of it, and no fault in the Party or his Counsel.

27 *H.* 6. 6. 10 *H.* 7. 23, 25. 11 *H.* 7. 2. 20 *H.* 6. 18. 27 *H.* 8. 1. Miſpriſion of a Certificate of a Record upon a Writ of Error ſhall be amended according to the Record, 22 *E.* 4. 46. & 21 *H.* 7. 41. But the ſame is by expreſs proviſion by the ſaid Statute of 8 *H.* 6. for it was the Act of the Judge, which was not amendable by the ſaid Branch of the Act, as ſhall be after ſaid. A thing apparent to be a Miſpriſion, which the Clerk of courſe ought to have added, without any inſtruction of the Party, althought it be in a material Point, ſhall be amended in another Term. As if in Debt brought, the Defendant ſaith, That he oweth him nothing; & *de hoc ponit ſe ſuper Patriam*, & *præd. Defendens ſimiliter*; where it ought to be, & *præd. Querens ſimiliter*, it ſhall be amended by this Act of 8 *H.* 6. 11 *H.* 7. 2. *acc.* which Caſe was not amendable by the Act of 14 *E.* 3. as it appeareth by the Book in 46 *E.* 3. before, for the firſt Act ſpeaketh only of Proceſs, and this Act ſpeaketh of Record and Plea. So in an Action brought againſt Sir *Roger Townſend*, he pleaded in Bar, and concluded, the which matter *præd. Johan.* is ready to averr, where it ſhould be *Rogerus*, and it was amended by the advice of all the Juſtices; as it is reported in 11 *H.* 7. 25. And as to the Writ of *Niſi prius*, it is to know, That the Miſpriſion of the Clerk of the Treaſury, who writeth it, is alſo amendable by this Statute, and to be made according to the Record, but with this Caution, *ſcil.* That the Record of *Niſi prius* have ſufficient matter in it ſelf either expreſſed or implied to give authority to the Juſtices of *Niſi prius* to try the Iſſue; for they cannot try any Iſſue by force of the Statutes made thereof, without authority given to them by Writ of *Niſi prius*, and ſo it is adjudged in 11 *H.* 6. 11. in Debt againſt *J. S.* Husbandman iſſue was taken, if he were Husbandman *die impetrationis Brevis*; and the Writ of *Niſi prius* was, whether he were Husbandman (omitting theſe words, *die impetrationis Brevis*,) which was the material point of the Iſſue; but the Roll was well, and the Jury paſſed for the Plaintiff, and found that the Defendant was Husbandman *à die impetrationis Brevis*, and the Writ of *Niſi prius* could not be amended by the Statute of 8 *H.* 6. becauſe the Juſtices of *Niſi prius* have no power to try the Iſſue contained in the Record, becauſe that *die impetrationis Brevis* was left out in the *Niſi prius*; and if the Juſtices of *Niſi prius* had taken the Verdict according to the Iſſue in the Writ of *Niſi prius* that he was Husbandman generally, without ſaying *die impetrationis Brevis*, it had been contrary to the Roll; for which cauſe it was awarded, That the Plaintiff ſhould ſue a new *Venire facias*. But 9 *Eliz. Dyer* 260, 261. In a Partition by *Wotton* againſt *Anthony Cook* and *Temple*, who appeared, and *Temple* confeſſed the
[162] Partition, and Judgment given accordingly, *ſed ceſſet executio*. *Cook* conveyed Title in ſeveraly, and traverſed the ſuppoſal of the Writ and Count, *abſque hoc* the Plaintiff maintained the Writ and Count, & *hoc petit quod inquiratur per Patriam*, & *præd.* Anthonius *ſimiliter*, *ideo* 12. &c. And in the Record of *Niſi prius* the Iſſue was well recited, and no part thereof left out. But where the Plaintiff concluded, & *hoc petit*, *quod inquiratur per Patriam*, by the negligence of the Clerk of the Treaſury, the Writ of *Niſi prius* was, & *præd. ſimiliter*, leaving out this word *Anthonius* in the cloſe, and joining of the Iſſue. And farther, the Iſſue entred in the Record of *Niſi prius* was, *Inter Wotton* Plaintiff, and *Cook* and *Temple* Defendants; where *Temple* had made a Confeſſion of the Partition before, and ſo a Stranger to the Iſſue: But the Record which warranted the ſame was well enough; And notwithſtanding theſe Faults and Miſpriſions, the Iſſue was tried at the *Niſi prius*, and afterwards, by the Rule of the Court of Common Pleas, the Verdict was taken, and the ſaid Miſpriſions were amended; for ſufficient authority was given by the Writ of *Niſi prius* (which is but the tranſcript of the Record) to try the Iſſue, and to take the Verdict. If a man declare of damages of 100 *li.* and the Record of *Niſi prius* is 100 *r.* and the Jury give damages 20 *li.* the *Niſi prius* ſhall be amended and made 100 *li.* according to the Roll; for it is the Miſpriſion of the Clerk, which doth not change the Iſſue. *Vide* 11 *Hen.* 7. 1. *b.* 10 *Hen.* 7. 25. *b.* and ſo was it adjuged in 2 *H.* 4. 6. See 39 *E.* 3. *Br.* 105. 7 *E.* 4. 15. See after when Miſpriſion of the Clerk in the Entry of the Verdict or Judgment, which are other parts of the Record, ſhall be amended. As to the word (Word) the ſame hath been explained before.

As to this word (Plea) it hath been explained before in the word (Record) which includeth it.

As to (Warrant of Atturney) See 23 *Hen.* 8. *Amendment* 85. 24 *Hen.* 8. *Amendment* 47. 2 *Ma. Dyer* 105. 2 *Eliz. Dyer* 180. 5 *Eliz. Dyer* 225. 6 *Eliz. Dyer* 231. But when no Warrant of Atturney is put in, it is not remedied by this Act. As to the words Pannel and Return, in what caſes Miſpriſions of them ſhall be amended within this Statute. *Vide* 2 *E.* 4. 7. 9 *E.* 4. 14. 33 *H.* 6. 42. after the Sheriff is removed, or dead, &c. 37 *H.* 6. 12. 3 *H.* 7. 14. 12 *H.* 7. 19. But no Return is helped by this Statute.

And it is to be noted, That thoſe things which are amendable before the Writ of Error brought, are amendable after the Writ brought; and if the inferior Court doth not amend them, the ſuperior Court may amend them.

It is neceſſary now to ſhew two things, 1. What things are not amendable by this Act of 8 *H.* 6. 2. How many of them, not remedied by this Act, are remedied by other Statutes. As to the firſt, This Act of 8 *Hen.* 6. *cap.* 12. nor the Act of 8 *Hen.* 6. *cap.* 15. do not extend to 14 Miſpriſions. 1. They do not extend to Want of an Original, but to Miſpriſion of Clerks, as is aforeſaid.
[*b*] 2. They do not extend to Miſpriſion of Form in the Original, either Falſe Latin, or Variance from the Regiſter. 3. They do not extend to material Variance betwixt the Original and the Count. 4. They do not extend to Inſufficient Trial, *ſcil.* when the Viſn is miſtaken; but Miſpriſion of the Clerk in the Entry of the Verdict ſhall be amended in another Term, according to the Note found by the Jurors: ſo was it adjudged in *Rawlye's* Caſe, in the Fifth Part of my *Reports*. 29 & 30 *Eliz.* 2. *b.* 5. They do not extend to a Jury returned by the Coroners, where the Sheriff ought to return it, & *è contra*. *Vide Bainham's* Caſe, in the Fifth Part of my *Reports*, *fol.* 36. *b.* *Vide* 21 & 23 *Eliz. Dyer* 367. 6. They do not extend to a Trial where no Return is endorſed upon the *Venire facias*,

facias, *Rowland's* Caſe, in the Fifth Part of my *Reports*. *Mich.* 35 & 36 *Eliz. fol.* 41. *b.* 7. They do not extend to a Trial, where one appeareth who was not returned upon the *Venire facias*. The Counteſs of *Rutland's* Caſe, in the Fifth Part of my *Reports*, *fol.* 42. 8. They do not extend to a Return of the *Venire facias* without the name of the Sheriff. 9. They do not extend to a Jeofail, Want of colour, Inſufficient pleading, or to any other Default of the Party, or of his Councel. 27 *H.* 6. 10. 18 *E.* 4. 3. 20 *E.* 4. 6. 21 *H.* 6. 28. for the Statute extendeth only to Miſpriſion of Clerks. 10. For the ſame reaſon they do not extend to any Error or Miſpriſion of the Judges in any Term paſt. 2 *R.* 3. 11. 9 *E.* 4. 3. *Vide* 30 *H.* 6. 1. But Miſpriſion of the Clerk in the Entry of the Judgment of a thing which is apparent, and not of neceſſity, is amendable, as the miſtaking of the ſumming of the Arrerages before or pendent the Writ of Annuity ſhall be amended. 35 *H.* 8. *Dyer* 55. 11. They do not extend to that, where the Juſtice of *Niſi prius* taketh the Verdict *poſt ipſum diem in Banco*, 1 *Ma. Dyer* 97. & 33 *H.* 6. 25. 12. They do not extend to Want of Warrant of Atturney. 13. This Statute nor the Statute of 32 *H.* 8. *cap.* 30. do not extend to help any of the Imperfections, where a Verdict is given upon an Iſſue joined betwixt the Demandant and the Vouchee; or the Tenant and the Vouchee, as it was reſolved *Mich.* 1 & 2 *Phil.* & *Mar. Bendloe's* Caſe. But if an Error in Law be in the Judgment, as *ideo in miſericordia*, for *pro capiatur*, or *è contra*, or the like; it is not amendable in another Term, as it hath been oftentimes adjuged. 14. Nor do they extend to an Appeal, nor to Pleas of the Crown, nor to any Proceeding upon them, for they are excepted, nor to the amendment of any Exigent, to make any one to be outlawed, &c. 20 *H.* 6. 18. 7 *E.* 4. 16. 22 *E.* 4. 7. 38 *H.* 6. 3. 21 *H.* 7. 34. 7 *H.* 4. 27. Now Miſpriſions not remedied, neither by the Statute of 32 *H.* 8. *cap.* 30. nor by the Statute of 18 *Eliz. cap.* 14. 1. All the ſaid Miſpriſions not remedied by the ſaid Statute of 8 *H.* 6. remain yet not remedied by any Law or Statute; or where no Verdict is given upon iſſue joined: As if Judgment be given upon Confeſſion, Demurrer, *Nihil dicit*, *non ſum informatus*, or otherwiſe than by Verdict of 12 men upon Iſſue joined. 2. When a Verdict upon Iſſue tried is given; 10. Miſpriſions are not remedied by the Statutes of 32 *H.* 8. 18 *Eliz.* or any other Statute; but yet remain not amendable. 1. Material Variance betwixt the Original and the Count, as it is reſolved in *Biſhop's* Caſe, in the Fifth Part of my *Reports*. 2. When the Original or Count wanteth Subſtance. *Vide Freeman's* Caſe, 41 *Eliz.* in the Fifth Part of my *Reports*. 3. Inſufficient Trial, *ſcil.* when the Viſn is miſtaken, and Verdict paſſeth. 4. When the Return of the Jury is by the Coroner, where it ought to be by the Sheriff, and *è contra*. 5. When the Sheriff doth not put his name to the Return of the Jury. 6. Where upon the the *Venire facias*, &c. no Return is endorſed, although that Verdict paſſeth. 7. When one appeareth, and is ſworn and entred, others give Verdict who are not returned upon the *Venire facias*. 8. In an Appeal, or Plea of the Crown, as Indictments, &c. or any Proceeding upon them; for they are excepted in the ſaid Act of 8 *H.* 6. and 18 *Eliz.* and the Statute of 32 *H.* 8. doth not extend to them. 9. Although that Verdict upon Iſſue tried be given for the Plaintiff, yet if upon the whole Record it appeareth to the Court, that the Plaintiff hath no Cauſe of Action, he ſhall never have Judgment, and the ſame is not remedied by any Statute, as it hath been oftentimes adjudged. 10. An Error in Law by Miſpriſion of the Judges in the Judgment entred in another Term is not amendable by any Statute. If the Plaintiff in an Aſſize recovereth, and hath not put in any Warrant of Atturney, this Error was not remedied by the Statute of 32 *H.* 8. as it appeareth 20 *Eliz. Dyer* 363. for the words of the Act are, for lack of any Warrant of Atturney of the Party againſt whom the Iſſue ſhall be tried: So that when the Verdict paſſeth for the Plaintiff, the lack of Warrant of Atturny for the Plaintiff is not aided by that Statute, nor *è contra*, but the ſame is helped by the Statute of 18 *Eliz.* for there the words are general (for want of any Warrant of Atturney) ſo that theſe words extend as well to lack of Warrant of Atturney of the Party for whom, as againſt whom the Verdict paſſeth.

[163]

Caſes in the Court of Wards.

Trin. 7 Jacobi *Regis.*

Myght's Caſe.

[b] IN the Court of Wards this Term, It was reſolved by the two Chief Juſtices, and the Chief Baron, and by the Court of Wards, That where *Jeffery Myght* with his own money purchaſed 12 acres of Lands, late *Lumners* to him and to *Simon Mond*, an Enfant, to them and their Heirs, holden of Queen *Eliz.* by Knights-ſervice; That this original purchaſe could not be averred to be by colluſion, to take away the wardſhip which might accrue after the death of *Jeffery Myght*; becauſe that the ſaid *Jeffery* was never ſole Tenant to the King, nor by the death of *Jeffery* in reſpect of the ſurvivor, by force of Jointenancy, any wardſhip or primer ſeiſin could accrue to the King. 2. It was reſolved, That no Feoffement which *Jeffery* could make of his moiety could be averred to be by colluſion, to take away the wardſhip or primer ſeiſin due by his death; for if no Feoffement was made, no benefit could accrue to the Queen by his death. Alſo he is out of the Statute of 32 and 34 *H.* 8. for the Statute of 34 *H.* 8. which is a Statute of explanation, ſpeaketh only of a

ſole ſeiſin in fee; for the words are, *having a ſole eſtate or intereſt in fee-ſimple*, &c. 3. It was
[164] reſolved, That when the Father maketh a Feoffement for the advancement of his Wife, preferment of his Children, or paiment of his Debts, that the ſame cannot be averred upon covin or colluſion, to give cauſe to the Queen to ſeiſe all the Land; for the Statute of 32 giveth power to the Tenant to diſpoſe two parts to ſuch uſes; and the Statute of 34 *H.* 8. doth explain, That if all be diſpoſed, it ſhall be good for two parts, and ſo upon the Conſideration of both the Statutes, no Averment can be of any Covin in ſuch caſes, for the Clauſe of 34 *H.* 8. concerning Covin is: *If any perſon, &c. having Eſtate of Inheritance, of or in any Lands, &c. holden of the King by Knights-ſervice in chief, or otherwiſe of the King by Knight-ſervice, hereafter ſhall give, will, deviſe, or aſſign, by will, or other act executed in his life, his manors, &c. by fraud or covin to any perſon for years, life, or lives, with one remainder over in fee, or with divers remainders over for term of years, life, or in tail, with a remainder over in fee-ſimple, &c. or ſhall convey or make by fraud or covin, contrary to the true meaning of this act, any Eſtates, Conditions, Meſnalties, Tenures, or Conveyances, to the intent to defraud or deceive the King of his Prerogative, Primer ſeiſin, &c. which ſhould or ought to accrue or grow, &c. by or after the deceaſe of his or their tenant by force, and according to the former Statute, and of this preſent Act and Declaration, and the ſame Eſtates, and other Conveyances, being found by office to be ſo made and contrived by covin, fraud and deceit, as is aboveſaid, contrary to the true meaning of the ſaid former Act, and of this Act, that then the King ſhall have aſwell the wardſhip of the body, and cuſtody of the Lands, &c. as livery, primer ſeiſin, &c. which ſhould or ought to appertain to the King, according to the true intent and meaning of the ſaid former Act, and of this preſent Act, as though no ſuch Eſtates or Coveyances by covin had never been had nor made.* So that this Branch oftentimes doth refer this clauſe of Covin to be contrary to the true intent and meaning of the former Act, and of this Act: And therefore it is firſt to be known, what is the true intent and meaning of the Act of 32 *H.* 8. And the ſame appeareth by the words thereof, *ſcil. That all and ſingular perſon and perſons having, &c. ſhall have full power and authority, to give, diſpoſe, will, or aſſign, by his laſt Will in writing, or otherwiſe, by any Act or Acts lawfully executed, two parts, &c. to or for the advancement of his Wife, preferment of his Children, and paiment of his Debts, or otherwiſe, at his will and pleaſure.* And the words of the Statute of 34 *Hen.* 8. *ſhall have full and free liberty, power and authority, to*
[*b*] *give, diſpoſe, will, or aſſign to any perſon or perſons, &c. two parts*, &c. Upon which Acts being conſidered together, it was reſolved by the two Chief Juſtices, and the Chief Baron, and the Court of Wards, That in all Caſes when the King's Tenant conveyeth his Land for life, years, or in tail to his Children, or when a Stranger was joined with the Heir in Eſtate, or when a Remainder in fee was limited in fee, or when an Eſtate was declared by Will (all which Caſes were out of the Statute of *Marlbridge*, and in which Caſes no Colluſion could have been averred, as appeareth by Sir *George Curſon*'s Caſe, in the Sixth Part of my *Reports*, and by our Books there cited) that in all ſuch Caſes, by the expreſs words of the Clauſe of 34 *Hen.* 8. concerning Covin and Colluſion, Covin may be averred for the King but only for a third part, and not for the two parts, for both the Acts have enabled the King's Tenants to diſpoſe of two parts at their wills and pleaſures, as appeareth by the expreſs words of both the Acts; and therefore where no Covin could have been alleged for the King in the Caſes aforeſaid before this Act, now Covin may be alleged for the third part only, and thereof the Act of 32 *H.* 8. doth put Examples, *ſcil.* That he may convey two parts for the advancement of his Wife, preferment of his Children, and paiment of his Debts, (againſt which no Colluſion could be averred by the Common Law) and concludeth with general words, *or otherwiſe at his will and pleaſure:* And it was objected, That in caſe where the King may take advange of Colluſion apparent, or averrable within the Statute of *Marlbridge, cap. 6. de his qui primogenitos & heredes infra ætatem exiſtentes feoffare ſolent*, &c. *ſcil.* to advance only his Son and Heir of an Eſtate in Fee-ſimple, if ſuch Covin be found by office, the King ſhall take benefit thereof. To which it was anſwered and reſolved, That the expreſs words of 23 *H.* 8. which enableth the Tenant to convey two parts for the preferment of his Children, the Queen ſhall have but the third part in ſuch caſe, for the ſaid Branch of 32 *H.* 8. doth conclude, *any Law, Statute, Cuſtom, or other thing to the contrary notwihſtanding.* And ſo the Statute giveth in many Caſes remedy to the King, where he had not any before; and in ſome Caſe, more benefit to the Subject than he had before. And the Caſe of *Mygh* as to this Point was ſuch, That *Jeffery Mygh* being ſeiſed of dives Lands and Tenements in the County of *Norfolk* in fee, ſome of them holden of the Queen *in Capite*, made Feoffements of divers parts of them to divers particulars Uſes, to his Brother and others of his bloud, to ſome of them for life, and to ſome for years, the Remainder to *Tho. Mygh* his Son and Heir apparent in tail, the Remander to *Jeffery* his younger Son in tail, the Remainder to *Anne* his Daughter in tail, the Remainder to *Ed. Mond.* in tail, the Remainder to *Jeffery* his Son in tail, with ſeveral Remainders over in tail, the Remainder in fee to *Thomas Mygh* in fee. And it was found by office after the death of *Jeffery*, that all the ſaid Eſtates and Feoffements were by
[165] fraud and covin to deceive the late Queen of her Prerogative, Ward and Marriage, and that *Thomas* was within the age of 21 years, and afterwards accompliſhed his age of 21 years, and before Livery *Thomas* the Son died without iſſue; after whoſe death another office was found 3 *Jac.* with all the ſpecial matter, and Queen *Eliz.* granted the Ward and Marriage of *Thomas* the Son of *Richard Chamberlain*, &c. and that *Thomas* the Son after his full age died without iſſue of his body before any Livery proſecuted, and that *Jeffery* the Son is his Brother and Heir, and within age, and alſo next Heir to the ſaid *Jeffery* the Father. And it was reſolved by the Court of Wards in the time of Queen *Eliz.* That although the Covin was found by office, that yet the Queen ſhould have but a third part of the Profits, and not the whole, for the Cauſes and Reaſons aforeſaid, and accordingly the Queen had but the third part of the Profits, which concurreth with the Reſolution before.

It was

It was alſo reſolved by the Juſtices, That after the death of *Thomas* without iſſue, *Jeffery* ſhould not be in Ward, for the Covin could not extend to *Jeffery* as Heir of *Jeffery* the Father, for at the time of the Feoffement he was the youngeſt Son, and the Remainder was limited to him to take effect after the death of *Thomas* the eldeſt Son without Iſſue, and the Queen had once taken advantage of the Statute after the death of *Jeffery*, and after the death of *Thomas* the Son he could not be in Ward; For *Jeffery* the Son claimed by force of a Remainder, and *Thomas* had nothing but in tail, and he is dead without Iſſue. And it was alſo reſolved by the ſaid Juſtices, That if the King's Tenant leave a third part to the King, that no Covin or Colluſion can be averred for the two parts, for the words and intent of both the Acts was, that the King ſhould be ſatisfied with the third part. And therewith agreeth *Dyer* 10 *Eliz.* in the Lord *Dacres* Caſe, where it is ſaid, That the ſame is the true meaning of both the ſaid Statutes being joined together.

Mich. 7 Jacobi *Regis.*

Digby's Caſe.

SIR *Everard Digby* ſeiſed in Fee of the Manor of *Stoke* in the County of *Rutland*, and of the Manor of *Tilton* in the County of *Leiceſter*, holden (by way of admittance) of the King by Knights-ſervice *in Capite*, by act executed in his life-time, and before any Treaſon committed by him, did convey the ſaid Manors to the uſe of himſelf for life, and afterwards to the uſe of his eldeſt Son and Heir apparent in tail, with divers Remainders over to his other Iſſues; and afterwards the ſaid Sir *Ev. Digby* was attainted and executed for the heinous and horrible Powder Treaſon committed after the ſaid Conveyance, his eldeſt Son being then within age. The Queſtion was, Whether the Wardſhip of the body, or of the third part of the ſaid Manors ſhould be to the King by force of the Statutes of 32 & 34 *H.* 8. And it was reſolved by the two Chief Juſtices, the Chief Baron, and the whole Court of Wards, That the King ſhall never have Wardſhip or Primer-ſeiſin, but where there is an Heir general or ſpecial. For the Statutes of 32 & 34 *H.* 8. give Wardſhip or Primer-ſeiſin to the King in divers caſes where there is no Deſcent: as if the King's Tenant convey his Lands for the advancement of his Wife, pereferment of his Children, or paiment of his Debts; but doth not give Wardſhip or Primer-ſeiſin in any caſe where there is not any Heir general or ſpecial; becauſe that Wardſhip or Primer-ſeiſin ought to be of the Land of ſome Anceſtor who hath an Heir. And the words of the Writ of *Diem clauſit extremum*, or *Mandamus*, as well after as before the ſaid Statutes are, *Et quis propinquior Hæres ejus ſit.* Alſo Livery ought to be ſued in the name of the Heir: But it was agreed, that in ſome caſe the King ſhall have Wardſhip or Primer-ſeiſin of the Son, although the Father be attainted of Treaſon; and the bloud be corrupt. And [b] [166] therefore if Tenant in tail of the King's Gift to hold by Knight-ſervice *in Capite* had been attainted of Treaſon before the Statute of 26 *H.* 8. and died his Son within age, in this caſe, although that the bloud is corrupt, yet, becauſe that by force of the Statute of *Donis conditionalibus*, the Land notwithſtanding ſuch attainder doth deſcend to the Son, he ſhall be in Ward to the King, becauſe he is a ſpecial Heir in ſuch Caſe. And the ſame is proved by the Book of 7 *H.* 4. 32. where the Caſe was, King *R.* 2. by his Letters Patents did grant divers Manors, &c. to *Thomas Holland* Earl of *Kent*, to have and to hold to him and the Heirs of his body, and afterwards the Earl, 1 *H.* 4. made Inſurrection, and levied Warr againſt the King, and, committing that Treaſon, was killed without Judgement, his Son *Ed.* within age; after whoſe death the ſaid *Thomas* Earl of *Kent* was attainted by Parliament of High Treaſon: And farther it was ordained, That all his Lands in Fee-ſimple, and no other ſhould be forfeited; By reaſon of which Act of Parliament the King ſeiſed the ſaid Manors, and they were in the Kings hands during the Nonage of *Ed.* the Son, and afterwards the ſaid *Ed.* at his full age ſued out of the Chancery a Writ of *Mandamus*, by which the ſaid Gift and Tenure, and that the ſaid *Ed.* was Heir *per formam doni* was found; and thereupon the ſaid *Ed.* came into the Chancery, and prayed to have Livery: And there it was reſolved by *Norton*, *Tremain*, *Hulls*, *Hankford* and *Thirning*, That in ſuch caſe the Son ſhall be in Ward, and although that the King ſeiſeth as for forfeiture for Treaſon, yet when the King is in poſſeſſion, the Law will adjudge him in by reaſon of Wardſhip, becauſe the ſame is his beſt Right; For the Law doth more reſpect a ſmall Eſtate during the minority of the Iſſue by right, than a great Eſtate in Fee-ſimple by wrong. But there *Markham* held, That when the King ſeiſeth any Land by forfeiture of Treaſon or other Cauſe claiming Fee, although that one who claimeth a Right in the Land cometh into the Chancery, and prayeth a *Mandamus*, thoſe of the Chancery ſhall not grant it: and *Gaſcoign* ſaid, That all the matter in this Caſe is, If the Writ of *Mandamus* iſſued well out of the Chancery, or not; and all this appeareth by the ſaid Book. And it was agreeed, That if there be Grand father, Father and Son, and the Grand-father is Tenant in tail, and the Father is attainted of Treaſon, and dieth ſeiſed, although that the bloud be corrupt, yet the Land ſhall deſcend to the Son *per formam doni*, and this Deſcent ſhall take away an Entry, for the Son is in by Deſcent.

Mich. 7 Jacobi *Regis.*

The Earl of *Cumberland*'s Case.

[*b*] IN the great Case of the Earl of *Cumberland* heard in the Court of Wards this Term, before the Earl of *Salisbury* Master of the Wards and Liveries, with the assistance of the two Chief Justices and Chief Baron, for the Castle and Manor of *Skipton* in *Craven*, &c. in the County of *York*; It was holden by the two Chief Justices and Chief Baron, That where King E. 2. by his Letters Patents had granted the said Castle and Manor of *Skipton* in *Craven*, &c. to *Robert de Clifford* in tail, King *H.* 6. granted (as it was often found by Office) *Tho. Domino Clifford* (Cosin and Heir of the body of the said *Robert de Clifford*) *reversion. præd. Castri & Manerii de Skipton in Craven*, &c. *cum suis pertin. necnon Castrum & Manerium præd.* which, admitting that the said Grant in tail to the said *Robert de Clifford* was void, (which was only put by way of admittance, without prejudice to any of the Parties) that yet the said Castle and Manor did pass by the later Grant to *Thomas* Lord *Clifford* in Fee-simple in possession. For the intent of King *H.* 6. was, that be it in possession or reversion, it shall pass, and the words agree with his intent; for first, he granteth the Reversion, if the Estate tail was good; and if the Estate tail was not good, then he farther granteth the said Manor in possession, and so his words in his Letters Patents do agree with his meaning, and both of them with the Law. As many Leases made by the King, and other his Progenitors before him, to one to begin after the determination of such a Lease, if the Lease be good, and if the Lease be not good, from such a Feast, and such Leases are good. Note, Reader, As to the recital
[167] of an Estate tail, or Lease for life or years, by these words, *mentionatur fore concedi*, or *dimitti*, &c. was but of late, (and yet a good invention,) but the ancient form was to recite the first Grant, and to grant the Reversion, and farther, to grant the Lands in possession, and these several Grants in a Patent are as good and as strong in Law as if the King by a Patent had recited the Estate tail, and granted the Reversion, and by another Patent had granted the Land in possession; without question the one and the other shall be good; so is it when the several Grants are contained in one and the same Patent; for *frustra fit per plura, quod fieri potest per pauciora.* And the opinion of *Hussey*, in 9 *H.* 7. 2. is good Law, if it be well understood, for *non in legendo, sed in intelligendo leges consistunt.* For where he saith, It is clear, if the King intending to ratifie and confirm a Grant made by his Predecessor of a Franchise by his Letters Patents, and he ratifieth and confirmeth the Estate, and farther addeth this Clause, *Damus & concedimus*; the same is but a void Grant, which ought to be intended, that for fear of forfeiture of the Franchise the Patentee took a Confirmation of the Successor King, which is sufficient (before Office found of the forfeiture) to discharge the Patentee of any forfeiture; and there he well said, that the subsequent words, *Damus & concedimus*, are but void; for the King in such case hath not any Estate grantable in Law before Office found, and therefore of necessity it ought to take effect by way of Confirmation, and cannot enure by way of Grant; and all this appeareth by *Hussey*'s reason expressed in the said Book, why *Damus & concedimus* in such Case are void: for (as he saith) it shall not pass by this Confirmation, and by Grant the same shall enure by way of Confirmation, and not by way of Grant. *Vide* 11 E. 4. 1. *b.* 7 *H.* 7. 14. *Plow. Com.* 397. But in the Case at Bar there is not any Confirmation which presupposeth that the King hath not but a title or right not grantable, but both Estates as well of the Reversion as of the Possession are grantable Estates, and so not like to the Case which is put by *Hussey*. And when the King's Charter may be taken to two intents, and both intents are effectual and good, in many cases it shall be taken to such intent which is most beneficial for the King, but if it may be taken to one intent good, and to another intent void and of none effect, it shall be taken and construed to such intent, that the King's Grant shall take effect; and the same in Judgment of Law standeth with the King's intent, for it was not the King's intent to make a void Grant. And therewith agreeth the Book in 21 E. 4. 44. the Abbot of *Waltham*'s Case: the Reason and Rule of which Book doth over-rule the Case now in question: *Scil.* either to make the Grant good, either of the Reversion, if the former Grant in tail was good, or of the Possession, if the former Grant was void, or if no Grant was at all, but not to make the King's Grant utterly void, as well of the Reversion as of the Possession, when the King hath either the Reversion or the Possession in him. So it was holden, If the King grant *totum illud Manerium suum de D.* or *totam illam Rectoriam sive Advocationem de B.* that if the King hath a Manor or Farm, and *non* Manor, or a Rectory impropriate, or Advowson, and no Rectory, that which the King hath shall pass; for the effect of the Grant is, be it Manor or Farm, Rectory impropriate or Advowson, that which the King hath in truth shall pass.

Hill.

Hill. 7 Jacobi *Regis.*

Paris Stoughter's Case.

Paris Stoughter was ſeiſed of the Manor of *Over-ſtoughter* in the County of *Glouceſter*, to him and the Heirs males of his body, and had Iſſue *Chambers Stoughter*, and died; By Writ of *Mandamus*, 2 *Jac.* it was found, that the ſaid *Paris* was ſeiſed of the ſaid Manor, as is aforeſaid, and died ſeiſed the 22 *Febr.* 40 *Eliz.* and that *Chambers* was his Son and Heir; and that the ſaid Manor was holden at the time of the death of Queen *Eliz.* as of her Manor of *Nether-hall* in the ſaid County, by Fealty and Rent, in free and common Socage, *&c. Trin.* 7 *Jacobi* a *Melius inquirendum* was awarded, reciting the former Office to enquire according to this Point, whether the ſaid Manor of *Overſtoughter* at the time of the death of the ſaid *Paris* were holden of the King *in Capite* by Knights-ſervice, or otherwiſe by Knights-ſervice. By virtue of which Writ it was found, that the ſaid Manor was holden at the time of the death of the ſaid *Paris* of the late Queen *Elizabeth* by Knights-ſervice, as of her Manor of *Nether-ſtoughter*, and that at the time of the taking of the ſame Inquiſition, the ſaid Manor of *Over-ſtoughter* was holden of the King which now is, by Knights-ſervice, as of his Manor of *Nether-hall.* And it was clearly reſolved by the two Chief Juſtices and the Chief Baron, That the ſaid Writ of *Melius inquirendum* was repugnant and void in it ſelf, and gave not authority to find ſuch Office as was found. For the ſaid *Paris* died 40 *Eliz.* And [b] the Writ of *Melius inquirendum* was to enquire, whether at the time of the death of the ſaid *Paris* the ſaid Manor of *Over-ſtoughter* was holden of our Lord the King which now is, which was impoſſible and repugnant, That *in Anno* 40 *Eliz.* the ſaid Manor of *Over-ſtoughter* ſhould be holden of our Lord the King, who then was King only of *Scotland*, and not of *England.* And although that the finding were well, yet foraſmuch as it was without the Warrant of the Writ, all was inſufficient and void, and a new Writ of *Melius inquirendum* ought to be awarded. *Vide F. N. B.* 255. *b.* that *Melius inquirendum* ſhall be awarded upon a ſurmiſe in Court that the Lands are of greater yearly value then is declared in the Office: and by the like reaſon upon ſurmiſe that they are holden by other Services; or that he is ſeiſed of another Eſtate than is recited in the Office. But it was reſolved, That if upon the *Melius inquirendum* in theſe caſes it be again found againſt the King, the King ſhall not have a new Writ of *Melius inquirendum*, and that for three Cauſes. 1. Becauſe that then there ſhall be no end thereof; but ſuch Writ ſhall be infinite, *& infinitum in jure reprobatur.* 2. As if, if a Writ of *Diem clauſit extremum*, or *Mandamus*, &c. are found againſt the King, there ſhall not be a new Writ of *Diem clauſit extremum*, or *Mandamus*, awarded: So if upon the *Melius* it be found againſt the King, no *Melius* ſhall be farther awarded. *Vide* 12 *Eliz. Dyer* 292. The *Melius* is in the nature of the firſt Writ of *Diem clauſit extremum.* 3. If Office be found for the King, the Party may traverſe it, and if the Traverſe be found againſt him, it maketh an end of the buſineſs. So if it be found for him who tendreth the Traverſe, it ſhall bind the King as to this matter. And when the firſt Office is found againſt the King, and the *Melius inquirendum* alſo, the King thereby is found to have another *Melius inquirendum* for the ſame matter, for the Comparative degree is above the Poſitive, and the Superlative above the Comparative, and no Comparative upon Comparative, no more then Superlative upon Superlative. But if upon the *Melius inquirendum* it be found for the King; yet the party grieved may traverſe it: And it ſtands with reaſon, That when Office is found for the King, that foraſmuch as the Party grieved is not concluded by it, but may traverſe it: ſo when it is found againſt the King, foraſmuch as the King cannot traverſe it, that he ſhall have a Writ of *Melius inquirendum*, and yet the *Regiſter* hath not any Writ in ſuch caſe. Note, Reader, It appeareth by the Statute of *Lincoln*, made 29 *E.* 1. that at the Common Law, the Eſcheators uſed to ſeiſe the Lands of the King's Tenant before Office; and therefore it is enacted by [169] the Statute, That when Inquiſitions are found by Writ before Eſcheators, *quod nihil tenetur de ipſo Dom. Rege*, &c. *quod ſtatim abſque dilatione mandetur per breve Dom. Reg. de Cancell. percipiend. quod Eſcheatores de terris & tenementis ſic in manus Dom. Regis per ipſos capt. manus ſuas amoveant omnino*, &c. *ſalvo ſemper Domino Regi quod ſi poſtea Eſcheatores ſuas manus amoverint per breve ipſius Domini Regis, ut præd. eſt, aliquid contigerit inveniri in Cancellaria vel ad Scaccarium, vel alibi in Cur. ipſius Dom. Regis per quod cuſtodia terrarum aut tenementorum eorundem, de quibus Eſcheatores manus ſuas amoverint in forma præd. Dom. Regi pertineant, quod ſtatim præmuniatur ille per breve de Cancellaria*, &c. And this Act doth not make againſt this Reſolution, for two Cauſes. 1. It is a Rule in Law, and affirmed by this Act, That where the King's hands are once removed by matter of Record, there for any ancienter title than the amover, the King ſhall not reſeiſe upon any new Office found without a *Scire facias*; and that appeareth in 28 *H.* 6. 9. *b.* 9 *E.* 4. 51. *Vide* 5 *H.* 5. 2. *a.* But in the Caſe at Bar there was never any Seiſure into the King's hands, and by conſequence there could be no amoving, and therefore this Caſe is clearly out of this Statute. 2. At this day the Eſcheator before Office found cannot ſeiſe any Lands into the King's hands, but the Seiſure ought to be after the Offence found, and that appeareth by the Statute of *Weſtm.* 1. *cap.* 24. *Vide* 5 *E.* 6. *Br. Office* 55. and many other Books, and ſo is the common experience at this day; and therefore the Caſe at Bar is out of the ſaid Statute. And true it is, That after *Diem clauſit extremum*, or *Mandamus*, &c. awarded and found againſt the King, no new Writ of *Diem clauſit extremum*, or *Mandamus*, &c. ſhall iſſue forth, as it is holden in 4 *Hen.* 7. 15, & 16. 14 *Ed.* 4. 5. 15 *Ed.* 4. 11.

8 *Eliz.*

8 *Eliz. Dyer* 248, & 249. But in ſuch Caſe a Writ of *Melius inquirendum* ſhall iſſue forth, as is aforeſaid, and as the common courſe in the Court of Wards is, and alwaies hath been: and with this difference the Books are reconciled, and agree, *& ſic interpretare & concordare Leges Legibus eſt optimus interpretandi modus.* But in good diſcretion no *melius inquirendum* ſhall be awarded after Office found againſt the King, without ſight of ſome Record, or other pregnant matter for the King, for avoiding of vexation of the Subject. *Vide* 12 *Eliz. Dyer* 292. It is found by Office, upon a *Diem clauſit extremum*, that the Land was holden *de Domina Regina*, *ſed per quæ ſervitia Juratores ignorant*, whereupon a *Melius inquirendum* was awarded, by which the Tenure was found of a Subject, and all Points certainly found, by that the firſt Office is void in all, by the ſenſe of the Statute of
[b] 2 E. 6. *cap.* 8. And all theſe Reſolutions were affirmed for good Law, *Mich.* 8 *Jac.* by the ſaid Chief Juſtices and Chief Baron in *Stephen Garner's* Caſe in the Court of Wards, for Lands in *Furſeby* and *Steeping* in the County of *Lincoln*, as to the ſaid Writ of *Melius inquirendum* where it was found by the firſt Office, that the Lands were holden of *Euſtace Hart* Eſquire and his Wife, as in the right of his Wife of their Manor of *Steeping:* and upon the *Melius* it was found that the Lands were holden of Sir *Ed. Carr* Knight, as of his Manor of *Monkthorp*, and notwithſtanding this Variance of the Offices, yet it was reſolved as above, That no new Writ of *Melius* ſhould iſſue forth, for the reaſons and cauſes before alleged.

Paſch. 8 Jacobi *Regis.*

Tourſon's Caſe.

[170] WIlliam *Tourſon*, an Idiot from his birth, by force of a Remainder after the death of his Father, was jointly ſeiſed with his elder Brother for Term of their lives, the Leſſor did purchaſe the Eſtate of the elder Brother, and took the body of the Idiot, and all the Profits of the Lands, and afterwards *William Tourſon* was found Idiot from his birth by Inquiſition; The Queſtion was, Whether the King ſhall have the mean Profits of the moiety from the time of the firſt ſeiſin of the Idiot, or from the time of the Office: and it was reſolved, that the King ſhould not have the Profits, but after the Office: and yet to ſome intent the Office ſhall have relation from the time of the birth, *ſcil.* to avoid all mean acts done by the Idiot; and therewith agreeth *F. N. B.* 202. *c.* and 18 E. 3. *Scire fac.* 10 32 E. 3. *Scire fac.* 106. 50 *Aſſ. p.* 2. *Vide Beverley's* Caſe, in the Fourth Part of my Reports. But for the mean Profits, it ſhall not have relation, but from the time of the Office found; for the ſame appeareth of Record, that the King hath right to ſeiſe the Lands: As if the King's Tenant commit Felony, *Anno* 1 *Jac.* and afterwards *Anno* 3. he is attainted for the ſame Felony, and afterwards *Anno* 4. all is found by Office; Now this Office ſhall have relation to the time of the Felony to avoid all mean Alienations and Incumbrances; but for the mean Profits, it ſhall have relation to the time of the Attainder, for then the King's Title appeareth of Record; and therewith agreeth *Plow. Com.* 488. & 38 E. 3. 31, 32. by *Kirton. Vide* 29 *H.* 8. *Br. Charter of pardon* 52. and there is a difference where the King ſhall have the Cuſtody, by reaſon of a Seigniory, as in caſe of Wardſhip, there, the King after Office found ſhall have the mean Profits from the time of the death of the Anceſtor, for the King hath Wardſhip by reaſon of his Seignorie, and he loſeth his
[b] rent and ſervices in the mean time. But the King hath the Cuſtody of an Idiot not in reſpect of any Seignorie, but in the right of his royal protection, becauſe that his Subject is not able to govern himſelf, nor his Lands or Tenements which he hath; and this protection doth begin by the Office found. And the Statute of *Prærogativa Regis*, *cap.* 9. ſaith, *The King ſhall have ward of the Lands of natural Fools, taking the Profits*, &c. *to find them neceſſaries*, &c. by which it appeareth that the King ſhall take the Profits from the time that he is charged with the finding of the Idiot, and his Family neceſſaries, *&c.* and that is after the Office found; ſo that when the King ſeiſeth in the right of his regal protection, as in the Caſe at Bar, or *nomine diſtrictionis*, as in Caſe of Alienation of Land *in Capite* without licenſe, or of Marriage of his Widow without licenſe, there, after Office found, the King ſhall not have any of the mean Profits before the Office, as it is holden in 8 E. 4. 4. 40 *Aſſ. p.* 36. But when the King ſeiſeth by reaſon of a former right or title, there the King ſhall have the mean Profits from the time of his right or title firſt accrued, as 18 *Aſſ. p.* 18. from the time of the Condition broken, 41 E. 3. 21. from the time of the Alienation of his Tenant in Mortmain; and if the Lands are holden of others, from the time the title came to him, 46 E. 3. *Forfeiture* 18. upon the Statute of *Weſt.* 2. *cap.* 45. which giveth the *Contra formam Collationis* from the time of the Alienation; for by theſe Acts the King's title and right doth accrue. *Vide* 35 E. 3. *Vill.* 22. 40 *Aſſ. p.* 36. 9 E. 4. 5. And in the principal Caſe no Precedent can be found, that the King was anſwered the mean Profits before the Office found, but only after the Office, and ſo the *Quære* in *Stamford's Prærogativa Regis*, 34. is well reſolved.

Paſch.

Pasch. 8 Jacobi.

Sir *Gerrard Fleetwood's* Case.

SIr *William Fleetwood Anno* 35 *Eliz.* was possessed of a house and certain Lands in *Pynner* in the [171] parish of *Harrow* in the County of *Midd.* for certain years yet enduring, and *Anno* 36 *Eliz.* he became general Receiver of the Revenue of the Court of Wards, &c. and entred into 20 Obligations, each of them of 200*l.* with Condition to make a yearly perfect accompt before the 20 of *June*, &c. And afterwards upon several accompts in the years 36, 37, 38, & 39 *Eliz.* he became indebted to the Queen in great sums of money: and he being so indebted, by his Indenture, 10 *Feb.* 14. *Eliz.* in Consideration of 1100*l.* did bargain and sell the said Lease to *James Pemberton*, by force whereof he entred, and was possessed thereof: which mean Conveyance, and in consideration of 1300*l.* was sold to Sir *Gerrard Fleetwood.* The Question was, whether the said Lands be now extendable, or lyable to the Kings debt. And although it is at the choice of the Sheriff, either to extend or to sell a Lease so long as it remaineth in the Kings debtors hands, as appeareth in the books of 31 *Ass. p.* 6. 38 *Ass. p.* 4. 14. E. 3. 16. 7 *H.* 6. 2. &c. Yet it was Resolved, That the said sale of the term should bind the King, because the term was but a Chattel: and there was no covin in the Case, and a sale *bona fide* of Chattels is good after Judgement, but not after execution awarded, as appeareth in 2 *H.* 4. 14. *per Curiam*, 9 *H.* 6. 58. 11 *H.* 4. 7. and of the Free-hold or Inheritance which he hath at the time of the Judgement in case of a Common person, and from the time one becomes the Kings debtor, 5 *Eliz. Dyer* 224, 225. Sir *Will. Cavendishes* Case. And the case in 50 *Ass. p.* 4. was urged to the Contrary, where the Kings debtor took a Lease to him and his wife for years, and before execution the Husband died, execution was sued against the wife, for that was the act of the Husband, and he had power of the term at the time of his death, and the wife came to the same without valuable Consideration, and in a manner continued the Interest of her Husband. And *Coke* chief Justice said, That a Receiver or other Accomptant shall not be in worse case than a felon or traytor, who may after the Felony or Treason, and before conviction, sell his goods *bona fide*, be they chattels real or personal, for his maintainance. [b]

Pasch. 8 Jacobi.

Hale's Case.

BY Office after the death of Sir *James Hales*, it is found that he died seised of divers Lands in [172] the County of *Kent* in Fee-simple, whereof part was holden of the Queen by Knights service *in capite*, and that *Chenie Hales* was his son and heir, and within the age of 21 years, and in Ward to the Queen, and afterwards *Chenie Hales* did accomplish his full age, as appeareth by the computation of the first Office, and so he was in truth, and he tendred his livery, and was admitted to it, and within the usual time given him for the prosecution of the Livery, by deed indented, he bargained and sold part of the said lands to another in fee, and died also within the said time. And 2 Questions were moved; 1. If the Livery of the said *Chenie Hales* be lost by his death. 2. Whether the issues and profits of the Lands so aliened, after the tender of the Livery and death are to be answered to the King for the want of the Livery, and for what time. And it was agreed, That at the Common Law, the King shall have Primer seisin when the Ancestor dieth his heir within age, and was in Ward, and that the Statute of *Prærogativa Regis*, is but an affirmance of the Common Law; *Sc.* The King shall have Primer seisin after the death of such as hold of him in Chief of all Lands and Tenements, whereof, &c. of what age soever their heirs be, taking the issues, &c. until he hath taken homage of such heirs. For when he hath been in Ward, he upon his Livery shall pay but half a years profit; and when he is of full age a whole years profit: and that was the Common Law, for no such distinction is made by the said Act. And it appeareth by the Act, That Primer seisin is, that the King shall take the profits of the Lands until he hath taken homage; the same is as much as to say, until he hath sued Livery, for upon his Livery he doth his homage; so that the Kings Interest is subject to this (*until*) which is a limitation in Law; then when the heir at his full age tendreth his Livery, which includeth tendring of his homage, the same is all that the heir can doe, and therefore if no Laches be afterwards in the heir in the prosecution of his Livery, he shall have as much advantage by his tender, as if he had done his homage, and had had his Livery when he made his tender, and the convenient time which the Law giveth to the heir for to prosecute his Livery out of the Kings hands after tender, is 3. moneths, because many things are requisite and necessary with great care and diligence to be well and duly followed in the prosecution thereof, then when the heir dieth within the said time: so that the doing of his homage, and [k]

ſuing out of his Livery without any fault in him, is become impoſſible by the act of God, *impotentia in hoc caſu excuſat legem*, and in Judgement of Law, the Kings Intereſt by the ſaid Limitation is determined, as if the King had taken the homage of the heir when he made his Tender. And with this Reſolution agree all the preſidents of the Court, and therefore when the heir doth render his Livery, the Court of Wards for fear of death hath uſed to take collateral aſſurance for that which is due to the King. But if the heir after he cometh of full age, or if he be of full age at the time of the death of his Anceſtor, dyeth without any tender, the Livery is gone, as is aforeſaid. But the King ſhall have all the mean profits till the death, for default of tender; but if the tender be purſued, or if within the time it becometh impoſſible by the act of God, *ſc.* the death of the heir, there the King by Law is barred to have the mean profits, as is aforeſaid. *Vide Stamford prerog.* 12, 13, &c. And it was Reſolved that in this caſe the Kings intereſt was determined by the death of the heir, ſo that the bargainee might enter and occupy the land without any *Monſtrans de droit*, or *Amoveas manum*.

Paſch. 8 Jacobi *Regis.*

Sir *Henry Conſtable*'s Caſe.

[173] SIr *Henry Conſtable* Knight 15 *December* 5. *Jac.* died ſeiſed of an eſtate in Fee-ſimple of Lands holden of the King by knights ſervice in *capite*, *Henry Conſtable* his ſon and heir being within age, and made a knight in the life of his Father, 1 *July* 7. *Jac. Henry* the Son did accompliſh his age of 21 years. *Henry* the ſon did tender his Livery after the death of his Father before his age of 21 years, and continued the ſame; And the Queſtions were, 1. Whether the profits of the ſaid Lands ſhall be ſaved to the King by the ſaid tender and continuance. 2. Whether the King ſhall have the rates within the age of 21 years. And both Queſtions were clearly reſolved againſt the King, and that the King ſhall have Primer ſeiſin, as if he had been of 21 years at the time of the death of his Father, becauſe that the King being the Soveraign of knighthood, hath adjudged him of full age to do knights ſervice in the life of his Father, for the reaſons reported at large in Sir *Drue Druries* Caſe in the 6. part of my *Reports*. All which were affirmed for good Law by the 2. Chief Juſtices, and Chief Baron.

Trin. 8 Jacobi *Regis.*

Virgil Parker's Caſe.

[b] *Virgil Parker* ſeiſed of the Mannor of *Fuſhil* in fee holden of the King by knights ſervice, as of his Dutchy of *Lancaſter*, *Anno* 27 *Eliz.* made a Feoffment of one half of the ſaid Mannor to *John Coxwell* and others before marriage, to the uſe of himſelf for life, and afterwards to the uſe of *Mary Coney*, whom he then intended to marry, for life, for her Joynture, and afterwards to the uſe of himſelf in tayl, with divers Remainders over, and afterwards he married the ſaid *Mary*; after which marriage, *ſc.* 39 *Eliz.* the ſaid *Virgil* did leaſe the other half of the ſaid Mannor to the ſaid *John Coxwell* and *Edw. Long* for divers years for payment of his debts and legacies, and afterwards made his will, and by the ſame deviſed 1000 *l.* in portions to his younger children, and dyed his ſon and heir within age. And the Queſtion was, If the King ſhould have the 3. part out of the half of the Mannor in leaſe only, or out of the wives half and this half alſo. And it was Reſolved, That for as much as the advancement of his wife is as well within the Statute, as payment of his debts, and preferment of his Children, and for as much as the operation of the Statute principally taketh its effect by the death of the Kings Tenant; For this cauſe, although the eſtate of the wife hath the precedency, It was Reſolved, That the kings 3. part ſhould be taken equally, out of both halves, and not out of the half ſo leaſed only. And ſo was it Reſolved in *Mich.* 41, & 42 *Eliz.* betwixt *Remington* and *Savage*, and 23 *Eliz.* in *Thynns* caſe; and therewith agreeeth the Common Experience of the Court of Wards.

FINIS.

THE REPORTS OF Sir Edward Coke Kt, &c.

PART IX.

Paſch. 28 *Eliz.* which is entred, *Mich.* 25 & 26 *Eliz.* *In the Common Pleas, rot.* 144.

Dowman's Caſe.

THomas *Dowman* Eſquire, and *Eliz.* his wife, brought an Aſſiſe of *Novel Diſſ ſeiſin* before *John Clench*, and *Francis Rodes* Juſtices of Aſſiſe in the County of *York*, againſt *Ed. Vavaſor*, *George Vavaſor*, and others; and complained themſelves to be diſſeiſed of his freehold in *Spaldington*, *Willitoft*, and *Southcave* in the ſaid County, *&c.* and made his plaint of 6 houſes; 300 acres of land, 100 acres of meadow, and 200 acres of paſture; And all but the ſaid *Ed. Vavaſor* pleaded *Nul tort nul diſſeiſin*; And the ſaid *Edward* pleaded, That one *Peter Vavaſor* Eſquire was ſeiſed of the Tenements aforeſaid put in view, and now in plaint in fee; Againſt whom *Andrew Windſor* Eſquire, *William Vavaſor*, and others 2 *Jan.* 15 *Eliz.* brought a Writ of Entrie in the Poſt of the Tenements aforeſaid, againſt the ſaid *Peter Vavaſor*, retornable *Octob. Hill.* at which day a common recovery was had againſt him with ſingle voucher, and executed by *habere facias ſeiſinam*, 4 *Feb.* &c. *quæ quidem temperatio in forma præd. habebat.* and was to the uſe of the ſaid *Peter* for his life, without impeachment of waſte, and afterwards to the uſe of his eldeſt ſon in tayl, and ſo to the 9th. ſon in ſeigniority in tayl, and for want of ſuch iſſue, to the ſaid *Ed. Vavaſor*, brother of the ſaid *Peter* for his life, without impeachment of waſte, and afterwards to the uſe of his eldeſt ſon, and to the heir males of his body, and ſo to the 9. ſon in the ſeigniority of the like eſtate; and for want of ſuch iſſue, to the uſe of *G. Vavaſor*, *Ra. Vavaſor*, *Mar. Vavaſor*, *Rob. Vavaſor*, *Tho. Vavaſor*, and *Rich. Vavaſor*, brothers of the ſaid *Peter*, to every of them the like eſtate, with like remainders to their 4th. iſſue male, in their ſeniority in tayl, and afterwards to the uſe of the heirs males of *Peter Vavaſor* Knight, lawfully begotten, and afterwards to the right heirs of the ſaid *Rich. Vavaſor*, and alleged the execution of the uſes by force of the Statute of 27 *H.* 8. and the death of the ſaid *Peter Vavaſor* without iſſue: after whoſe death he entred in his remainder, and gave colour to the Plaintif. To which the Plantif did reply and confeſs the recovery, as the ſaid *Ed.* hath alleged; but further ſaid, That the ſaid Recovery was to the uſe of the ſaid *Peter* and his heirs, and that after the death of *Peter* the tenements did deſcend to the ſaid *Elizabeth* wife of the ſaid *Tho. Dowman*, as ſiſter and heir of the ſaid *Peter*, without that the ſaid Recovery of the Tenements aforeſaid, &c. in form aforeſaid had, was to the uſe in the bar of the ſaid *Ed.* ſpecified, *prout, &c.* And thereupon iſſue was Joyned; And it was found by the Recognitors of the Aſſiſe, That the ſaid *Peter* being ſeiſed in fee, did ſuffer the ſaid recovery of the Tenements aforeſaid, as the ſaid *Ed.* had alleged. And further the Recognitors of the ſaid Aſſiſe ſaid, That a certain Indenture was made between the ſaid *Peter Vavaſor*, and the aforeſaid *Andrew Windſor*, and others the recoverers of the other part, the tenor whereof doth follow *in hæc verba*, which Indenture beareth date the firſt day of *Feb.* in the 15th. year of Queen *Eliz.* and witneſſeth, That it is co- [b] [8]

venanted, concluded, condeſcended, decreed and agreed between the ſaid parties, and either of the ſaid parties for him and his and their heirs doth conclude, condeſcend, declare and agree by theſe parties, to and with the other. That is to ſay, Whereas the ſaid *Andrew, &c.* have this preſent Term of St. *Hill.* recovered to them and their heirs by writ of *Entrie ſur diſſeiſin in le poſt.* againſt the ſaid *Peter Vavaſor*, according to the uſual order and form of Common Recoveries heretofore uſed, The Manner of *Spaldington*, &c. That the intent and true meaning of all the ſaid parties now is, and at the time of the ſaid recovery had and ſuffered was, That the ſaid Recoverers and their heirs immediately from and after the recovery had and executed ſhould and ſhall ſtand and be ſeiſed of the ſaid Mannor, &c. to the only uſes and intents hereafter by theſe preſents ſet forth and declared, and to no other uſes, intents or purpoſes, That is to ſay; and declared and expreſſed the ſame uſes mentioned and alleged in the bar of the ſaid *Edward Vavaſor*, without any vari ance. And further the ſaid Recognitors of Aſſize found, That the tenements now put in view were parcel of the ſaid Mannor of *Spaldington.* But whether the Indenture aforeſaid, after the recovery aforeſaid by the
[b] ſaid *Peter Vavaſor*, in form aforeſaid made and had, bearing date the firſt day of *Feb.* and firſt delivered the 15th. day of *Feb.* in the 15 year aforeſaid, after the recovery aforeſaid *exiſten.* to the uſes therein ſpecified, be good and ſufficient in Law to lead and declare the uſes of the ſaid Recovery of the ſaid Tenements put in view of the Recognitors, and ſpecified in the plaint or not, the Jurors know not, and therefore pray the advice of the Court; And if it ſhall ſeem to the Court, That the ſaid Indenture was good and ſufficient, Then they found that the ſaid recovery of the Tenements aforeſaid was to the uſes in the barr of the ſaid *Ed. Vavaſor*, as the ſaid *Ed.* hath alleged; and that the other Defendants have done no wrong nor diſſeiſin; and if the ſaid Indenture be not ſufficient and good in Law, then they found againſt all the Defendants. And for difficulty the ſaid Juſtices of Aſſize did adjorn the parties and record before the Juſtices of the Common Pleas, *de audiendo & recepiend. quod eiſdem Juſticiar. Dominæ Reginæ de prad. Banco adtunc & ibid. conſiderand. videbitur in hac parte.* And in this Caſe 2. Queſtions were moved and argued by the Serjeants, at the Barr.

1. If the ſaid Indenture made after the ſaid Recovery, was ſufficient in Law to direct and declare the uſes of the ſaid precedent Recovery?

2. If upon a ſpecial point in iſſue upon an *abſque hoc*, the Recognitors of the Aſſiſe may give a ſpecial verdict.

And as to the firſt it was argued, That the ſaid Indenture was not ſufficient to declare and direct the uſes of the ſaid precedent Recovery, for 5. reaſons and cauſes. 1. When a recovery is ſuffered (the ſame being without Conſideration) preſently after the Recovery the Law doth adjudge the ſame to be to the uſe of him who ſuffereth the Recovery and his heirs. Then when the uſe in the caſe at barr was veſted in *Peter Vavaſor* preſently after the Recovery executed, before the ſaid Indentures made, this uſe ſo veſted cannot be deveſted by any Declaration or agreement ſubſequent, and the ſaid Indenture ſhall not conclude the heir in this caſe, becauſe the ſame being ſubſequent, cannot by the Law deveſt that which was preſently veſted after the recovery had. And to this purpoſe they cited the books in 39 *Aſſ. p.* 3. & 46 *E.* 5. *Aſſiſe* 357. Where an Infant brought an Aſſiſe againſt *F.* of certain land, the Defendant ſaid that *I.* Unckle of the Infant, whoſe heir he is, held the ſaid land of him by homage Eſcuage, and 4 weeks rent, and died ſeiſed: And becauſe the Plaintif was within age, he ſeiſed the Tenements for wardſhip. To which the Plaintif pleaded, that the ſaid *I.* held in ſocage, &c. To which the ſaid Defendant ſaid, you ſhall not be admitted to that plea; for the ſaid *I.* your Unckle in a ſute betwixt us, did acknowledge to hold the ſame Land of us by the
[9] like ſervices by deed indented; and demanded Judgement, if he ſhall be received to ſay the contrary, and ſhewed forth the deed. And the caſe for difficulty was adjorned into this Court, and there it was adjudged that the ſaid acknowledgement or declaration by deed indented ſhould not conclude the heir of *I.* and the reaſon of *Thorp* chief Juſtice, who gave the Judgement was, becauſe that by Deed Indenture, other ſervices, could not be granted, which were not due before: So in this caſe at Bar the Deed indented ſubſequent ſhall not conclude the heir of *Peter Vavaſor*, becauſe it cannot deveſt the uſe, which was by operation of Law preſently veſted after the Recovery: And they alſo cited 35 *H.* 6. 33. *John Crooks* caſe, where the like acknowledgement by deed indented was made, &c. and eſtoppel pleaded, and it was adjudged, that the Declaration by Deed indented, for the certainty of the ſervices ſhould not bind the heir of the tenant, who was party to the ſaid deed indented.

Secondly, It was objected, That every Declaration of uſes upon recoveries, fine, &c. of Lands, Tenements, and Hereditaments ought to be certain (otherwiſe there ſhall be no certainty of inheritances) and this certainty ought to be chiefly in three things, *ſc.* in perſons to whom; in Lands of which, and in eſtates by which uſes ſhall be limited and declared; and if there wanteth certainty in any of them, the Declaration is not ſufficient. But here in the caſe at the Bar, there was not any of theſe certainties, when the recovery was ſuffered; and therefore the Declaration ſubſequent is inſufficient, *Oportet quod certæ perſonæ certæ terræ*, &c. *Et certi ſtatus comprehendantur in declaratione uſuum.*

The third objection was, That the limitation and declaration of the uſes ought to be compleat of it ſelf, without any reference to Indentures or writings to be after made; for then it is but an imperfect communication, and no compleat declaration: And that it was but a communication they alleged 3 reaſons. 1. The uſes were many, and of much variety of eſtates. 2. That the ſame did concern the eſtabliſhment of his inheritance, of a great yearly value in his name of family, and therefore the intent of the parties was not to leave it to the ſliding and ſlipery memory of men, which ſhould be loſt in a ſhort time, and namely when *Elizabeth* (one of the Plaintifs) was his Siſter and heir, before whom he ſhould prefer others of his name and blood

3. Diverſe.

3. Diverſe of the ſaid uſes and eſtates could not be limited with ſuch qualities and privileges by word without deed: as the uſe limited to the ſaid *Peter Vavaſor* (and to diverſe others) for life, without impeachment of waſte, which privilege to be diſpuniſhable of waſte none can have by word without deed; And for this cauſe all the words which paſſed betwixt the parties before, or at the time of the Recovery, were referred to Indentures to be made thereof; and ſo but a communication, and no compleat agreement: *Quia id perfectum eſt quod ex omnibus ſuis partibus conſtat, & nihil perfectum eſt dum aliquid reſtat agendum.*

The fourth Objection was, That the ſaid Indenture was but directory, and declaratory of the uſes of the Recovery, and was not of any force to raiſe or create any uſe: Then when the iſſue was, whether the ſaid recovery was ſuffered to the ſaid uſes mentioned in the Bar, The Indenture ſubſequent might peradventure be a good evidence to perſwade the Recognitors of the Aſſiſe, that the ſaid Recovery was ſuffered to the ſaid uſes; but of it ſelf being ſubſequent to the Recovery, it is not ſufficient in Law to direct the uſes of the precedent recovery, if not that by the agreement of the parties the uſes were ſo declared before, or at the time of the Recovery, and then the Declaration precedent, and not that which was ſubſequent, is the Declaration which bindeth in Law, and the ſubſequent is but evidence to prove the precedent: And therefore if the ſaid *Peter Vavaſor* had pleaded the ſaid Recovery, and pleaded alſo the Indenture ſubſequent to the effect as the Recognitors have found it, it ſhould be altogether inſufficient, for the Indenture ſubſequent is but the report and evidence of a former thing, *ſc.* that the true meaning of all the ſaid parties, *&c.* at the time of the ſaid recovery, *&c.* was, that the ſaid Recoverers, *&c.* and evidence ſhall never be pleaded, becauſe it intendeth to prove matter in fact; and therefore the matter in fact ſhall be pleaded; and if the ſame be denied, the evidence is to be given to the Jury, and not to the Court. And therefore in *9 E. 3. 5.* and *6. John Darcy* brought a *Quare Impedit* againſt the Biſhop of *Durham*, of a diſturbance to preſent to the Church of *Simondisbury*, and counted that King E. 2. was ſeiſed of the Mannor of *Wrecks* in *Tindale* to which the advowſon is appendant, and preſented, &c. and made the deſcent of the Mannor to the King, that now is, who gave the Mannor, with the fees and advowſon to the Plaintif and his heirs, &c. To which the Demandant ſaid, That the Advowſon is not appendant to the Mannor, &c. To which the Plaintif replyed, that the Deſendant ſhould not have this averment. For we ſay, That one *Edward*, late King of *Scotland* was ſeiſed of the Mannor of *Wrecks*, and of the advowſon, and preſented to the Church as appendant, and ſhewed how afterwards the Mannor came to the hands of King *Edw.* the Grandfather by forfeiture of *John Baliol*, and ſhewed how afterwards the Kings preſented as appendant to the Mannor, for which the Plaintif did not conceive that againſt ſo many preſentments, as appendants that the Defendants ſhould be received to plead, that the Advowſon is not appendant. And Sir *William Herle* who gave the Rule, ſaid, That the preſentments of which you have ſpoken, are but evidence to the Jury that the Advowſon is appendent, and evidence ſhall not ouſte the Plaintif of his Plea.

The 5 and laſt Objection was, That if theſe Declarations ſubſequent ſhall be ſufficient in Law to declare the uſes of a precedent recovery, for as much as it ſhall be reſtrained to no certain time, and therefore may be made many years after; by that means, eſtates, leaſes and intereſts in and out of lands veſted in the mean time ſhall be defeated, which ſhall be miſchievous and inconvenient. And the Caſe of *Arthur Baſſet*, which you may ſee reported by the Lord *Dyer*, *3 & 4 Phil. & Mar. 136.* That Indentures made 4 years after a Recovery, were holden ſufficient to declare the uſes of a precedent recovery, was agreed to be good Law; For in the ſaid Caſe of *Baſſet* the Recovery was ſuffered in *16 H. 7.* and the Indentures made *20 H. 7.* (which was long before the Statute of transferring of uſes in poſſeſſion) at which time an uſe being but a thing in confidence might be directed and altered, according to the intent of the parties. And after the caſe had been often argued by the Serjants at the Barr; the caſe was argued by the Juſtices at the Bench. And it was unanimouſly reſolved by all the Juſtices of the Bench, That the ſaid Indenture ſubſequent was ſufficient to direct and declare the uſes of the precedent recovery againſt the ſaid *Peter Vavaſor* and his heirs, for ſo it is contained and declared by deed indented, that the true intent and meaning of all the parties now is, and at the time of the ſaid Recovery was, That the ſaid recoverers, &c. ſhould ſtand ſeiſed, &c. to the only uſes and intents by theſe preſents ſet forth and declared, and to no other uſe, intent, or purpoſe. Againſt which expreſs affirmation and declaration by deed indented, the ſaid *Peter* or his heirs ſhall never be admitted or received to ſay, that no ſuch uſes were declared at the time of the ſaid recovery, but that the ſaid recovery, notwithſtanding the ſaid ſubſequent declaration ſhall be conſtrued and adjudged by force of an uſe implyed by operation of Law, to be to the uſe of the ſaid *Peter* and his heirs. But this declaration by deed indented hath this operation in Law againſt the ſaid *Peter* and his heirs, that there was a preſent, certain, and compleat agreement and declaration of the ſaid uſes at the time of the ſaid recovery, for ſo much the Indenture doth expreſly purport. And therefore all that which hath been objected, That the Declaration ought to be precedent, or preſent and certain and compleat, and not as a communication with reference to matter to be after put in writing was agreed. But now this deed indented in Judgment of Law, doth import and witneſs againſt the ſaid *Peter Vavaſor* and his heirs, foraſmuch as nothing appeareth to the contrary, that there was certain and compleat declaration of uſes at the time of the ſaid Recovery, and the ſame ſtands upon pregnant and apparent reaſon, for in as much as *Peter* and his heirs are only to take advantage for want of declaration of uſes reaſon, wills, that this declaration of the ſaid *Peter* by his deed indented ſtand againſt him and his heirs: And this caſe is not like to the ſaid caſes in *39 Aſſ.* and *46 E. 3.* cited before; for in ſuch caſe if the lands were holden before in ſocage, the tenant could not grant or create Knights ſervice,

[b] [10] [b]

which was not due before; and in the Record the Infant was not made heir to *I.* But here wi
out queſtion *Peter Vavaſor* might, at the time of the recovery limit what uſes he would, and E
is heir to *Peter*, And the reaſons of the book in 35 *H.* 6, are, 1. The heir in ſuch caſe was
bounden, becauſe the words of the Charter were but by way of recital. 2. The words of the De
indented were all the words of the Lord, and not of the Tenant, the heir of whom ſhould be boun
and that the brother of the half blood was not heir to the Tenant, who was party to the deed. B
in our caſe, 1. It is not by way of recital. 2. It is the acknowledgement and Declaration of the T
nant of the Land it ſelf: and the ſaid *Elizabeth* one of the Plaintifs, as heir to *Peter Vavaſor*, *Vi*
10. E. 3. 24. *Robert de Vales* Caſe. And as to the objection which was made, That the ſaid priv
lege to be without impeachment of waſte cannot be without deed, &c. It was anſwered and reſo
ved, That if it were admitted that a deed in this caſe ſhould be requiſite; yet without Queſtion a
the eſtates limited ſhall be good; although it were admitted, that the clauſe concerning the ſai
privilege ſhould be void. And therefore if a man infeof one by words, to the uſe of *A.* for lif
without impeachment of waſte, with divers remainders over, admit that the clauſe without im
peachment of waſte in ſuch caſe ſhall be void; yet the eſtate for life, with the remainder over is we
executed. And a difference was taken between Indentures precedent, which ſhall direct the uſe
of a ſubſequent Recovery, and Indentures ſubſequent. For when precedent Indentures are made
and afterwards a recovery followeth accordingly, there no averment can be taken by word, that th
recovery was to other uſes than are declared in the Indenture; for nothing veſts in any till the Re-
covery had, and in ſuch caſe a declaration by word ſhall not controul the declaration by deed. But
[11] againſt Indentures ſubſequent, declaring the uſes of a recovery precedent, there averment may be,
that other uſes than in ſuch Indentures are declared, were expreſſed and limited before and at the
time of the Recovery, becauſe that by ſuch limitation, the uſe and eſtate was veſted according
to ſuch limitation, which could not be deveſted by any declaration by Indenture ſubſequent. It
was alſo reſolved (as it appeareth before) that the ſaid Declaration ſubſequent by Indenture ſtood
good againſt the ſaid *Peter* and his heirs; for as much as appeareth, there was no other declaration
of any other uſe. But if after the recovery had, *Peter* had ſold, or given, or charged the lands to
others, which ſhould be defeated or annulled by the declaration ſubſequent, there ſuch ſubſe-
quent declaration of it ſelf ſhall not overthrow the mean eſtates, charges, or intereſts, if not that
it is otherwiſe proved, that by the certain compleat agreement of the parties, the Recovery
was had to ſuch uſes; for by judgement of Law ſuch declaration ſubſequent ſhall be ſufficient,
when no other certain or compleat Declaration, or limitation of any other uſe, either at the time,
or before the recovery be made, or any eſtate or intereſt mean be veſted. And as when a Com-
mon recovery is ſuffered without conſideration, the ſame in Judgement of Law, without any
proof, is to the uſe of him who ſuffereth the Recovery, ſo when ſuch ſubſequent declaration (as
in the caſe at Bar) is made, it ſhall be ſufficient of it ſelf, without other proof of declaration of the
ſame uſes, either before, or at the time of the recovery, if no other limitation of uſe were made,
nor any mean eſtate or intereſt of any other thereby defeated. And becauſe the intention of the
parties is the direction of uſes; In the argument of this caſe many caſes were put; where a ſub-
ſequent Act ſhall declare the intent of a general Act precedent: As if tenant in tayl hath iſſue 2
ſons, and dieth, and the eldeſt entreth into the whole, and afterwards maketh a feofment there-
of with warranty, the ſame is a lineal warranty for one moity, and a collateral warranty for
the other; for the ſubſequent feofment doth declare the intention of the general entry, that it was
only for himſelf, or otherwiſe it ſhould be a warranty which commenceth by diſſeiſin for one moy-
ty, and therewith agreeth *Lit. Cap. Gar.* 160. So if the Lord cometh upon the Tenancy, and ta-
keth and driveth away an Oxe, and impoundeth it, the taking ſhall be adjudged for a diſtreſs;
but if he killeth the Oxe, this ſubſequent Act ſhall declare his intent *ab initio*, and ſhall make
him a Treſpaſſer; and therewith agreeth 12 E. 4. 8. *b.* 28 *H.* 6. 5. &c. And as to the 4th. reaſon
or Objection, which was made, that the ſame was but matter of evidence tending to prove to
which uſes the recovery was had, To the ſame it hath been anſwered before, that in Judgement of
Law it is ſufficient to declare the uſe when nothing appears to the contrary, as in the caſe of Inden-
tures precedent, or when a recovery is ſuffered without any conſideration, and without limitation
of any uſe. But as to the point of pleading, it was reſolved, that as well in the caſe at Bar, as
in the caſe of an Indenture precedent, and recovery ſuffered without conſideration, the uſual form
of pleading ought not to be altered, *ſc.* to averr that the Recovery was ſuffered to ſuch uſes; and
upon the evidence the Court ought to direct the Jury according to the Law, or that they find the
truth of the caſe, as in the caſe at barr they do. And the Juſtices in this caſe cited a former reſo-
lution in the point in the Court of Wards, between the ſame parties: *Hill.* 21 *Eliz.* the whole ſpe-
cial matter before being found by office, and tranſcribed into the ſame Court, where by Sir *Chri-
ſtopher Wray*, and Sir *James Dyer* Aſſiſtants to the ſaid Court, and by the advice alſo of the other
Juſtices, it was reſolved, That the ſaid Indentures ſubſequent were ſufficient to declare the uſes
of the recovery precedent, becauſe that nothing appeareth to the contrary. And as to the 5th. or
laſt reaſon or Objection which was made, it was anſwered and reſolved, That there cannot any
miſchief or inconveniency follow upon this conſtruction, as was pretended at the Barr, but great
inconveniency would follow on the other ſide; for the Inheritances of many Subjects in *England*
do depend upon ſuch ſubſequent declarations, or at leaſt upon Indentures which in truth were de-
livered after the recoveries ſuffered, or fines levied. And theſe Reſolutions ſtand with the Commo
opinion of learned men in the Laws, and common experience, and the alteration of ſuch opinion
which concern aſſurances and inheritances ſhall be very dangerous.

As to the ſecond point, it was Objected, That the Jurors cannot give their verdict at large, but in a writ of Aſſiſe, Treſpaſſe, or the like, where the general iſſue is pleaded, and not when iſſue is joyned upon a matter collateral to the point of the general iſſue; for there the Jury ought to find the iſſue preciſely, without giving their verdict at large. And they ſtrove to prove the ſame by reaſon and authorities: For they ſay that at the Common Law, before the Statute of *Weſt.* 2. *cap.* 30. The Jurors in every Action ought to have given their verdict directly and preciſely, either in the affirmative, or the negative, according to the iſſue joyned, and not at large, and the ſame is proved by the ſaid Statute, *Item, It is ordained, That the Juſtices aſſigned to take Aſſizes ſhall not compell the Jurors to ſay preciſely, whether it be diſſeiſin or not, ſo that they do ſhew the truth of the deed, and require aid of the Juſtices.* Which Acts as to actions is taken by equity, but only to ſuch actions which are general, and have general iſſues, as Aſſize, Treſpaſs, and the like, and not [12] to actions which comprehend certainty, although the general iſſue be pleaded. Alſo the ſame extendeth to general actions, where the general iſſue is pleaded, and not when iſſue is joyned upon a ſole and certain point out of the general iſſue; and therefore the Statute ſaith, *Do not compell the Jurors to ſay preciſely If it be diſſeiſin or not.* And that is when *Nul tort nul diſſeiſin* is pleaded, which is the general iſſue in an Aſſiſe. And the reaſon thereof was, becauſe upon the general iſſues in writs, which comprehend no certainty, many and doubtful matters may be given in evidence; So that as the Plaintif and Defendant in ſuch caſe are at liberty upon the general iſſue, to give what evidence they will; ſo are the Jurors at large, when the matter is intricate and doubtful in Law, to find the ſpecial matters, *& petere auxilium Juſticiariorum.* But when either the writ is certain, or when the iſſue is joyned only upon a point in certain, there they cannot be ſo inveigled and perplexed, as upon a general writ and general iſſue. And that is the reaſon that the Statute ſhall be taken by Equity, as to actions which are in equal miſchief, but not as to iſſues which differ in cauſe and reaſon: And therefore in 7 *H.* 4. 11. *I. B.* brought an action of Treſpaſs againſt *I. de R.* of breaking his cloſe, and digging his Land, *ſc.* 3. acres of meadow, and of carrying away his graſs: the Defendant pleaded that it was his freehold, upon which iſſue was joyned, and the Jury found a ſpecial verdict, *ſc.* That the Plaintifs Anceſtors was ſeiſed of 5 acres of lands in another County in fee, and the Anceſtor of the Defendant of the ſaid 3 acres in fee; and an exchange was by word betwixt them, without deed, *ſc.* That the Plaintifs Anceſtor ſhould have the 3 acres of Meadow in fee, and the Defendants Anceſtor the ſaid 5 acres of lands, by force whereof each of them did enter, and continued it all their life times, and died ſeiſed, after whoſe death the Plaintif entred into both, upon whom the Defendant entred in the Meadow, and was ſeiſed 4 weeks before the Treſpaſſe, and digged, &c. And prayed the opinion of the Juſtices by the Statute of *Weſt.* 2. *cap.* 30. *Hankford*, you are not now in an Aſſize, for your charge is but to ſay, who was Tenant of the Freehold the time of the treſpaſſe ſuppoſed, ſo that you have nothing to do whether the entry be congeable or not; for which cauſe the Jury found for the Deſendant, and upon that Judgment was given. By which it appeareth, that upon the ſaid collateral iſſue of his Freehold a ſpecial verdict could not be given: And that this caſe was out of the Act of *Weſt.* 2. *cap.* 30. which Act was cited in the ſame book. And in an Attaint in 8 E. 4. 29. [*b*] The Jurors asked if they might give their verdict at large, as in an Aſſiſe, and the Juſtices ſaid that they could not, 9 *H.* 7. 5. *Brian* chief Juſtice held, That in Reſcous, which is a writ conceived upon a ſpecial matter, *ſc.* the tenure, diſtreſs, and reſcous, the verdict ſhall not be given at large, although the general iſſue be pleaded. So in debt, which always doth comprehend certainty, although that *rien luy doit* be pleaded, the verdict ſhall not be given at large, becauſe that theſe and the like writs, which comprehend certainty, are out of the miſchief of the ſaid Statute. But the Statute doth extend to Treſpaſſe, becauſe the writ is as general as the Aſſiſe, becauſe the plaint and Count in them are general; for which cauſe the verdict ſhall be given at large, and that is by the Statute, but in no ſpecial caſe where the matter is ſpecially counted, no verdict at large. And 9 *H.* 7 19. *Fairfax* holdeth, That in no caſe where the iſſue is joyned upon a certain point, the verdict ſhall be at large, but in Treſpaſſe, which is a general Writ, if the Defendant pleadeth, *Not guilty*, the Jurors may give their verdict at large; And ſo in an Aſſize upon *Nul tort nul diſſeiſin*, the Jury may give their verdict at large. So in 23 *H.* 8. *br. verdict* 85. The Court of Common Pleas cannot ſuffer verdicts at large in a writ of Entrie in the nature of an Aſſize, becauſe it is a Precipe, and comprehendeth certainty. And in the *Reports* of the Lord *Dyer*, now newly printed, *Paſc.* 11. *Eliz.* 283, 284. In an Aſſize betwixt *Butler* and *Crouche* for lands in the County of *Somerſet*, upon an *abſque hoc*, iſſue was taken upon a preſcription, upon which the Jury gave a ſpecial verdict, and it was reſolved by all the Judges of the Common Pleas in my Chamber, as the Lord *Dyer* reporteth, that upon this ſpecial iſſue by an *Abſque hoc*, and not a general iſſue, a preciſe verdict ought to be given of the one part or the other; which was a reſolution in the point, as it was ſtrongly urged, and doth over-rule the point now in queſtion. But it was reſolved by Sir *Ed. Anderſon* chief Juſtice, and all the Judges of the Bench, That the ſpecial verdict in the caſe at Barr was well found; They held, That in all Pleas, as well of the Crown as of common pleas, *ſc.* Actions real, perſonal and mixt, and upon all iſſues joyned, either between the King and the party, or between party and party, The Jury may find the ſpecial matter, which is pertinent, and tendeth only to the iſſue joyned, upon which being doubtful to them in Law, they may pray the opinion of the Court. And that they may do by the Common Law, which hath ordained, That matters of fact ſhall be tryed by Jurors, and matters in Law by the Judges: and as *ad queſtionem facti non reſpondenet Judices, ita ad quæſtionem Juris non reſpondent Juratores*; but their duty is [13] to find the truth of the fact, and to referr the diſcuſſion of the Law to the Juſtices, and therefore their finding is called *Veredictum, quaſi dictum veritatis*, the telling of truth, and the cenſure of the Judges

Judges is called *Judicium*, *quaſi Juris dictum.* 1. *Ipſa viva vox Juris*, The ſaying of the Law, and the wiſdom of the Law was to referr things to perſons in which they had knowledge, and experience, and were expert, according to the ancient rule, *Quod quiſque norit in hoc ſe exerceat.* And therefore the Law will not compel neither the Jurors, who have not knowledge in the Law, to take upon them the knowledge of the points of the Law, either in caſes which concern life or member, or inheritance, freehold, goods, or chattels, but to leave them to the conſideration of the Judges; nor the Juſtices of Aſſiſe, nor any other Judges, be it in Pleas of the Crown, or Common Pleas, to give their opinions of queſtions and doubts in Law upon the ſudden; but in ſuch caſe to have the truth of the caſe found, and upon conference and conſideration to adjudge according to the Law in ſuch caſes. And therefore it was reſolved, That the ſaid Act of *Weſt.* 2. *cap.* 30. was but an affirmance of the Common Law; and the ſame appeareth by the Statute it ſelf, and by authorities in Law in all ſucceſſions of ages. And as to the Statute, the precedent and ſubſequent clauſes were conſidered. The precedent is, *All Juſtices of the Benches from henceforth ſhall have in their Circuits Clarks to enroll all pleas pleaded before them, like as they have uſed to have in times paſt*; which clauſe appeareth to be in affirmance of the Common Law. The ſubſequent is, *And from henceforth the Juſtices ſhall not put in Aſſiſes or Juries, any other then were ſummoned to the ſame at firſt*; for at the common Law they ought to come in by return of the Sheriff. And ſo the middle clauſe touching the point in queſtion, *That the Juſtices ſhall not compel Jurors to ſay preciſely*, &c. was but a Declaration of the Common Law, as well for the Relief of the Jurors, which upon their oath ſhall not be compelled to find at their peril things doubtful to them in Law, but alſo for a good Caveat to Juſtices of Aſſiſe and othes Judges, that they do not upon the ſudden overrule Queſtions in Law, for every Judge ought in giving of his Judgement in doubtful caſes avoid 2. things, *ſcil. Præcipitationem quia ad pœnitentiam properat citò qui judicat: & moroſam cunctationem*, *ſc.* when the Law is determined, either to make a Queſtion in Law where none is, or to delay the party, which is in effect a denying of Juſtice. And for the better direction of Judges in ſuch caſes, and for the advancement of Common right it is enacted by the next chapter following, *ſc.* 31. When any one ſhall plead before any Juſtices; and doth put in an Exception, *ſc.* a matter which he ſuppoſeth will ſerve him in Law, and requireth that the Juſtices doe allow it, which if they will not allow, and he who ſhall put in the Exception doth write the Exception and requireth the Juſtices to put their ſeal in witneſs thereof, the Juſtices ſhall put their ſeals thereunto, &c. And that was to prevent precipitation of Judges in over-ruling (*ex improviſo*) Queſtions in Law: For it is a good Rule in the 9. Chapter of *Judges*, Conſider, conſult, and then give Judgement. See for the Bill of Exception, 9 *Aſſ. p.* 8. 11 *H.* 4. 52. 65. 92. 21 E. 4. 11. *Regiſter* 182. *Book Entries, tit. Error in the diviſion of Exception.*

For authorities in Law touching the 2. point of the caſe now in Queſtion, and 1. of ſpecial Verdicts given in Criminal Cauſes, or in Caſe of Indictment at the Kings ſute; or an Appeal at the ſute of the party, 3 E. 3. *Itinere North. Coron.* 284. *S.* was indicted of the death of *N.* and arreigned upon it, and pleaded Not guilty, and the Jury gave a ſpecial Verdict to this effect, That a Contention was betwixt them, whereupon *N.* now dead ſtroke *S.* with a ſtaff on the head, ſo that he fell to the ground, and the ſaid *S.* preſently when he aroſe fled as far as he could, and the ſaid *N.* followed him with the ſaid Staff to kill him if he could, and drave him to a wall betwixt 2. houſes, beyond which he could not by any means go; and when he perceived the ſaid *N.* would have killed him with the ſaid ſtaff, and that he could not avoid his own death, unleſs he defended himſelf, he took a poll-axe, and ſtruck the ſaid *N.* upon the head, ſo that he preſently died thereof, &c. Whereupon the Jury ſaid, that the ſaid *S.* did kill the ſaid *N.* in his own defence, and not by any felony or before-thought malice, &c. And this verdict finding the ſpecial matter, was received, and he had his pardon of courſe; and therewith agreeth 3 E. 3. *Coron.* 286. 43 *Aſſ. p.* 31. 26 *H.* 8. 5. 44 E. 3. 44. In an Appeal of death againſt *William Halbener*, he pleaded Not guilty; and the Jury found a ſpecial Verdict at large, *ſc.* That the dead ſtroke the Defendant on the neck, ſo that he fell to the ground, and when the Defendant was upon the ground, the the dead drew forth his knife to have killed the Defendant; and the Defendant lying upon the ground drew forth his knife, and the dead was ſo haſty to have killed the Defendant, that he fell upon the Defendants knife, and ſo killed himſelf. And it was adjudged, That for as much as the dead killed himſelf in this manner, it was adjudged upon this ſpecial verdict, that the Defendant was [14] not guilty, and his goods not forfeited. *Vide Fitz. Coron.* 94. and therewith agreeth 44 *Aſſ. p.* 17. 45 E. 3. 20. In a *Formedon* the Demandant counted of a gift made to *I. de C.* in Frankmariage with *Johan* Siſter of the Donor, the Defendant pleaded, That the Tenements were given in Feeſimple, and traverſed, that he gave them not as the Writ did ſuppoſe. And afterwards by *Niſi prius* before *Wichingham* and *Chl're* a Deed was ſhewed in Evidence that the Donor gave to *I. de C. in liberum maritagium tenementa præd. cum Johanne ſorore ſua*, To have and to hold *tenementa præd. præd. Johanni & Johannæ, & hæredibus ſuis imperpetuum*; and becauſe that ſome words contained in the ſaid Deed are *in liberum maritagium*, and ſome are *in feodo ſimplici* the Jurors cannot judge the truth, and pray the opinion of the Juſtices thereupon. And upon this ſpecial Verdict found at length, Judgement was given againſt the Demandant, becauſe a Feeſimple, and not an eſtate in Franckmariage doth paſs by the Deed. By which Judgement it appeareth, That in a Writ which comprehendeth certainty (as in a *Formedon*) a ſpecial Verdict may be given. *Vide* 16 E. 3. *Verdict* 21. 42 E. 3. in *Dower*, 47 E. 3. 19. *in Præcipe quod reddat*, upon an iſſue collateral to the point of the writ. 30 E. 3. *&* 9 *H.* 7. 3. *in Reſcous*, 41 E. 3. 10. *in Accompt.* 40 E. 3. 2. *in Debt.* 28 *H.* 8. *Dyer* 32. *in Debt. Paſch.* 1. *&* 2. *Phil. & Ma. Dyer* 115. *b. in Covenant. Mich.* 1. *&* 2. *Eliz. Dyer* 173. *in Attaint.* 2 *Eliz. Dyer* 192. *in Debt.* 9 *Eliz. Dyer* 260. *in Debt. Mich.* 10. *&* 11. *Eliz.*

Eliz. Dyer 279. *b. in Debt.* 13 *Eliz. Dyer* 300. *b. in Ejectione firmæ.* 32 *H.* 8. *Dyer* 47. *in Trespas. Pasch.* 1 & 2 *Phil. & Mar. Dyer* 114. *in Trespas. Plow. Com.* 92. in the Assise of Fresh force brought by the Parson of *Hony lane.*

Note, Reader, In all Cases when Jurors find the special matter doubtfull in Law pertinent and tending to the Issue which they are to try, there the Court ought to accept of it, but when they find matter at large which is not pertinent, and tending to the Point in Issue, upon which they are to give their Verdict, there the Court ought to disallow of it, as impertinent to the Issue, and to their charge. And upon this Difference the Books which have some shew of contrariety are reconciled. For example, in the Case of 7 *Hen.* 4. 11. the Issue in Trespas, being joined upon the Freehold at the time of the Trespas, forasmuch as it is found that the Plaintiff did enter in the said three acres of meadow, upon whom the Defendant entred, and was seised by four weeks before the Trespas, although they found an exchange by word of Lands in several Counties which was void in Law, so as the Entry of the Plaintiff was lawfull; yet the issue being joined upon the Freehold at the time of the Trespas; *Hankford* said to the Jury, in such case, according to Law, *scil.* Your Charge was but to say, who was Tenant of the Freehold the day of the Trespas; so whether the Entry [b] of the Plaintiff be lawfull or not, you have nothing to doe; for which cause the Jury found for the Defendant. Which Book proveth, That the Jurors cannot find special matter which is not within their charge, and with which, having regard to the Issue joined, they have nothing to doe: by which it is strongly implied, That if the special matter had been within their charge, and tending to the Issue, with which they have to doe, that it shall be allowed. And in the said Book of 7 *E.* 4. 29. it doth not appear what was the Issue, nor what special matter they would have found, and therefore is to be intended according to the said difference. And as to the opinions in 9 *H.* 7. in the same Case there is difference of opinions, and therefore are to be reconciled as aforesaid. And as to the opinion of 11 *Eliz.* in the same Case there was other clear matter to stay the Judgment, and the opinion which was conceived in this Point, was *in cubiculo meo*, without any open argument, and therefore if it shall not be intended according to this difference, it had not any warrant of any Book ruled in the Point, but against all the said Judgments and Authorities in Law in all successions of ages; and afterwards Judgment was given in the principal Case as followeth, *Scilicet*, At which day came as well the said *Tho. Dowman* and *Eliz.* as the said *Ed. Vavasor* and *George Vavasor*, &c. by their said Attorneys; and thereupon the Premises being seen and well understood, it seemed to the said Justices, that the said Indentures after the said Recovery in form aforesaid had and made by the said *Peter Vavasor* was good and sufficient in Law to lead and declare the uses of the said Recovery of the Tenements aforesaid put in view, *&c.* And that the Recovery aforesaid by the said *Andrew Windsor*, &c. against the said *Peter Vavasor*, Esquire, in form aforesaid had, was to the uses in the said Bar of the said *Ed. Vavasor* above specified in manner and form as the said *Ed.* in his Bar aforesaid alleged. And therefore it was adjudged, That the said *Thomas Dowman* and *Eliz.* his Wife should take nothing by their Writ, *sed sint in misericordia pro falso clamore suo. Et prædicti Defendentes eant inde sine die.* After the said Resolution in the Court of Wards, *Dowman*, not satisfied with it, brought the said Writ of Assise after the death of the said Sir *James Dyer*, Chief Justice of the Common Pleas, who was a Judge of deep knowledge and judgment in the Laws of the Land, and chiefly in the form of good Pleading, and of the true Entry of Judgments, *&c.* and of a great Piety and Sincerity, who from his Heart abhorred all manner of Corruption and Deceit, of a bountifull and generous disposition, and a Patron and Preserver of men learned in the Laws and expert Clerks; of singular Sedulity and Conversation, [19] as appeareth by his Book of *Reports*, all written with his own hands, and of a fair, reverend, and venerable Countenance and Personage. And according to the said differences it was resolved *Mich.* 44 & 45 *Eliz.* by the two Chief Justices *Popham* and *Anderson*, and *Periam* Chief Baron, and Justice *Gawdie*, in the Case of *John Littleton*, Esquire, which was referred to them by the Commandment of Queen *Elizabeth.* And so was it resolved by all the Judges of the Common Pleas, *Mich.* 9 *Jacobi*, upon an Evidence to a Jury at Bar on the Case of Sir *Richard Champernon*, who claimed the whole Inheritance of *Charles* late Earl of *Devonshire*, That Indentures subsequent were sufficient to direct the Uses of a Fine precedent against the Earl and his Heirs; for the Reasons and Causes, and with the Cautions aforesaid.

Hill. 28 Eliz.

Anna Bedingfield's Case.

ANne *Bedingfield*, late Wife of *Ed. Bedingfield*, Esquire, (Son and Heir of *Henry Bedingfield*, of [b] *Oxborough* in the County of *Norfolk*, Knight,) brought a Writ of Dower against *Tho. Bedingfield*, Son and Heir of the said *Edmond*, to be endowed of the Manors of *Oxborough*, *Nelton*, and many other Manors, Lands, and Tenements in the County of *Norfolk* of a great yearly value, *&c.* And in this Case divers Points were resolved by the Court of Common Pleas. 1. That where in the said Writ the said *Tho.* cast an Essoin, it was challenged, because that by the Statute *de essoniis calumniandis*, it is enacted, *That Essoin doth not lie in a Writ of Dower:* But, because that the

Common Essoin hath been alwaies allowed in a Writ of Dower, for this cause the Justices did construe the Statute to extend to an Essoin of the King's service, and not to a Common Essoin; and so much the rather, because the said Act doth add a Reason of the Purview, *scil. Because it seemeth to be but a Deceit and a delay of right*; and that is properly to be intended of an Essoin of the King's service, which is a delay and prorogation of right by a year. *Vide* 4 *Ed.* 3. 36. 4 *Ass. pl.* 2.

[16] *Litt.* 5 E. 4. 70. Then the said *Tho.* purchased a Writ out of the Chancery called a Writ of *Circumspectè agatis*, setting forth, That where the said *Edmund* was seised of the Manor of *Nection* in the County of *Norfolk* in fee, and held the same of the King in Chief by Knights-service, and died thereof seised, the said *Tho.* of full age, as by a certain Inquisition it is found, *&c.* by reason whereof the King hath seised as well the said Manor, as the Manors of *Oxborough*, *Ashil*, &c. and because the Queen was bound to restore the Tenements, *tam integrè*, &c. as they came to her hands, for this cause it was Commanded to the Judges to surcease *Domina Regina inconsulta:* It was resolved, That this Writ, which is in the nature of an Aid prayer of the King, cannot extend to any Manors not found in the Office, because the Queen by the Law cannot seise more Manors then are comprised within the Office. And as to the Manor of *Nection*, which appeareth by the Writ to be only found in the Office, the Case was well debated at the Bar and Bench. And the Counsel of the Tenant cited the Books of 8 E. 3. 15. 18 E. 3. 38. 19 E. 3. *Aid de le Roy* 64. 39 E. 3. 8. 46 E. 3. 19. 11 H. 4. 39. 5 H. 5. 1. & 12 R. 2. *br.* 646. 9 H. 6. 40. F. N. B. 163. *f.* 154. *d.* by which it appeareth, that where the Heir is within age, and in Ward to the King, and committed over, and is impleaded, or cometh in as Vouchee in a Writ of Dower, that Aid of the King shall be granted; And although that in the Case at Bar, it appeareth by the Office mentioned in the Writ, that the Heir was of full age at the time of the death of his Ancestor, yet the same will not make any difference; For the King, when he hath the primer seisin, may as well endow the Wife in the Chancery, as where the Heir is within age, and in his Ward. And the same appeareth by the Statute of *Prærogativa Regis*, *cap.* 4. The King shall assign to Widows after the death of their Husbands, that held of him in chief, the Dower that to them belongeth, *&c.* though the Heir be of full age, *&c.* And upon these authorities and reasons the Court gave day the same Term to the Demandant, to shew cause wherefore the Writ should not be allowed. At which day the Serjeants of the Demandant's Councel (a Pleader of the Inner-temple being present and also of Councel in the cause) shewed cause to the Court wherefore the said Writ should not be allowed. They agreed, That in all the said Books Aid was granted of the King in a Writ of Dower brought against the Heir, or when the Heir was vouched within age, being in Ward to the King; and it ought also to be confessed, that the granting of it, if it were not grantable in Law, is no Error. But it is enacted by the Statute *de Bigamis*,

[b] *cap.* 3. concerning the Dower of Women, where any Gardians of the Inheritance of their Husbands have the custody, by the Gift or Grant of the King; whether such Gardians be Tenants of the thing in demand, or the Heirs of such Lands be vouched to Warranty; if they except that they cannot answer without the King, the Justices shall not surcease, but shall proceed therein according to right; which Statute is not vouched or remembred in any of the said Books, and is express in the Point, that in such Cases be the Heir Tenant or Vouchee, they shall not surcease but proceed in the Cause; which is so well penned, that it extendeth as well to the said Writ of *Circumspectè agatis*, as to Aid prayer. And in 4 *H.* 7. 1. *Aid le Roy*, 33. in Dower against the Committee of the King, during the nonage of the Heir, the Defendant shewed, how it was found by Office, that the Father of the Husband of the Demandant was seised in fee of certain Lands, and held them of the King, and had Issue the Husband, and died; and the Husband entred, and died, his Heir within age, without any Livery, and all this matter was found by Office, for which the King seised and committed it to the Defendant. Judgment if Action? and thereupon was a Demurrer. And it was adjudged that she should be endowed: and there Sir *Tho. Brian* Chief Justice Justice of the Common Pleas, which gave the Rule in the said Case, said, it appeareth that Right is in the King, wherefore we will proceed no farther without Aid of the King, wherefore sue to the King. But when *Townsend* Justice cited the said Statute *de Bigamis*, which ousted the Party of Aid in that Case; *Brian*, having consideration of the said Act, did alter his opinion, and discharged him of suing to the King, and awarded, that the Demandant should recover her Dower. *Omnia habere in memoria & in nullo penitus errare, potius est deitatis, quam humanitatis.* And if the said Statute had not been remembred, the Aid also had been granted in 4 *H.* 7. as it had been in the said Books. But to make a full answer to the Case in question, *Distinguenda sunt tempora; & concordabis leges.* The said Statute *de Bigamis* was enacted at a Parliament holden 4 *Ed.* 1. And the Statute of *Prærogativa Regis* was made 17 *Ed.* 2. And before the Statute of *Prærogativa Regis*, the King, when the Heir was of full age, had but primer seisin *capiendo exitus*, &c. as it is said in the said Chapter next before; and in such Case the King is not Gardian, and therefore cannot endow the Wife at the Common Law. For as a Writ of Dower lay against Gardian in Chivalry, during the minority of the Heir, or the Gardian might endow her without any Sute, during the minority of the Heir, if he would; but after full age, although that he held over the Land for the value of the Marriage, no Writ of Dower lay against him, nor could he endow the Wife, because that after full age of the Heir he was not Gardian, and none

[17] who hath but a Chattel (except the Gardian only) can endow the Wife of a Freehold, neither did a Writ of Dower, which is a real Action, lie against him, as appeareth in 6 E. 3. 16. he ought to be Gardian, and named Gardian, and a Writ of Dower brought in such Case against the heir within age, shall abate, for it ought to be brought against the Gardian, and therewith agreeth 17 E. 3. 79. 9 H. 6. 6. *b.* *Vide* E. 1. *Dower* 861. 8 E. 3. 63. Dower lieth against Gardian within age, and against the Heir at full age, 46 E. 3. 19. 7 E. 3. 10. 9 E. 4. 31. and in 8 E. 3. 15. a Woman brought a Writ of Dower against *Henry Bolton* as Gardian in Knights-service, who pleaded, that he had

nothing

The Case of Avowry.

IN the Case of in the King's Bench, this Point was principally moved and debated, [20]
that is to say; If there be Lord and Tenant by fealty and rent, and the Tenant maketh a Lease for years, and the Lessor hath done fealty, and paid the rent continually, and yet the Lord distraineth the Cattel of the Lessee for the rent, when in truth none is behind, and avoweth upon a meer stranger which never had any thing, as his very Tenant for the arrerages of the rent, if the Lessee shall be without remedy in this Case. And the opinion of *Priscot*, 34 *H.* 6. 46. was objected, where he holdeth, That if there be Lord, Mesne, and Tenant, and the Lord avoweth upon a stranger, and not upon the Mesne, the Tenant is without remedy: And so if a Termor bringeth a Replevin, and he avoweth upon another than the Lessor, the Termor is without remedy: And that the common opinion of our Books is, That a stranger unto an avowry shall not plead that nothing is behind; or a tenure by lesser services, or any other Plea, but only out of his fee, or a thing which doth amount to asmuch. 17 *E.* 3. 14, 15. 34 *E.* 3. *Avowry* 257. 38 *E.* 3. *Avowry* 61. 39 *E.* 3. 34. 43 *E.* 3. 13. 2 *H.* 6. 1, & 54. 34 *H.* 6. 21. 35 *H.* 6. 51. 37 *H.* 6. 23. 38 *H.* 6. 23. 7 *E.* 4. 10. 13 *E.* 4. 6. 14 *H.* 8. 4. 26 *H.* 8. 6. & 22 *H.* 6. 2. *b.* it is said, That it is a Position in Law, That a stranger to an avowry shall not plead, but out of his fee, *&c.* It was also objected, That Lessee for years could not pray in aid of his Lessor, and so make himself party to plead, because that the Lessor is a stranger to the avowry, and the Lessee might plead as much as the Lessor himself might, and that is, ought of his fee. And so are the Books in 18 *E.* 3. 7. 17 *E.* 3. 9. 34 *E.* 3. *Avowry* 258. 3 *E.* 2. *Aid* 151. 6 *E.* 4. 3, 12 *E.* 4. 5. 5 *H.* 5. 5. 2 *H.* 7. 10. 8 *H.* 7. 8. *&c.* If not [b]
that the Lessee maketh his Lessor privie in Estate to him, upon whom the avowry was made. *Vide* 3 *E.* 2. *Avowry* 186.

Yet it was resolved, That the Lessee for years shall be by Law relieved in this Case; And for the better understanding of the Law in this Case, two differences in Law were observed. First, (as hath been said) a stranger to an avowry shall plead nothing, but out of his fee, or some thing which doth amount to as much. And the same is true as to the pleading of any matter in bar of the avowry; but the right Tenant, although he be a stranger to the avowry, yet being made party he shall plead matter in abatement of the avowry, as it shall appear. Another difference is, when the Lessee for years, or for life, shall have aid of one who is a stranger to the avowry, and when not; For upon a general allegation, that such a one a stranger was seised in fee and leased to him for life or years, he shall not have aid, as the Books before cited prove, because it shall be in vain in such case to grant aid, when the Lessee may plead out of his fee: But upon special matter disclosed, he shall have aid of his Lessor, who is very Tenant. And there if the Lessee in such case allege, that his Lessor was, and yet is seised of the Tenancy in his demesne, as of fee, and held the same of the Lord by the services, *&c.* of which services the Lord hath been, and yet is seised by the hands of the Lessor, as by the hands of his very Tenant, and that the Tenant hath leased the Land to him, and that the Lord, to charge the Plaintiff unjustly, hath avowed upon one, who hath nothing in the Tenancy; and thereupon he prayeth in aid of his Lessor; in this Case, upon this special matter, he shall have aid, because without his Lessor he cannot plead this matter in abatement of the avowry, nor the Lord shall be compelled to avow upon the Lessor: and by this special matter there appeareth true privity in estate and seignorie betwixt the right Tenant and the Lord, so that there wanteth no privity in this case, nor the Law will not esteem him who is true Tenant in Law to be a stranger to the Lord; and the false avowry of the Lord upon the stranger who is not Tenant shall not hurt the Lessee against the truth of the Case, *quia veritas nihil veretur nisi abscondi.* And the Law shall never suffer a falsity to suppress the truth. And the same is well proved by the Books cited before; as, taking one for Example, in the Book of 18 *E.* 3. 7. [21]
the Case was such, *A.* brought a *Replevin* against *William Weylond*, who avowed for a Rent-service upon the issue in tail; the Plaintiff shewed, That a stranger to the avowry leased to him for life, and prayed in aid of him, and was ousted of the aid because the Lessor could not plead more than the Lessee, because they are both strangers; but there upon special matter pleaded he shall have aid of him, to the end that both may join in a Plea of abatement of the avowry, which the Lessee himself alone shall not plead: For the Lessee to have aid may say, That the Donor before the Statute infeoffed the Donee in fee to hold of him, and that the Lessor is Assignee to the Feoffee and hath tendred the services, and compel the Lord to avow upon him. To which Sir *Richard Wilby* Chief Justice, who giveth the Rule, saith, Plead you this matter if you will have aid. Which Case proveth both the differences, *scil.* That a stranger to any avowry shall compell the Avowant to avow upon him: which is as much as to say, That he shall abate the avowry made upon him who hath nothing, and compell the Lord to avow upon him who is his right and true Tenant. 2. That upon such special matter which tendeth to drive the Lord to avow upon his very Tenant, it shall have aid of a stranger to the avowry: And the Law requireth, That the Lord alwaies avow upon him who is his Tenant in right and in Law, and to doe it the Lord shall be compelled by special pleading, and therewith agreeth *Littleton* 106. in the Chapter of *Releases*, That if the Tenant be disseised, and the Lord taketh Cattel of the Disseisee, and he sueth a Replevin, and the Lord avoweth upon the Disseisor who is Tenant in possession, the Disseisee by pleading of the special matter shall abate the Lord's avowry upon the Disseisor, and compell him to avow upon him, because that the

Disseisee is Tenant to him in Right and in Law. *Vide* 20 *H.* 6. 9. *b.* by *Newton*, 48 E. 3. 8. by *Fitz. à fortiori*, in the principal Case, when the Lord avoweth upon one who hath nothing, upon the special matter shewed the Lessor shall join in Aid to the Lessee, and shall abate the Avowry made upon him who hath nothing, and drive the Lord to avow upon his Tenant in Right and in Law; and therewith agreeth 4 E. 3. 50, 51. *Hugh de Luche* brought a *Replevin* of his Cattel against *Will. de Stringland*, who avowed upon three Sisters, as Daughters and Heirs of *Alice Sager*, by reason that they held of him certain Tenements by Homage, Fealty, and Escuage, and by the Services of 10 *s.* by the year, *&c.* and for Homage behind he avowed. To which the Plaintiff said, True it is, that *Alice Sager* held of him the said Tenements by Fealty, and 6 *d.* by the year for all Services; [*b*] and that *Alice* did enfeoff us of the same Tenements, and we have oftentimes tendred to you our Fealty. Judgment, if you can avow upon another than upon us, or for more Services than, *&c.* To which Plea in Abatement of the Avowry exception was taken, because the Plaintiff was a Stranger to the Avowry. To which it was answered and resolved, That the Plaintiff was privy enough, because he was Tenant to the Land and hath rendred the Services: and there it is expresly said, That the Issue *de cest avowry ne se puit prender sur le droit des services*, but to abate the Avowry, and to drive the Lord to avow upon the Plaintiff, and then might they plead to the Right of the Services. 48 E. 3. 8. by *Finchden*, & 16 E. 3. *Avowry* 90. *acc. Vide* 39 E. 3. 34. & 10 H. 6. 26. 31 E. 3. *Avowry* 111. *à fortiori*, when the Lord shall avow upon one who hath nothing in the Land, he who is the very Tenant, and by whom the Lord hath received the Services, shall compell him (as *Linl.* saith) to avow upon him. *Vide* 9 *H.* 5. 15. and in 34 E. 3. *Avowry* 258. the Plaintiff was ousted of Aid, because he did not shew the special matter to give him cause of Aid. And in this Point the Law is curious; for although the Lord doth avow upon the right person, yet if he doth not convey to him his true Title to the Land, his Avowry shall abate; and therefore if a man avoweth upon one as Heir to his Mother, where he is Heir to his Father, his Avowry shall abate. 13 E. 3. *Avowry* 102. & 11 *H.* 4. 24. 10 E. 4. *Avowry* 193. 3 E. 3. 69. *Vide* 27 E. 3. 88. So if in a *Replevin* the Defendant avoweth upon the Plaintiff as his very Tenant, the Plaintiff in Abatement of the Avowry may say, That he hath nothing but for terme of life of the Lease of *W.* the Reversion now to his Son and Heir, and pray in aid of him, to the intent that he drive the Lord to avow upon him who is his Tenant in Law; and therewith agreeth 3 *Hen.* 6. 12, 13. and *Fitz.* in abridging of the Case, *Aid* 57. saith, that this Plea doth goe in Abatement of the Avowry; and for this Cause by the Rule of the Book he had Aid of a Stranger to the Avowry. *Vide* 15 *Edw.* 3. *Aid* 33. Tenant in Dower had Aid of the Heir in Reversion, who was a Stranger to the Avowry. And the great wisedom and policy of the Law was observed, which hath provided for remedy in this Case. For in Avowry for Rent-service, *&c.* the Plaintiff being Tenant for years, or for life, shall have Aid of his Lessor before Issue joined, because without him the Lessee cannot plead, as appeareth in 2 *H.* 5. 1. 7 E. 4. 23. 6 E. 4. 3. 21 E. 3. 12. 13 *Eliz. Dyer* 229. to the end the rightfull and very Tenant joyning with him, may abate the feigned Avowry made upon him who hath nothing, or upon one who is not rightfull Tenant, and drive the Lord to avow upon him who is Tenant in Law: And it should be great absurdity, and defect in the Common Law, if the false and feigned Avowry upon him who hath nothing should charge the Termor with Arrerages of Rent where none was due; [22] and the Law of *England*, *non patitur absurdum*: And if any defect hath been in the Law, as it was objected, the Makers of the Act of 21 *H.* 8. *cap.* 19. would have provided Remedy as well for the Tenant, and all Lessees and other Strangers to the Avowry against the Lords, as they made for the Lords against the Tenants and their Lessees, as appeareth by the Preamble, and not to have bound the Tenants, Lessees, *&c.* and left the Lords at liberty. And it was said at the Bar, that in some case the Lord was left to the Common Law, and could not avow within the Act of 21 *H.* 8. and that is, when the Lord cometh to distrein, and seeth the Cattel upon the Tenancy, and the Tenant driveth them off into other Land not holden, and the Lord freshly followeth them and distreineth there, as he well may, as it is holden in 44 E. 3. 20. 6 *R.* 2. *Rescous* 11. 11 *H.* 7. 4. 21 *H.* 7. 40. 34 *H.* 6. 18. 16 E. 4. 10. that this Case is out of the said Statute, because that the Purview is, *If the Lord distrein upon the same Manors, Lands, or Tenements*, &c. *that the Lord of whom the same Lands, Tenements, or Hereditaments have been so holden, may avow as within his fee and seigniory*, and the Distress is taken in Lands not holden of him, nor in his Fee and Seigniory, and therefore this Case is out of the said Act. But it was resolved, that this Case is within the Purview of the said Act; for, 1. it is cleerly within the mischief within the Preamble, and the Act is made to suppress Fraud: 2. upon the matter the Distress is taken upon the Land holden, for the Lord cannot distrein out of his Fee, but the View of the Lord and his fresh Sute maketh the Distress to be in Judgment of Law taken within his Fee, or a thing which amounteth to as much; and as *Thorp* saith in 44 E. 3. 20. the taking shall alwaies refer to the first place, and it shall be inconvenient that the Act of the Tenant himself, (against which the Act was made) shall make the good Act to little or no effect. But Note, Reader, If one cometh to distrein for Damage feasant, and seeth the Cattel, and the Owner driveth them off, he cannot distrein them Damage feasant, but is put to his Action of Trespass. 16 E. 4. 10. and 2 E. 2. *Avowry* 182. For there the Cattel ought to be Damage feasant at the time of the Distress, and so a Difference.

And as to the other Case which *Prisot* putteth, *scil.* If there be Lord, Mesne, and Tenant, and the Lord avoweth upon a Stranger, and not upon the Mesne, the Tenant is without remedy; It was strongly urged, that that was good Law for the Tenant upon some special Pleading, as in the [*b*] Case of the Lessee, cannot have aid of the Mesne, because he is Tenant in Fee-simple, and the Mesne cannot join with him, because he is a Stranger to the Avowry, for the Mesne shall never join with the Tenant, but when the Avowry is made upon the Mesne: And both these Points are resolved in

13 E. 4.

nothing but a Leaſe for ſix years, of the Leaſe of *John Mowbray* Gardian of the Lands. Judgment of the Writ. And there it is holden, that the Writ of Dower doth not lie againſt him in reſpect of the Poſſeſſion, if he be not Gardian; for which cauſe the Demandant did maintain that he was Gardian, 2 *E.* 3. 15. A Writ of Dower brought againſt Tenant by *Elegit* ſhall abate, 8 *Ed.* 2. *bre.* 809. Dower was brought againſt Tenant for years, and abated by award, but there *Beresford* ſaith, it is good againſt a Gardian, becauſe he anſwereth in the name of the Heir. So the King when the Heir is of full age, could not have endowed the Wife, becauſe he is not Gardian, but hath in effect the Profits of the Land but for one year, and therefore the makers of the Statute of *Bigamis*, 4 E. 1. If the King could have endowed the Wife when the Heir was of full age, they would have outted delays in ſuch caſe as they did, and *à fortiori*, that when the Heir was within age. But at this time, *ſcil.* 4 *E.* 4. the King, when the Heir was of full age, could not endow the Wife; but ſuch Power as he hath was given to him by the Statute of *Prærogativa Regis*, made in 17 *Edw.* 2. long time after; which Act of *Prærogativa Regis*, although it gave Power to the King to endow the Wives, *&c. licet hæredes fuere plenæ ætatis*, yet the Statute addeth, *ſi viduæ illæ voluerint*; ſo as the Statute leaveth it to the election of the Wife, either to be endowed in the Chancery, or at the Common Law, and by conſequence the Writ of Dower (which is favoured in Law, and is to be likened to no other *Præcipe*) is not to be ſtayed by Aid prayer in that Caſe. Upon which the Court took adviſement and conſideration: And afterwards the Court, for the reaſons and cauſes aforeſaid, diſcharged the Tenant from ſuing to the Queen, and gave day, in the beginning of *Eaſter* Terme then next following, to plead an iſſuable Plea peremptorily. In which Terme the Defendant's Councel offered to plead Detainment of Charters by the Demandant, *&c.* which was in *Eaſter* Terme, and *Trinity* Terme following well argued at the Bar and Bench: And upon good advice and conſideration, theſe Points were reſolved by the Court.

1. The Charters ought to concern the Land whereof the Dower is demanded, and not other Lands deſcended to the Heir, *vide* 33 *H.* 6. 51. reſolved in the Point 22 *H.* 6. 42. And the Law in this Caſe well allowed. That this Rebutter of the Action is a good Plea in a Writ of Dower for two Cauſes. 1. The Charters are the Sinews of the Inheritance of the Heir of the Husband, and ſhe is not worthy to have Dower of the Inheritance of her Husband, who would wrongfully detain from his Heir (by whom ſhe is to be endowed) the muniments which might defend the ſaid Inheritance; For Charters are called Muniments, *à muniendo, quia muniunt & defendunt Hereditatem.* 2. There is a greater privity when a Wife is endowed of the immediate Eſtate, which the Heir of her Husband hath by deſcent, then when ſhe is endowed by a Stranger, or of another Eſtate; For if the Wife be endowed of the immediate Eſtate deſcended to the Heir of the Husband; if ſhe be after impleaded, ſhe ſhall vouch the Heir, and ſhall be new endowed of other Lands which the Heir hath; but if the Wife be endowed by the Alienee of the Husband, or of the Heir, if ſhe be impleaded, ſhe ſhall not vouch the Alienee to be newly endowed: And that is the cauſe that when a Woman bringeth a Writ of Dower againſt the Alienee of the Husband, *&c.* and he voucheth the Heir, the Demandant may witneſs that the Heir hath Lands deſcended to him in the ſame County (for the Original doth not extend to another County) and pray that ſhe may be endowed of his Eſtate, and that is for the benefit of her Voucher to be newly endowed, *vide* in 4 *E.* 3. 36. and in 6 *E.* 3. 11. the Tenant in a Writ of Dower vouched the Heir of the Husband; and the Demandant did teſtifie that he had by Deſcent, *&c.* in the ſame County; and Judgment was given againſt the Heir if he had, *&c.* and not againſt the Tenant. In 6 *E.* 3. 20. There the Wife of a Stranger brought a Writ of Dower, and the Tenant vouched the Heir, *&c.* The Demandant ſhall not recover againſt the Heir, becauſe there wanteth privity. In 18 *E.* 3. 36. in Dower the Tenant voucheth, and the Vouchee voucheth the Heir of the Husband of the Demandant; the Demandant doth teſtifie that the Heir hath Aſſets by deſcent in the ſame County, the Demandant ſhall not recover againſt the Heir, but againſt the Tenant only, for there is not immediate privity betwixt the Heir and the Demandant, for the Demandant ſhall recover againſt the Heir only, when the Tenant in Demeſn voucheth him. *Vide Regiſt. Judic.* 15. 16 *E.* 3. *Dower* 56. 3 *Eliz. Dyer* 202. And that is the reaſon that the Heir only ſhall plead Detainment of Charters, and not a Stranger, as ſhall be after ſaid. *Vide Fitz. Na. Br.* 8 *E.* 50 *E.* 3. 7. And the reaſon which *Newton* giveth in 22 *H.* 6. 42. that the Heir ſhall have this Plea of Detainment of Charters, *&c. ſcil.* that if the Heir had the Charters of his Lands, he might peradventure plead in Bar of her Dower, cannot be the reaſon thereof; For when the Heir hath pleaded that he hath been alwaies ready, and yet is to render Dower, *&c.* if the Demandant would render to him the Charters, it is a full confeſſion of the Action, if the Demandant delivereth the Charters, and therefore after the Charters delivered, the Heir ſhall plead no farther, but the Demandant ſhall preſently have Judgment, as more fully afterwards appeareth. [b] [18]

2. He who pleadeth this Plea ought to have the certainty of the Charters; whereupon a certain Iſſue may be joined, or that they are in a Cheſt or Box ſealed or unſealed; and in both Caſes an Action of *Detinue* may be grounded and brought by the Heir, 22 *H.* 6. 16. 2 *H.* 7. 6. 14 *H.* 6. 4. 21 *E.* 3. 8. 18 *H.* 8. 1.

No Stranger, although that he be Tenant of the Land, and hath the evidences conveyed to him, can in a Writ of Dower pretend Detainment of Charters, but this Plea lieth only in privity, *ſcil.* for the Heir of the Husband, as hath been ſaid. Alſo in divers Caſes the Heir ſhall be in degree of a Stranger, and therefore ſhall not plead Detainment of Evidences, and that he ſhall not doe it in five Caſes. 1. If the Heir hath the Land by Purchaſe. 2. If the Heir hath delivered the Charters to the Wife, he ſhall not plead Detainment of them, for that the Wife hath them by his own Act, as it is reſolved in 7 *E.* 3. *Dower* 101. 3. If the Heir be not immediately vouched by

the Tenant in the Writ of Dower, but by his Vouchee, as hath been ſaid 18 E. 3. 36. 4. If the Heir cometh in as Vouchee, having no Lands in the County where the Dower is demanded. 5. If he cometh in as Tenant by receit, he ſhall not plead detainment of Charters, as appeareth in 16 E. 3. *Dower* 57. and in many other Books; and the reaſon thereof is manifeſt; if the true form of pleading in that caſe be well obſerved; For he who pleadeth detainment of Charters in bar of Dower, ought to plead, that he hath been alwaies ready, and yet is to render Dower, if the Demandant would deliver to him the Charters; and Tenant by receit, or ſuch Vouchee as is aforeſaid, cannot ſo plead, becauſe he cannot plead that he hath been alwaies ready to render Dower; when the Demandant cannot recover againſt the Heir in ſuch caſes either being Vouchee or reſerved, nor he cannot render to the Damandant the Dower which to her by the Law doth belong. But if a
[b] man be ſeiſed of three acres in three Towns, *ſcil. A. B.* and *C.* in one County, and enfeoffeth a ſtranger of one acre with warranty, and dieth, now the Heir may aſſign to the Wife one acre in ſatisfaction of her Dower, as well in the acre whereof the ſtranger is enfeoffed, as of the other acre deſcended to the Heir, for by courſe of Law ſhe ſhall have Dower againſt the Heir, in diſcharge of all the Tenancy, as well that which he ought to warrant, as that which is deſcended to him in the ſame County, in which Caſe the Heir may agree with the Wife, as well out of Court as in Court, for that which by the Law he is bound to doe, and being vouched by the Feoffee in a Writ of Dower, he ſhall plead the ſame in bar, as it is adjudged in 33 E. 3. *Judgment* 154. and 8 E. 3. 69. *Michael Treweneye's* Caſe; and by the ſame reaſon in ſuch Caſe, the Heir being vouched ſhall plead detainment of Charters, *&c.* for he may well ſay, that he hath been alwaies ready, and yet is to render Dower to the Demandant, in diſcharge of the whole Tenancy in the ſame County; for by the Law, the Demandant ought to be entirely endowed againſt the Heir. And therewith alſo agreeth 17 E. 3. 58. where in Dower the Tenant vouched the Heir in Ward, the Guardian by the Warrant ſaid, That the Demandant did detain from him the Heir, whereas the Land is holden in Knights-ſervice, and if ſhe would render the Heir, he hath been alwaies ready, (note this) and yet is to render Dower: and the exception is taken to it, becauſe this Plea lieth not for him, but for him who alwaies after we were dowable, might have rendred Dower, and you could not before render: To which it was anſwered, That we are he againſt whom ſhe ſhall recover, and the Tenements hold in peace, and alwaies might have made agreement for that which we held, becauſe by the Law ſhe ſhall be ſerved of Dower of that which we held, ſo that ſuch Plea is given to us in lieu of *Withernam.* And it ſeemed to the Court, That the Gardian Tenant by the Warranty ſhould have ſuch Plea; whereupon the Demandant did traverſe the Eſſoinment of the Infant: In 8 E. 3. 55. In a Writ of Dower the Tenant made default after default; whereupon came one *John*, and ſaith, That the Tenant held for the term of his life of his leaſe, the reverſion being to him, and prayed to be received, and was received, and ſaid that he was Heir to the Husband of the Demandant, of
[19] whom ſhe demanded Dower, and ſaid that ſhe detained two Charters touching his Inheritance, and ſhewed which, *&c.* and ſaid that if ſhe would render to him the Charters, he ſhall be ready to render her Dower, *&c.* And becauſe that Tenant by receit cannot render Dower, and he is a ſtranger, this Plea did not lie in his mouth. And thereupon ſeiſin of the Land was awarded to the Wife.

And ſo note two good Differences. 1. Between the Heir being immediate Vouchee, having Aſſets in the ſame County, and when he is vouched by a Vouchee, or when the Heir hath nothing but in a forein County; for in the firſt Caſe he may plead, That he was alwaies ready to render Dower, and in the other two not. 2. Between the Heir having Land in the ſame County, when he is immediately vouched, and when he is Tenant by receit; for in caſe of receit the Judgment ſhall be given againſt the Tenant, and not againſt the Heir, ſo that the Plea lieth not for him, *ſcil.* that he is yet ready to render Dower, for he cannot render to the Demandant her demand. See 7 *Edw.* 3. *Dower* 101. 6 *Eliz. Dyer* 230. 7 *E.* 2. *Dower* 130. 11 *H.* 3. *ibid.* 187. 45 *H.* 3. *ib.* 174. 14 *H.* 4. 30. 36 *H.* 6. 7. 41 *E.* 3. 11. 6 *E.* 3. 45.

4. In a Writ of Dower againſt Gardian in Knights-ſervice, he ſhall not plead detainment of Charters, for he cannot conclude his Plea, and if the Demandant will deliver him the Charters, *&c.* for the Charters which do concern the Inheritance of the Heir ſhall not be delivered to the Gardian, as it is adjudged in 10 E. 3. 49. But the Gardian in a Writ of Dower may plead detainment of the Heir by the Demandant, and that he hath been alwaies ready, *&c.* For the Ward doth belong to him; and if the Demandant doth detain the Ward, and doth not render him to the Gardian unmarried; or if ſhe rendreth him to him married, ſhe ſhall loſe her Dower, and therewith agreeth 8 E. 3. 70. 7 E. 3. 17. 22 *H.* 6. 16. 2 *H.* 7. 6. 17 *E.* 3. 56. 16 E. 2. *Dower* 144. *vide* what manner of Charters or Evidences the Demandant in Dower ought to detain, that the Heir may plead, *&c.* 41 E. 3. 11. 6 E. 3. 45. *&c.* And ſo all the Books in all theſe Points are well agreed. And when (in the Caſe at Bar) the Tenant perceived that if he ſhould plead ſuch Plea, that the Demandant might deliver the Charters in Court, and preſently pray Judgment upon his confeſſion, as appeareth in 10 E. 3. 49. 21 E. 3. 8. 9 E. 4. 47. *&c.* He waived the Pleas touching theſe matters. And in
[b] *Trinity Term*, when the Demandant did expect that he would have confeſſed the Action; he pleaded, *Ne unques accouple in loyal matrimony:* Whereupon it was written to the Biſhop of *Norwich*, who certified, *Quod infranominati Edmund. & Anna legitimo matrimonio copulati fuerunt.* To which Certificate, being ſhort and direct to the Point, no exception was taken: whereupon the Demandant had Judgment, and divers parcels in demand aſſigned her in Dower, which the Demandant leaſed to divers perſons named by the Tenant, in conſideration of 1000 *li.* Fine, and 500 *li.* Rent *per annum.*

The

13 E. 4. 6. and in other Books, 31 E. 3. §*Joinder in Aid*, 14. 17 E. 3. 15. the Abbot of *Furney*'s Case, and there is a defect observed in the Common Law in such Case, which is prayed to be amended and reformed by the Justices, as in other Cases to avoid mischief they have done. *Vide* 39 E. 3. 34. And it was resolved and agreed, That the opinion of *Prisot* in this Case is good in Law to the end that *Prisot* intended. For it is true that *Prisot* did intend that the Tenant is without remedy either to plead any Plea, or to plead *Rien arere*, &c. because he is a stranger to the Avowry; or by special Pleading to pray in aid of the Mesne, for as hath been said, he is Tenant in fee-simple, and cannot pray in aid of the Mesne, and the Mesne cannot join with him, because the Lord hath not avowed upon the Mesne; and therefore as to these three waies, the Tenant, as *Prisot* meaneth, is without remedy, and his opinion as to these is warranted by the said Books, but that the Common Law hath left the Tenant without remedy in such Case, it appeareth fully and commonly to the contrary in our Books. And therefore, when there is Lord, Mesne, and Tenant, and the Mesne payeth the Rent and doth the Services to the Lord, and yet the Lord distraineth the Tenant peravail for them, and impoundeth his Cattel, in this Case the Tenant may presently repair to his Mesne, and relate the Case to him, and pray him to acquit him: Now the Law hath given power to the Mesne to go to the Pound, and to take the Cattel of the Tenant peravail out of the Pound, and to put his own Cattel in the Pound in the stead of them, and to sue a Replevin, and so to make himself Party, and then if the Lord will avow upon the stranger, he may shew the truth of the matter, and abate his feigned avowry made upon the stranger, and compell the Lord for to avow upon him, as upon his very Tenant in Law. And although Not distreined in his default is a good Plea in a Writ of Mesne, yet if the Mesne will not doe it upon request, the Tenant upon the matter is distreined upon his default, as it is holden in 7 *H.* 4. 18. 4 *Ed.* 3. 35. 15 *Ed.* 3. *Joinder in Aid* 15. 17 E. 3. 44. 34 *H.* 6. 47. 13 E. 4. 6. and *F. N. B.* 136. *b.* And if the Lord will not suffer the Mesne in such Case to take the Cattel of the Tenant out of the Pound, he is a Trespassor *ab initio*; for he doth not use them according to the nature of a Distress, and therewith agreeth 13 *E.* 4. 6. But let the Tenant look to it, that in such Case he sue not forth a *Replevin* of his goods, and have deliverance of them, for that it shall be accounted his own folly that he doth not make request to the Mesne, as above. For then if the Lord shall avow upon a stranger, the Tenant is without remedy through his own default, but in such Case after the Tenant hath deliverance of his Cattel by a *Replevin*, if the Lord avoweth upon the Mesne, there the Tenant may request the Mesne to join with him to plead in his discharge, and if the Mesne will not, the Tenant may have a Writ of Mesne against him, and recover his damages: for now by matter *ex post facto*, he is distreined in his own default, as it is holden in 39 E. 3. 34. where the Case was, That *Henry* Percy was Lord paramount, *Gilbert Umfrevill* Earl of *Angus*, Mesne, and a Tenant peravail, of divers Manors, *scil.* 10 Towns, *&c.* the said Lord paramount did distrein the Tenant peravail, the Tenant pleaded a Release by Deed of the said Lord paramount to the Mesne, to hold by lesser services; *& non potuit*, because he was a stranger to the Avowry. And there it is holden, that the Tenant in such Case is at no mischief, for he might have required the Mesne upon the Avowry made to have joined with him in answer, and if he had come, they two might have joined in the Plea which the Tenant now pleads, and if the Mesne would not have joined with the Tenant, he might have against him a Writ of Mesne, and therein recovered damages against him; and if the Tenant doth not request the Mesne, it shall be accounted his own folly. And therewith agreeth 17 *E.* 3. 15. and 12 E. 4. 2. 7 E. 4. 19. And it is observed, that in such Case, the Mesne ought to join *gratis*, for there is no Process in Law to compell him to appear, as in the Case of Aid prayer, but only upon the Tenant's request he ought to appear *gratis*. And so may the Lessor upon whom a Avowry is made, join *gratis* with the Lessee, the Plaintiff in the *Replevin*, and therewith agreeth 45 *E.* 3. 7. *&* 39 *H.* 6. 7. [23]

Lastly, in the principal Case, If the Lessee (or the Tenant peravail in the Case of the Mesnalty) be present when the Lord or his Bailiff cometh to distrein, if nothing be behind, he may well make Rescous, and so relieve himself, as it was resolved in *Bevil*'s Case, in the Fourth Part of my *Reports*. *Vide* 2 *H.* 4. 22. *b.* 8 *H.* 4. 1. 4 *E.* 6. *br. Distress* 75. *By the Justices*, 31 *E.* 3. *Rescous* 17. 39 E. 3. 45. 39 *H.* 6. 7. *F. N. B.* 102. 27 *Ass. p.* 51. and 28 *Ass. p.* 50. So that the Lessee, or Tenant peravail, hath a certain provision by the Law to relieve himself in the Cases aforesaid, if by his Laches or misdoing he do not prejudice himself. And forasmuch as notwithstanding the Statute of 21 *H.* 8. *cap.* 19. the Lord may at this day avow upon one person, as upon his very Tenant, according to the Common Law, (for the said Statute doth enact, *That the Lord*, &c. *may avow*, &c. *as in lands within his fee and seigniory*, which doth not take away the Common Law, but giveth a Liberty to the Lord to pursue the one or the other) I have thought necessary to report this Case, whereby all the said Books are reconciled, the Doubts well resolved, and no absurdity or mischief suffered, or not remedied, by the Common Law. [b]

Mich.

Mich. 33 & 34 Eliz.

The Case of the Abbot of *Strata Marcella*.

[23] IN a *Quo warranto* against *Owen Vaughan* for using these Liberties and Franchises amongst others, that is to say, To have Waifs, Straies, and Felons goods, *&c.* in *Llanihangel* in the County of *Mountgomery*; as to the Waifs and Straies, the Defendant claimed them by Prescription, and as to the Felons goods he pleaded, *Quod Johan. nuper Abbas de Strata Marcella licite habuit & gavisus fuit infra Llanihangel præd. bona & catalla felonum, & ad usum suum proprium disposuit, usque* 4 *diem Febr.* 27 *H.* 8. And pleaded the Statute of 27 *H.* 8. That all Monasteries under the yearly value of 200 *li.* were given to the King, in as large and ample manner as the Abbots, *&c.* then had, or ought to have them; and that the said Abby of *Strata Marcella*, and the Possessions thereof, were under the yearly value of 200 *li.* and pleaded also the Statute of 32 *H.* 8. *cap.* 20. by which it is enacted, *That all liberties, privileges, and franchises, and temporal Jurisdictions which the late Owners of the said Abbyes*, &c. *have used or exercised lawfully*, &c. *within three months before the said Act of* 27 *H.* 8. *shall by the said Act of* 32 *H.* 8. *be revived, and shall be really and actually in the King, his heirs and successors*; By force whereof King *H.* 8. was seised of the said Franchises, *scil.* To have Felons goods within *Llanihangel* aforesaid in his demesne as of fee in the right of his Crown, and so seised, and being also seised of the Manor of *Tallerthege* in *Llanihangel*, &c. in the said County, [b] (late parcel of the Possessions of the said Abby of *Strata Marcella*) granted by his Lett. Patents 37 *H.* 8. the said Manor to Sir *Arthur Darcie*, Knight, in fee, with general words, that is to say, *tot, talia, tanta, hujusmodi, eadem & consimilia, libertates, franchesias, privilegia, jurisdictiones*, &c. *quot, qualia, quanta, & quæ dictus Abbas*, &c. *habuit, tenuit, sive gavisus fuit infra*, &c. By force whereof the said *Arthur* was seised as well of the said Manor aforesaid, as of the Liberties, *&c.* aforesaid in fee; and so seised of the said Manor, did enfeoffe the Defendant in fee, (for although there were divers mean Conveyances, the same was the substance of the Case) and then he made a Conclusion for all his Plea, *Et eo warranto clamat libertates, franchesias, & privilegia præd. tanquam Manerium præd. speciat. & pertinent.* And upon this Plea, as to the Goods and Chattels of Felons, the Queen's Councel did demurr in Law. And it was argued on the part of the Queen, That the Defendants Claim to have the Goods and Chattels of Felons was insufficient for two Causes; 1. Because he doth not shew, That the Abbot had the Goods of Felons by Charter within *Llanihangel*; for by Prescription, or any usage, he could not have them. For although he shall not be driven to shew the Charter in Court, or to plead an Exemplification of it, because the Charter was made to a Stranger, yet he ought to have pleaded, That the Abbot had the said Franchise by Charter. 2. That the Substance of the Plea wanteth Trial; for the Effect of the Plea is, *Quod præd. nuper Abbas licite habuit & gavisus fuit infra*, &c. *bona & catalla felonum*, &c. And these two Points were often argued at the Bar in divers several Terms; and the Effect of the Arguments on the Queen's part, as to the first, was, That the Abbot could not have Felons goods by Prescription or Usage, but by Charter, *quod fuit concessum per Curiam.* See the Authorities, and the Reasons and Causes thereof in *Foxley*'s Case, in the Fifth Part of my *Reports*; and thereupon it was inferred, that the Defendant ought to have pleaded in certain, That such King granted to some of the Predecessors of the Abbot, *&c.* or to the Abbot himself, to have Felons goods within the Town of *Llanihangel*, &c. and not that *præd. Abbas habuit & gavisus fuit*, &c. and chiefly in a *Quo warranto*, in which the Defendant ough to shew a full, perfect Title to himself. As to the second, it was objected, That the Plea was insufficient, because that every Plea ought to be triable, either by the Country, if it contain matter of Fact, or by the Justices if it contain matter in Law, or by the Record it self, if it consist in matter of Record, *Plow. Com.* 22. But this Plea is not tri-
[24] able by the Country for two Causes. 1. Because the Substance of the Issue doth consist upon matter of Record; for without matter of Record the Abbot could not have them, which cannot be tried by the Country, but the Law doth attribute so much honour and credit to them, that they shall be tried only by themselves, and not by the Country. *Vide* 37 *Hen.* 6. 21. *Plow. Com.* 7. & 23. 8 *Eliz. Dyer* 242. and *Hind*'s Case in the Fourth Part of my *Reports*. 2. Matters in Law are not triable by the Country, no more then matters in Fact by the Justices, *quia sicut ad quæstionem Facti non respondent Judices, ita ad quæstionem Juris non respondent Juratores.* But in this Case the Defendant hath comprehended in his Plea, *quod præd. nuper Abbas licitè gavisus fuit*, &c. which tendeth to a matter in Law which is not enquirable by the Country, and yet the Defendant hath not shewed his Case in so certain and special manner, that the Court may judge whether the Abbot by the Law had Felons goods or not; and therefore it is agreed in 22 *Edw.* 4. 40. the Lord *Lisley*'s Case. A man was bounden in an Obligation, and the Condition was, That if he came to *B.* on such a day, and there shewed to the Obligee or his Councel a sufficient discharge of the Annuity of 40 *s.* which he claimed out of two houses, *&c.* that then, *&c.* And in Debt upon this Obligation the Defendant pleaded, That he came to *B.* at the day aforesaid, and there offered to shew to the Plaintiffe's Councel a sufficient discharge to them, and they refused, upon which the Plaintiff did demurr in Law. And, after long Argument, it was adjudged, That the Plea was sufficient, for his Plea ought to have alleged what manner of Discharge he offered to shew, that is to say, a Release, or Unity of possession, or other matter of Discharge, upon which the Court might judge if it were

were ſufficient or not. For the Country ſhall not enquire of it, but it ought to be adjudged by the Court, which the Judges cannot do, if the ſpecial matter be not ſhewed to them: but if the iſſue be taken, that the Obligor came not there, the ſame ſhall be tried by the Country, for the ſame is matter in fact, of which the Court hath not Conuſance, and all that appeareth in the ſaid book. *Vide Plow. Com.* 112. *Amy Townſends* caſe, and 159. *b.* in the Lady *Hales* caſe, &c.

And as to the Objection which may be made, that it ſhall be miſchievous to the Subject to drive him to ſhew, or to plead the Charters made to Abbots, Priors, &c. as well for the infinite ſearch of them, as for the impoſſibility to come to them, many of them being loſt, or defaced, or poſſeſſed by one only; To that it was Anſwered, that there is not any ſuch miſchief, either for the incertainty, or for the impoſſibility, for although that the Charters are loſt, yet they are enrolled of Record, of which every one may have an Exemplification; or if ſuch inrollments cannot be found, yet allowances in Eyre (as by the Law ought to be) are of Record of all ſuch Franchiſes, by which it appeareth by force of theſe Charters ſuch Franchiſes were allowed. Againſt which it [b] was argued on the Defendants part, That the plea was ſufficient, upon which Judgment ought to be given for the Defendant: and that all the Conſideration of this caſe doth chiefly conſiſt upon the true Conſtruction of the Statute of 32 *H.* 8. and therefore the final intention of the Act, and the purview of the Act are to be conſidered: The intention of the Act was to advance theſe poſſeſſions as well in valuation as eſtimation, to revive actually and really ſuch privileges, liberties, franchiſes, and Temporal juriſdictions which the late owners of the Abbyes had, &c. Then it is to ſee, What privileges, liberties, franchiſes, and juriſdictions were extinct in the Crown by the coming of the ſaid poſſeſſions to it. And as to that, It is to know, That when the King granteth any privileges, liberties, franchiſes, &c. which were privileges, franchiſes, liberties in his own hands, as parcel of the flowers of his Crown, as goods and chattels of Felons, Fugitives, Outlaws, &c. goods and chattels waiſed, eſtrayes, deodands, wreck of the Sea, &c. within ſuch poſſeſſions, there if they come again to the King they are drowned in the Crown, and he hath them again in the Right of the Crown: and if the wreck, or goods waiſed, eſtrayes, &c. were appendant before to poſſeſſions, now the appendancy is extinct, and the King is ſeiſed of them in the right of his Crown. But when a privilege, liberty, franchiſe, or juriſdiction was at the beginning erected and created by the King, and was not any ſuch flower before in the garland of the Crown, there, by the comming again of them to the Crown they are not extinct, nor the appendancy of them ſevered from the poſſeſſions; As if a Fair, Market, Hundred, Leet, Park, Warren, and the like are appendants to Mannors, or in groſs, and afterwards they come back to the King, they remain as they were before *in eſſe* not drowned in the Crown, for at the firſt they were erected and created newly by the King, and were not *in eſſe* before, and time and uſage hath made them appendant. Which difference was agreed by the whole Court; and this appeareth in our books, for the firſt part of the difference, 6 *E.* 3. 32. *John Darcies* caſe, the Caſe of forfeiture of Warr, and 30 *H.* 8. *Dyer* 44. 43 *E.* 3. 32. 43 *Aſſ. p.* 10. 1 & 2 *Phil. & Mar. Dyer* 108. And for the ſecond part of the difference, 11 *H.* 4. 5. and 15 *E.* 4. 7. the caſe of the Market, 4 *E.* 3. 42. the caſe of the Hundred, 10 *H.* 7. 21. [26] the caſe of the Earldom. All which Privileges, liberties, franchiſes, and Spiritual Juriſdictions of the firſt quality (which were the ancient Revenues and flowers of the Crown) being drowned in the Crown, are now by this Act revived again actually and really in the King, his heirs and ſucceſſors. And as to thoſe of the later part of the difference, there needeth not any Act of Parliament to revive them, for they were not extinct. So that the Patentee in ſuch caſe of Felons goods, ſhall have them as the ſame franchiſe which is *in eſſe* in the Crown. And therefore it was obſerved, that the ſaid general words in Patents, *tot, talia*, &c. *eadem & conſimilia, quot, qualia, quanta, & quæ*, &c. *dictus nuper Abbas habuit*, &c have ſeveral and diſtinct ſignifications; for by force of this word *eadem*, the franchiſes themſelves as hereditaments *in eſſe* in the Crown ſhall paſs, and by force of *talia & conſimilia*, &c. the Patentee ſhall have the like to them the Abbot had, for thoſe themſelves the King cannot grant, becauſe they were drowned in the Crown. And it was agreed, That if the King by his Letters Patents grant to *I. S.* and his heirs, *Catalla felonum* within his Mannor of D. and afterwards *I. S.* granteth to the King his heirs and ſucceſſors, the Mannor with the ſaid Franchiſe, and afterwards the King by his Letters Patents granteth to *I. N.* and his heirs, the ſaid Mannor, and further granteth to him and his heirs within the Mannor, *tot, talia, tanta, eadem & conſimilia privilegia, libertates, & franchefias, quot, qualia, quanta, & quæ*, the ſaid *I. S.* had; In this caſe in a *Quo Warranto I. N.* ought to plead in ſuch general manner as the Defendant now hath done; but ought to plead in ſpecial the firſt Charter made of the ſaid Felons goods, and the regrant of them, &c. All which was agreed by the whole Court. But it was ſtrongly urged by the Defendants Councel, that by force of the Act of 32 *H.* 8. the Defendant might averr, That the ſaid *John* late Abbot of *Strata Marcella* had and enjoyed within *Flanthangel* goods and chattels of Felons, for therein the Defendant in his plea hath followed the words of the ſaid Act, which are, *That all privileges, &c. which the ſaid Owners of the ſaid Abbyes, &c. have uſed and exerciſed lawfully within 3. moneths before the ſaid Act of* 27 *H.* 8. *ſhall be by force of the ſaid Act of* 32 *H.* 8. *revived*, &c. For the Defendant hath pleaded, That the late Abbot, &c. lawfully hath uſed and exerciſed to have the goods and chattels of Felons, till the 4. day of *Feb. Anno* 27 *H.* 8. and the ſame was compared to divers other Statutes; as in *Vernons* caſe in the 4th part of my *Reports*, where the Statute of 27 *H.* 8. *cap.* 10. which ſpeaketh for the Jointure of the wife, giveth averment, that an eſtate upon an other expreſs [b] condition, may be averred for the Jointure of the wife. And ſo upon the Statute of 13 *Eliz.* of uſury, and upon the Statute of 23 *H.* 8. upon Obligations taken by Sheriffs and the like. And where it is Objected, that this uſury is not triable, it was Anſwered, that it ſhall be tried

by the Country, for (*licitè*) is concluded within the other words, *sc. gavisus fuit*, for (if *licitè* had been left out) in the sense of the Statute it had been implyed, as the Statute of *Glouceſter*, *cap.* 3. which saith, whereof no fine is levied in the Kings Court, is as much as to say, whereof no fine is lawfully levied in the Kings Court. So 11 *H.* 4. 80. upon the the Statute of *West.* 2. *cap.* 5. *Si Epiſcopus Eccleſiam conferat*, is as much as to say, *Si Epiſcopus Eccleſiam legitimo modo conferat.* And in the Statute of *West.* 2. *de Donis conditionalibus*, the words *ad dona prius facti. non extenditur*, are to be intended of gifts lawfully, and in due manner made by the Donees, before the Statute, *Plow. Com.* in the Lord *Barkley*'s case; and therewith agreeth 12 *H.* 4. *Formedon* 15. And the Statute of 1 *H.* 4. *cap.* 2. which enacteth, that all manner of Indictments taken in Torns or Leets shall be delivered to the Justices of Peace at the next Sessions; &c. and that he shall proceed upon them, extend only by construction of Law to proceedins upon lawful and sufficient Indictments, and do not make any insufficient indictment good, as it is holden in 4 *E.* 4. 31. And that is the fundamental and directory reason of the Common Law, for the Common Law saith, That no conspiracy lyeth when the party was indicted, but although he be indicted, if the Indictment be not sufficient in Law, the party shall have his writ of Conspiracy, for when the Common Law speaketh generally, it is to be intended in a good and lawful sense. So that it was concluded, That if this word (*licitè*) had not been averred, it had been implyed, and by Consequence the addition of it shall not make alteration of tryal, for *expreſſio eorum quæ tacitè inſunt nihil operatur.* And because the Defendant ought to follow the Statute in his plea, and not to omit this word *licitè*, which if it had been left out in the Statue, it had been implyed, for this cause it was concluded, that this issue shall be tried by the Country. And it was said, that the Statute of 32 *H.* 8. hath great reason to direct such summary course of averment for the impossibility and infiniteness of search, many of the said Religious houses being founded before time of memory, and their Charters of Franchises also made before time of memory, and some by general, obscure, doubtful and obsolete words; and although that such Franchises have been allowed in Eyre, yet the allowance in Eyre of it self only is not pleadable, and perhaps such allowances being of such great antiquity, have been by casualty, or length of time, which is
[27] *edax rerum*, defaced or lost. And for these causes, and for avoiding of incertainty of Questions and Sutes, and for the advancing of the estimation of these possessions, the Statute of 32 *H.* 8. hath altered the manner of pleading which the Common Law would have required. And upon this Case great doubt was conceived by *Popham* Chief Justice, *Gawdy*, and the Court, and the same depended in argument and advisement, till *Hil.* Term, 39 *Eliz.* in which Term 3. other matters were moved against the Defendants claim. 1. Because it doth not appear by the Defendants claim what estate the Abbot had in the said Franchises, but generally, *quod licite habuit & gavisus fuit*, &c. and perhaps he had in them but a Lease for years, or for life, &c. And the Statute of 32 *H.* 8. doth not give more to the King than the Abbot had, and the Statute of 32 *H.* 8. doth not revive more than was extinct; and by the Letters Patents of 37 *H.* 8. the Defendant hath pleaded a grant of the Franchises as Franchises revived by the Act, and *in esse* at the time of the grant. 2. The second Objection was, That when the Defendant hath claimed *bona & catalla waviata*, and strays, by prescription appendant to the said Mannor, and Felons goods by force of the Act of 32 *H.* 8. and possession of the said Abbot, the Defendant concludes his claim to all, *& eo warranto clamat libertates Franchesias, & libertates, & privilegia præd. tanquam ad Manerium præd. ſpectant. & pertinent.* whereas *bona & catalla felonum* without question cannot be appendent, or appurtenant to the said Mannor, because they lye not in prescription, and the Claim without the Conclusion *eo warranto*, had been insufficient, and it is all one to have no conclusion, and an insufficient conclusion. *Vide* 22 *H.* 6. 53. 36 *H.* 6. 17. 37 *H.* 6. 39 *H.* 6. Lastly, it was Objected, That the Defendant in his claim hath conveyed the said Mannor to himself by Feoffment, which is pleaded without Deed, and hath not conveyed to himself any title, and the Franchises cannot pass without deed, and then without question judgement ought to be given against him, for he hath not any title, and the Franchises, (if there were any) do remain with the Feoffor. As to the first of these three Objections, It was answered, 1. That a general having and enjoying of them, shall be intended of a having and enjoying in Fee simple, and that a particular estate or Interest shall not be presumed, if it be not specially shewed, and therefore *primâ facie* it shall be intended a Fee-simple. 2. That the Defendant in this case hath followed the words of the Statute, but it was granted, that the pleading had been the clearer, if the Defendant had alleged, That the said Abbot was seised of them in Fee till the said Act of 27 *H.* 8. and in the end taken the averment
[b] according to the Statute. But the Court did not give Judgement upon that point. As to the 2. the Court gave not any Resolution, for some said it should be taken good *reddendo ſingula ſingulis*, and some held the contrary. But it was Resolved by the whole Court, That if the Queen granteth the Mannor of *D.* to *I. S.* and his heirs, and within the same Mannor to have waifs, & strayes, goods and chattels of Felons, &c to the said Mannor belonging and appertaining, that in a grant these words (*to the ſaid Mannor belonging and appertaining*) do not referr to Felons goods, or other Franchises which lye in point of Charter, which could not by no usage nor time be appendant or appurtenant to a Mannor, but they shall pass although they were never demised or used with the Mannor. But the doubt was conceived in the case at barr when it was by way of pleading. *Vide* Justice *Windhams* case, in the 5. part of my *Reports*. But as to the last Objection, it was Resolved by the whole Court, without any question, That forasmuch as the Defendant hath not conveyed to himself any title to the said Felons goods, that for them Judgement should be given against him, and so it was.

Note Reader upon the Arguments of this case, 4 things are worthy consideration. 1. What antient Franchises ought to have allowance, and what not. 2. How in a *Quo Warranto* one may claim

for life only; and that was the greater doubt: For it was objected, That if Queen *Mary* hath referred it to the Charter made to Queen *Katherine*, yet without a special grant, that they should have such Franchises in tayl, &c. which Queen *Katherine* had for life, such Franchises which she only had for life shall not passe to them in tayl; for the Queens grant shall be taken to a common intent: But here the case is stronger, For the Charter of Queen *Mary* doth not referr to the Charter of Queen *Katherine*, but only by general words, *prout aliquis seu aliqui*, &c. But it was Resolved, That when a Charter hath general reference to other Charters, it is as much in Law as if all the Charters had been recited, for they are of Record. And although that Queen *Katherine* had the Mannor and Hundred but for life, yet it is within the expresse words of the reference, *viz. aliquis seu aliqui præmissa ante tunc habentes, possidentes, aut seisiti inde existentes, unquam habuerunt, tenuerunt, seu gavisi fuerunt*, so that Queen *Katherine* was within the word (*seisiti*) for she was seised of the Mannor, &c. And I acquainted *Popham* Chief Justice with this Resolution, and he agreed with it: And it was well observed, That the reference doth not extend to the quantity of the estate, but to the quality of the Franchises, whereof they to whom the reference was made were seised, be they seised for life, in tayl, or in fee. [b]

As to the 4th. point, there are diverse manners of tryal allowed by the Common Law, above the three mentioned in the argument of this case, that is to say, Of matters in fact by Jurors; Of matters in Law by the Justices; and of matters of Record by the Record it self. As in Treason the Tryal of one who is a Peer of the Realm, that is a Lord of the Parliament, shall be upon an Indictment of Treason or Felony, tryed by his Peers, without any oath, but upon their honours and allegeances; But in an Appeal at the sute of a Subject they shall be tryed *per probos & legales homines juratos*, 10 E. 4. 6. &c. Customs and usages of every Court shall be tryed by the Judges of the same Court, if they be pleaded in the same Court, 11 E. 4. 2. In Dower or Appeal brought of the death of her Husband, or in an Assise brought by a woman who was the wife of B if the Tenant or Defendant plead that the Husband is living, the Tryal shall not be by Jury, but by the Justices, upon proofs made before them, for greater expedition: 6 E. 3. 29. 17 E. 3. 30. 43 *Ass. p.* 26. 8 H. 6. 23. 33 H. 6. 8, 9, 10. *Diversity of Courts* 119. 36 *Ass.* 5. *Vid.* 39 *Ass. p.* 9. 41 *Ass. p.* 4. In a writ of Error to reverse a fine for Nonage, or in an *Audita querela* to reverse a Recognisance or Statute for Nonage, there the age shall be tryed by the inspection of the Justices, and not by the Country; for that which Judges of Record do as Judges, shall not be tryed by Jury. If an Infant appeareth by Attorney, the same is Error, but shall be tryed by Jury, and not by the Justices; for the making of the warrant of Atturney is the Act of the party, without examination of the Justices: and yet the appearance by Attorney is recorded by the Court: And therefore if the Plaintif maketh Attorney in Court, and the Defendant pleads that the Plaintif is dead, and one appeareth and saith, he is the Plaintif, which is denyed by the other party, The Justices shall adjudge if he who appeareth be the same person who before made Attorney in Court; and therewith doth agree 34 H. 6. 43. If the Tenant in a Real Action voucheth *A.* as heir within age; Or if the Tenant for life be impleaded, and he prayeth in aid of *A.* in Reversion within age, and prayeth that the paroll may demurr, &c. in the one case and the other, if the Demandant replyeth that he is of full age, it shall not be tryed by the Country for the great delay to the Demandant; but a Writ shall be awarded to the Sherif, commanding him, that *Venire faciat tali die præd.* A. *ut per aspectum corporis sui constare poterit præfat. Justic. nostris si præd.* A. *sit plene ætatis, nec ne, &c. Vid.* 17 E. 2. *Accompt* 121. 33 E. 3. *Acc.* 130. &c. *Maybem* may be tryed by inspection of the Court, 28 *Ass.* 5. 21 H. 7. 33. 11 E. 4. 2. If Question be made if these be the Summoners and Viewers, &c. which appear, it shall be tryed by the examination of the Justices, 33 H. 6. 10. Earl or not Earl, Baron or not Baron shall not be tryed by Jury, nor by the Justices, but by the Kings writ, as appeareth in the Countess of *Rutlands* Case, in the 5 part of my *Reports*. 25 H. 6. 46. &c. 19 E. 4. in a plea of Alien born, the League between the King and the Soveraigne of the Alien shall be tryed by the Record of the Chancery, for every League is of Record. And generally all matters of Record shall be tryed by Record it self, and not by Jury, or otherwise. 19. H. 6. 52. 9 H. 7. 2. 5 E. 4. 3. 16 H. 7. 3. 1 H. 7. 29. *b. Plow. Com.* 231. If antient Demesne be pleaded of a Mannor and denyed, it shall be tryed by the Record of the book of Domesday in the Exchequer; but if issue be taken, that certain acres are parcel of the Mannor, which is ancient demesne, it shall be tryed by Jury; for it cannot be tryed by the same book, 22 *Ass.* 45. But see 44 E. 3. 32. In an attachment upon a prohibition they were at issue, if the sute in Court Christian were for Tythes, or for a rent reserved, and it was tryed by the Jury, and not by the Rolls of the Bishop, for they are not of Record. The same Law of all other Courts, which are not of Record, 34 H. 6. 49. 9 E. 4. 43. And therewith agreeth 44 E. 3. 32. And probate of a Testament shewed forth under the Seal of the Ordinary; yet the other party may plead, that he who is dead died intestate, as it is holden 44 E. 3. 16. So if issue be taken upon the probate of a will, or if administration was committed (although they shew the Bishop Letters Testimonial) it shall be tryed by Jury; and therewith agreeth 13 *Eliz. Dy.* 294. 6 *Vid.* 21 H. 6. 24. When a man is found Ideot from his birth by office, he who is so found Ideot, (falsly as he supposeth) may come personally in Chancery, before the Chancellor, and pray that before him and the Justices and Sages of the Law, which he shall call to him (and are called the Kings Councel) he may be examined, if he be Ideot or not; or by his friends he may sue forth a writ out of the Chancery, returnable in the Chancery, to bring him into the Chancery, *ibid. coram nobis & consilio nostro examinand:* And if it be found upon such examination, that he is no Ideot, the Office found thereof, and all the Examination which hath been made by force of the writ, or the Kings Commission, is utterly void, with- [31]

without any traverſe, or *Monſtrans de droit*, or other ſute : As it appeareth by the Regiſter and *F. N. B.* 233. *Vid.* 10 E. 3. *Liverie* 30.

Note Reader, Now by the Statute of 32 *H.* 8. *cap.* 46. Ideots and their Lands are in the Survey of the Court of Wards, &c. An Apoſtata ſhall be certified by the Abbot, or other Religious Governour to whom he owed obedience, *F. N. B.* 233. *Regiſter* 267. In ſome Caſes, as in general Baſtardy, Excommengment, Loialty of Matrimony, Profeſſion, and divers other Eccleſiaſtical matters they ſhall be tryed by the Certificate of the Biſhop. In Appeal, or uppon Approvement, the Defendant in ſome Caſes may plead, Not guilty, and try it with the Plaintif by combate, or battail in perſon before the Juſtices, 17 *Aſſ. p.* 1. 19 *H.* 4, 3. So in a writ of Right the Tenant may joyn iſſue upon the meer Right, and try it by combat or battail by his Champion, with a Freeman the Champion of the Demandant (and not in perſon) before the Juſtices, 9 *E.* 4. 35. 1 *H.* 6. 1. 3 *H.* 6. 55. If it be in Queſtion whether the Sherif made ſuch a Retorn, it ſhall be tried by the Sherif, 9 *H.* 4, Trial by Certificate of the Sherif, upon a writ directed to him in Caſe of Privilege, if one be Citizen or Foreiner. 10 *H.* 6. 10. If a Queſtion be made if ſuch a one be Sherif, it ſhall be tryed by the Examination of the Sherif himſelf, 10 *H.* 4. 7. yet he is made by Letters Patent of Record, and therefore alſo it may be tryed by the Record, 32 *H.* 6. 27. A Retorn made by the Under-Sherif, if it be denied, ſhall be tryed by the Under-Sherif, and the Sherif cannot diſavow it, if he confeſs himſelf to be Under-Sherif, 10 *H.* 4. 7. If an Approver ſaith that he did commence his Appeal before the Coroners by dureſs, it ſhall be tryed by the Coroner; and if the Coroner deny it, he ſhall be hanged, 12 *Aſſ.* 29. 12 *E.* 3. *Corone* 118. Trial if the Statute ſhewed forth be the true Statute, ſhall be tryed by the Examination of the Mayor and Clerk of the Statutes, who took the Statute, and not by Jury, *F. N. B.* 104. *a. Regiſt.* 27 *E.* 3. 41. Cuſtom of *London* ſhall be tryed by the Mayor and Aldermen, certified by the Mouth of the Recorder, 5 *E.* 4. 30. 21 *E.* 4. 16, In an Aſſiſe the Tenant ſaith that the Lands are ſeiſed into the Kings hands, it ſhall be tryed by the Examination of the Eſcheaters, 9 *H.* 41. 38. *Aſſ.* 16. If one in avoidance of an utlagary allege, that he was in priſon at *Burdeaux*, *ultra Mare*, *in ſervitio Maioris de Burdeux*, it ſhall be tryed by the Certificate of the Mayor, 4 *E.* 4. 10. And in like Caſes other Tryals ſhall be by the Certificate of the Marſhall of the Hoſt, 21 *E.* 4. 10. *Lit.* 21. *F. N. B.* 85. And by the Captain of *Calice*, 2 *E.* 4. 1. 11 *H.* 7. 5. by a Meſſenger of a thing done beyond Sea, as in *Barties* Caſe, 2 *Eliz. Dyer* 176, *Vid.* 10 *H.* 4. 3. At the *Petit Cape*, the Tenant ſaid that he was impriſoned 3 days before the default, and 3 days after, it ſhall be tryed by the Examination of the Atturney 13 *R.* 2. *Examination* 22. Not attached by fifteen daies in an Aſſize, ſhall not be tryed by Jury, but by Examination of the Baily; ſo that the Tenant was not ſummoned *ſecundum legem terræ*, ſhall not be tryed by Jury, but by wager of Law, and wager of Law doth countervail a Jury; for the Tenant ſhall make his Law *de duodecem à manu*, that is to ſay, 11 with himſelf (and that for to avoid delay) if it be not againſt a Corporation, as Mayor and Commonalty, for then it ſhall be tried by the Country for neceſſity, becauſe he cannot wage his Law. In a writ of Deceit, upon a Recovery by default, the tryal ſhall be, if the Judgement be given upon the *Petit Cape* by the Summoners, if upon the *Grand Cape* by the Summoners, *pernors*, or *veiors*, and not by the Country, 48 *E.* 3. 11. So if a Recovery by default in a real Action be pleaded, to which the other ſaith, not compriſed, it ſhall not be tryed by Jury, but by the Summoners and Veiors, 10 *H.* 4. 7. and yet there is no remedy if they ſay falſly; and therefore *ubi eſt majus periculum, ibi eſt cautius agendum.* The cauſe of challenge ſhall be tryed by two Triors to be appointed by the Juſtices, 9 *E.* 4. 5. 15 *E.* 4. 24. 4 *E.* 4. 18. 18 *E.* 4. 18. 16 *E.* 4. 7. 14 *H.* 7. 1. 19 *H.* 6. 48. 20 *Aſſ.* 15. 7 *H.* 4. 46. But trial of any of the Grand Jury ſhall be taken before 4 Knights. Alſo tryal may be in Debt, upon a ſimple contract, *detinue*, *&c.* either by wager of Law of the Defendant himſelf, or by the Jury at the Defendants election, *Vid.* 30 *Aſſ. p.* 19. Trial by Jury of Attorneys of the Common pleas, and the Exchequer. As to divers other tryals, as 1. *per medietatem linguæ.* 2. *per primos Juratores & alios, & per primos* only upon not compriſed and certificate of Aſſiſe. 3. By Jury, with witneſſes adjoined. 4. By tryal by Grand Aſſiſe, above the number of 12. that is to ſay by 16. 5. By tryal in Attaint by 24. I have omitted theſe and divers other the like, becauſe they are tryals by Jurors, and for them, See 22 *E.* 3. *cap.* 14. the Statutes of 25 *E.* 3. *Stat. Stap. cap.* 8. 27 *E.* 3. *Stat. Stap. cap.* 8. 21 *H.* 6. 4. 28. *E.* 3. *cap.* 14. 2 *H.* 5. *cap.* 3. 8 *H.* 8. *cap.* 28. The Statute of *York*, *cap.* 2. 42 *E.* 3. 2. 44 *E.* 3. 34. 11 *Aſſ. p.* 19. 7 *Aſſ.* 20 18 *Aſſ. p.* 11. 29 *Aſſ.* 57. 40 *Aſſ.* 34. 30 *E.* 3. 8. *b.* 7 *H.* 4. 4. 5 *H.* 7. 8. *b.* 4 *Aſſ.* 19. 22 *Aſſ.* 16. 27 *Aſſ.* 17. 31 *Aſſ. p.* 6. 38 *Aſſ.* 4. 40 *Aſſ.* 4. 48 *Aſſ.* 1. 5 *H.* 5. 1 *H.* 6. 5. 4 *H.* 6. 28. 12 *H.* 4. *& cætera Patent.* Concerning tryals by particular Cuſtom, I totally purpoſely do omit them. It appeareth by ancient Records, as well before the Conqueſt as ſince (for no credit is to be given to conjecture) that then there was another manner of tryal in criminal cauſes, and that was called *Ordalium*, and in the Saxon language *Ordel*, which is as much as to ſay, *expers Criminis*; for (*or*) in the ſaid language is privative, and (*del*) is part, that is, no party, or not guilty; and then the Defendant being arraigned, and pleading not guilty, might chooſe whether he will put himſelf upon God and the Country, which is upon the verdict of 12 men (as they do unto this day) or upon God only, and therefore it was called *Judicium Dei*, preſuming that God would deliver the Innocent, *ſc.* if he were of free eſtate, then by fire, *ſc.* to paſs over *novem vomeres ignitos nudis pedibus*, and if he eſcaped *illæſus*, then he ſhould be acquitted, and if not, he ſhould be condemned; and if the guilty party were of ſervile condition, then he might put himſelf upon the tryal of God, *ſc.* by Water, and that in diverſe manners: All which appeareth in *Lambard verbo Ordalium*, with all the ſuperſtitious vanities appertaning to it: And thereof *Glanvil* wrote, who wrote in the time of *Hen.* 2. *lib.* 14. *cap.* 1 & 2. And 17 of King *John in turr. London.*

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[b]

claim Franchises, which lie in point of Charter. 3. When one claimeth such Franchises by the said general words, *tot, talia, eadem, & consimilia privilegia, &c.* as such a one had, &c. what estate he to whom the reference is made, ought to have in the Franchises. 4. Something is needful to be said of the manner of Trials allowed by the Common Law; for above these 3 mentioned in the said arguments, there are many more. As to the first, it is to know, That every Franchise, Liberty, or Privilege, either lyeth in point of Charter, and cannot be claimed by prescription, as goods and chattels of Felons, or lyeth in presciption and usage in *pais*, without the help of any Charter, as wreck, waif, strays, &c. Of Franchises which lie in point of Charter, either they are before time of memory, or within time of memory, (that is to say the time of *R.* 1. *Lit.* 38. *Regist.* 158. 20 *H.* 6. 3. 34 *H.* 6. 36. 5 *E.* 3. 50, 51. 6 *E.* 3. 18. 8 *Eliz. Dyer* 245.) If they were granted before time of memory, as many of the Charters and Grants to Abbots, Priors, and such religious corporations are, they are granted either by special words, as they seldom or never were, or by general old, obscure ambiguous, and obsolete words; As in 30 *Ass.* 31. King *Will.* the Conquerour granted to the Abbot of *Battail*, *quod habeat Curiam suam regalem*, 34 *Ass.* 14 The Conquerour granted to the Abbot of *Glassenbury*, *omnem regiam potestatem.* 14 *H.* 6. 12. King *H.* 2. founded the house of St. *Bartholomew*, and granted that they should be as free in their Church as the King in his Crown: 10 *H.* 7. 13. 14. In old times the King granted *omnia jura sua regalia*: The Kings *Canutus*, and *Edward the Confessor* granted to the Abbot of *Burie*, *quod nulla secularis persona, aut minister Regis in aliquo se intromittat in burgo sancti* Edmundi, *aut hominibus in eo manentibus nisi Abbas & Covent. & eorum Ministri*, and many others which I have seen: And be such grants of Franchises special or general, certain or obscure, &c. yet forasmuch as they are made before time of memory, and so themselves are not any Records pleadable, they ought to have the aid and supportation of some matter of Record, within time of memory, as allowance before Justices in Eyre, or before the Justices of the Common Pleas, or before the Barons of the Exchequer, or by force of confirmation by Charter of Record of some King within time of memory, and shall not be now allowed, but for such part of the grant which so hath been allowed or confirmed, although it be all in one Patent. But usage only, which is but matter in fact, will not support a Record before time of memory in such case, and therewith agreeth 26 *Ass.* 24. 30 *Ass.* 31. 34 *A.* 14. 1 *H.* 4. 3. 2 *E.* 4. 22. 21 *H.* 7. 29. 9 *H.* 7. 12. 10 *H.* 7. 14. 16 *H.* 7. 16. 20 *H.* 7. 7. 8 *H.* 8. *Kelway* 189, 190. *Vid.* 8 *E.* 3. 18. 17 *E.* 3. 11. 12 *H.* 4. 23. 8 *H.* 6. 4. 38 *Ass. p.* 1. And when such old grant is general, obscure, or ambiguous, It shall not be now interpreted as a Charter made at this day, but it shall be construed as the Law was taken at the time when such old Charter was made, and according to the old allowance on Record, 33 *H.* 6. 22. 10 *H.* 7. 13, & 14. 16 *H.* 7. 9. 12 *H.* 4. 12. 14 *H.* 6. 12. 35 *H.* 6. 54. 9 *H.* 7. 11. 6 *E.* 3. 54, 55. 7 *E.* 3. 40, 41. 18 *E.* 3. *Conusans* 39. 34 *Ass.* 14. 40 *Ass.* 21. But if the Charters were granted within time of memory, then they are pleadable, without shewing any allowance or confirmation, as by the books aforesaid appeareth. Of franchises which cannot be claimed by prescription, as wreck, waif, stray, &c. as they may be originally claimed by usage, which is a matter in *pais*, so usage may uphold them, without any aid of any Record, either of Creation, allowance, or confirmation; and therewith agreeth the books aforesaid.

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As to the second it is true, that it is said in 6 *E.* 3. 5. & 8 *E.* 3. 10, & 11. and commonly in other books, That the *Quo Warranto* for Franchise is in the nature of the Kings writ of Right in such Case, and that the Defendant in it ought to make a sufficient title against the King in such Case; and it is to see how this title shall be made. And for the better understanding of the reason of it, and of the books which treat thereof, it is to know, That it is enacted by a Statute made 18 *E.* 1. called *Statutum de Quo Warranto*, Concerning the Writ which is called *Quo Warranto*, it was established by our Lord the King, That all those which claimed to have quiet liberty of the Franchise before the time of King *Richard* without interruption, and can shew the same by lawful Enquest, shall well enjoy their possession, and in case that such possession be demanded for cause reasonable, the King shall confirm it by title: And those that have old Charters of Franchise, shall have the same Charters allowed, according to the tenor and form of them: And those that have lost their liberties since *Easter* last past, by the aforesaid writ, according to the course of pleading in the same Writ heretofore used, shall have restitution of their Franchise lost; and from henceforth they shall have according to the nature of this present constitution.

[b]

In 2 *E.* 3. 29. The King brought a *Quo Warranto* against *Roger Mortimer* and *Johan* his wife, before Justices in Eyre in the County of *Middlesex*, to shew by what Warrant they claimed to have Conusans, as well of the Crown as other, *contra voluntatem nostram*, in their Mannor of *T.* where *Roger de Mortimer* and *Johan* said, That *Walter de Lacie* ancestor of the said *Johan* was seised of the said Mannor of *T.* and of other lands after time of memory, that is to say in the time of *R.* 1. and had the said Franchise to have conusance of pleas in the said Mannor, long time before *R.* 1. from which *Walter* the Inheritance descended to many daughters, and conveyed part after partition made, to the wife of the Defendant, in allowance of other lands, &c. and the Defendants prayed in aid of the other Coperceners, and the Justices denied the aid, and because the Defendants held themselves to the aid, and would not say other thing, the Justices did forejudge them of the Franchise; and thereupon the Defendants brought a writ of Error out of the Chancery, retornable in the Kings Bench; and the first Judgment was reversed for two causes, which Sir *Jeffry Scrope* openly declared. 1. That the Justices denied the Defendants aid, where the aid was grantable. 2. That they have forejudged the Defendant of the Franchise, that is, to forfeit the Franchise for ever; for in the same case the Franchise ought to be seised into the Kings hands; and in some case shall be forejudged: But Forejudger holdeth for ever. And therefore there *Scrope* said, we see by this Record, that the Justices pusted the Defendant of the aid, where the aid was grantable;

[29]

and further awarded that they should be forejudged of the Franchise, because they would not otherwise plead, but held themselves to the aid; where for want of pleading the Franchise ought not to be forejudged, but seised, if the Defendants answer had not been sufficient; and therefore the Court awarded that the Judgement was erronious, &c. and void, and sue you to have the Franchise.

But Note Reader that it is to be understood, and so it may be gathered by the book, That the said Franchise had been allowed before Justices in Eyre. And therewith agreeth 18 *H.* 6. *Prescription* 45. If a man hath allowance in Eyre of Franchises which lie in point of Charter, as to have conusance of pleas, &c. that he may prescribe (by the help of such allowance of Record) in such Franchises. And so, as it seemeth, the said Statute of 18 *E.* 1. well expounded, that is to say, That the party who hath such allowance, which is such possession as the Statute intendeth, may prescribe in such Franchises which lie in point of Charter. And the same stands upon great reason for the Charter may be made before the Conquest, and of such antiquity, that the Charter it self and every enrolment of it is utterly perished and consumed; and therewith agreeth 8 *H.* 8. *Keilway.* And as to the Objection which was made, that in the case at Bar no tryal could be by the Country, whether the Abbot had Felons goods, *Vide* 8 *E.* 3. 10, & 11. *John* brought a Replevin of Sheep against the Abbot of *Peterborough*, and diverse others, The Abbot avoweth the taking by reason that he is Lord of the Hundred of *F.* within which Hundred he hath a Liberty to have the goods of all Felons and Fugitives within the same Hundred to take them by himself or his Officers; And that *Robert de Porter* stole the said goods, being the goods of the said *John* the Plaintif, and would have driven the Sheep aforesaid through the Town of *C.* within the same Hundred; whereupon the said Abbot and the others, would have arrested the said *Robert* as a Felon, and thereupon the said *Robert* fled to the Church of *Libbone*, which is within the same Hundred, and there before the Coroner of the said County he confessed the said felony, and thereupon he was abjured; so the Abbot is seised of the said Sheep, as of his own goods by reason of the said Franchise. To which avowry exception was taken, because he claimed *bona & catalla Felonum & Fugitivorum*, and hath not shewed rightful title, as to say, That he and his predecessors have by [b] and time out of mind seised, (that is to say with allowance as above) or by the Kings Charter. To which it was answered; Forasmuch as he hath said, that he hath such Franchise, he needeth not to shew by what title he claimeth to have such Franchise: But when the King bringeth his *Quo Warranto* against him, then must he shew his title. And the Plaintif was awarded to answer over, *Ex quo sequitur*, that the general avowry, that the Abbot had such Franchise, that is to say, to have Felons goods within the said Hundred, being ordered to be good, that the same is issuable and tryable by the Country, whether the Abbot had such Franchise or not; for if the matter of the avowry was not issuable and tryable, the avowry could not have been ruled to be good.

As to the 3 *Hill.* 40. *Eliz. Edward Ameredith* Esquire, put in his claim into the Exchequer for issues, goods and chattels of Felons, &c. within his Mannor of *Stokenham*, and of the Hundred of *Colridge* within the County of *Devon*, which fell in *Anno* 35 & 36 *Eliz.* and the case was such: King *H.* 8. was seised in fee of the said Mannor and Hundred, and *inter alia*, by his Letters Patents, 25 *Feb.* 35 *H.* 8. granted to Queen *Katharine* his Wife the said Mannor and Hundred (*inter alia*) for her life. And by other Letters Patents, 28 *Feb.* 35. granted that the Queen should have, for term of her life, within the said Mannor and Hundred *bona & catalla felonum, fugitivorum, utlagatorum*, &c. Fines, amerciaments, issues, &c. as well of the Royal Officers, as of others, &c. *annum, diem, & vastum*, &c. to be discharged of purveyance for the King, his heirs and successors, and of carriages, to be exempt from the Jurisdiction of the Admiral, and to have Admirals Jurisdiction, and to nominate Coronors and Escheators, &c. And afterward Queen *Katherine* died, and conveyed the said Mannor and Hundred by mean descents to Queen *Mary*; who 22 *Junii Anno* 1. of her reign, by her Letters Patents granted the said Mannor and Hundred to *Francis* Earl of *Huntington*, and *Katherine* his Wife (late parcel of the possession of *Margaret* Countess of *Salisbury*, and afterwards assigned to Queen *Katherine* for her Joynture) and that they within the said Mannor should have, *tot, talia, eadem, & hujusmodi Libertates, Privilegia,* [30] *Franchesias, Jurisdictiones*, &c. *quot, qualia, quanta, & quæ pred. Comitissa* Sarum, *aut aliquis vel aliqui aut præmissa aliquam inde parcellam ante tunc habentes possidentes, aut seisiti inde existentes unquam habuerunt, tenuerunt aut gavisi fuerunt*, &c. *infra præmissa*, &c. *ratione vel pretextu alicujus cartæ, doni, seu concessionis, seu aliquarum literarum potentium*, &c. To have and to hold to them in tayl, with diverse remainders in tayl, the remainder over in fee, with a general *Non obstante*; and conveyed the said Mannor with all Liberties, Privileges, Fanchises, &c. by mean conveyances, to the said *Edward Ameredith* and his heirs. And upon all this matter the question was, if *Ameredith* should have all the said Franchises, &c. which were granted, as aforesaid, to Queen *Katharine*. And in this case two questions were moved, one, because that the reference in the Letters Patents to Queen *Mary* were general, *sc. quot, qualia, quanta, quæ aliquis seu aliqui*, &c. And then the grant of the liberties being general, *tot, talia*, &c. without expressing any in certain, and the reference being also general, it was objected it was too incertain in the Kings Case: But the Case in 20 *E.* 3. Avowry was well agreed; for there although that the grant of the Liberties was general, yet the reference was certain: But it was resolved by *Periam* Chief Baron, and the whole Court, that although that the grant and reference were general, yet it ought to be applied to a certain in particular, as in this case to the Charter made to Queen *Katharine*. The second doubt was, That forasmuch as Queen *Marie* hath granted an Inheritance in the said Franchises, &c. such general grant, with such general reference shall not be applied to a grant which the King made for

London. membr. 35. *Rex Petro de Scudamor & aliis*, &c. *Mandamus vobis quòd conveniatis unà cum Vicecom. noſtr.* Winton *ad diem & locum competentem*, *& tanquam Juſticiarii noſtri capi faciatis judicium ferri à Robin. fre. Petipas*, *quod ei adjudicatum eſt per Juſticiarios noſtros tinerantes tempore inverdicti*, *& tunc capi non potuit quia appellatus fuit de morte hominis*, *& cum legem illum ceperitis*, *faciatis inde quod judicium dederit*, *mandamus enim Vicecom. noſtr.* Wintonie, &c. This manner of trial was called *Vulgaris purgatio*, utterly forbidden by the Councels of the Church, as temptations of God, and not lawful trials, and that they were invented *fabricante Diabolo*: And in the Gloſs it is ſaid, *Vulgaris purgatio prohibetur*, *quia fabricante Diabolo eſt inventa*, *cum ſit contra præceptum Domini*, *Non tentabis Dominum Deum tuum.*

And afterwards the ſaid tryal called *Ordel*, *viz. judicium ignis & aquæ*, was taken away by Parliament: and that appeareth *Rot. Pat. Anno* 3 *H.* 3. *membr.* 5. For the Record ſaith, *Proviſum fuit per Regem & Concilium*, &c.

And that was the true manner of the tryal of *Ordel*: And although it were firſt forbidden by the Canons, yet it remained in uſe within this Realm, till it was utterly taken away by authority of Parliament. And *Monamachia*, i. e. *Duellum* is alſo forbidden by the Canons; but yet foraſmuch as it is not yet taken away by Parliament, the ſame (in ſome Caſe as it appeareth before) doth remain even to this day. And of this manner of tryal by combate or battail, not only writeth *Glanvil, lib.* 2. *cap.* 3. & 4. as he wrote alſo of *Ordel*, But *Bracton lib.* 3. *Tract.* 2. *cap.* 21. *fol.* 140. And *Britton*, *cap.* 22. wrote only of the tryal by battail, and not of *Ordel*, becauſe the ſame when they wrote was utterly taken away and condemned. See *Deuter. cap.* 18. *ver.* 10. All which (becauſe many have erred in this point of Antiquity) I thought worthy to be imparted to the ſtudious Reader. [33]

Paſch. 42 Eliz. *in the Common Pleas.*

Bucknal's Caſe.

Paſch. 42 *Eliz.* in *Bucknals* Caſe in the *Common Pleas*, divers points were reſolved, 1. That there is a difference when the Lord in his avowrie varieth from the truth of the quality of the ſervices, by colour of ſeiſin and poſſeſſion which he hath got from his Tenant; and when he varieth from the truth of the quantity of the ſervices, by reaſon of ſeiſin which he hath got of more than he ought to have of the ſame nature; as the caſe there was: *Bucknal* avowed, becauſe that the Plaintif held of him certain Land, by Fealty, Rent, and Sute of Court, and alleged ſeiſin of all, and for the Rent behind, &c. where the true tenure was by Fealty and Rent only; in this caſe the ſeiſin of the Sute is not material, becauſe it is of another quality and nature, and the tenure originally was not charged with any ſervice of ſuch quality as Sute, and therefore in ſuch caſe the tenure is traverſable. But where the rent was 2*s. per annum*, if the Lord hath got quiet and voluntary ſeiſin of more rent than he ought, as of 3*s.* (without any coherction of diſtreſs) there becauſe the Tenancy is charged with ſervice of ſuch nature and quality, and it is not to be preſumed that the Tenant would voluntarily pay more rent than he ought, there the ſeiſin in an avowry is traverſable, and not the tenure.

And the Statute of *Magna Charta*, *cap.* 10. *Nullus diſtringatur ad faciendum majus ſervitium de feodo militis*, *nec de alio libero tenemento*, *quam inde debetur*, by conſtruction extendeth to the Right, and not to the poſſeſſion. To which purpoſe the writ of *Ne injuſtè vexes*, which is in the Right, is grounded; and therewith expreſly agreeth *F. N. B.* 10. *a.* and *Regiſter* 4. *a. Vid.* 10 *E.* 3. 25. 22 *E.* 3. 18. *b.* and the ſame alſo appeareth in the old book of 18 *E.* 2. *Avowrie* 217. In a Replevin brought by R. the Defendant avowed upon the Plaintif, becauſe that one *C.* was ſeiſed of the Tenancy, and held of the avowant by Fealty, and 20*d. per annum*, of which ſervices he was ſeiſed by the hands of *C.* as by the hands of his very Tenant, which *C.* enfeoffed the Plaintif, and for 20*d.* arrear for one year he avowed upon the Plaintif, To which the Defendant ſaid, that the ſaid *C.* his Feoffor held of the avowant by fealty and 12*d.* and as to that, nothing arrear. To which barr of avowry exception was taken, becauſe he did not anſwer to the ſeiſin. To which *Shard* of Councel with the Plaintif did anſwer, That the Plaintif is a ſtranger purchaſor, where he cannot have an *Injuſte vexes*, for which cauſe he ought to diſcharge himſelf by plea. But Sir *William Bereford* Chief Juſtice of the Common Pleas ſaid, and gave the rule; You may plead that the ſeiſin was by outragious diſtreſs, and that you do not ſay, wherefore we hold the ſeiſin rightful, and you do not deny the ſeiſin; and therefore adviſe of it: for which cauſe *Shard* by the Rule of the Court did traverſe the ſeiſin. In which was obſerved the great regard the ancient Judges had of ſeiſin and poſſeſſion to maintain it againſt the Statute of *Magna Charta*, although the Act was in the Negative, and therefore the ſtronger. *Vide* 34 *E.* 1. *Diſclaimer* 30. An Infant ſhall anſwer to the ſeiſin had by his own hands. And in 8 *E.* 3. 18. *Robert de Woodhouſe* Archdeacon of *Richmond*, brought an aſſiſe of *Darrein preſentment* againſt the Prior of *Pomfret*, and prayed that the aſſiſe would take notice, That he had laſt preſented to the Church of St. *Sampſon of York*; and afterwards *Robert* was Non-ſute; for which it was Ruled, that the Prior ſhould have a writ to the Biſhop; but execution ſhould ſtay till the colluſion was enquired of; and there Sir *William Herle* Chief Juſtice of the Bench Charged the Recognitors of the Aſſiſe, firſt to enquire among themſelves [b]

if

if the Writ were brought by colluſion, to make the advowſon come into Mortmain; and if they ſhall find that the writ was brought by colluſion, that they ſhould enquire of the right of the Prior, and if he had right, which of his Predeceſſors preſented, and in the time of what King. And in evidence to prove the Priors right, a Charter of King *Steven* was ſhewed, by which the [34] ſaid King gave the ſaid advowſon to ſuch a one Prior, his Predeceſſor, and to his Succeſſors; And the Jury returned and ſaid, That the writ was not brought by colluſion; And further ſaid, That the Prior nor his Succeſſors had never preſented within time of memory, but always the Archdeacon and his Predeceſſors: To which *Herle* Chief Juſtice ſaid, We have no Warrant to enquire of the right of the Archdeacon, but of the Priors right; wherefore you are to ſay, if the Prior hath right, or not; And when the Jury were in doubt what to ſay, *Herle* ſaid, Although a man had right before time of memory, if he nor his Anceſtors were never ſeiſed after time of memory, he is ouſted of his right, and therefore according to your intent, if you have ſaid the truth, that the Prior or any of his Predeceſſors were never in poſſeſſion after time of memory, you may ſafely ſay that the Prior hath not right. And ſo they ſaid.

Note Reader, I have put this caſe at length, becauſe it is a notable caſe for divers points, and chiefly for the great reſpect the Judges gave to the poſſeſſion, without regarding any antient Charter of the King, or any right by colour thereof, although it were matter of Record, and betwixt the Charter and the caſe then in queſtion there were not above 176 years, and that in the caſe of a Prior, who in many caſes ſhall not be prejudiced by the Laches of his predeceſſor, as a private man ſhall be.

But in the caſe of ſeiſin of more rent than ought to be, the ſame ſhall bind in an avowry. But in *Ne injuſte vexes*, *Ceſſavit*, *Aſſiſe*, *Reſcous*, or *Treſpaſs*, ſuch ſeiſin of more rent ſhall be avoided, for there the tenure and not the ſeiſin is traverſable: and for theſe differences, ſee 10 E. 3. 25. 12 E. 3. *Avowry* 104. 22 *Aſſ.* 68. 28 *Aſſ.* 33. 4 H. 5. 4. 10 H. 3. 6. 30 H. 6. 5. 33 H. 6. 44. 37 H. 6. 25. 12 E. 4. 7. *b.* 16 E. 4. 11. 21 E. 4. 64. F. N. B. 10 *Plow. Com. Woodlands caſe*, 94, 95. 4 E. 2. *Avowry* 200. notwithſtanding the Statute of *Magna Charta*, the Lord ſhall avow for relief according to the ſeiſin of the Quantity of the Knights fee that the Lord hath encroached, for Relief is no ſervice, but incident to ſervice. But this caſe of ſeiſin in caſe of Avowry doth receive certain limitations. For 1. the iſſue in tayl ſhall avoid in an avowry ſeiſin had by the hands of a Tenant in tayl, 20 E. 3. *Avowry* 131. F. N. B. 10. 2. The ſucceſſor of a Biſhop or Prior, &c. ſhall avoid in an avowry ſeiſin had by the hands of the predeceſſor. 3. The very Tenant of the Land ſhall avoid ſuch encroachment of rent in avowry, if he hath a deed to ſhew the contrary; but none ſhall have a *Contra formam Feoffamenti*, but the Feoffees or his heirs, 10 H. 7. 11. [b] 22 H. 6. 50. F. N. B. 163. 18 E. 3. 18. 3 E. 3. 27, 28. 10 E. 3. 25. 22 E. 3. 18. 28 *Aſſ.* 33. 28 E. 3. 92. 22 H. 6. 3. 30 H. 6. 7. 33 H. 6. 22. 39 H. 6. 7. 7 E. 4. 24. 5 H. 5. 4. 14 H. 4. 5. 11 E. 3. *Avowry* 106. 4 E. 3. *Avowry* 201, 202. 12 R. 2. *Avowry* 266. that in avowry the heir of the Feoffee, upon a deed ſhewed, ſhall avoid ſeiſin had by his own hands, 31 E. 1. *Avowry* 244. and 31 E. 1. *Avowry* 241. 6 E. 2. *Avowry* 216. 4 E. 2. *Avowry* 202. 32 E. 3. *Avowry* 114. and 19 E. 3. *Avowry* 122. *Wilby* ſaith, that he hath ſeen between privy and privy, privy and a ſtranger, and a ſtranger and a ſtranger, the ſame payment to avoid encroachment of ſeiſin in avowry adjudged upon ſhewing of a deed. And all this grounded upon the Statute of *Marlbridge*, *cap. 9. Qui autem per Cartam pro certo ſervitio tot ſolidorum annuatim pro omni ſervitio ſolvend. feoffati ſunt, ad ſeſtum, vel ad aliud, contra formam feoffamenti de cætero non teneantur.* 4. Encroachment of ſeiſin is not material, where there is no Tenure, 20 E. 4. 2. 22 H. 6. 2. 5. Such ſeiſin ſhall be avoided by coherſion of diſtreſs, 12 E. 4. 7. 8 H. 6. 17. 47 E. 3. 4. 6. If the Rent be payable at 2. days of the year, and the Lord encroacheth ſeiſin at 4. days of the year, and at 2. dayes, where he ought to pay it but at one, this encroachment being voluntary ſhall be avoided in avowry, becauſe they agree in the ſum, 21 E. 4. 8.

And it is worthy obſervation, Where and How ſeiſin in avowry ſhall be traverſed. 1. In an avowry the Tenant ſhall not plead, Never ſeiſed of the ſervices generally, for thereby he leaveth not to the Lord any Remedy, neither by avowry, nor by cuſtoms and Services; and therefore if he be Tenant in Fee-ſimple, he ought to diſclaim, or he ought to plead out of his Fee, and ſo traverſe the Tenure; and therewith agreeth 22 H. 6. 3. and 30 H. 6. *Avowry*, by all the Juſtices. And where it is ſaid in 5 E. 4. 2. that the very Tenant ſhall not plead out of his fee, for if it ſhould be found againſt him, it is not peremptory to him, but it ſhall be peremptory to the Lord, and ſo not equal, and therefore in ſuch caſe he ſhall diſclaim: The contrary to the ſame is adjudged in 28 H. 6. 10. in the point, and *Forteſcue* there ſheweth 2. or 3. judgments in the terms. *Vide* 15 E. 2. *Avowry* 214. 24 E. 3. 34. 11 H. 4. 10. 12 H. 4. 23. 8 H. 6. 17. & 21 H. 6. 22. 21 H. 6. 10. and Brook in abridging the (ſaying) in 5 E. 4. 2. *Hors de ſon fee* 15, ſaith, that it is not Law: and the abridgement of *Fitzharbert* of 35 H. 6. 10. *Hors de ſon fee* 17. is not warranted by the book at [35] large. 2. He who denieth ſeiſin after the Limitation, ought firſt to acknowledge a Tenure, to the end the Lord may have his writ of Cuſtoms and Services; as if the Lord allegeth the Tenure by Fealty, Rent, and ſute of Court, and allegeth ſeiſin within time of Limitation, and avoweth for ſute behind, the Tenant may confeſs the Tenure by Fealty and Rent; and as to the ſute plead never ſeiſed thereof after the time of Limitation. And therewith agree 15 E. 2. *Avowry* 214. 18 E. 3. 10. & 22 E. 3. 32. againſt the opinion ill reported, 10 H. 6. 7. 3. If the Lord avoweth for ſervices, and allegeth ſeiſin by the hands of the Plaintif, or any other in the *Replevin*, as by the hands of his very Tenant, the Tenant may plead that the avowant was never ſeiſed by his hands, &c. and therewith agreeth 24 E. 3. 50. 19 E. 2. *Avowry* 224. 22 H. 6. 2. & 3. 4. That ſeiſin is not traverſable, but only of that for which the avowry is made, if not that ſeiſin be alleged of a Superior ſervice for

(for which the avowry is not, which in Law is a seisin of the inferiour, as in 26 *H.* 8. 1. where the Tenure is by rent and divers services, and seisin is alleged in all, and avowry for the rent onely, there the seisin of the rent is onely traversable: But if the Tenure be by Homage, Fealty, Escuage, and rent of 2 *s.* and seisin alleged in all, and he avoweth for Homage, he shall be received to traverse the seisin of the Escuage, for that is seisin of Homage, 21 *E.* 3. 52. 13 *E.* 3. *Avowry* 103. 19 *E.* 2. *Avowry* 224. And where it is said, That when the Lord varieth in the nature and quality of the services, that the Tenure is traverseable, the same is true, when the Tenant confesseth the Tenure in part, as is aforesaid; but he cannot traverse the whole Tenure; as if the Defendant in a *Replevin* avoweth upon the Plaintif for rent and services as upon his very Tenant, the Plaintif cannot say that he holdeth the Land of a Stranger, without that he holdeth of the avowant, but he ought to disclaim or plead Out of his Fee; and therewith agreeth 10 *H.* 6. 6. & 7. 35 *H.* 6. *Avowry.* 37 *H.* 6. 25. 11 *H.* 4. 11. 19 *E.* 2. *Avowry* 222. 15 *E.* 2. *ibid.* 214. And at first, the Plaintif in the case at barr would have pleaded, That he held the Land in the avowry, and other Lands by Fealty and rent, without that that he held the Land in the avowry *modo & forma*; and the Court was moved, If the plea in barr of the avowry was good? and the Councel of the Plaintif conceived that the plea was good, and they cited the books in 8 *H.* 7. 25. and 13 *H.* 7. 25. where the case was, That in a *Replevin* the Defendant doth avow, That the Plaintif held of him one acre of Land by fealty and 12 *d.* and for rent behind: The Plaintif said, That he held the said acre, and another acre of land in the same Town by the services of 6 *d.* without that that he held one acre of the Avowant *modo & forma*; and *Brian* there conceived the traverse good. But the Court did less allow of the said book of 5 *H.* 5. 4. where the case was, In a *Replevin* in this Court the Defendant avowed, by reason that the Plaintif held of him 4 Roods of Land called *Crispinlond* by fealty, and 10 *s.* rent *per ann.* &c. of which services he was seised, *&c.* and for rent behind he did avow. The Plaintif said, That he held of him 2. Roods of Land by Fealty, and 5 *s.* rent onely, without that that he held 4. Roods in the same manner and form as he had avowed. And *Hull*, who gave the Rule, held it no plea, for as to discharge of 5 *s.* rent, the same went in barr; and as to that that he did not hold but 2. Roods, the same went in abatement, and so infolded divers and double matter: also he answered not to the seisin, *&c.* for which cause by the Rule of the Court, the Plaintif pleaded in abatement of the avowry, and said that he held 2 Roods of the Defendant by the services of fealty, and 5 *s.* and the other 2 Roods by fealty, and demanded Judgment of that avowry; the conclusion of which plea was single enough. To which the avowant replied, that he held of him *in* manner and form as he had avowed; and thereupon issue was joined, and therewith agreeth 18 *E.* 3. 18. *a.* where the Defendant in a *Replevin* avowed upon the Plaintif because he held of him a Carve of Land by Homage, and Fealty, and 10 *s. per annum*, &c. The Plaintif said, That he held that Carve and another Carve by Homage, Fealty, and Rent of 10 *s.* as one entire Tenancy, and demanded Judgment of the avowry, which supposeth the parcel in gross by it self, and the plea was good, for otherwise he might be double charged, And the avowant did maintain that the Case in the avowry was the whole Tenancy, *&c.* But it was Resolved, That if the Plaintif agreeth with the avowant in the services, and varieth in the quantity of land, there the traverse may be without that that he holdeth *modo & forma*, or with a *tantum.* And therefore in 20 *H.* 6. 20, 21. If the Defendant avoweth because the Plaintif holdeth 16 acres of him by certain services, and the Plaintif saith that he holdeth these 16 acres, and other 16 acres, without that that he holdeth 16 acres *tantum*, the avowry shall abate. Also if he maketh several avowries, supposing 2 acres to be severally holden, where they are holden by entire services, or *è contra. Vid.* 9 *H.* 6. 7. 7 *H.* 4. 102. 4 *E.* 3. 34. 43 *E.* 3. 13. 47 *E.* 3. 5 *E.* 4. 2. *temp. E.* 1. *Avowry* 228. 2 *E.* 2. *Avowry* 184. 24 *E.* 3. 34. 32 *E.* 3. *Avowry* 114. 46 *E.* 3. 16. 41 *E.* 3. *Avowry* 77. And afterwards the Plaintif in the principal case agreed with the avowant in the quantity of the Tenancy, confessed the tenure by Fealty and Rent, and as to the Rent pleaded, *Nihil* arrear, and traversed the Tenure *modo & forma*, sc. *absque hoc*, that the Tenanty was holden by Fealty, Rent, and Sute of Court, in manner and form, *&c.* And the traverse was good by the rule of the Court, although the avowry was for rent onely; whereupon issue was joyned, and found, that the land was holden by Fealty and Rent, and not by sute of Court; and although that the avowry was for rent behind; yet forasmuch as the Tenure alleged by the avowant was traversed and found against him, it was adjudged *M.* 42. & 43 *Eliz.* against the avowant, for it shall be in vain to make it traversable, and yet if it shall be found against the avowant, that he shall have the return of the Cattel. And *Lit. lib.* 3. *cap. Attornment* 127. saith, That the Seignorie is entire, although that there are divers manner of services, which the Tenant ought to do, and Tenure by Fealty and Rent is another Tenure then the Plaintif hath alleged in his avowry, for which cause Judgment was given for the Plaintif. [36]

Note Reader, although the purview of the Act of 21 *H.* 8. *cap.* 19. be general, *That the Lord may avow*, &c. *as in lands and tenements within his fee and seignory, alleging the same Lands to be holden of him, without naming any person certain, or upon any person certain*; yet all necessary incidents are intended, and therefore the avowant ought to allege seisin by some hands, 27 *H.* 8. 4. *acc.* but the antient form of alleging seisin shall not be altered, and therefore the avowrie shall be made generally after the Statute of 32 *H.* 8. *cap.* 2. as it was used before; but the Plaintif in barr of the avowry may plead never seised within 40 years, *&c.* and therewith agreeth 1 *Mar. Brook* 107. and 14 *Eliz. Dyer* 315. And if the Lord by the Statute of 21 *H.* 8. allegeth seisin in his avowry, and avoweth the distresse, as within his fee and seignory, and upon no person certain, In such avowry every Plaintif in the Replevin, be he Termer or other, may have every plea to the avowry, which is sufficient, also have aid, and every other advantage in

Law; and it is not now an Exception that he is a ſtranger to the avowry; for in ſuch caſe, forasmuch as the avowry is upon no perſon certain, either none is a ſtranger to it, or every one is a ſtranger to it: and therewith agreeth 34 *H.* 8. *Bre. Avowry*, 113. 27 *H.* 8. 4. & 20.

Trinit. 42 Eliz.

Henſloe's Caſe.

[b] *Henſloe* brought an action of debt againſt *Gage* and others, as Executors; the Defendants pleaded abatement of the writ, that the Teſtator made one *Hilleſly* Co-executor with them, who hath adminiſtred, &c. not named in the Writ, Judgment of the Writ. To which the Plaintif ſaid, That before any adminiſtration, &c. The ſaid *Hilleſly* being cited with the others to prove the will before the Ordinary, did refuſe, and the Defendants only proved the ſaid will, &c. upon which the Defendants did demur in Law. And it was objected, That after this refuſal *Hilleſly* could not adminiſter for 2 cauſes. 1. Becauſe *Hilleſly* may wave the Executorſhip, and ſhall not be Executor againſt his will; and *jus Teſtamentorum pertinet ad Ordinarium*, as it is ſaid in 4 *H.* 7. 13. when *Hilleſly* once refuſed before the Ordinary, who is lawful Judge of the Cauſe, and thereby waiveth the Executorſhip, and utterly diſmiſſeth himſelf thereof, he cannot after reſume the ſame; and in all caſes of Intereſts and Authorities, and principally before a lawful Judge in an ordinary courſe of proceeding, he ſhall never after agree to it. And therefore put the Caſe that *Hilleſly* had been joyned in the writ, and he had pleaded Never Executor, never ad-
[37] miniſtred as Executor, ſhall he be afterwards received to adminiſter? it was ſaid clearly no. 2. It was ſtrongly urged, That if all the Executors are cited before the Ordinary to prove the will, and all refuſe, the Ordinary may accept of the refuſal, and thereupon commit adminiſtration, and after that refuſal they ſhall never take upon them the charge of the will, nor adminiſter as Executors, becauſe they have before a lawfull Judge in ordinary courſe of proceeding waived it before; and if they might all refuſe before the Ordinary, and this refuſal ſhall bind them, what reaſon ſhall it be, that if any of them refuſe before him, that the ſame ſhould not bind them? And as when Executors (agreeing to the will) adminiſter, they cannot afterwards refuſe, as it is holden in 9 E. 4. 33. 47. *Plow. Com. Greisbrooks* Caſe 210. So when any of the Executors once before a competent Judge, refuſeth, they ſhall not after agree. 2. It was objected that the barr was not good, becauſe the Defendant hath not alleged, that the Teſtament was proved, according to the opinions in 3 *H.* 7. 14.

But it was Reſolved without open argument, That the Plaintifs Replication to maintain his writ was not ſufficient; for notwithſtanding the refuſal of *Hilleſly* in this caſe, he might adminiſter after at his pleaſure. And the Court took this difference, When many are named Executors, and ſome of them refuſe, and ſome of them prove the will, thoſe who have refuſed may afterwards at their pleaſure adminiſter, notwithſtanding this refuſal before the Ordinary: But if all refuſe before the Ordinary, and the Ordinary committeth Adminiſtration to another, there they cannot afterwards adminiſter: And this difference is proved by our books in 21 *E.* 4. 24. where it is reſolved by the Juſtices, That if 20 be named Executors, and one proveth the will, it ſufficeth for them all, and the refuſal before the Ordinary is not any eſtoppel againſt them to adminiſter after when they pleaſe in our Law, and we have no regard in this point to the Law of the Church: And the Executor who proveth ought to name them who refuſe in every action for to recover the Teſtators debt, and they may releaſe the whole debt: And it is clear that they who refuſe ſhall have an action by Survivor. But it is holden in 36 *H.* 6. 8. That if a man maketh two Executors, and both refuſe before the Ordinary, now they can never after adminiſter as Executors by force of the Teſtament, for now the Teſtator dieth inteſtate: otherwiſe when one proveth and the other refuſeth before the Ordinary, the other may adminiſter with him when he will; In 41 *E.* 3. 22. One Executor brought an action of debt, and ſhewed forth the will, which proved that he had another Executor, and the Defendant pleaded to the writ that
[b] he is alive: To which the Plaintif ſaid, That before the Ordinary he was diſcharged of the adminiſtration, and that he never adminiſtred, and becauſe he might adminiſter at his pleaſure, it was adjudged that the writ ſhould abate. But it is Reſolved by *Littleton*, *Newton*, and *Danbie* in 7 *E.* 4. 13. That if all the Executors refuſe before the Ordinary, they may not after prove the will. In 22 *E.* 3. 19 *b.* In debt by two Executors, and Teſtament ſhewed, the Defendant ſaith, that in the Teſtament 3 are made Executors, and the third not named, &c. Judgment of the writ; the Plaintif replieth that the third did refuſe before the Ordinarie, and would not adminiſter, and was diſcharged by the Ordinary, &c. and it was adjudged that the writ ſhould abate. And therewith agreeth 15 *E.* 3. *Executors* 8. 42 *E.* 3. 26. 11 *H.* 4. 83. 35 *H.* 6. 37. 21 *H.* 6. 23. 2 *R.* 3. 20. But it appeareth in 50 *E.* 3. 9. 3 *H.* 7. 14. That if all refuſe before the Ordinary, he may grant adminiſtration.

2. It was Reſolved, That in Debt againſt one Executor, it is a good plea to ſay, That the Teſtator made him and another Executor, who hath adminiſtred, and is alive, without ſaying that the Will is proved; and therewith agreeth 33 *H.* 6. 38. 32 *H.* 6. 25. 22 *H.* 6. 59. 3 *H.* 4. *Adminiſtration* 22. For after the Executors have adminiſtred, and ſo have taken upon them the chage of

this

the Executorſhip, they cannot afterwards refuſe, 9 *E.* 4. 33. 37. *Plow. Com. Greisbrooks* Caſe 280. So that it was Reſolved, that the plea in barr was good: and ſo the doubt conceived by the way in 3 *H.* 7. 14. well explained. Alſo the Plaintif in his Replication hath ſhewed, that the will was proved, &c. and ſo if need be, hath made the barr good. And I will agree that this Caſe was upon manifeſt and many authorities and judgments in books, adjudged according to Law, which was the cauſe that in a caſe ſo cleer the Judges did not deliver the reaſons and cauſes of the ſaid differences, nor made any anſwer to the ſaid Objection, which ſome learned in the Law deſired, for their ſatisfaction to be done. As to that it is to know, That it is holden in 2 *R.* 3. *Teſtament* 4. That it is but of late years that the Church had the probate of wills in this Land, until it was by an Act, &c. For the people have probate of Teſtaments in all other places, except *England*, and in many places within *England* the Lords of Mannors have probate of wills at this day in their Temporal Courts. And *Tremail* there ſaid, That he is a Steward in his Country, and the Free Tenants and Bondmen prove their Teſtaments before him in the Court Baron, and ſo it hath been uſed time out of mind, &c. and therewith agreeth *Fineux*, and all the Juſtices in 11 *H.* 7. 12. *b.* That the probate of Teſtaments belonged not to the Spiritual Court, but of later times, &c. and they have not the ſame by the Spiritual Law. And *Linwood* who was [38] Dean of the Arches, and wrote *Anno Dom.* 1422. in the reign of King *H.* 6. *lib.* 3. *de Teſtamentis*, *fo.* 124. Confeſſeth that probate of Teſtaments did appertain to the Ordinaries, *de conſuetudine Angliæ & non de communi jure:* And in other Realms the Ordinaries had not the ſame: And in another place he affirmeth, the power of the Biſhop in probate of Teſtaments, *per conſenſum regni & ſuorum procerum ab antiquo.* And I have a book publiſhed in Latin, *Anno Dom.* 1573. by the moſt reverend Prelate *Matthew Parker* Archbiſhop of *Canterbury*, very expert in matters of Antiquity, in which it is affirmed in theſe words, *ſc. Rex Angl. olim erat conciliorum Eccleſiaſtic. præſes, vindex temeritatis Romanæ, propugnator religionis, nec ullam habebant Epiſcopi authoritatem præter eam quam à Rege acceptam referebant, jus teſtamenta probandi non habebant, adminiſtrationis proteſtatem cuique delegare non poterant.* Then foraſmuch as probate of wills is given to the Spiritual Court, whereof they had not juriſdiction before, when they have proved the Teſtament, their authority is executed, and they have not power to take the refuſal of any when any of the Executors prove the will. And therefore the refuſal of any of the Executors before the Ordinary in ſuch caſe is void. The Executors have therein title by the Teſtament, which is Temporal, and to the goods and chattels alſo which are Temporal, as it is agreed in *Plow. Com.* in *Greisbrooks* Caſe 280. which Teſtament is compleat as to all goods and chattels in poſſeſſion and reverſion; and as ſhall be after ſaid, for releaſing of any debts and duties before any probate. But as to bring actions in the Kings Courts, the Judges do not admit the Executors to ſue for things in action, if they ſhew not the Teſtament proved duly under the Seal of the Ordinary: But always the Kings Courts have uſed to allow the probate of any of the Executors, to enable them all to bring actions: So that the probate of the Teſtament doth not give them any Intereſt or Title to the things in action or in poſſeſſion, for they have their Title and Intereſt by the Teſtament, and not by the probate: But yet without probate, the Judges will not allow them to bring actions; And therefore all the ſaid books in all ſucceſſions of ages affirming clearly the refuſal before the Ordinary by one Executor, when another proveth the will to be void, prove, the Eccleſiaſtical Judge hath not power to take the refuſal in ſuch caſe; for without Queſtion the Executor hath power to refuſe.

And as to the Objection which hath been made, That he hath once waived the Executorſhip, and therefore ſhall not afterwards take the ſame upon him: To that it may be anſwered, Foraſmuch [b] as the Eccleſiaſtical Judge hath not power to receive that refuſal or diſagreement, it is upon the matter done to a ſtranger, and by conſequence void, and of no force to barr the Plaintif to take upon him the ſame afterwards, as in the like caſe it is reſolved in 14 *H.* 8. and the ſame is alſo affirmed by all the other books, which prove the refuſal void.

And as to the ſecond reaſon, that is to ſay, That the Eccleſiaſtical Judge may take the refuſal of all, and by conſequence of any of them: To that it may be anſwered, That as originally the Eccleſiaſtical Judge hath not power to prove Teſtaments, but the ſame was given to him as it appeareth before; ſo originally the Eccleſiaſtical Judge could not commit adminiſtration to any who might ſue or be ſued as Adminiſtrator, but that alſo was given to the Ordinary by an Act, *ſc.* by the Act of 31 *E.* 3. *cap.* 11. by which it is enacted, That in caſe a Man dieth Inteſtate; The Ordinarie is to depute the next and moſt loyal friends of the dead perſon inteſtate, to adminiſter his goods, which Deputies ſhall have an action to demand and recover the debts due to the Inteſtate in the Kings Courts for to adminiſter, &c. and ſhall anſwer alſo in the Kings Courts to others to whom the ſaid dead was holden and bounden, in the ſame manner as Executors ſhall anſwer, and ſhall be accomptable to Ordinaries, as Executors be in the Caſe of Teſtament, as well in times paſt, as in times to come.

Now it is needful to know 2 things. 1. What the Law was before this Statute, and 2. What alteration the Statute of 31 *E.* 3. hath made: And as to the firſt, three points are to be conſidered. 1. That of old time when a man died inteſtate, and had made no diſpoſition of his goods, nor committed his truſt to any, that in ſuch Caſe the King who is *Parens Patriæ*, and hath the Supreme care to provide for all his Subjects, that every one enjoy that which he ought to have, uſed by his Miniſters to ſeiſe the goods of the inteſtate, to the intent they ſhould be preſerved and diſpoſed for [39] the benefit of the deceaſed, for the payment of his debts, for advancing of his Wife and Children, if they had any, and if not, thoſe of his blood. And this appeareth in *Rot. Clauſ.* of 7 *H.* 3. *m.* 16. *Bona inteſtatorum capi ſolebant in manu Regis*, &c. And afterwards this care and truſt was committed to Ordinaries, for none could be found more fit to have ſuch care and charge of

the tranſitory goods after the death of the Inteſtate, then the Ordinary, who all his life had the cure and charge of his immortal Soul, as it is ſaid in *Plow. Com.* 280. in *Greisbrook's* Caſe. And therefore he was to this purpoſe conſtituted in *loco Parentis:* And that appeareth by that which hath been ſaid before: And alſo by the conſtitution of *John Stratford* Archbiſhop of *Canterbury*, at a Synod in *London*, *Anno Dom.* 1380. where he confeſſed, That the adminiſtration of the goods of an Inteſtate was granted to Ordinaries, *conſenſu Regis & Magnatum Angliæ.* But no power was given to the Ordinary to ſell or diſpoſe of the goods, either to his own uſe, or the uſe of any other. And yet it is true, as it is ſaid in the books, that he hath a property in the goods of the Inteſtate, but that is *ſecundum quid*, and not *ſimpliciter:* And according thereunto it is reſolved by the whole Court, *M.* 8 & 9 *Eliz. Dyer* 255, 256. That the Ordinary himſelf had no authority to ſell any of the goods of the Inteſtate, although they were in danger of periſhing. Alſo 18 *H.* 6. 23. and other books agree, That the Ordinary cannot releaſe a debt due to the Inteſtate, and yet if the abſolute intereſt of the debt were in him, he might releaſe it, although he cannot have an action. As Executors before the probate of the Teſtament may releaſe a debt due to the dead, becauſe they have the abſolute intereſt of the debt in them, although they cannot have an action before probate, as it was adjudged in the Common Pleas, *Paſch.* 1 *Jacobi*, betwixt *Middleton* and *Rymon*, againſt the opinion of *Weſton*, *Plow. Com.* 277, 278. in *Greisbrook's* Caſe. And that which the Ordinary himſelf might doe before the ſaid Act, he may in reſpect of the multitude of cauſes within his Dioceſs commit to another. But his Committees cannot do more then he himſelf can; as it is alſo reſolved, *M.* 8 & 9 *Eliz. Dyer* 235, 256. 2. It was not given to the Ordinary, nor to his Deputies or Committees, that they ſhould have any action to recover any debt, or to take any advantage of any Covenant, or of other things in action, before the ſaid act, which is alſo a manifeſt proof, That the Common Law gave him no abſolute power in the goods, for then the Law would have given him power alſo to recover the debts and things in Action of the Inteſtate. And therefore in 19 *E.* 3. *Covenant* 24. (which was before the Act of 31 *E.* 3.) in an Action of Covenant brought by the Executors of *N.* who ſhewed forth Letters of adminiſtration delivered by the Ordinary, Sir *Richard Wilbie* Chief Juſtice, who gave the Rule ſaid, The Ordinary could not have ſuch action, for which cauſe, how can he give this action to another? *Stone*, A man hath not ſeen, That the Ordinary ſhall have an action but of goods whereof they were ſeiſed and ouſted. *Wilbie*, That's true: And
[b] afterwards it was ruled that they ſhould take nothing by their writ, *quia non executores, & actio non datur per Statutum. Vid.* 19 *E.* 3. *Adminiſtration* 18. 35 *E.* 3. *Executors* 105. 11 *H.* 4. 71. 10 *H.* 6. 22. 18 *H.* 6. 23. 10 *E.* 4. *a. F. N. B.* 120. 92. *a.* 3. That an action lieth againſt the Ordinary or his Deputies or Committees at the Common Law if they will intermeddle with the goods, and not pay the Debts. And the Statute of *Weſt.* 2. *cap.* 19. is but an affirmance of the Law before, and therewith agreeth 9 *E.* 4. 33. 11 *H.* 7. 12. 24 *E.* 3. 54. *Vid.* 11 *E.* 3. *Adminiſtration* 21. and to the Executors, 17 *E.* 2. *brief* 822. 11 *H.* 4. 73. 18 *H.* 6. 23. *Plow. Com.* 277. *Greisbrook's* Caſe. 8 *Eliz. Dyer* 247. But note Reader, an action lyeth againſt the Deputies or Committees of the Ordinary, before the ſaid Act, by the name of Executors, as appeareth by 38 *E.* 3. 26. 42 *E.* 3. 2. *à multo fortiori*, an action ſhall lie by the Common Law againſt the Ordinary, who is the principal, and from whom the Adminiſtrators derive their authority.

As to the ſecond point, the Statute of 31 *E.* 3. hath made 6 alterations, 3 as to the Ordinary, and 3 as to the Adminiſtrators. As to the Ordinary, 1. Whereas before the Statute he was not compellable to grant adminiſtration; Now by the Act of Parliament he is commanded, and thereby compelled to grant adminiſtration; for the words of the Act are; The Ordinary make Deputies, *&c.* and the refuſal to make them is a contempt to the King, and injury to the party. 2. The Ordinaries are reſtrained to grant adminiſtration to whom they pleaſe, becauſe that now the Adminiſtrator by this Act hath more abſolute intereſt in the goods of the Inteſtate then the Ordinary had, and ability to recover the things in action and debts due to the Teſtator, where no remedy is given to the Ordinary himſelf, and therefore the Ordinary is tyed by the Act to grant adminiſtration to the next of Kinn, who are not attainted of Treaſon, Felory, or hath other lawfull diſabilitiy, but are loyal friends. But the Statute of 21 *H.* 8. *cap.* 5. giveth power to the Ordinary to commit adminiſtration to the wife of the Inteſtate, or to the next of Kinn, or to both, and ſo as to the wife hath altered the Act of 31 *E.* 3. 3. The Ordinary himſelf hath not greater intereſt in the goods by this Act, but hath greater power then he had before, in that he may appoint Adminiſtratours, who ſhall have by this Act greater intereſt and ability then they had before the Act. And
[40] where the Statute ſaith, That in caſe where a man dieth Inteſtate, It is to know that a man may die Inteſtate 2 ways, that is to ſay, either in *fait*, when he maketh no Teſtament; or in Law, when he maketh a Teſtament, and the Executors refuſe before the Ordinary, or all of them die inteſtate, in this caſe he is in Law dead inteſtate, and the ſaid Act of 31 *E.* 3. extendeth to both the Inteſtates, as appeareth in *Plow. Com.* 279. and in 18 *H.* 6. 23. and all the books aforeſaid, which prove in ſuch caſe, The Ordinary may grant adminiſtration; and the reaſon in ſuch caſe, wherefore the Ordinary may upon refuſal of all, or death of all Inteſtate, grant adminiſtration, is, becauſe now the Teſtator dieth Inteſtate, and then the ſaid Act giveth him power to grant the ſame according to the ſaid Act, which the Ordinary cannot doe when one refuſeth, and the other proveth the will. And ſo the ſecond Objection upon full and pregnant reaſon and authority is anſwered. And where the Statute ſaith, In caſe a Man dieth inteſtate that the Ordinary depute the next, *&c.* of the dead Inteſtate, this word (dead) is meant very large, for it extendeth as well to civil death, *ſc.* entry into Religion, at natural death; and therewith agreeth *Litt. lib.* 2. *cap. Vill.* 44. That if a man entreth into Religion and doth not make Executors, the Ordinary may commit adminiſtration of his goods to another man, as if he were dead indeed: As to the Adminiſtrators,

1. they

1. they have now ſo abſolute property in the goods and chattels, as Executors have, which they had not before this Act; 2. they ſhall recover the debts, (and by Equity ſhall have an action of Covenant, actions upon the Caſe, and all other actions which Executors may have) which they could not doe before at the Common Law; 3. they ſhall anſwer to actions, *&c.* in the ſame manner as Executors; and in this point alſo the Common Law is altered; for at the Common Law they were charged by the name of Executors, and now they ſhall be charged by the name of Adminiſtrators, and yet there was a doubt after the making of this Act by what name they ſhould be charged, In 38 *E.* 3. 26. Debt was brought againſt an Adminiſtrator, by the name of Adminiſtrator; the Defendant pleaded to the Writ, that he ought to be named Executor; for at the Common Law before the Statute of 31 *E.* 3. a man ſhould have an action againſt an Adminiſtrator, and name him Executor, and the ſame yet remaineth. *Thorp* Chief Juſtice who gave the Rule, The [b] Statute giveth actions againſt Adminiſtrators, and that they may have actions againſt others, for which cauſe the writ was ruled good. And yet after that this point was called in queſtion, for in 41 *E.* 3. 2. an action of debt was brought againſt an Adminiſtrator, and the Defendant demanded judgment of the Writ, for it ſhould be brought againſt him as Executor, for the Statute giveth an action for the Adminiſtrator, but the action is maintenable againſt them as Executors at the Common Law, and yet is. *Thorp*, The Statute giveth actions againſt Adminiſtrators, and afterwards the writ was ruled good. So this Adminiſtrator conſtituted by the Ordinary (whom the Law hath put *in loco parentis*,) is ſo advanced, enabled, and adorned, and in all points made equal to Executors conſtituted by the party himſelf, is newly created by this Act; and there was no ſuch Adminiſtrator at the Common Law. And therefore the Ordinary was conſtituted *in loco parentis*, to ſee that the debts and duties of the Inteſtate ſhould be paid, and to grant adminiſtration according to the ſaid Act, for the benefit of his Children and others of his blood, with his goods, as hath been ſaid. But becauſe it ſhall be a greater trouble for the Ordinary himſelf to take ſuch a Charge in ſuch multitude of caſes in his Dioceſe, for his eaſe the ſaid Act of 31 *E.* 3. hath endowed his Deputies with greater power then himſelf had, to the intent that the Adminiſtrators which might beſt intend it, ſhould perform the truſt which was committed to him; and for this cauſe the ſaid Act hath alſo provided, That Adminiſtrators to the ſaid intents and purpoſes ſhall be accomptable to Ordinaries, as before Executors are.

It is worth Obſervation for the reaſon of the principal caſe, How probate of wills, and granting of *adminiſtrations* ſhall be tryed, if they be traverſed or denied in the King's Courts; and therefore, if iſſue by joyned in the King's Courts, That the Ordinary did not commit adminiſtration to the Plaintiff, *&c.* or that the Teſtament is not proved before the Ordinary, or that he whoſe will is proved before the Ordinary, died Inteſtate, or that he of whoſe goods adminiſtration is granted, as of one Inteſtate, made a will, *&c.* in none of theſe caſes it ſhall be tried or certified by the Ordinary, as in Caſe of Excommengement, but it ſhall be tried by Jury, becauſe that theſe two caſes of probate of wills, and conſtituting Adminiſtrators, originally did not belong to the Eccleſiaſtical Conuſans, but were given them of later times; and therefore nothing but the probate, and granting of Adminiſtration, which were given to them, doth appertain to their Juriſdiction; But the trial of [41] them is not given to them, but is left to the trial of the Common Law; and therewith agreeth 21 *E.* 4. 50. where it is holden, That if Letters of Adminiſtration be denied, the iſſue ſhall be, That the Ordinary did not commit to them Adminiſtration by his Letter, *&c.* For there it is ſaid, That Letters of Adminiſtration may be forged, 12 *E.* 4. 16. *a.* 35 *H.* 6. 31. 22 *H.* 6. 52. 13 *Eliz. Dyer* 294. iſſue was joyned in the Common Pleas, *ſi Epiſcopus London. commiſit adminiſtrationem, &c.* and was tried by Jury. *Vide* 34 *H.* 6. 13. and in 44 *E.* 3. 16. One brought debt againſt one as Adminiſtrator, and declared that the debtor died Inteſtate, and the Ordinary deputed the Defendant to be Adminiſtrator; and the Defendant ſaid that the dead made his will, and made the Defendant and another his Executors, *&c.* Judgment of the writ? and ſhewed forth the will, and the Plaintiff did tender to averr that he died inteſtate, and was ready, *&c.* And the Defendant ſaid, He ſhall not be received ſo to averr againſt the will which is proved before the Ordinary, and under the ſeal of the Ordinary, *& non allocatur*; for which the Plaintiff had the averrment, and it was tried by the Country. *Vide* 14 *H.* 6. 5. by *Paſton* acc. againſt the opinion of *Herle*, 4 *E.* 3. *Executor* 89. *obiter.* And for as much as it is to be tried by Jury, and not by the Certificate of the Ordinary, nor it needeth not that the will or the adminiſtration be ſhewed to enable the plaintiff to his action, proved, or granted by the Ordinary himſelf, as in the caſe of Excommengement, which is meerly in the Spiritualy, and originally belongeth to the Juriſdiction of the Ordinary; But if the Teſtament be proved, or Adminiſtration granted by the Official or Commiſſary of the Ordinary, or in ſome caſes by the Archdeacon, or other Inferiour Judges Eccleſiaſtical who have lawfull authority, in ſuch caſe, the ſame is good and ſufficient in Law; and although the Statute of 31 *E.* 3. ſaith, The Ordinary ſhall depute, they are Ordinaries as to this purpoſe within the ſame Act; and therewith agreeth 11 *H.* 4. 64. 12 *E.* 4. 15. *b.* 7 *E.* 14. 20 *H.* 6. 1. 3 *E.* 3. *Itin. North. Teſtaments* 5. And ſo you have the reaſons and cauſes of the Judgment in the principal caſe, and of many Judgments and Reſolutions before this time in the ſame point, with anſwer to all the Objections made to the contrary, which I have done for 4 cauſes. 1. That it ſhall be manifeſt that Ordinaries (againſt all Objections [b] made by them who impugn their authority) have lawfull Juriſdiction to prove Teſtaments, and to grant Adminiſtrations. 2. That they have their Juriſdiction derived in theſe caſes from the Crown of *England*. 3. To reconcile all the books and authorities in the Law: and 4. To ſatisfy the ſaid doubts and queſtions clearly by our books, authorities in Law, and Judicial Records.

Trin. 7 Jacobi. *In the Common Pleas.* *Rot.* 26. 12.

The Earl of *Shrewbsbury*'s Caſe.

[42] UPON the ſeveral parts of the Record, (which ſee in *Rot.* as above) the Defendants Counſel moved many exceptions to every part of it, 1. againſt the Patent and the validity of the grant *ab initio*; 2. admitting the grant, that the office is forfeited; 3. againſt the Writ and Count; 4. againſt the *gift* of the action; 5. againſt the Verdict. As to the firſt it was ſaid, That the grant was utterly void for 3. cauſes; 1. Becauſe the grant is of the office *Seneſchalli Dominiorum ſive Maneriorum noſtrorum de Maunsfield, Bolſover, & Horſley*, and no County mentioned where they lie, and ſo in the King's caſe incertain and void; for it was ſaid, It may be, and ſo is the truth, That the King hath divers Mannors of the ſame name in ſeveral Counties, and of ſeveral values, and iſſue cannot be taken what Mannor the King meant to grant, for his intent ought to appear within his grant, and not by collateral averment. And ſo it appeareth in 21 E. 4. 48. the King's Patents ought to extend certainly to the thing of which the Patentee will have advantage. 2 *R.* 3. 7. If the King grant to me that I ſhall not be Sheriff, without ſhewing of what County, it is void for the incertainty, *quia Conceſſio per Regem fieri oportet de certitudine:* but if the grant was, *quod non erit Vicecomes alicujus Comitatus*, there the grant is good, as it is there holden. And in Acts of Parliament of confirmation of Letters Patents, the uſual purview is, that the Letters Patents ſhall be effectual, notwithſtanding the *miſnaming or not true naming of the Counties where the Honors, Mannors,* &c. *lien* [47] *or been:* which (proveth as was urged) that if the County be omitted, that the grant is void. To which it was anſwered and reſolved by the whole Court, That the ſaid grant was certain enough although the County was omitted: and many antient grants are without mentioning any County, and God forbid that all of them ſhould be adjudged void. For the Mannors of *M. B.* and *H.* import ſufficient certainty, and ſuch certainty of name and quality, that a Viſne (which requireth certainty) may come from is ſufficient. If the King by his Letters Patents granteth to another all the Mannors and Advowſons which were to the Prior of *A.* being a Prior Alien, or to *I. S.* who was attainted, &c. it is holden in 32 *H.* 6. 20, 21. that the grant is good, and yet it is not mentioned in what County the Mannors, &c. or the Priory was, or in which County the Mannors, &c. were whereof *I. S.* was ſeiſed the day of his Attainder; and the reaſon is, *Quod id certum eſt quod certum reddi poteſt, ſed id magis certum eſt quod de ſemet ipſo eſt certum:* and in this caſe the Mannors of *M.* B. and *H.* have more certainty in them than the ſaid general grants. So if the King grant to an Abbot and his Succeſſors, that the Monks during the vacation ſhall have all the Temporalties of the Abby, it is a good grant, without mentioning of any County, as it is adjudged in 39 E. 3. 21. and *F. N. B.* 33. *T.* And in 23 E. 3. 21. where the Caſe was, That a Barony eſcheated to the King, and the King granted to the Queen all the poſſeſſions of the Barony, till *John* of *Gaunt* could govern himſelf, and adjudged a good grant, without mentioning in what County the Barony lay; and if the King hath divers Mannors of one name in divers Counties, yet there are many clauſes in the Letters Patents to deſcribe what Mannor the King intendeth to paſs, to diſtinguiſh it from the other, *ſc.* either by recital, or reference in whoſe tenure or occupation it was, or by the value of it, or of whoſe poſſeſſion it was, or by the clauſe that the Patentee ſhall have and enjoy the ſame in as ample manner and form as *I. S.* &c. or any other owner of the ſame Mannor had, or the like, or by the particular. But in pleading it ought to be alledged in what Counties the Mannors lie (as in the caſe at Bar the Plaintif did) And if the other party had pleaded *Non conceſſit*, upon trial of the iſſue the Circumſtances aforeſaid may be given in evidence, to prove what Mannor was granted: But if the other party had demanded Oyer of the Letters Patents, and had demurred in Law, it ſhould be adjudged againſt him, for it is matter in fact what Mannor ſhall paſs, to be proved in Evidence, as is aforeſaid. And the Acts of Confirmation doe not ex- [b] tend where the County is omitted, but where the County is miſnamed, or not truly named. Alſo for avoiding of all Queſtions, all Imperfections are ſaved by the Acts of Confirmations, which are not of force to avoid the grant.

2. It was objected againſt the grant, that the grant was, *à tempore plenæ ætatis* 21. *annorum ejuſdem Comitis, pro & durante toto termino vitæ naturalis dicti Rogeri Comitis Rutland. offic. Seneſchal. Dominiorum ſive Maneriorum noſtrorum de M. B. & H. cum vadiis & feodis eiſdem officiis ab antiquo debitis & conſuet. capiend.* And therein the King was deceived, for he cannot grant the office from the day which was paſt before. To which it was anſwered, and Reſolved by the Court, that the intent of the grant was, that the Patentee ſhould have the Fees from the time of the accompliſhment of his full age; but without queſtion, although the King cannot grant the office from a day before, yet it ſhall be good for the life of the Patentee to begin by grant, and void for the time paſt.

3. It ws objected. 1. That by no expreſs clauſe in the Patent the Patentee can make a deputy. 2. That by Law the Patentee without expreſs words cannot make a Deputy. As to the firſt, It was obſerved, That the ſaid Letters Patents do conſiſt upon 3. ſeveral grants: 1. of the office of Conſtable, &c. Steward, and chief Juſtice of the Foreſt, *&c.* which grant hath *Habendum*, and power to make a Deputy, 2. of the office of Stewardſhip of the ſaid 3. Mannors, with limitaion of eſtate

eſtate for life, and with a clauſe to receive the Fees, &c. but no power to make a Deputy. 3. *Ac inſuper de uberiori gratia*, &c. *dedimus*, &c. *præfat. R. comiti cuſtodiam Parci de Nott.* &c. *Habend. gaudend. & exercend. offic. præd.* written by ſuch contraction *) per ſe, vel ſufficient. deputatum, ſen deputatos ſuos ſufficient. à tempore plenæ ætatis*, &c. *durante vita ipſius Rogeri Comitis, cum vadiis, feodis*, &c. *eidem officio*, &c. *pertinent. aut ratione ejuſdem*, &c. And it was ſtrongly urged, that this later word (*Habendum*) ſhould have relation only to the premiſes of the laſt grant, 1. becauſe that there are, as is aforeſaid, 3. ſeveral grants, of 3. ſeveral diſtinct offices; 2. every one hath a diſtinct limitation of eſtate; 3 every one hath a diſtinct grant of the fees and profits. And although the later (*Habendum*) is writ (*offic. præd.*) which, as was urged, may be meant *officium præd.* and then it referreth to all the ſeveral grants, yet it cannot be ſo meant, for the three reaſons before; and alſo theſe words in the ſame ſentence, *cum vadiis, feodis*, &c. *eidem officio* written at length; *aut ratione ejuſdem*, explain the ſaid words written ſhort (*offic. præd.*) to be in the ſingular number, *officium prædictum*; and the office of the premiſes is to expreſs the certainty of the thing given, and needeth not limit any eſtate, and the office of the *Habendum* is to limit the certainty of [48] the eſtate, and needeth not repeat the thing given again, and therewith agreeth *Wrotteſlyes* caſe, *Plow. Com. 196.* So in the Caſe at barr the *Habendum* ſhall be by conſtruction of Law referred to the proper premiſes; and of that opinion was the whole Court. Mark Reader, for abbreviations and incongruous writing in grants, theſe Rules, *Falſa orthographia non vitiat conceſſionem. Item, Ille numerus & ſenſus abbreviationum accipiendus eſt ut conceſſio non ſit inanis. Falſa grammatica non vitiat conceſſionem.* And therefore if the King granteth *tot. ill. man. de* D. & C. if there be but one Mannor in truth, then theſe abbreviations *de tot. ill. man.* ſhall be taken in the ſingular number *totum illud manerium*: and if there be in truth 2. diſtinct Mannors, then theſe abbreviations ſhall be taken in the plural number, *tota illa maneria*, or otherwiſe the grant ſhould be void. *Vide* 32 E. 3. *brief* 293. A *Scire facias* doth rehearſe, That a fine was levied *de maneriis de B. & H.* and the Concluſion was, *Quare præd. manerium de B. & H. ingreſſus eſt*; and good with averment that in truth B. & *H.* is but one Mannor. And in 10 *H.* 4. *brief* 497. exception was taken to the writ, becauſe it was written with abbreviation *Matil'* where it ſhould be *Matild*, and yet good, becauſe it was uſed to write this name ſo, *quod nota* in a writ which ſhall abate for falſe Latin, for he may purchaſe a new writ at his pleaſure, but not a new grant. *Vide* 17 *Eliz. Dyer* 342. The 4. firſt Letters in the name and ſtile of King *H.* 7. *ſcil. H. R. A. F.* were left out in the Letters Patents made to *Simon Digby*, yet adjudged a good grant. And 38 *H.* 6. 33. A Count in which it was alleged that *W. T. reſignavit*, &c. *in manus I. Epiſcopi & loci illius Ordinarii*, and exception was taken, becauſe it was not *in manus Johannis Epiſcopi*, for the Letter *I.* doth ſignify nothing, and yet the Count adjudged good. And in 4 *H.* 6. 16. Between the Duke of *York* and the Earl of *Warwick* the writ was, *Henr. Dei gratia Rex Angliæ, Dux Hiberniæ*, where it ſhould be *Dominus*, and for this incongruity the writ did abate, but a grant by ſuch name ſhall be good enough. So in a Conuſans of fine falſe Latin or incongruity ſhall not hurt the fine, as in the caſe before, where a fine is levied *de maneriis de B. & H.* where there is but one Mannor; and 9 E. 3. a warranty was in the fine, *eidem Galfrido & uxori ſuæ*, where it ſhould be *eiſdem*, and yet good enough; and 24 E. 3. 37 *a.* the fine was *pro omnibus ſervitiis exactionibus & add'is pertinente*, where it ſhould be *pertinentibus*, and therefore challenged; and notwithſtanding allowed.

1. It was Objected, That by the Law without ſpecial words a Steward cannot make a deputy, [b] becauſe it is an office of knowledge, fidelity, and diſcretion; and therefore, *Fleta, lib. 2 cap. 6.* doth deſcribe what perſon a Steward ought to be, *Provideat ſibi Dominus de Seneſchallo circumſpecto, & fideli, & modeſto, qui in legibus & ſub conſuetudinibus Provinciæ & jura domini ſui in omnibus tueri affectet, quique ſuos Balivos Domini in ſuis erroribus & ambiguis ſciat inſtruere, & docere, quique egenis parcere, & nec prece vel pretio velit à tramite juſtitiæ deviare, & perverſe judicare.* And therefore it was ſaid, that this office is appropriate to the Plaintif. 1. To his perſon, for the ſame is granted to him only during his life; 2. To his qualities of his mind, *ſc.* ſcience, fidelity, underſtanding and diligence, which are ſo individually annexed to him that he cannot make a deputy, nor aſſignee; and therewith agreeth Sir *Hen. Nevels* caſe, *Plow. Com.* 384. *Litt. lib. 3. cap. Condic.* 89. *Vide* 39 *H.* 6. 32. 11 E. 4. 1. 10 E. 4. 14. 17 *H.* 7. by *Frowick, Kellaway*, &c. and nothing of that was denied by the Court, and yet it was reſolved and ſo adjudged, That the Plaintif might (as this caſe is) make a deputy. And it was obſerved, that this word (Steward) is derived of 2 words, *ſc. Stede*, and *Ward*, and is as much as to ſay, my place, or for me; and therefore he is commonly called a Woodward, who hath the charge of my wood, and ſo Hayward of my hayes, & ſic de ſimilibus. And *Seneſchallus* in Latin hath the ſame ſignification, as it appeareth in the Hiſtory of *Ingulphus* 463. *inter Conſuetudines Scaccarii*, where the Underſheriff becauſe he exerciſeth the place of the Sheriff himſelf is called *Seneſchallus Vicecomitis*, and therefore a great Officer within this Realm is called, the High Steward, becauſe the King appointeth him in divers caſes to exerciſe his place, &c. There is a great difference betwixt a Deputy and an aſſignee of an office; for an aſſignee is a perſon who hath an eſtate or intereſt in the office it ſelf, and doth all things in his own name, for whom his grantor ſhall not anſwer, if it be not in ſpecial Caſes; but a Deputy hath not any Intereſt or eſtate in the office, but is but the officers ſhadow, and doth all things in the name of the Officer himſelf, and nothing in his own name, and for whom his grantor ſhall anſwer; and when an Officer hath power to make aſſignees, he may *implicite* make Deputies, for *cui licet quod majus eſt, non debet quod minus eſt non licere*; and by conſequence, when an office is granted to one and his heirs, thereby he may make an aſſignee, and by conſequence a Deputy. In the caſe at barr, the principal parts of the office of Steward of a Mannor is *intrare querelas*, pleas, ſurrenders, admittances, and fealties, to prove Teſtaments, and to commit adminiſtrations within the Mannors, &c.

And

And the ſuters are the Judges of the Court Baron, and the Steward for the moſt part as Prothonotary or Regiſter to the ſuters, &c. for whoſe labour in writing, &c. the Steward taketh for all fees.
[49] Now when the King granteth the office of a Steward of the ſaid Mannors to the Plaintif, who is an Earl, ſo that in reſpect of the ſmalneſs of the office in a baſe Court, and of the Dignity of the perſon being an Earl, it is implied in Law for conveniency that he may make a Deputy, for whom the Earl ought to anſwer, ſo that it cannot be any prejudice to the Queen, and his Deputy *exercebit officium laboris*, as in holding of the Court Baron, and in entring of the pleas, ſurrenders; and when need ſhall be in caſes of difficulty, or concerning the profit of the Queen, the Earl *exercebit officium fiduciæ, ſcientiæ, & ingenii. Comites dicuntur à comitando, quia comitantur Regem.* Bracton *lib.* 1. *cap.* 8. *Comites à comitatu, ſive à ſocietate nomen ſumpſerunt; qui etiam dici poſſunt Conſules, Reges enim tales ſibi aſſociant ad conſulendum.* And the ſame was the moſt eminent and ſupreme dignity before the Conqueſt, until 11 E. 3. where the Black Prince was created Duke of *Cornwall*, and thoſe who of antient times were Created Earls were of the blood Royal. And even to this day, the King in all his appellations doth ſtyle them, *per nomen Chariſſimi Conſanguinei noſtri*, and for theſe cauſes the Law giveth to them high and great privileges; and therefore their bodies ſhall not be arreſted for debt, treſpaſs, &c. becauſe the Law doth intend that they do aſſiſt the King with their Counſel for the Commonwealth; and do keep the Realm in ſafety by their proweſs and valour. Alſo for the ſame Cauſe they ſhall not be put on Juries, although it be for the ſervice of the Country. Alſo if iſſue be taken, if the Defendant be an Earl or not, it ſhall not be tryed by Jury, but by the Kings writ. Alſo the Defendant ſhall not have day of grace againſt a Lord of the Parliament, becauſe he is intended to attend the publique: and all theſe and many other appear in our books, 48 E. 3. 30. *Regiſter* 179. F. N. B. 247. 48 *Aſſ. p.* 6. 22 *Aſſ. p.* 24. 32 H. 6. 27. 35 H. 6. 46. So that as when ſuch office deſcendeth to an Infant, or a man *Non compos mentis*, or Ideot, &c. they of neceſſity ought to exerciſe the ſame by deputy. So an Earl for the neceſſity which the Law intendeth, of his attendance upon the King and the publique, this Stewardſhip of a baſe Court
[b] ſhall be exerciſed by his Deputy; and therefore it was agreed, That if a Pakerſhip be granted to an Earl, without words to make a Deputy, he may keep it by his ſervants. And in many caſes the Law doth allow diverſe acts for conveniency in reſpect of the dignity of the perſon; as if licenſe be given to a Duke to hunt in a Park, the Law for conveniency giveth him ſuch attendances as is requiſite to the dignity of his eſtate. *Vide* 12 H. 7. and 13 H. 7. 10. So when a Biſhop is riding, it is not convenient to his eſtate and degree to be forced to examine the ability of a Clerk, but he ought to attend his convenient leiſure, 14 H. 7. 21. 15 H. 7. 7. and 8. And of old time the Earl was *Præfectus, ſeu Præpoſitus Comitatus*, and had the Charge and Cuſtody of the County, and is called by the *Romans, Satrapas*, which word they had from the *Perſians*, and was applied to them who were, *Præfecti Provinciæ.* And *Vicecomes* is *vicem gerens ſive vicarius Comitis*: And now the Sheriff hath the authority for adminiſtration and execution of Juſtice, which the Earl had. And now the King by his Letters Patents doth commit to the Sheriff *Cuſtodiam Comitatus*, without expreſs words to make a Deputy, and yet he who cometh in lieu of the Earl may make one Under-ſheriff, that is, his Deputy, which in ancient time, as appeareth before, was called *Seneſchallus Vicecom.* and in the Statute of *Weſtm.* 2. *cap.* 39. he is called *Subvicecomes*, and in 11 H. 7. *cap.* 15. he is called the Shire Clerk; And if *Vicecomes qui gerit vicem comitis* may make a Deputy, *à fortiori*, the Earl himſelf may make one; and ſo much the rather in the caſe at barr, becauſe the ſame doth concern private Caſes in a baſe Court. Alſo when before the Statute of *Quia Emptores terrarum* the King or other Lord, &c. had given lands to a Knight to hold of him by Knights ſervice, *ſc.* to go with his Lord (when the King maketh a voyage royal to ſubdue his Enemies) for 40. dayes, well and conveniently arrayed for the warr, in this caſe the Law had ſo much regard to the dignity of Knighthood (which is the inferiour degree of Dignity) that he might find an able perſon, &c. to go for him with the King in his warr: and therewith agreeth 7 E. 3. 29. for 2 cauſes, one concerning the publique adminiſtration and execution of Juſtice in time of peace, and the other the publique defence of the Realm in time of warr, were more ſtrong caſes than the Caſe at barr. And it appeareth in
[50] the ſaid Letters Patents that it was the intent of the Queen, That the Earl ſhould make a Deputy by theſe words, *Volentes & firmiter injungendo præcipientes per præſentes omnibus & ſingulis officiariis, miniſtris, & ſubditis noſtris, tam infra libertat. quam extra, tenore præſentium, quod eidem Regero Comiti Rutland, & deputato, ſive deputatis ſuis in præmiſſis omnibus faciend. & exequend. ſint auxiliantes, & conſulentes prout decet.* By which it appeareth that ſhe did mean that the Earl ſhould make a Deputy *in præmiſſis omnibus*: and her grant ought to be expounded, in reſpect of the dignity of the perſon according to her intent. And as to the opinion of *Fleta*, as above, it is further ſaid, *cujus officium eſt curias tenere maneriorum, & ſi per ſubſtitutum ſuum hoc plerunque fecerit, &c.* By which it ſeemeth, that then Stewards of Courts might make Deputies.

As to the ſecond point, Admitting that the Plaintif cannot make a Deputy, Then it was Objected, That the Non-uſer thereof is a Cauſe of Forfeiture, and to prove that, 2 H. 7. 11. in the caſe of the Clerk of the Market, &c. was cited. To which it was anſwered and Reſolved, That by not uſer, the office in the caſe at barr cannot be forfeited. And for the better underſtanding of the true reaſon of it, It is to know, That there are 3. cauſes of Forfeiture, or ſeiſure of offices for matter in fact, as for abuſing, not uſing, or refuſing. Abuſing or Miſuſing, as if the Marſhal, or other Gaoler ſuffer voluntary eſcapes, it is a forfeiture of their offices, 39 H. 6. 32. 5 *Ma. Dyer* 151. *vide* in 22 *Aſſ. p.* 34. 11 E. 4. 1. 8 H. 4. 18. 20 E. 4. 5, 6. So if a Foreſter or Keeper fell and cut wood, if not for neceſſary browſe, it is a forfeiture of their offices; for the deſtruction of Vert is the deſtruction of Veniſon. As to not uſing, (which concerneth the caſe at barr) there is a difference when the Office doth concern the adminiſtration of Juſtice or the Common-wealth,

and

and the officer *ex officio*, ought of neceſſity attend without any demand, or requeſt; there the not uſing or not attendance in Court is a forfeiture. As the office of Chamberlain in the Exchequer, Prothonotary, Clerk of the Warrants, Exigenter, Philiſer, &c. in the Common Pleas, &c, for the attendance of them and the like officers is of neceſſity for the adminiſtration of Juſtice; So the attendance of the Clerk of the Market is of neceſſity for the Commonwealth. *Vide* 2 *H.* 7. 31. So of holding the Sheriffs Torn, 5 *Ma. Dyer* 151. But when the officer ought not attend, but by demand or requeſt made by him to whom he is officer, there the Not uſing or not attending, is no cauſe of forfeiture without demand or requeſt. As in the Caſe at Barr, he was not bound to hold any Courts, but upon requeſt had, and ſo much is implyed in his grant, *ſcil.* to hold his Courts when he ſhall be required: And ſo it was adjudged in *Walton*'s Caſe in the Common Pleas, *Anno* 10 *Eliz.* and 20 *Eliz.* in the ſame Court in *Randal Hurleſton*'s Caſe; as if a man granteth an annuity *pro conſilio impendendo*, he is not bound to give Counſel but upon requeſt made, 39 *H.* 6. 22. *John Bruin*'s Caſe and 22 *Eliz. Dyer* 369. *Plommer*'s Caſe, 41 *E.* 3. *Bredon*'s Caſe.

But when the Office doth concern any mans private, and the Officer ought *ex Officio* attend his Office without Requeſt, there the not uſing or not attending is not a cauſe of forfeiture, if not that the not uſing or not attending be cauſe of prejudice or damage to him whoſe Officer he is in any thing which concerneth his charge. As if a Keeper of a Park do not attend one or two days, and within theſe days no prejudice or damage happeneth, it is no forfeiture; but if by reaſon of his abſence unknown perſons kill the Deer, it is a forfeiture of his Office; and therewith agreeth 5 *E.* 4. 6. [b]

As to the Refuſal it is to know, That in all caſes when an Officer is bound upon requeſt to exerciſe his Office, if he do it not upon requeſt, it is a forfeiture: As if the Steward of a Mannor be requeſted by the Lord to hold a Court, which he doth not, it is a forfeiture.

The 3 point. Againſt the Writ and Count it was objected, that they were *vi & armis* (where an action upon the caſe ought to be without *vi & armis*) for the Writ and Count are, that the Defendants *eundem Comitem ad exercend. dict. Offic. infra dict. maner. de M. & vadia, feoda, commoda, & proficua eidem offic. de jure pertinent. habere & percipere vi et armis adtunc et ibid. impediverunt, et ad hunc impediunt.* And the Books in 43 *E.* 3. 33. *et* 17 *E.* 4. 2. were cited. And *F. N. B.* 86 *H.* that the Action upon the Caſe ſhall be without *vi et armis.* And as to that it was Reſolved by the Court, that the Writ and Count were good enough. And a difference was taken betwixt not doing, and miſ-doing, for not doing or negligence, it ſhall never be ſaid *vi et armis*, for that ſhould be *oppoſitum in objecto*, nor for negligence or not doing the writ ſhall be, *contra pacem*, 12 *H.* 4. 3. 45 *E.* 3. 17. 43 *E.* 3. 33. But ſome writs ſhall be *contra pacem*, which ſhall not be *vi et armis*, as 9 *H.* 6. 1. A Recaption ſhall be *contra pacem*, and againſt the Law and the Statute, but ſhall not be *vi et armis.* So in all actions for a thing done againſt any Statute, the writ ſhall be *contra pacem*; *vid.* 17 *E.* 3. 1. although it be not for damage. But when there are two cauſes of an action upon the Caſe, the one *cauſa cauſans*, and the other *cauſa cauſata*: *cauſa cauſans* may be alleged to be *vi et armis*; as in 12 *H.* 4. 3. The putting of the Dung into the River is *cauſa cauſans*, and therefore it may be *vi et armis*, but *cauſa cauſata*, *ſc.* the point of the action upon the caſe is the drowning of the Plaintifs land: So in 8 *H.* 2. *Hoſteler* 2. *Regiſter* 105. the breaking of the Inne may be alleged *vi et armis*; For *defectus cuſtodie* is the point of the action upon the Caſe againſt the Hoſteler, *M.* 29 *E.* 3. 20. *b.* The Abbot of *Eveſham* brought an action upon the Caſe againſt certain perſons, and counted that he had a Fair in *S.* with all that belonged to a Fair, and that the Defendants with force and armes did diſturb the people from coming to the fair (which was *cauſa cauſans*) by which the Plaintif loſt his Toll (which was *cauſa cauſata*) the point of the action, and the action was maintainable. So in the caſe at bar, the Defendants might *vi et armis* hinder or interrupt the Plaintif to exerciſe the Office, and that is *cauſa cauſans*, by which he loſeth his fees, &c. and that is *cauſa cauſata* the point of the action, and 7 *H.* 4. 14. If an action upon the Caſe hath ſufficient matter, although it hath alſo matter in Parliament, yet it ſhall be maintainable. [51]

The 4th. point, Againſt the action it was objected, That no action upon the caſe lieth, becauſe it appeareth by his own ſhewing that he may have an Aſſiſe, *Vid.* 2 *H.* 4. 11. 13 *H.* 7. 26. and many other books. To which it was anſwered and Reſolved by the Court, That of things not maynorable, *hæreditamenta incorporea*, as Common, Corodie, Office, Rent, &c. he who is ſeiſed of them is in Election to have an Aſſiſe, and to admit himſelf to be out of poſſeſſion; as if a Man ſeiſed of a Corodie certain thereof be diſturbed by another, by which he cannot take his Corodie; yet he may grant it over; otherwiſe it is of Land. And therewith agreeth 17 *E.* 2. *Nuper obiit, &c.* So if another take up my rent; yet I may grant it over, and therewith agreeth 24 *E.* 3. 4. 15 *E.* 4. 8. 1 *E.* 5. 5. 19 *R.* 2. *Action ſur le caſe* 51. *I. F.* brought an action upon the caſe againſt certain perſons, and declareth, that he is Bedel of the Hundred of *H.* and ought to have of every Brewer, who ſelleth 3 gallons of the beſt Beer for 7 *d.* certain Beer; and ſaith that he, and thoſe whoſe eſtate he hath in the Hundred have been ſeiſed thereof. And *Hankford* took 3 Exceptions to the Declaration, 1. That he hath not ſhewed how he hath his eſtate, *& non allocatur*, 2. He claimeth by preſcription of every of theſe Brewers Beer by virtue of his Office; and he hath joyned ſundry Brewers in his action, where he ought to have ſeveral actions, and *non allocatur*, for all in Covine were acceſſary. 3. He hath ſhewed he was diſturbed, in which caſe he ought to have an Aſſiſe; and *non allocatur.* But the reaſon of the Rule of the Book is miſtaken by the Reporter; for there the reaſon which is given is, becauſe peradventure he hath nothing in the Office but for a time, as a Clark hath nothing but the occupation, &c. the contrary of which appeareth

peareth in the declaration, where he preſcribeth in the Office; but the true reaſon is, that it is in his election, as is aforeſaid.

The 5 point. Againſt the verdict 5 Exceptions were taken. 1. That there was not any diſturbance found, and if any diſturbance be found, the diſturbance alleged in the Declaration is not found: Firſt the ſaid words which paſſed betwixt them, was not any diſturbance or interruption of the Plaintif, as in 16 E. 4. 10 & 11. *David Malpas* was bound to another, that he ſhould not interrupt him to uſe the Office of Parker, *&c.* and they met in *London*, and *Malpas* ſaid to the Parker, that if he would be ſo hardy as to come to the ſaid Park, and uſe the office aforeſaid, that he would beat him, and it is there holden that this verbal threatning is not any interruption.

[b] 2. There is not any diſturbance found *vi & armis*, which is alleged in the Declaration. To which it was Anſwered, and Reſolved by the Court; That there was an expreſſe diſturbance found, *ſc.* to hold the Court, and of the taking of the Fees; for *impedire eſt pedem imponere, & impedimentum eſt quo quis impeditur ut not perficiat quod ad ſe pertinet*; And although the diſturbance with all the circumſtances be not found, yet if any diſturbance be found which is alleged in the Declaration, it is ſufficient, and that without queſtion is directly found. 3. The Verdict is, *Quod quidem* Simon Stern *adtunc exiſtens deputat. prædict. Comitis* Rutland. *pro exercitio prædicti Officii Seneſchalli prædict. Maner. de M.* and it is not found that he made the ſaid *Stern* his Deputy by his Deed, as it ought to be, as it is agreed in 28 *H.* 8. *Deputie* 17. for this cauſe the verdict was inſufficient. To which it was Anſwered and Reſolved; That it is true, that he who maketh a Deputy ought to make him by writing: But when the Jury find that *Simon Stern* is his Deputy, all neceſſary incidents are thereby found; and therefore upon the matter they have found that it was by deed. 4. The verdicts is, *Quod acceſſit ad villam de M. & ad uſualem locum ibid. ubi Curia Maner. de M. communiter tent. & cuſtodit. fuit*, and yet it is not found that he came to any part of the Mannor, but onely *ad villam de M.* and therefore it is inſufficient; for the Court ought to be holden upon part of the Mannor, or at leaſt upon ſome part of that which is holden of it, but it may well be that ſome part of the Town is not within the Mannor, but holden of another Mannor; and *non allocatur*. 1. Becauſe it ſhall be entended *prima facie* in this ſpecial verdict, that the Mannor doth include the whole Town. 2. The other words, *ſc. ad uſualem locum ubi Cur. Maner, &c.* the ſame maketh in a ſpecial verdict the matter clear, that it ſhall be intended in ſome place within the Mannor, for ſuch preciſe form is not by Law required in a ſpecial verdict, which are the finding of Lay people, as in pleadings, which are by men learned in the Law. Laſtly it was objected, That the verdict hath found, that, thereupon *ſc.* (from the 16 day of *Feb.*) *iidem* Tho. Woodward & Rob. Spencer *receperunt omnia feoda pertinent.* Seneſchal. *ibid.* which ought to be intended till the finding of the Verdict, and therefore they have given damages entirely for all, whereas it ought to be onely for the taking of the fees before the Original; for this caſe the verdict was inſufficient. To which it was Anſwered and Reſolved by the Court; That the beginning of this ſentence is, and *abinde uſque impetrationem præd. brevis original. &c.* Theſe words in this ſpecial verdict ſhall guide and limit the 2 *abinde* alſo. 2. The Jurors, if, &c. find them guilty *de tranſgreſſ. infra ſcript.* which was alleged in the Writ and Declaration from the 16 of *Feb. hue uſque*, which taking of all the profit ought to be intended *uſque ad impetrationem brevis.* And afterwards in the end of this Term a writ of Enquirie of damages was awarded by the Court, and upon Retorn of it Judgement was given for the Plaintif. And the Chief Juſtice in the argument of this Caſe

[52] ſaid, That in the ſaid Letters Patents, there is a general clauſe which referreth unto the ſaid grant of the Office of the Stewardſhip laſt named, and the other Offices which were before granted, *ſc. una cum omnibus aliis profic', juribus, commodit', & emolument. dict. omnibus & ſingulis officiis cum ceteris præmiſſis pervenient. ſeu aliquo modo ſpectant. & adeo plene & integre, & in tam amplis modo & forma, prout* Tho. Manners *Miles, &c. aut aliquis alius, ſive aliqui alii, offic. præd. vel eorum aliquod ante hæc tempora occupans ſive occupantes, habuit & percepit, habuerunt ſive perceperunt, &c.* And if in any former Patent of the ſaid Office of Stewardſhip, the Patentee had expreſſe power to make a Deputy, that then by theſe general words *ide omnibus juribus, &c. adeo plene, &c.* being applied to a particular Charter which hath ſuch expreſſe authority, the Plaintif may make a Deputy, and to this purpoſe 43 *E.* 3. 22. 18 *Eliz. Dyer* 351. *Hil.* 40. *Eliz. Amereditb*'s Caſe in the Exchequer were cited.

Micb.

Mich. 8 Jacobi *In the Common Pleas.*

Hickmot's Caſe.

IN an action of debt brought by *Will. Hickmot* againſt *Thomas Oxenbridge* upon a Bond of 40 *l.* 1 *Jan.* 5 *Jac.* the Deft. pleaded in barr, that after the making of the ſaid Bond, *ſc.* 10 *Julii* 1608. [b] the Plaintif did releaſe unto him, and pleaded part of the Releaſe, The Plaintif demanded Oyer of the Releaſe, which was read to him in theſe words, *July* the 13 day in *Anno* 1608. *It is concluded and agreed, upon the day and year above written, between* Wil. Hickmot *of the one party, and* Tho. Oxenbridge *of the other party; That upon good conſiderations, drawing the parties thereunto, The ſaid* William Hickmot *doth acknowledge himſelf fully ſatisfied and diſcharged of all Bonds, debts or demands whatſoever, from the beginning of the world until this preſent day, by the ſaid* Tho. Oxenbridge. *And that he the ſaid* William Hickmot *is to deliver all ſuch bonds as he hath yet undelivered to* Thomas Oxenbridge, *except one Bond of* 40 *l. yet unforfeit, which is for the payment of* 22 *l. wherein the ſaid* Thomas Oxenbridge *and* Roger Oxenbridge, *his brother, ſtandeth bound to the ſaid* William Hickmot, *In witneſſe whereof, &c.* And the Plaintif ſaid that he ought to be barred of his action, for, he ſaid that the Bond of 40 *l.* ſo excepted, and the ſaid Bond brought into Court, are one and the ſame Bond, &c. upon which the Plaintif did demurr in Law. And in this Caſe 3 points were Reſolved.

1. That the ſaid acknowledgement by his deed to be ſatisfied and diſcharged of all Bonds, is in Judgment of Law a releaſe or diſcharge of the Bonds, for none ought to be ſatisfied but once, although that the word Diſcharge is not properly ſaid of the part of the Obligee, but of the Obligor, for the Obligor is to be diſcharged; yet when the Obligee doth confeſs himſelf to be diſcharged of all bonds by the ſaid *Tho. Oxenbridge*, the ſame amounteth to as much, that the Bonds themſelves ſhall be diſcharged: So that as well this word Diſcharge, as this word Satisfied, is ſufficient in Law to barr the Plaintif of all benefit of the ſaid Bonds; For by what words a debt may be created, by the contrary words it may be diſcharged, *Vid.* 22 E. 4. 22. *a.* 8 E. 4. 5. *a.* 37 H. 6. 9. *a.* what ſhall be good words Obligatory: And *bis idem exigi bona fides non patitur, & in ſatisfactionibus non permittitur amplius fieri quam ſemel factum eſt.* [53]

2. It was Reſolved, That the ſaid exception ſhall extend to all the premiſes, and not onely to the clauſe of delivery, for 3 cauſes. 1. Becauſe it is a Rule, *Quod exceptio ſemper ultimæ ponenda eſt, Vid. Regiſt.* 1. 2. All the words before make but one entire ſentence, and one depending upon the other, for it was reaſon, when all Bonds are ſatisfied and diſcharged, that they ſhould be delivered. 3. It was reaſon that this Bond of 40 *l.* ſhould be excepted, for the ſame was not then due.

The 3 point, That now it appeareth by the Confeſſion of the Plaintif in his Replication, That he cannot have an action of debt againſt the Defendant onely, but he ought to have the ſame againſt him and *Roger Oxenbridge*, for the Bond of 40. *l.* excepted was a joint Bond; and the Plaintif doth aver in his Replication, that the ſame is the Bond upon which he conceived this action, and therefore he hath abated his own Writ. But the Court gave day to another Term, at which day the Plaintif was Nonſute.

Mich. 8 Jacobi. *In the Common Pleas.*

Baten's Caſe.

HEnry *Baten*, and *Elizabeth* his Wife brought a *quod permittat* againſt *George Sampſon*, to proſtrate a houſe in the Pariſh of St. *Clements Danes* without *Temple Barr*, *London*, which [b] the ſaid *George* wrongfully, and without judgment had levied *ad nocumentum liberi tenementi nuper* Johannis Pleader, *& modo præd.* Henrici *&* Eliz. *in jure ipſius* Eliz. &c. And counted that the ſaid *John Pleader* was ſeiſed of a Meſſuage in the *Strood* in the ſaid Pariſh in Fee. And ſo ſeiſed the ſaid *George*, *ult. Octob.* 41 *Eliz.* wrongfully, and without judgment did erect upon his Freehold a houſe, ſo near the ſaid Meſſuage *nuper præd.* Johannis Pleader *& modo ipſorum* Henrici *&* Elizab. *ſic quod Orientalis pars ejuſdem domus ipſius* Georgii *ſuperpendet, Anglicè, doth juttie over* the ſaid Meſſuage late the ſaid *John Pleader's*, and now the ſaid *Henry* and *Elizabeth's*, in breadth 17 Inches, and in length 17 feet, *ad nocumentum liberi tenementi ipſorum* Henrici *&* Elizab. *in eadem, &c.* to their damage of *C l.* upon which the Defendant did demur in Law. And in this Caſe 3 points were Reſolved.

1. That it needeth not to ſhew how the Plaintif had the eſtate of *John Pleader* in the ſaid houſe to which the Nuſance is, for ſo have always been the forms of actions upon the Caſe, and the Counts upon them in ſuch Caſes. And ſo was it adjudged

and affirmed in a Writ of Error, as appeareth by the Record (which agreeth with this Caſe) in *Penruddocks* Caſe in the 5th. part of my *Reports*.

2. It was Objected, That there was variance between the Writ and the Count in this Caſe, becauſe the Writ was *levavit*, &c. *ad nocumentum liberi tenementi nuper* Johannis Pleader, *& modo præd.* Henerici *&* Eliz. and the Count was *levavit*, &c. *domum*, &c. *tam prope Meſſuag. præd.* Henrici *&* Eliz. *ſic quod Orientalis pars*, &c. *ſuperpendit*, *Anglicè*, *doth juttie over*, *præd. meſſuag. nuper præd.* Johannis Pleader, *& modo ipſorum* Henrici *&* Eliz. &c. *ad nocumentum liberi tene-*
[54] *ment. ipſorum* Henrici *&* Eliz. *in eadem*; ſo that the Writ is, *ad nocumentum liberi tenementi nuper* Johannis Pleader, *& modo* of the Plaintifs, and the Count is, *ad nocument. liberi tenementi ipſorum* Henrici *&* Eliz. and ſo variance: And it was not allowed, for the Plaintifs ſhew in their Count, that the levying was in the time of *John Pleader*, &c. which agreeth not with the Writ, becauſe that the levying was *ad nocumentum* Johannis Pleader, and the concluſion *ad nocumentum* of the Plaintifs is neceſſary; for otherwiſe they cannot maintain the action, nor demand damages.

3. It was Objected, That the Plaintifs have counted generally, *ad nocumentum*, and have not aſſigned any Nuſance certain, *ſc.* That the Rain did fall from the ſaid houſe newly built, to the houſe of the Plaintifs, or that the windows are ſtopped, by which he loſeth the light, &c. as in 4 *Aſſ.* 3 *&* 4 E. 3. *Richard de Daulbies* Caſe: The Plaintiff in the *quod permittat* ſhewed the manner of the Nuſance, when the ſmoke entred into the ſaid houſes, ſo that no man could ſtay there. So in 18 E. 3. 22. *b.* A man brought a Writ of Nuſance of a houſe levied to his freehold, and counted that where he had a houſe, and under his houſe had a place which contained ſo much in length, and ſo much in breadth, by which the water uſed to diſcend from his houſe and paſſe, there the Defendant had built a houſe above the Spout, ſo that the water and drops of Rain could not fall as they ought, but fell upon the peraies of his houſe, whereby the Timber of his houſe did periſh. So in 32 *Aſſ.* 2. In *Aſſiſe of Nuſance*, *quod duxit curſum aquæ*, &c. And aſſigned that he made a trench out of the River which came to the Plantifs Mill, ſo that it was miſ-turned, inſomuch that where the Mill uſed to grind day and night 3 quarters, &c. it could not now grind a Buſhel, and alſo that the ſaid Water did drown 15 acres of the Plaintifs Meadow, adjoining to the ſame Mill; ſo as where he uſed to have 40 loads of Hay, he could not now have 7, &c. *Vid.* 30 E. 3. 3. & 26. 17 E. 3. 39. 2 H. 4. 13. and ſo it was in the ſaid *Penruddocks* Caſe. But it was Reſolved, that the Plaintif need not in this Caſe aſſign any ſpecial Nuſance; for here it appeareth to the Court, that it is to the Plaintifs Nuſance; For this Caſe differs from all the other Caſes; for in this Caſe the Defendant hath built a new houſe, which overhangeth part of the Plaintifs houſe (which was not in any of the other Caſes) ſo that of neceſſity the Rain which falleth from the new houſe ought
[b] to fall upon the Plaintifs houſe. Alſo *Cujus eſt ſolum, ejus eſt uſque ad Cœlum.* And therewith agreeth 13 H. 8. 1. And by the overbuilding upon part of the houſe of the Plaintifs, he hath deprived them of the Air; alſo he hath prevented them to build their houſe higher; and that which appeareth to the Court needeth not to be averred; for *Lex non requirit verificari quod apparet Curiæ*, *Plow. Com.* 87. in *Patridges* Caſe; 13 H. 4. 17. If an Infant bring an Aſſize of Mortdanceſter, he needeth not averr, that it is within the time of limitation, for it appeareth by the Plaintifs Infancy, 46 E. 3. In Treſpaſs for taking of money, the value needeth not be ſhewed, becauſe it appeareth, *Vid.* 33 H. 6. 54. 26 H. 6. *Gard.* 58. 35 H. 6. 30. *a Bracton* 254. and this is according to the old verſe, *Quod conſtat clarè non debet verificare.* And in *Penruddocks* Caſe, the Plaintif aſſigned ſome ſpecial Nuſance before the writ brought; but that *ſuperpendit 3 pedes curtillagii*, &c. *per quod aquæ pluviales de eadem domo deſcendentes*, *ſolum ejuſdem meſuagii conterunt*, *ac magnoperè indies magis magiſque conſumunt & devaſtant*, *& ea ratione curtilagium præd. quolibet pluviali tempore humectatum & inundatum exiſtet:* So that all the words in the ſaid Count being in the preſent Tence, and ſo after the writ brought, and no aſſignment of any ſuch particular nuſance before the writ brought, it appeareth thereby that the Court, as of a thing apparent, took notice thereof without averment, For *Nunc pluit*, *& toto nunc Jupiter æthera fulgit*, and that every one knoweth: And the book in 3 H. 3. *Aſſiſe* 362. was cited where in Aſſiſe of nuſance *de foſſo levato ad nocum. liberi ten. ſui*; and made his plaint that there where the water of *S.* held courſe directly from *S.* to the water of *Idele*, the Deft. had made a ditch over the water ſo that the water was ſtopt and roſe, that his land lying near the ſaid ditch is drowned to his damage; and Exception was taken to it, becauſe he doth not ſet forth how much much land was drowned, ſo that the plea is uncertain (and note he doth not ſhew as in 32 *Aſſ.* before, the particular Nuſans upon the drowning, *ſc.* where he uſed to have ſo many loads of hay, that now he hath but ſo many;) alſo it might have been ſaid, that by ſome manner of drowning, the meadow ſhould be better, but there *ad damnum* doth imply the contrary. But it was anſwered in the caſe of 3 E. 3. that the Aſſiſe ſhall ſay in certain, becauſe that ſometimes more may be drowned, ſometimes leſs, for which cauſe the plaint was adjudged good. So in the caſe at barr, the Jury ſhall enquire of the certainty and quantity of the damage which happened to the Plaintif by the ſaid Nuſans. Note Reader, there are 2. wayes to redreſs a Nuſans, one by action, and that is to recover damages, and have judgment that the Nuſans ſhall be removed, caſt down, or abated, as the caſe requireth; or the party grieved may
[55] enter and abate the Nuſans himſelf, as it appeareth by 17 E. 3. 44. and 9 E. 4. 35. and in *Penruddocks* caſe, but then he ſhall not have an action, nor recover damages; for in an Aſſiſe of Nuſans, or *Quod permittat proſternere*, *&c.* it is a good plea, that the Plaintif himſelf either before the writ brought, or hanging the writ, hath abated the Nuſans: For in an Aſſiſe or *Quod permittat*, he ſhall have Judgment of 2 things, *ſc.* to have the Nuſans abated, and therefore the action doth not lie; and therewith agreeth 50 E. 3. 11. The Abby of *Buckfaſts* caſe. 2 H. 4. 11, 46 E. 3. 24. 29 *Aſſ.* 2. *Vide* the Stat. of *Weſt.* 2. *Cap.* 24. *In Caſibus in quibus conceditur bre. de Cancell. noſtra de*

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facto alicujus, de cætero non recedant querentes à Curia noſtra ſine remedio, pro eo quod tent. transfertur de uno in alium. Et in Regiſtro de Cancellaria non eſt inventum aliquod bre. in iſto caſu ſpeciali, ſicuti de muro, domo, mercato, conceditur bre. ſuper eum qui levavit ad nocumentum, & ſi transferatur domus, murus, & hiis ſimilia in aliam perſonam, bre. denegetur, ſed de cætero cum in uno caſu conceditur bre. in Conſimili caſu remedio indigente ſicut prius fiat bre. And the reaſon, that at the Common Law Aſſiſe of Nuſans lieth not againſt him who levyeth the Nuſans, and him to whom the tenement was paſſed, was becauſe there was not found any writ of Aſſiſe of Nuſans in the *Regiſter*, but which ſuppoſed, that the Tenants in the aſſiſe *levaverunt*; and that cannot be ſaid when the Tenement is paſſed over to another; for he doth not levy it, but onely the other; and now that Statute giveth an Aſſiſe in ſuch Caſe: *ſc. Queſtus eſt nobis A. quod B.* (who levyed the Nuſans,) *& C.* (to whom the Tenement is transferred) *levaverunt*, and this Statute doth extend onely to Aſſiſe of Nuſans againſt him who maketh the Nuſans and his alienee. 30 E. 3. 26. *b.* 46 E. 3. 23. 24. 50 E. 3. 11. and afterwards the Plaintif in the *Quod permittat* had judgement.

The Poulters Caſe.

[*b*] Mich. 8. *Jac.* The Caſe between *Stone* Plaintif, and *Raſe Waters*, *Henry Bate*, *John Woodbridge*, and many other Poulters of *London* Defendants, for combination, confederacy, and agreement betwixt them falſly and malitiouſly to charge the Plaintif (who had married the wife of a Poulter in *Gratious*-ſtreet) with robbery of the ſaid *Raſe Waters*; ſuppoſed to be done in the County of *Eſſex*, and to procure him to be indicted, arraigned, adjudged, and hanged, and in Execution of this falſe conſpiracy, they procured divers warrants of Juſtices of peace, by force whereof *Stone* was apprehended, examined, and bound to appear at the aſſiſes in *Eſſex*; at which aſſiſes the Defendants did appear, and preferred a bill of Indictment of Robbery againſt the Plaintif; And the Juſtices of Aſſiſe hearing the Evidence to the Grand Jury openly in Court, they perceiving great malice in the Defendants in the proſecution of the cauſe, and upon the whole matter it appeared, That the Plt. the whole day that *Waters* was robbed, was in *London*, ſo that it was not poſſible that he committed the robbery, and thereupon the Grand Inqueſt found *Ignoramus*. And it was moved and ſtrongly urged by the Defendants Councel, That admitting this combination, confederacy and ageement between them to indict the Plaintif, to be falſe, and malitious, that yet no ſute lieth for the ſame in this Court, or elſewhere, for divers cauſes. 1. Becauſe no writ of Conſpiracy for the party grieved, [56] or Indictment at the Kings ſute lieth, but where the party grieved is indicted, and *legitimo modo acquietatus*, as the books are, F. N. B. 114. *b.* 6 E. 3. 41. 24 E. 3. 34. 43 E. 3. *Conſpiracy* 11. 27 *Aſſ. p.* 59. 19 H. 6. 28. 21 H. 6. 26. 9 E. 4. 12. *&c.* 2. Every one who knoweth himſelf guilty, may to cover their offences, or to fright or diſcourage thoſe who would proſecute the cauſe againſt them, ſurmiſe a confederacy, combination, or agreement, together betwixt them, and by ſuch means notorious offendors ſhall eſcape unpuniſhed, or at the leaſt, Juſtice ſhall be in danger to be perverted, and great offences to be ſmothered, and therefore it was ſaid by them, that there was not any preſident or warrant in Law to maintain ſuch a Bill as this is. But upon good conſideration, it was Reſolved that the Bill was maintenable; and in this caſe divers points were Reſolved.

1. That at the Common Law, which not onely favoureth the life of a man, but alſo his liberty, and freedom from Impriſonment, when a man was impriſoned for the death of a man, &c. where *prima facie* by the Law he was not bailable, and *ne detineatur diu in priſona, ſc.* till the coming of the Juſtices in Eyr, as appeareth by the Statute of *Weſt.* 1. *cap.* 11. the priſoner in ſuch caſe might have a writ of *Odio & atia*, directed to the Sherif, *quod aſſumptis ſecum cuſtodibus placitorum coronæ in pleno Comitatu per Sacrament. proborum & legalium hominum, &c. inquirat. utrum A. captus & detentus in priſona, &c. pro morte W. unde rettatus* (that is, *accuſatus*) *eſt, rettatus ſit odio & atia, an eo quod inde culpabilis ſit, & ſi odio & atia, tunc quo odio & atia, &c. niſi indictatus vel appellatus fuerit coram Juſtic. noſtris ultimo itinerantibus in partibus illis, et pro hoc captus et impriſonatus, etc.* By which it appeareth, that if the priſoner be indicted or appealed, and by force thereof impriſoned, the ſaid Writ being but a ſurmiſe lay not againſt the ſaid matter of Record.

2. It is obſerved, That if upon the ſaid writ of *Odio et atia*, the Jury found him not guilty, yet the Sheriff, with the Coroners, or any of them, could not bail him; but then ſhould iſſue forth a writ of *Ponendo in ballivum* to the Sheriff, which writ doth recite the Inquiſition, by which it is found the priſoner to be Not guilty, or that he did it *ſe defendendo, et non per feloniam, etc. malitia præcogitata, vel per infortunium, Tibi præcipimus, quod ſi præd. A. invenerit tibi* 12. *probos et legales homines de Comit' tuo, etc. qui eum manucapiant habere coram Juſticiariis noſtris ad primam Aſſiſam, &c. ad ſtandum, &c. tunc ipſum A. &c. præd.* 12. *interim tradas in ballivum.* By which it appeareth, that in ſuch a caſe the Sheriff without a writ could not bail him, nor by writ bail under the number of 12. perſons which ſhould bail him. *Vide Magna Charta, cap.* 16. *Weſt.* 1. *cap.* 11. *Glouceſter,* [*b*] *cap.* 9. *Weſt.* 2. *cap.* 29. But now the writ of *Odio & atia* is forbidden by the Statute of 28 E. 3. *cap.* 9. *Vide Regiſter. Stamf. pleas of the Crown.* 77. *g. Bracton lib.* 3. 121. *b.*

3. It is to be obſerved, That there was means by the Common Law before Indictment to protect the innocent againſt falſe accuſation, and to deliver him out of priſon: and as *Odium* in the ſaid Writ doth ſignifie hatred, ſo *Acia* or *Atia*, doth ſignifie malice, becauſe that *malicia eſt acida*, that is, egre, ſharp and cruel.

And it is true, the writ of *Conſpiracy* lieth not, if not that the party be indicted, and *legitimo modo acquietatus*, for ſuch are the words of the Writ; But that a falſe conſpiracy betwixt diverſe perſons ſhall be puniſhed, although that nothing be put in Execution, is full and apparent in our books; and therefore in 27 *Aſſ. p.* 44. In the Articles of the Charge of Enquiry by the Enqueſt in the Kings Bench, there is a *Nota*, That two were indicted of Confederacy, each of them to maintain the other, whether their matter be true, or falſe, and notwithſtanding that nothing was ſuppoſed to be put in Execution, the parties were forced to anſwer to it, becauſe the thing is forbidden by the Law, which are the very words of the book; which proveth that ſuch falſe confederacy is forbidden by the Law, although it was not put in ure or execution. So there in the next Article in the ſame book, Inquiry ſhall be of Conſpirators and Confederates, which agree amongſt themſelves, *&c.* falſly, to indict, or acquit, and of the manner of agreement betwixt them, which proveth alſo, That confederacy to indict or acquit, although that nothing be done, is puniſhable by Law. And there is another Article concerning Conſpiracy betwixt Merchants, and in theſe caſes the Conſpiracy or Confederacy is puniſhable, although the Conſpiracy or Confederacy be not executed, as it is holden in 19 *R.* 2. *brief* 926. A man ſhall have a writ of Conſpiracy, although they doe nothing but conſpire together, and he ſhall recover damages, and they may be alſo indicted thereof. Alſo the uſual Commiſſion of *Oyer* and *Terminer* giveth power to the Commiſſioners to enquire, &c. *de omnibus coadunationibus confœderationibus, & falſis alligantiis*; and *Coadunatio* is a uniting of themſelves together, *Confœderatio* is a Combination amongſt them, and *falſa alligantia* is a falſe binding each to other, by bond or promiſe, to execute ſome unlawfull act; In theſe caſes before the Act done the Law doth puniſh the Coadunation, Confederacy, and falſe alliance, to the
[57] end to prevent the unlawfull act, *quia quando aliquid prohibetur, & id per quod per venitur ad illud: Et affectus punitur licet non ſequatur effectus*; and in theſe caſes the Common Law is a Law of Mercy, for the ſame preventeth the Malignant to do miſchief, and the Innocent to ſuffer the ſame. *Hill.* 37 H. 8. In the Starr-chamber a Prieſt was ſtigmatized with F. and *A.* in the forehead, and ſet upon the Pillory in *Cheapſide*, with a paper for a falſe accuſation. *M.* 3, & 4. *Phil.* & *Ma.* one alſo for the like was branded with an F. *A.* in the cheek, with this ſuperſcription as is aforeſaid. *Vide Proverbs* 1. *Si te lactaverint peccatores & dixerint, Veni nobiſcum ut inſidiemur ſanguini, abſcondamus tendiculs contra inſontem fruſtra, &c. omnem pretioſam ſubſtantiam reperiemus & implebimus domus noſtra ſpoliis, &c. Fili mi ne ambules coram eis, pedes enim eorum ad malum currunt & feſtinant ut effundant ſanguinem.* And afterwards upon the hearing of the caſe, and upon pregnant proofs, the Defendants were ſentenced for the ſaid falſe confederacy by fine and impriſonment. Note Reader, Thoſe Confederacies puniſhable by Law, ought before they be executed to have 4 incidents: 1. The Confederacy ought to be declared by ſome manner of proſecution, as in this caſe it was, either by making of Bonds, or promiſe one to the other: 2. It ought to be malitious, as for unjuſt revenge, &c. 3. It ought to be falſe againſt an innocent: 4. It ought to be voluntary out of Court.

Mich. 8 Jacobi. *In the Common Pleas.*

William Aldred's Caſe.

[*b*] *William Aldred* brought an action upon the Caſe againſt *Tho. Benton*, which began *Trinit. 7. Jacobi, Rot.* 2802. That where the Plaintif, 29 *Septemb. 6. Jac.* was ſeiſed of a houſe, and of a parcel of land in length 31 feet, and in bredth 2 feet and a half, next to the Hall and Parlor of the Plaintif, of his houſe aforeſaid in *Harleſton* in the County of *Norfolk* in fee; and where the Defendant was poſſeſſed of a ſmall Orchard on the Eaſt part of the ſaid parcel of Land, the ſaid *Thomas malitioſè machinans & intendens ipſum Willihelmum de eaſamento & proficuo meſſuag' & parcell' terræ ſuorum præd. impedire & deprivare*, the ſaid 29. day of *Septemb. Anno* 6. *quoddam magnum lignile in dicto horto ipſius Thomæ conſtruxit & erexit, ac illud adeo exaltavit*, &c. *quod per lignile illud*, &c. *tam omnia feneſtr. & luminaria ipſius Willihelmi aulæ & Camerarum ſuarum, quam oſtium ipſius Willihelmi aulæ ſuæ præd. penitus obſtupat' fuer*, &c. *& præd. Thomas ulterius machinans & malitioſè intendens ipſum Willihelmum multipliciter prægravare, & ipſum de toto commodo, eaſamento & proficuo totius meſſuagii ſui præd. penitus deprivare, præd.* 29 *die Sept. anno* 6. *ſupradict. quoddam edificium pro ſuibus & porcis ſuis in horto ſuo præd. tam prope aulam & conclave ipſius Willihelmi præd. erexit, ac ſues & porcos ſuos in*
[58] *edificio in horto illo poſuit, & il' ibidem per magnum tempus cuſtodivit, ita quod per fetidos & inſalubres odores ſordidorum prædictorum ſuum & porcorum prædict. Thomæ in aulam & conclave præd. ac alias partes præd. Meſſuagii ipſius Willihelmi penetran' & influent. idem Willihelmus & familia ſui, ac aliæ perſonæ in meſſuagio ſuo præd. converſantes & exiſten. abſque periculo infectionis in aula & conclavi præd. ac aliis locis meſſuagii prædicti continuare ſeu remanere non potuerunt: prætextu cujus idem Willihelmus totum commodum, uſum, eaſamentum, & proficuum maximæ partis meſſuagii ſui prædicti per totum tempus prædict. totaliter perdidit & amiſit ad damnum ipſius Willihemi* 40 *l.* &c. And the Defendant pleaded

Not

Not guilty, and at the Assises in *Norfolk* he was found guilty of both the said Nusances, and damages assessed. And now it was moved in arrest of Judgment, That the building of the said house for hoggs was necessary for the sustenance of man; and one ought not to be so delicate nosed, that he cannot endure the scent of hoggs; for *Lex non favet delicatorum votis:* But it was Resolved, That the action for the same (as this case is) was well maintenable; for in a house 4. things are desired, *habitatio hominis, delectatio inhabitantis, necessitas luminis, et salubritas aeris*, and for Nusance done to 3 of them an action lieth, *sc.* to the habitation of the house, for that is the principal end of a house. 2. For hindrance of his light, for the old form of action upon the Case was significant, *sc. quod Messuagium horrida tenebritate obscura tum fuit*, therewith agreeth 7 E. 3. 30. 22 H. 6. 14. by *Markham*, 11 H. 4. 47. and so was a Case adjudged in the Kings Bench, *Mich.* 29 *Eliz. Tho. Bland* brought an action upon the Case against *Tho. Moseley*, and declared how that *James Bland* was seised in fee of an antient house in *Netherousgate* in the Parish of St *Michael* in the County of the City of *York*; and that the said *James*, and all those whose estate he hath in the said house, time out of mind, &c. had and have used to have for them his Tenants, for life, years, and at will, in the West side of the said house 7 windows or cleristeries against a piece of land containing half a Rood, in the Parish aforesaid, adjoining to the said house, which piece of land time out of mind was without any any building, until the 28 day of *Sept. Anno* 28 *Eliz.* and shewed the length and breadth of the said windows for all the time aforesaid, by force of which windows the said *James*, and all those whose estate he hath in the said house time out of mind have used to have for them and their Tenants divers wholesome and necessary easements and commodities, by reason of open Air and light, &c. And that the said *James* the 20th. of *Sept. Anno* 28 *Eliz.* demised to the Plaintif the said house for 3 years; and that the Defendants malitiously intending to deprive him of the [b] said easements, *& obstruere Messuagium præd. horrida tenebritate, &c.* 20 *November. Anno* 29 *Eliz.* had erected a new building upon the said piece of land, so near to the said 7 windows, that the said 7 windows were stopped, whereby the Plaintif lost his said easement, *&c. Et maxima pars Messuagii præd. horrida tenebritate obscurata fuit, &c.* In the bar of which action the Defendant pleaded, *quod infra præd. civitatem Ebor. talis habetur, & à toto tempore cujus contrarii memoria non existit, habebatur consuetudo, videlicet, quod si quis habuerit fenestras & visum per easdem versus terram vicini sui, vicinus ille visum illarum fenestrarum obstruere super terram illam solebat & posset, sicut melius viderit sibi expedire.* By force of which custom he justified the stopping of the said Windows; and upon that the Plaintif did demur in Law; And it was adjudged by Sir *Christopher Wray* Chief Justice, and the whole Court of Kings Bench, That the Barr was insufficient in Law to barr the Plaintif of his action, for two causes. 1. When a man hath a lawfull easement, or profit, by prescription time out of mind, &c. another Custom which is also time out of mind cannot take it away, for the one is as antient as the other: As if one hath a way over the land of *A.* to his Freehold, time out of mind by prescription, &c. *A.* cannot allege prescription or custom to stop the said way. 2. It might be that before time of memory, the owner of the said piece of land hath granted to the owner of the said house to have the said windows, without any stopping of them, and so the prescription might have a lawfull beginning: any *Wray* Chief Justice then said, That for stopping as well of Air as of Light an action lieth, and damages shall be recovered for them, for both are necessary, for it is said, *& vescitur aura etherea*; and the said words *horrida tenibritate* are significant, and imply the benefit of light. But he said, That for prospect, which is a matter onely of delight, and not of necessity, no action lieth for stopping thereof, and yet it is the great commendation of a house if it have a long and large prospect, *unde dicitur* [59]

Laudaturque domus longos qui prospicit agros.

But it doth not give actions for such things of delight. And *Solomon* saith, *Eccles.* 11. 7. *Dulce lumen est & delectabile oculis videre solem. Et olim (ut Plutarchus in Conv. 7. Sap. refert.) Rex Æthiopum interrogatus quid optimum? respondebat lucem; quis enim naturâ tennebras non exhorresceret?* and if the stopping of the wholesome Air, give cause of Action, *à fortiori* an Action upon the Case lieth in the Case at Barr, for the infecting and corrupting of the Air. And the building of a Limekill is good and profitable, but if it be built so near to a house, that when it burneth, the smoke thereof entreth into the house, so that none can dwell there, an action lieth for it. So that if a man have a watercourse running in a ditch from the River to his house, for his necessary use, If a Glover set up a Lime-pit for Calves skins, and Sheep skins, so near the said Water-course, that the corruption of the Lime-pit hath corrupted it, for which cause his Tenants leave the said house, an action upon the Case lieth for the same, as it is adjudged in 13 *H.* 7. 26. *b.* and the same stands both with the Rule of Law and Reason, *sc. Prohibetur ne quis faciat in suo quod nocere possit alieno; & sic utere tuo ut alienum non ladas.* See in the Book of *Entries tit. Nusance* 406. *b.* That he who hath a several piscarie in a water shall have an action upon the Case against him who erecteth a Dyehouse, *ac fimos, fœditates, & alia sordida extra domum præd. decurrentia in piscariam præd. decurrere fecit, per quod idem proficuum piscariæ suæ præd. totaliter amisit, &c.* And there is another President against a Dyer, &c. *quod idem* Henricus *in mansione sua præd. ob metum infectionis per horridum fetorem fumi fœditatis, & aliorum sordidorum, &c. per magnum tempus morari non audebat.* So in the Case at Barr, forasmuch as the Declaration is, That the Defendant malitiously intending to deprive the Plaintif of the use and profit of his house, did erect a Swine stie, *tam propè aulam & conclave ipsius* Will'i, *ac sues & porcos suos in ædificio ill. posuit, & illa ibidem per magnum tempus custodivit, ita quod fœtidi & insalubres odores sordidorum præd. suum & porcorum præd.* Thomæ *in aulam*, &c. *penetrans & influens idem* Will'mus *ac famuli sui*, &c. *in mesuag. præd. conversantes existen. absque periculo infectionis in aula, &c. continuare seu remanere non potuerunt, præsertim cujus idem* Wil. *totum commodum, &c. maximæ partis præd. messuag. per totum tempus præd. totaliter*

taliter perdidit, To which Declaration the Defendant pleaded Not guilty, and was found guilty of the matter in the Declaration, It was adjudged that the Plaintif ſhould recover.

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John Lamb's Caſe.

[b] *John Lamb* Proctor of the Eccleſiaſtical Court exhibited a Bill into the Star-Chamber againſt *William March*, *Robert Harriſon*, and many others of the Town of *Northampton*, and againſt *Shuckburghe* and others, for publiſhing of two libels. It was Reſolved, That every one who ſhall be convicted in the ſaid Caſe, either ought to be a contriver of the libel, or a procurer of the contriving of it, or a malitious publiſher of it, knowing it to be a Libel, for if any readeth a Libel, the ſame is not any publiſhing of it, or if he hear it read, it is no publication of it, for before he read or hear it, he cannot know it to be a Libel, or if he hear, read it, and laugh at it, it is no publiſhment of it; but if after he hath read or heard it, he repeat the ſame, or any part of it in the hearing of others, or after that he knoweth it to be a libel, he readeth it to others, the ſame is an unlawfull publiſhing of it; or if he write a Copy of it, and do not publiſh it to others, it is no publication of the Libel; for every one who ſhall be convicted ought to be contriver, procurer, or publiſher of it, knowing it to be a Libel. But it is great evidence that he publiſhed it, when he, knowing it to be a Libel, writeth a Copy of it; if not that afterwards he can prove that he delivered the ſame to a Magiſtrate to examin it; for then the ſubſequent Act doth explain the precedent
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Robert Bradſhaw's Caſe.

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miſe

miseth to the Lessee, than the Lessee who is a stranger to it; and therefore the Defendant ought to shew what estate he had in the land at the time of the demise made, by which it may appear to the Court, that he hath full power and lawfull authority to lease the same. Note, the point adjudged by both Courts.

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Mackalley's Case, In killing of the Sergeant of *London.*

BY command from the King all the Judges of *England* were commanded to meet together to Resolve what the Law was, upon a Record (of a special verdict found at the Sessions of Gaol delivery holden at *Newgate* the 5th. day of *December*, *Anno* 8 *Jacobi*) and accordingly all the Judges of *England*, and Barons of the Exchequer, in the beginning of *Hillary* Term last past met together, and held Councel learned upon the same special verdict, aswel of the prisoners, as of the King; that is to say, Serjeant *Harris* the younger; *Anthony Dyer*, and *Randel Crewe* of Councel with the Prisoners; and *Yelverton*, *Walton*, and *Coventry* for the King. And the matter was very well argued by Councel on both sides at 2 several days in the same Term; and diverse Exceptions were taken to the Indictment, and to the verdict. [b]

First, against the Indictment 5 Exceptions were taken. 1. Because it appeareth, That the arrest was tortious, and by consequence the killing of the Sergeant could not be murder, but Manslaughter: And they argued that the arrest alleged in the Indictment was tortious, because it was in the night, that is to say, the 18 day of *November*, between the hours of 5 and 6 afternoon, which appeareth to the Court to be in the Night, and the Night is a time of rest and repose, and not to arrest any one by his body, for thereof would ensue (as in this Case it fell) bloodshed; for the Officer and Minister of Justice cannot have such assistance, nor the peace cannot be so well kept in the Night, that is to say in the dark, as in the Day, *in aperta luce*. And the Prisoner cannot know the Officer or Minister of Justice in the Night; nor the Prisoner cannot so soon find sureties for his appearance in the Night, and thereby avoid his imprisonment, as he may in the day time. And they cited 11 *H.* 7. 5. That the Lord cannot distrain for his Rent or Services in the Night. But it was answered by the Councel with the King, and in the end Resolved by all the Judges and Barons of the Exchequer, That the arrest in the Night is lawful, as well at the Subjects sute as at the Kings sute; for the Officer or Minister of Justice ought for to arrest him when he can find him; for otherwise perhaps he shall never arrest him, *quia qui malè agit odit lucem*; and if the Officer do not arrest him when he findeth him, and may arrest him, the Plaintif shall have an action upon the Case, and recover all his loss and damages; And it is like to the Case of distress for damage feasant, for which one may distrein in the Night; for otherwise perhaps he shall never distrain the Cattel, for they may be taken or escape away, and then he cannot distrain them; But in the Case of Rent service it is otherwise; for the Law doth intend that the Tenant will all the day attend upon the Land to pay his Rent, but he is not compellable to attend in the Night. *Vid.* 11 *H.* 7. 5. 10 *E.* 3. 21. 12 *E.* 3. *Distresse* 17. and no inconvenience will follow upon it; For although that he cannot see the Officer; yet when he heareth him say, I arrest you in the Kings name, &c. he ought for to obey him; and if the Officer hath not a lawful warrant, he shall have his action of false imprisonment. And as to the finding of sureties the Law is, That he ought to remain in prison till he find sureties, be it in the Day time, or in the Night. But great inconvenience will follow on the other side, if those who are indebted to others shall in the Night go at their pleasure without danger of arrest, for then they would become Nightwalkers, and turn the Day into Night in despight of their Creditors. And as the Officer or Minister of Justice may by force of a Warrant directed to him, arrest any one at the Kings sute either for felony or other crime in the Night, so may he do at a Subjects sute; for the King hath no more prerogative as to the time to make an arrest, than a Subject; for the arrest is no other but to the intent to bring the party to Justice. And it appears by the opinion of the Court in the Kings Bench in *Semaigns* Case in the 5 part of my *Reports*, That the Sheriffs may arrest in the Night, as well at the sute of the Subject, as at the Kings sute. And in *Heydons* Case in the 4th. part of my *Reports* it is Resolved, That if one killeth a Watchman in doing of his Office, it is Murder, and yet it is done in the Night; and if an affray be made in the Night, and the Constable, or any other who cometh to aid him to keep the peace be killed, the same is Murder; for when the Constable doth command them in the Kings name to keep the Peace, although he cannot discern or know him to be the Constable, yet at their perils they ought to obey him. [66] [b]

It was also Resolved, that although in truth between 5 and 6 of the clock in the ninth of *November* be part of the Night, yet the Court is not bound *ex Officio* to take knowledge of it, no more than in the Case of Utlagary, without these words, *in nocte ejusdem diei*, or *Noctanter*.

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Mackalley's Case, In killing of the Sergeant of *London.*

BY command from the King all the Judges of *England* were commanded to meet together to Resolve what the Law was, upon a Record (of a special verdict found at the Sessions of Gaol delivery holden at *Newgate* the 5th. day of *December*, *Anno* 8 *Jacobi*) and accordingly all the Judges of *England*, and Barons of the Exchequer, in the beginning of *Hillary* Term last past met together, and held Councel learned upon the same special verdict, aswel of the prisoners, as of the King; that is to say, Serjeant *Harris* the younger; *Anthony Dyer*, and *Randel Crewe* of Councel with the Prisoners; and *Yelverton*, *Walton*, and *Coventry* for the King. And the matter was very well argued by Councel on both sides at 2 several days in the same Term; and diverse Exceptions were taken to the Indictment, and to the verdict. [b]

First, against the Indictment 5 Exceptions were taken. 1. Because it appeareth, That the arrest was tortious, and by consequence the killing of the Sergeant could not be murder, but Manslaughter: And they argued that the arrest alleged in the Indictment was tortious, because it was in the night, that is to say, the 18 day of *November*, between the hours of 5 and 6 afternoon, which appeareth to the Court to be in the Night, and the Night is a time of rest and repose, and not to arrest any one by his body, for thereof would ensue (as in this Case it fell) bloodshed; for the Officer and Minister of Justice cannot have such assistance, nor the peace cannot be so well kept in the Night, that is to say in the dark, as in the Day, *in aperta luce.* And the Prisoner cannot know the Officer or Minister of Justice in the Night; nor the Prisoner cannot so soon find sureties for his appearance in the Night, and thereby avoid his imprisonment, as he may in the day time. And they cited 11 *H.* 7. 5. That the Lord cannot distrain for his Rent or Services in the Night. But it was answered by the Councel with the King, and in the end Resolved by all the Judges and Barons of the Exchequer, That the arrest in the Night is lawful, as well at the Subjects sute as at the Kings sute; for the Officer or Minister of Justice ought for to arrest him when he can find him; for otherwise perhaps he shall never arrest him, *quia qui malè agit odit lucem*; and if the Officer do not arrest him when he findeth him, and may arrest him, the Plaintif shall have an action upon the Case, and recover all his loss and damages; And it is like to the Case of distress for damage feasant, for which one may distrein in the Night; for otherwise perhaps he shall never distrain the Cattel, for they may be taken or escape away, and then he cannot distrain them; But in the Case of Rent service it is otherwise; for the Law doth intend that the Tenant will all the day attend upon the Land to pay his Rent, but he is not compellable to attend in the Night. *Vid.* 11 *H.* 7. 5. 10 E. 3. 21. 12 E. 3. *Distresse* 17. and no inconvenience will follow upon it; For although that he cannot see the Officer; yet when he heareth him say, I arrest you in the Kings name, &c. he ought for to obey him; and if the Officer hath not a lawful warrant, he shall have his action of false imprisonment. And as to the finding of sureties the Law is, That he ought to remain in prison till he find sureties, be it in the Day time, or in the Night. But great inconvenience will follow on the other side, if those who are indebted to others shall in the Night go at their pleasure without danger of arrest, for then they would become Nightwalkers, and turn the Day into Night in despight of their Creditors. And as the Officer or Minister of Justice may by force of a Warrant directed to him, arrest any one at the Kings sute either for felony or other crime in the Night, so may he do at a Subjects sute; for the King hath no more prerogative as to the time to make an arrest, than a Subject; for the arrest is no other but to the intent to bring the party to Justice. And it appears by the opinion of the Court in the Kings Bench in *Semaigns* Case in the 5 part of my *Reports*, That the Sheriffs may arrest in the Night, as well at the sute of the Subject, as at the Kings sute. And in *Heydons* Case in the 4th. part of my *Reports* it is Resolved, That if one killeth a Watchman in doing of his Office, it is Murder, and yet it is done in the Night; and if an affray be made in the Night, and the Constable, or any other who cometh to aid him to keep the peace be killed, the same is Murder; for when the Constable doth command them in the Kings name to keep the Peace, although he cannot discern or know him to be the Constable, yet at their perils they ought to obey him. [66] [b]

It was also Resolved, that although in truth between 5 and 6 of the clock in the ninth of *November* be part of the Night, yet the Court is not bound *ex Officio* to take knowledge of it, no more than in the Case of Utlagary, without these words, *in nocte ejusdem diei*, or *Noctanter.*

2. It was objected, that the Sunday is no Law day, and therefore no arreſt can be made thereon, but the ſame is the Sabbath, and therefore therein every one ought to abſtain from ſecular affairs for the better worſhip and ſervice of God in Spirit and Truth. As to that it was Anſwered and Reſolved, That no judicial act ought to be done on that day, but miniſterial acts may be lawfully executed on the *Sunday*; for otherwiſe peradventure they ſhall never be executed; and God permitteth things of neceſſity to be done that day; and Chriſt ſaith in the Goſpel, *Bonum eſt benefacere in Sabbatho.*

3. Another Exception was taken, becauſe it is ſaid in the beginning of the Indictment, *in Curia dicti Dom. Regis in computatorio ſuo, ſituat. in parochia Sancti* Michaelis, in *Woodſtreet London*, and doth not ſhew in what Ward the ſaid Pariſh was, *& non allocatur*, For it is holden in 7 *H.* 6. 23. *b.* Every Ward in *London* is as a Hundred in a County, and every Pariſh in *London* is as a Town in a Hundred, and it is not neceſſary to ſet forth in what Hundred a Town is, no more in what Ward a Pariſh is; but the ſame is commonly averred, becauſe that there are divers Pariſhes in *London* of one name, and the Ward is added to make diſtinction of one Pariſh from another; For which cauſe it was Reſolved, That in the caſe at Bar the Indictment was ſufficient, notwithſtanding the leaving out of the Ward, for it doth not appear to us that there is any other Pariſh of that name, and this Pariſh is particularly deſcribed, *viz. in Parochia St. Michael.* in *Woodſtreet*, *London.* And therewith agreeth the Rule of the Book in 7 *H.* 6. 36. *b.* for a Bill was ruled good *in Parochia Sancti Laurentii in Judaiſmo*, omitting the Ward.

The 4th. Exception was, becauſe it doth not appear in what Pariſh the Sheriff did command *Fells* the Sergeant to arreſt the Defendants; and the ſame was diſallowed by all the Juſtices; for the words of the Indictment are, *taliter in eadem Curia proceſſ. fuit*, &c. and *eadem Curia* fully ſheweth that the Warrant was made at the ſame Court mentioned before; and the ſame was expreſly alleged to be holden *in Parochia Sancti Michaelis.*

[67] 5. It was excepted againſt the Indictment, *viz.* That the precept was to arreſt the Defendant, *ſi inventus fuerit infra libertates Civitatis præd.* and the Indictment is *quod in Parochia St. Martini Bower, Rowe in warda de Farringdon infra Londinum præd.* the Sergeant arreſted him, ſo that he hath not purſued the precept, for the precept is, *infra libertates London*, and notwithſtanding that, the Indictment was reſolved to be good, for the ſaid Pariſh and Ward in *London* ſhall be intended to be within the liberties of *London*, for theſe words liberties of *London* are more ſpacious than *London*, and include in them the City of *London* it ſelf.

And 9 Exceptions were taken to the verdict. 1. That there is a material variance betwixt the Indictment and the Verdict, for the Indictment doth ſuppoſe that *Piot* Sherif of *London* upon a Plaint entred, made a precept to *Fells* Sergeant at Mace to arreſt the ſaid *Mackalley* the Deft. and by the verdict it appeareth that there was not any ſuch precept made, but that by the cuſtom of *Lond.* after the plaint entred, any Sergeant *ex officio* at the requeſt of the Plt. may arreſt the Deft. *abſque aliquo præcepto ore tenus*, or otherwiſe, ſo that the Indictment being ſpecial, to make this offence Murder, by Conſtruction of Law upon the ſpecial matter, without any forethought malice, ought to be followed, and proved in Evidence, which is not done in this caſe. And becauſe the Jurors have not found the ſaid ſpecial matter contained in the Indictment, but other matter, Judgment cannot be given againſt the Priſoners upon this Indictment. To which it was anſwered, and in the end Reſolved, That there was ſufficient matter in the verdict purſuant to the matter contained in the Indictment, upon which the Court ought to give judgment of death againſt the ſaid Priſoners, notwithſtanding the ſaid variance, and that for 2. cauſes.

1. Becauſe that the Warrant which the Sergeant had to arreſt the Defendant was but circumſtance, and is not neceſſary to be preciſely purſued in Evidence to be found by the Jury; but it ſufficeth if the ſubſtance of the matter be found without any ſuch preciſe regard to circumſtance: and therefore, if a man be indicted, that he with a dagger gave another a mortal wound, upon which he died, and in Evidence it is proved that he gave the wound with a Sword, Rapier, Baſton, or Bill, in that caſe the Defendant ought to be found guilty, for the ſubſtance of the matter is, That [b] the party indicted hath given him a mortal wound, whereof he died, and the circumſtance of the manner of the weapon is not material in caſe of Indictment; and yet ſuch circumſtance ought not to be omitted, but ſome weapon ought to be mentioned in the Indictment. So if *A. B.* and *C.* are indicted for killing of *I. S.* and that *A.* ſtrook him, and that the others were preſent, procuring, abetting, &c. And upon the Evidence it appeareth, that *B.* ſtrook him, and that *A.* and *C.* were preſent, &c. in this caſe the Indictment is not purſued in the circumſtance; and yet it is ſufficient to maintain the Indictment, for the Evidence doth agree with the effect of the Indictment, and ſo the variance from the circumſtance of the Indictment is not material; for it ſhall be adjudged in Law the ſtroke of every one of them, and is as ſtrongly the act of the others, as if they all three had holden the weapon, &c. and had altogether ſtroke the dead; and therewith agreeth *Plow. Com.* 98. *a.* So if one be indicted of the murder of another upon forethought malice, and he is found guilty of Manſlaughter, he ſhall have judgment upon this verdict, for the killing is the ſubſtance, and the pretended malice the mannor of it; and when the matter is found, Judgment ſhall be given thereupon, although the manner be not preciſely purſued; and therewith agreeth, *Plow. Com.* 101. where it is ſaid, when the ſubſtance of the act, and the manner of the act, are put in iſſue together, if the Jury find the ſubſtance and not the manner, Judgment ſhall be given for the ſubſtance. And I moved all the Judges and Barons, if in this caſe of killing of a Miniſter of Juſtice in the execution of his office, the Indictment might have been general, *ſc.* that the priſoners *felonicè, voluntarie, & ex malitia ſua præcogitata*, &c. *percuſſer.* without alleging any ſpecial matter and I conceived that it might

might well be, for the Evidence would well maintain the Indictment, for as much as in this caſe the Law doth imply forethought malice: As if a Thief who offereth to rob a true man kill him in reſiſting the thief, the ſame is murder of forethought malice; Or if one kill another without provocation, and without any forethought malice which can be proved, the Law will adjudge the ſame murder, and implieth malice; for by the Law of God every one ought to be in love and charity with all men, and therefore when he killeth another without provocation, the Law implieth malice: and in both theſe caſes they may be indicted generally that they killed of forethought malice, for malice implied by Law given in Evidence, is ſufficient to maintain the general Indictment. So in the caſe at barr; And in this caſe of a Sergeant, the Indictment might have been general, That he feloniouſly and of his forethought malice killed the ſaid *Fells*, and the ſpecial matter might well have been given in Evidence; which was granted by all the Judges, and Barons of the Exchequer. The 2. cauſe was, becauſe it is expreſly alleged in the Indictment, That the ſaid *John Mackalley*, &c. *eundem Richardum Fells*, &c. *felonice, voluntarie, & ex militia ſua præcogitata*, &c. *percuſſit & inforavit*, &c. ſo that above the ſpecial matter which implieth malice, it is expreſly contained in the Indictment, that he feloniouſly and of his forethought malice killed the ſaid *Fells*, and then although the ſpecial matter given in Evidence had varied in ſubſtance from the ſpecial matter contained in the Indictment, yet for as much as it was reſolved that the Indictment in this caſe might be general, for this cauſe the Evidence, although it doth not agree with the ſpecial matter, yet it proveth, that the priſoners killed the ſaid *Fells* of their forethought malice; and ſo well maintaineth the Indictment. And that in the end was the opinion of all the Judges and Barons of the Exchequer. [68]

2. Exception was taken to the verdict, That the Cuſtom found by the Jury, that after a plaint entred, the Defendant might be arreſted by his body, was againſt Law, becauſe the Defendant ought to be firſt ſummoned before that the warrant in natute of a *Capias* can iſſue forth, for his body ſhall not be arreſted if he hath ſufficient, *& non allocatur*; for it appeareth by the book in 21 E. 4. 66 *b*. That by common experience daily uſed, that after a pleint entred, by the cuſtom of *London*, (which is eſtabliſhed and confirmed by Parliament) the Defendant may be arreſted. And in this caſe 3. points were Reſolved by all the Judges and Barons of the Exchequer, 1. that although the proceſs be apparently erronious, that yet if the Miniſter of Juſtice in the execution thereof be killed, the ſame is murder. For the Miniſter is not bound to diſpute the authority of the Court, which awardeth the proceſs, but his office is to execute the proceſs: and therefore, if a *Capias* in an action of Debt be awarded againſt a Baron, or other Peer of the Realm, which is erronious (becauſe their body by the Law is privileged in ſuch caſes) yet if the Officer be killed in execution thereof, it is murder. So if a *Capias* be awarded where a Diſtreſs ought to iſſue, and in execution thereof the Officer is killed, it is Murder, for as the Sheriff, &c. when he is charged with an Eſcape ſhall not take advantage of any Error in the proceeding, ſo the Defendant when he killeth the Sheriff, &c. ſhall not take advantage of Error in the proceeding. 2. It was Reſolved, That if any Magiſtrate or Miniſter of Juſtice, in execution of their office, or in keeping of the peace according to the duty of his office be killed, it is murder, for their contempt and diſobedience to the King, and to the Law, for it is *contra poteſtatem Regis & legis*, and therefore, if a Sheriff, Juſtice of Peace, Chief Conſtable, Petit Conſtable, Watchman, or any of the Kings Miniſters, or any one who cometh in their aid be killed in doing of their office, it is murder for the cauſe aforeſaid: for when the Officer or Kings Miniſter by proceſs of Law (be it erronious or not) arreſteth one in the Kings name, or requireth the breakers of the peace to keep the peace in the Kings name, and they notwithſtanding diſobey the arreſt or Commandment in the Kings name, and kill the officer, or the Kings Miniſter, reaſon requireth that this killing and ſlaying ſhall be an offence in a higher nature than any offence of this nature; and the ſame is voluntary, felonious, and murder of forethought malice. And a Watchman by the Law may arreſt a Night-walker, 4 *H.* 7. 2. and if a Watchman arreſteth ſuch a one, and he killeth him, the ſame is murder. *Vide Heydons* caſe in the 4th. part of my *Reports*. And it is true, That the life of a man is much favoured in Law, but the life of the Law it ſelf (which protecteth all in peace and ſafety) ought to be more favoured, and the execution of the proceſs of Law and of the offices of Conſervators of the peace, is the Soul and life of the Law, and the means by which Juſtice is adminiſtred, and the peace of the Realm kept. *Vide* 2. *R.* 3. 21. If the Principal be erroniouſly attained, the Acceſſory ſhall be put to anſwer, and ſhall not take benefit for the ſaving of his life of the erronious proceeding againſt the Principal. 3. It was Reſolved, That the Officer or Miniſter of the Law in the Execution of his office, if he be reſiſted or aſſaulted, is not bound to flye to the wall, &c. (as other Subjects are) for *Legis miniſter non tenetur in executione Officii fugere, ſeu retrocedere*.

3. It was Objected, That the Defendant ought not to have been arreſted before that the plaint was entred of Record in the Court before the Sheriff, for this ſame is in truth the Court of Record where the Declaration and pleading ſhall be. To that it was anſwered and Reſolved by all, That after the plaint entred in the Porters book, and before the entry thereof in the Court before the Sheriff, the Defendant may be arreſted by the Cuſtom of *London*; and therewith agreeth the book in 21 E. 4. 66. in the point. *Vide* 9 E. 4. 48 *b*.

4. It was Objected, That the ſaid Arreſt found by the verdict was not lawful, for the Sergeant in this caſe ought to have when he arreſted him, ſhewed at whoſe ſute, out of which Court, and for what cauſe he made the arreſt, and in what Court the ſame is returnable, to the intent, that if it be for any execution, he might pay the money, and free his body, and if it be upon mean proceſs either to agree with the party to put in bayl according to the Law, and to know when he ſhall appear, as it is Reſolved in the Counteſs of *Rutlands* Caſe, in the 6. part of my *Reports*. But in the

Caſe at barr the Sergeant ſaid nothing, but *I arreſt you in the Kings name, at the ſute of Mr. Radford*, and ſo the arreſt not lawful, and by conſequence the offence is not murder. To that it was Anſwered and Reſolved, That it is true that it is holden in the Counteſs of *Rutlands* caſe, That the Sheriff or Sergeant ought upon the arreſt to ſhew at whoſe ſute, &c. But the ſame is to be intended when the party arreſted ſubmitteth himſelf to the arreſt, and not when the party (as in this caſe *Murrey* did) maketh reſiſtance and interrupteth him, and before he could ſpeak all his words, he was by them mortally wounded and murdered, in which caſe, the priſoners ſhall not take advantage of their own wrong. It was alſo Reſolved, That if one knoweth that the Sheriff, &c. hath proceſs to arreſt him, and the Sheriff coming to arreſt him, the Defendant to prevent the Sheriff to arreſt him, kill him with a gun, or any other engine, or weapon, before any arreſt made, the ſame is murder: *à fortiori* in the caſe at barr, when he knew by the ſaid words, that the Sergeant came to arreſt him.

5. Exception was taken, becauſe it was not found by the Verdict, That the ſaid *Mackalley felonicè percuſſit*, &c. but *percuſſit* only, *& quod idem Johannes Murrey, & Johannes Engliſh fuerunt præſentes, auxiliantes*, &c. and doth not ſay *felonicè*; *& non allocatur*, for the office of the Jury is to ſhew the truth of the fact, and to leave the Judgment of the Law to the Court; but they have well concluded, And if *ſuper tota materia præd. vedibitur Juſtic. & Cur. hic quod præd. interfectio dict. Rich. Felles ſit murdrum, tunc Jurat. præd. dic. ſuper Sacramentum ſuum quod. præd. Johannes Murrey, Johannes Mackalley, & Johannes Engliſh ſunt Culpabiles, & quilibet eorum eſt culpabilis de murdro præd. Rich. Felles, modo & forma prout per Indictamentum præd. ſupponit.* &c. And becauſe the Judges and the Court hath reſolved upon the ſpecial matter, that it is murder, the Jury have found him guilty of murder contained in the Indictment.

6. It was Objected, That the Sergeant at the time, nor before he arreſted ſhewed the priſoner his Mace; for thereby he is known to be the Miniſter of Law, and from thence he hath his name, *ſc. ſervieus ad clavam*; *Et non allocatur* for 2 cauſes. 1. becauſe the Jury have found, That he was *ſerviens ad clavam dict. Vicecomitis, & juratus, & cognitus, & miniſter. Cur.* And a Bayliff ſworn and known needeth not (although the party demand it) ſhew his warrant, nor any other ſpecial Bayliff is not bound to ſhew his warrant without demanding of it, 8 *E.* 4. 14. 14. *H.* 7. 9. *b.* 21 *H.* 7. 23. and where the books ſpeak of a known Bayliff, it is not requiſite that he be known to the party who is to be arreſted, but if he be commonly known it ſufficeth; 2. If notice were requiſite, he gave ſufficient notice when he ſaid, *I arreſt you in the Kings name*, &c. and the party at his peril ought to obey him; and if he hath no lawful warrant, he may have his action of falſe impriſonment. So that in this caſe without Queſtion the Serjeant needeth not to ſhew his Mace; and if they ſhall be driven to ſhew their Mace, it ſhould be a warning for the party arreſted to flye.

7. Another Exception was taken to the Verdict, becauſe that the Cuſtom which gave to the Sergeant warrant to arreſt, was not purſued; for the cuſtom is, *Quod aliqua perſona exiſtens Serviens ad clavam ad requiſitionem partis hujuſmodi querelam ſic levantis*, &c. *uſa fuit arreſtare*, which ought to be taken that the plenit ought to be entred before the requeſt; but afterwards it is found that the requeſt was before the pleint, and ſo the Cuſtom not purſued; *& non allocatur.* For by the Cuſtom it is not proved, but that the requeſt may be as well before as after the pleint entred, and ſo is the Common uſage and experience.

8. It was Objected, That the verdict was repugnant in it ſelf, for firſt they found, that the pleint was entred *de Recordo* [*in Rot. Cur. Computator. im his verbis, Die Sabbathi* 17 *die Novemb.* and afterwards they found, *quod intratio præd. in Rot. Cur. præd. facta fuit die Lunæ* 19 *die Novembr.* &c. And the Jury cannot find any thing againſt the Record it ſelf. *Vide* 11 *H.* 6. 42. 9 *H.* 6. 37. 28 *Aſſ.* 34. 47 *E.* 3. 19. 11 *H.* 4. 26. 9 *H.* 7. 3. 13 *H.* 7. 14. 33 *E.* 3. *Judgement* 255. *Dyer* 32. & 147, &c. And all that was affirmed for good Law. But that maketh the Caſe ſtronger againſt the Priſoners, for now the Judges ought to judge upon a pleint entred of Record in *Cur. Computator*, the Saturday the 17. of *Novemb.* which was before the arreſt.

9. Exception was taken to the Verdict, that the entry of the pleint was without form, and ſo ſhort and obſcure, *quod opus eſt interprete*; *& non allocatur.* For it was found that it was according to the Cuſtom of *London*; which is but a Remembrance to draw the Declaration at length in the Court of Pleas, which notwithſtanding is by Cuſtom ſufficient to have the Defendant arreſted. And afterwards at the Seſſions the 5 day of *May* after this Term, the 2. Chief Juſtices openly declared the Reſolution of all the Judges and Barons of the Exchequer, to the great ſatisfaction and contentment of all there preſent. And accordingly Judgment of death was given againſt the three Priſoners by the Recorder of *London*, in the preſence of the 2. Chief Juſtices. And the ſaid *Mackalley* was executed with other Priſoners at *Tyborn*. [70]

Trin. 9 Jacobi *In the Star Chamber.*

Richard Peacock's Caſe.

NOte this Term in the Star-chamber in the Caſe between Sir *George Reynel* Plaintif, and Sir *Richard Peacock* and others Defendants, where *I. H.* and another were Commiſſioners to examine *Peacock* upon Interrogatories drawn by the Plaintif; *Peacock* being examined, would have declared the whole truth, which *I. H.* being a Commiſſioner choſen by the Plaintif, would not ſuffer him to do, but held him ſtrictly to the Interrogatory; ſo that the truth could not appear. And that was holden by the Lord Chancellor, and the two Chief Juſtices, and the whole Court of Star-Chamber, a great miſdemeanour, for the ſame is a murthering of the truth and right, as the Statute of *Exeter* ſpeaketh. And Commiſſioners to examine ought to be indifferent, and by all means to expreſs the truth. And they are not ſtrictly tyed to the words of the Interrogatories, but to every thing alſo which neceſſarily ariſeth thereupon for the manifeſtation of the whole truth concerning the matter in queſtion. Alſo the ſaid *I. H.* when he was in examination went out of the place to the Plaintif, which was in another room near to him, and had ſecret conference with him. And it was holden by the whole Court, That a Commiſſioner ought not before publication of the Witneſſes diſcover to any of the parties the matter which any one doth teſtifie or depoſe, nor after he beginneth to examine upon the Interrogatories to conferr with the party to take new inſtructions to examine further than he knew before, and if he ſhall ſo do, theſe are great miſdemeanors, puniſhable by fine and impriſonment. For if theſe ſhall be admitted, Perjury would in theſe days abound; and for as much as in the Starr-chamber and Exchequer chamber the Courts proceed upon examination of Witneſſes, if the truth ſhould be by ſuch means ſuppreſſed, and falſity certified in the Examinations, ſo the Innocent ſhould be oftentimes puniſhed, and the guilty eſcape puniſhment, and Juſtice and Right ſhould be utterly ſubverted; for as it is commonly ſaid, The ſuppreſſion of Truth, is the oppreſſion of the Innocent. And the Lord Chancellor ſaid, That he heard in the Common Pleas, in the time of Sir *James Dyer*, then Chief Juſtice of the Common Pleas, *That it was* not a principal Challenge to ſay, That one returned of a Jury was choſen Commiſſioner for the other party for examination of Witneſſes in the Court of Chancery; for every Commiſſioner is made by the appointment of the King, who is the head of the Commonwealth, by his Commiſſion under the great Seal, and therefore he being Commiſſioner upon Record, is preſumed in Law to be indifferent: But otherwiſe it is of an Arbitrator, for he is created only by the ſubmiſſion of the parties themſelves in the Country; and therefore it is a principal Challenge to ſay, That ſuch a one returned of the Jury was an Arbitrator for the other party; and therewith agreeth *7. H.* 7. 10. *9 E.* 4. 46. *15 E.* 4. 24. *3 H.* 6. 24. And the Court had ſo great diſlike of the proceedings of the ſaid *I. H.* that the Attorney General was requeſted to prefer an Information againſt him for the ſaid miſdemeanors, and in mean the time he was put out of the Commiſſion of Peace. [b] [71]

Trin. 7 Jacobi. *In the Common Pleas.* *Rot.* 26. 12.

Doctor *Huſſey*'s Caſe.

IN a Raviſhment of Ward brought by *Francis Moor* Eſquire, according to the Statute of *Weſt.* 2. *cap.* 35. againſt *James Huſſey* Eſquire, and *Katherine* his wife, *Robert Wakeman* Clark, *John Woodford*, and *Cutberd Clifford* of the Raviſhment of *James Horniold*, ſon and heir of *Ralph Horniold* Eſquire, being within age, The Defendants pleaded Not guilty, which iſſue was tried at the barr, *Mich.* 8 *Jac.* And the plea began *Trinit.* 7 *Jac. Rot.* 759. and was tried in the abſence of *Walmeſly* for ſickneſs, and of *Coke* Chief Juſtice, then being in the Star Chamber. And the Jury found that the ſaid *Katherine*, *Robert*, and *John Woodford* were guilty of the Raviſhing and leading away of the ſaid *John Horniold*, as the ſaid *Fr.* complained againſt them, and aſſeſſed damages, &c. 10 *l.* and coſts 10 *s.* And further the Jury ſay upon their oaths, That the ſaid *John Horniold* is married, and that the ſaid *John* at the time of his marriage was of the age of 16 years and more, and within the age of 21 years, and that the ſaid marriage *valet juxta verum valorem* 800 *l.* And that the ſaid *James* the Husband of the ſaid *Katherine* and *Cutberd* were not guilty. And in arreſt of Judgment divers points were moved and argued by the Serjeants at Barr, in the Terms of St. *Mich. Hill.* and *Paſch.* And the principal point which was argued by the Sergeants was, If a Feme Covert were within the Statute of *Weſt.* 2. *cap.* 35. or not. And now this Term it was argued by the Juſtices; And it was argued by *Foſter* and *Warburton*, that Judgment ought to be given as well againſt the Feme Covert, as againſt the others who were found guilty, and their principal reaſon was, becauſe at the Common Law a feme Covert was puniſhable for Raviſhment [b] [72]

of a Ward, and ſhall be therefore fined and impriſoned, and damages ſhall be recovered againſt her, and levied upon her Husband, and after his death upon the Wife her ſelf; and the Statute of *Weſt.* 2. *cap.* 35. doth but add greater penalty to the value of the marriage, damages and coſts, and impriſonment for 2 years, and if the debtors be not ſufficient, that they abjure the Realm, or have perpetual impriſonment; ſo that it never was the meaning of the makers of the Act to exclude a Feme Covert out of the purview thereof, who was puniſhable by action of Treſpaſs at the Common Law, for which offence her body alſo at the Common Law ſhall be impriſoned: And there they ſtrongly held, that a Feme Covert was within the Statute of *Merton cap.* 6. and within the Statute of *Weſt.* 1. *cap.* 20. *de malefact. in parcis.* For a Feme for theſe offences was puniſhable by the Common Law, and theſe Statutes add greater puniſhment, and in another manner than it was at the Common Law. And they ſaid, That a feme Covert was within the Words of the Act; and it ſhould be a miſchief if any conſtruction ſhould exempt her out of the penalty of this Statute, in ſuch odious caſes as Raviſhments of Wards are. An action upon the Statute of forcible Entre upon the Statute of 8 *H.* 6. lieth againſt a Feme Covert, as the book is in 36 *H.* 6. 22, 23. So waſte lieth againſt the Husband and Wife as it is holden in 3 *H.* 3. 76. So if a Feme Covert commit Rediſſeiſin, ſhe ſhall be puniſhed in a Rediſſeiſin, 9 *H.* 4, 5. *F. N. B.* 188. So if a *Ceſſavit* lieth againſt Husband and Wife, 4 *E.* 2. *Cui in vita* 22. And many other Caſes were put upon this ground, for which they did conclude that Judgment ſhould be given againſt all for the value, damages, and coſts, and that the Defendants *Capiantur.* And it was argued by the Chief Juſtice and *Walmeſley* to the contrary, That the Plaintifs ſhall not have Judgment upon this Record againſt none of the Defendants: And their Argument was divided into 4 parts. 1. What alteration the Statute of *Weſt.* 2. *Cap.* 35. hath made. 2. If a Feme Covert be within the ſaid Statute. 3. If the verdict be ſufficient or not againſt any of the Defendants. 4. If damages beſides the value are to be recovered in this action of Raviſhment of Ward grounded upon this Statute.

As to the firſt, it was Reſolved by all, That at the Common Law for Raviſhment of Ward, the Gardian might have an Action of Treſpaſs, in which the Plaintif ſhould recover damages, and the Defendants ſhould pay a fine to the King, and ſhould be impriſoned, &c. and that ſuch action lay againſt a Feme Covert, as well as againſt a Feme ſole; And therefore where ſome books ſay, That no writ of Raviſhment of Ward lay at the Common Law, It is true, if it be meant of Ra-
[b] viſhment of Ward, which is in ſuch Regiſter, and in *F. N. B.* for the ſame is grounded and formed by the Statute of *Weſt.* 2. *cap.* 35. but that in ſuch caſe the Gardian might have an action of Treſpaſs it is manifeſt in our books, 29 *Aſſ. p.* 35. 29 *E.* 3. 24. 3 *E.* 3. 3. 8 *E.* 3. 52. 22 *R.* 2. *damages* 130. 12 *H.* 8. *Kellaway* 20, 21. *F. N. B.* 90, *H.* 149. Then came the Statute of *Merton, cap.* 6. by which it was enacted, (and greater puniſhment than the Common Law doth inflict) *de hæredibus contra pacem vi abductis vel detentis ſeu maritatis*, by their Kinsfolks, or others with force againſt our peace, It is provided, *That whatſoever Layman be convict thereof, that he hath ſo with-holden, lead away, or maried any Child, he ſhall yeeld to the loſer the value of the mariage, and for the offence his body ſhall be taken and impriſoned*, &c. *and this ſhall be of an heir within the age of 14 years.* And by the Statute of *Weſt.* 2. *cap.* 35. It is enacted, *Concerning Children males or females (whoſe mariage belongeth to another) taken and carried away; if the Raviſher have no right in the mariage, though afterwards he reſtore the Child unmarried, or elſe pay for the mariage, he ſhall nevertheleſs be puniſhed for his offence by 2 years impriſonment, and if he do not reſtore, or do marrie the Child after the years of conſent, and be not able to ſatisfy for the mariage, he ſhall abjure the Realm, or have perpetual impriſonment.* And this Statute of *Weſt.* 2. *cap.* 35. hath made ſeven alterations. 1. The ſaid Statute of *Merton* did not extend to heir females, for before the age of 14 years the male cannot aſſent to mariage, but the heir female at 12; and therefore it was taken that the Statute of *Merton* did not extend to an heir female: And therewith agreeth the book in 35 *H.* 6. 53. And the Act of *Weſt.* 2. by expreſs words extendeth to both; for the words are, *Concerning Children male, or female.* 2. The Statute of *Merton* doth not extend to any of the Clergy; for the words are, *That whatſoever Lay-perſon be convicted thereof*, &c. But the Statute of *Weſt.* 2. extendeth to all perſons; for the words are, *If he who ſhall raviſh having no right, without any reſtraint.* 3. The Statute of *Merton* doth not extend, as it appeareth before, but when the heir female was lead away within 14 years, within which time the heir male cannot conſent to a mariage: But now the Statute of *Weſt.* 2. extendeth to a Raviſhment after *annos nubiles.* 4. The words of the Statute of *Merton* are, *vi abductis vel detentis*, the words of the Statute of *Weſt.* 2. are *raptis ſeu detentis.* 5. The Action given by the Statute of *Merton* is the old writ of Right of Ward, as it is holden in 18 *E.* 3. 52. But the Statute of *Weſt.* 2. giveth *actionem formatam in verbis conceptis*, a new action, the form of which was not at the Common Law, the form of which appeareth eſpecially by the Act. 6. In proceſs, for in a writ of Right upon the Statute of *Merton*, he ſhall have but the old proceſs at the Common Law: But the Statute of *Weſt.* 2. giveth a more ſpeedy
[73] proceſs, and that the death of the Plaintif or Defendant ſhall not abate the writ. 7. The Statute of *Weſt.* 2. giveth greater puniſhment than the Statute of *Merton* doth, as it appeareth by the purview of both Acts. And theſe are the moſt material alterations that the Statute of *Weſt.* 2. hath made.

As to the 2 point; If a Feme Covert be within the purview of the Statute of *Weſt.* 2. The parts thereof were conſidered, That as to this purpoſe it ſtandeth upon 4 parts. 1. If he reſtore the Child unmarried, yet he ſhall be puniſhed for his offence by impriſonment for 2 years. 2. If he marieth the Child, and ſhall ſatisfie the mariage, yet he ſhall be puniſhed by impriſonment as above. 3. If he do not reſtore, and cannot ſatisfie, he ſhall abjure the Realm, or have perpetual impriſonment. 4. If he marieth the heir after years mariageable, and cannot ſatisfie for the mari-

age,

age, he ſhall abjure the Realm, &c. as above: And this Caſe is within the laſt clauſe, *ſc.* That the Feme Covert hath married the Infant, and is not able to ſatisfie, but is diſabled by the Law to ſatisfie; and foraſmuch as the Law hath diſabled a Feme Covert to ſatisfie, the Law will not for his diſability inflict ſo great a puniſhment as perpetual baniſhment, or perpetual impriſonment, that is, to loſe either his Country, or his liberty. *Et lex non cogit ad impoſſibilia, ſed impotentia excuſat legem.* 22 E. 3. *Coron.* 279. If an Appeal be brought againſt a Feme Covert, or a Monk, and they are acquitted, the Feme Covert or Monk ſhall never have a writ to enquire of the Abettors; for by the general words the Law ſhall never enable one for his benefit, who is diſabled by Law, *à fortiori* the general Law ſhall never puniſh any one ſo ſeverely for not doing of that which the Law hath diſabled him to do. So upon the Statute of *Marlebridge*, *Non liceat hujuſmodi feoffatos expellere*, If the Lords Villain be infeoffed, the Lord ſhall put him out, for the general Law will not do wrong, *ſc.* to enable the Villain againſt his Lord. And divers other Caſes were put to the ſame effect; as the Caſe of Eccleſiaſtical perſons, in the 4th. part of my *Reports*, and others. And 7 E. 3. 11. was cited by the Chief Juſtice, *ſc.* That *W.* brought a writ of Raviſhment of Ward againſt the Maſter of the Hoſpital of *Burton Saint Lazer*, and *Robert de Lee*, & *Richard de la Foſſe*, confreeres of the ſame Hoſpital, and there *Trew* Sergeant for the Defendants ſaid, This Writ is given by Statute, and of certain form, and the ſame ought to be when the parties againſt whom the writ is brought are ſuch, who by the Law may have right to have the Ward; but when the writ it ſelf doth ſuppoſe ſome named in the Writ to be ſuch perſons, that they cannot have right in the Ward, &c. wherefore the Writ cannot be maintained. To which Sir *William Herle* Chief Juſtice anſwered, If the Freres in aid of the Gardian took the Infant in ſaving the right of the Hoſpital, the Freres have *quodam modo* right, becauſe they are of the Hoſpital; wherefore anſwer. Out of which Caſe 2 things were obſerved. 1. That every man ſhall be intended ſufficient to ſatisfie the Plaintif, if the Plaintif do not pray that the Jury enquire of his ſufficiency; And therewith agreeth 8 E. 3. 52. 22 R. 2. *damages* 130. But when it appeareth by the Writ it ſelf, the ſame Defendant is not able (having diſability by Law) to ſatisfie, there the difference appeareth, becauſe in one Caſe it is apparent to the Court, and in the other not; and therefore this caſe is ſpecial, and differeth from the reaſon of all the caſes which have been put. For example, from the caſe of *Malefactoribus in parcis*; for there the purview is general; but the ſaid Act is not ſo preciſely penned as the Statute of *Weſt.* 2. is: For in effect this Act hath a purview, that none ſhall be puniſhed by this Act, which by poſſibility may ſatisfie at the time of the Judgment, for the words are, *& de maritagio ſatisfacere non potuerit*, and not to puniſh him by the Law for the diſability which the Law it ſelf hath made. And in 8 E. 3. 52. 22 R. 2. *damages* 130. &c. The Plaintif prayed that the Jury do enquire of the ſufficiency of the Defendant, which ſhould be to no purpoſe in this caſe; becauſe it appeareth to the Court, That a Feme Covert at the time of the Judgment is diſabled by the Law. And therefore ſuch Rule is to be given in ſuch caſe as Sir *William Herle* gave in the like caſe, in 7 E. 3. 41. In a Writ of Meſne brought againſt the Husband and Wife, they made default at the grand diſtreſs, upon which the Plaintif ſued proclamation, and now at this day the proclamation was teſtified, and the husband and wife were demanded, and appeared not; for which the Plaintif prayed that they ſhould be forejudged. *Herle.* It is no reaſon that the wife be forejudged of her Seignory for the default of her husband, and eſpecially by your ſute which you have brought, which is given by Statute, where you may have your action at the Common Law: And ſo in this caſe the Plaintif may have his remedy at the Common Law, either by action of Treſpaſs againſt all who raviſhed, or a writ of *valore Maritagii* againſt the heir himſelf, and not upon this Statute, for the goods and lands of the husband who is innocent, ſhall not be liable by this Act, for the Act hath expreſly provided, That for the inſufficiency of the Defendant he ſhall be puniſhed, &c. And therefore the Statute doth not charge the husband in this caſe, for the Statute is penal and perſonal to the Defendant it ſelf. And ſo for a raviſhment made by a Monk, his Soveraign ſhall not anſwer by force of this Act. [b] [74]

As to the Objection which was made, That he may have Judgment at the Common Law, *ſc.* of damages and impriſonment, and then the husband ſhall be charged with the damages; the ſame was utterly denied for 2 cauſes: One, that this action is grounded upon the Statute of *Weſt.* 2 *cap.* 35. and ſuch writ in this caſe is brought, as is there formed; and therefore he ought to have Judgment according to his original, which is the foundation of his ſute; and not to ground his writ upon the Statute, and to have Judgment at the Common Law, nor *è converſo*, 30 E. 3. 11. The King brought a Prohibition againſt the Prior of *Woburne*, That where the King had recovered in a *Quare impedit*, the Defendant ſent his Frere to *Rome* with an Appeal, and ſued there to avoid the Judgment, according to the Statute of *Præmunire*, and upon not guilty pleaded, it was found againſt the Defendant, and there for the King Judgment was prayed upon the Statute newly made, *ſc.* 27 E. 3. *cap.* 1. in caſe of *Præmunire*, and it was adjudged he ſhould not have it, becauſe that the Judgment ought to be conformable to the Original; and this ſute was not brought according to the Statute, but by a writ of prohibition at the Common Law. And in 47 E. 3. 10. In a general action of Treſpaſs againſt miſdoers in Parks, the Defendants were found guilty, and the Plaintif prayed Judgment of double damages, 3 years impriſonment, and ſureties never more to offend, and if he find no ſureties, that he might forejure the Realm. And although the Statute gave not any formed action, yet foraſmuch as the action was brought generally at the Common Law, he could not have Judgment upon the Statute, and therewith agreeth 10 *H.* 6. 2. & many other books.

As to the 3 point, It was holden by the Chief Juſtice, and *Walmeſley*, that the verdict was ſufficient; for this action being founded upon the ſaid Statute, extended only when the Raviſher marrieth the Infant, for the words are (*hæredem poſt annos nubiles maritaverit*) ſo that inaſmuch as the

Statute

Statute is ſo penal, it ſhall not be extended but only when the Raviſher marrieth him. And if after the raviſhment, the Infant of his own head *poſt annos nubiles* marrieth himſelf, without the procurement or aſſent of the Raviſher, or if a ſtranger afterwards marrieth him, in theſe caſes the firſt Raviſher ſhall not be puniſhed by this Statute. And in this caſe the Jury have found generally *quod pred.* Johannes Horniold *maritatus exiſtit*, *quodque idem* Johannes *tempore maritagii illius fuit etatis ſexdecim annorum & amplius*, *& infra etatem viginti & unius annorum*, which verdict is not only uncertain who procured him to be married, *ſc.* the Raviſher or any ſtranger, or the Plaintif himſelf, or if the Ward of his own head married himſelf, but is alſo uncertain in the time when he was married, *ſc.* before the raviſhment or after. And therefore in the book of Entries 368. *p.* 11, & 12. 369. *p.* 17. A. *rapuit*, *et idem* A. *maritavit*, &c. *contra voluntatem* of the Plaintif, *Vid.* 27 *H.* 6. *Gard.* 118. 8 E. 3. 52. 33 E. 3. *Judgement* 251. &c. *acc.* And therefore it is well ſaid in 30 E. 3. 29. A verdict ought to be ſuch, that the Judges ought cleerly go to Judgment, and therefore ambiguous and doubtful Judgments were inſufficient, and void, as in 40 E. 3. 15. in debt againſt Executors they plead fully adminiſtred, and ſo nothing in their hands: The Jury find that they have Aſſets in their hands, and do not ſay to what value; and for this uncertainty the verdict was holden inſufficient and void.

[b]

As to the 4th. point, although that 16 E. 3. *Damages* 80. and ſome other books are againſt it, That no damages ſhall be recovered; yet foraſmuch as it is holden in 17 E. 3. 51. *b.* 25 E. 3. 44. 24 E. 3, 46. 22 R. 2. *Damages* 130. 8 E. 3. 52. 27 H. 6. *Gard.* 118. *Paſch.* 27 H. 6. *Rot.* 123. in the book of Entries, 368. and diverſe other books with which common experience agreeth, It was reſolved accordingly. And the Chief Juſtice vouched an old Reading upon the Statute of *Weſt.* 2. *cap.* 35. That when the Statute ſaith he ſhall abjure the Realm, or have perpetual impriſonment in the diſjunctive, That the Election ſhall be in the Court to give Judgement upon which of the ſaid 2 points the Judges will: And great reaſon, for it may be the diſpoſition and quality of the Defendant being conſidered, that it ſhall be dangerous to the State to baniſh him into foreign Countries.

Trin. 9 Jacobi *in the Common Pleas.*

Combe's Caſe.

[75] IN a Replevin by *William* at *Lee*, againſt *Daniel Banks* and *Tho. Osborne* of taking of his Cattle at *Harmonſworth*, in place called *the Walnut tree Cloſe*, in the County of *Middleſex*, &c. Which plea began *Trinit.* 8 *Jac. Reg. Rot.* 330. Upon the pleading, and iſſue joyned, and ſpecial verdict given, the caſe was ſuch. *Tho. Combes* Copyholder in fee of 10 acres of paſture in *H.* of the Mannor of *Harmondſworth* in the County of *Midd.* by his Deed 22 *No.* 5 E. 6. did conſtitute and ordain *William Combes* and *Stephen Erlie* 2 Copyhold Tenants of the ſame Mannor his lawful Atturnies, to ſurrender in his turn and name to the Lord of the ſaid Mannor, the ſaid 10 acres, to the uſe of *John Nicholas* and his heirs: And afterwards at a Court holden of the ſaid Mannor 8 *Julii* 6 E. 6. the ſaid Atturneys then Tenants of the Mannor by Copy of the Court Roll, did ſhew the ſaid writing, bearing date the 22 of *Nov.* in Court, and the ſaid *William* and *Stephen* by authority of the ſaid Letter of Attorney did ſurrender into the hands of the Lord the ſaid 10 acres, to the uſe of the ſaid *John Nicholas* and his heirs, who was at the ſame Court admitted accordingly: And that within the ſaid Mannor there was not any Cuſtom to ſurrender Copyhold lands by Atturney, either in Court or out of Court. And if the ſaid ſurrender by the ſaid Letters of Atturney

[b] of the ſaid lands holden by Copy, &c. be good or not, was the doubt which the Jury referred to the conſideration; And this caſe was argued at the Barr, in *Michaelmas Hillary*, and *Eaſter*, and this Term by the Juſtices at Bench; and in this caſe 2 points were moved, 1. If a ſurrender may be made by force of a Letter of Attorney. 2. If the Atturneys have purſued their authority. As to the firſt it was agreed by all the Judges in their ſeveral Arguments, that the ſurrender in the caſe at Bar made by Letter of Attorney, was good; and their reaſon was, becauſe that every Copyholder having a cuſtomary eſtate of Inheritance, may of Common right, without any particular cuſtom ſurrender his lands holden by Copy in full Court, and therefore in pleading the Copyholder needeth not allege a Cuſtom within the Mannor to ſurrender in Court; For that which is the uſage throughout *England*, is the Common Law, as it is holden in 34 *H.* 8. *Br. Cuſtom* 59. & 34 *H.* 8. *Dy.* 54. *quod habetur conſuetudo inter Mercatores per totam Angliam*, &c. is no good manner of alleging a cuſtom; for that is the Common Law; and in the book of *Entries*, *tit. Treſp. Diviſion Copyhold* 1. *fo.* 568. no cuſtom is alleged to enable a Copyholder to ſurrender in full Court, no more than that a Copyholder may make a Leaſe for one year; for that he may do by the general cuſtom of the Realm, which is the Common Law. *Vid. Bracton. lib.* 2. *cap.* 8. Then if a Copyholder may ſurrender his eſtate in Court by general cuſtom of the Realm, which is the Common Law, from thence it will follow that he may do it by Atturney, as a thing incident by the Common Law: And that will more clearly appear if the reaſon of ſuch things which a man may do by Atturney be well conſidered. And therefore if a man hath a bare authority accompanied with a Truſt, as Executors have to ſell lands, they cannot ſell by Atturney; but if a man hath an abſolute authority, as owner

owner of the land, there he may do it by Atturney, as *Ceſtui que uſe* may, after the Statute of 1 *R.* 3. and before the Statute of 27 *H.* 8. for *Ceſtui que uſe* hath an abſolute authority to diſpoſe of the land at his will, without any confidence repoſed him, as it appeareth in 11 *Eliz. Dyer* 283. and there is a Judgment cited in 25 *H.* 8. accordingly, againſt the opinion of ſome Judges in 9 *H.* 7. 24. But in the caſe at Bar, the Copyholder hath a cuſtomary eſtate of Inheritance, and not an authority of power only. Alſo there is a difference betwixt a general abſolute power and authority as owner of the land, as aforeſaid, and a particular power and authority (by him who hath but a particular Intereſt) to make leaſes for life or years. And therefore if *A.* be Tenant for life, the remainder in tail, &c. and *A.* hath power to make Leaſes for 21. years rendring rent, &c. he cannot make a Leaſe for 21 years by Letter of Attorney by force of his power, becauſe he hath put a particular [76] power which is perſonal to him: and ſo was it reſolved in the caſe of the Lady *Greſham* at the Aſſiſes in *Suffolk* in *Lent*, 24 *Eliz.* by *Wray* and *Anderſon* Chief Juſtices of Aſſiſe there. Alſo there are ſome things perſonal, and ſo inſeparably annexed to the perſon of a man, that he cannot doe them by another, as doing of Homage or Fealty: So it is holden in 33 *E.* 3. *Treſpaſs* 253. the Lord may beat his Villein for cauſe or without cauſe, and the Villein ſhall not have any remedy; but if the Lord commandeth another to beat his Villein without cauſe, he ſhall have an action of battery againſt him that beateth him in ſuch caſe. So if the Lord diſtrein the Cattel of his Tenant, although nothing be behind, the Tenant for the reſpect and duty which belongeth to the Lord, ſhall not have Treſpaſs *vi & armis* againſt him; But if the Lord commandeth his Bailif, or Servant in ſuch caſe to diſtrein where nothing is behind, the Tenant ſhall have an action of Treſpaſs *vi & armis* againſt the Bailif or Servant, 2 *H.* 4. 4. 11 *H.* 4. 78. 1 *H.* 6. 6. 9 *H.* 7. 14.

Littleton in his Chapter of *Burgage* holdeth, That where in a Borough he who is ſeiſed of Lands in fee may deviſe by cuſtom, there the Owner of the Land may deviſe that his Executors ſhall ſell, which ſhall be Attornyes to him, 3 *E.* 3. *Coron.* 310. by the Cuſtom of a Mannor a Freehold ſhall paſs from one to another by ſurrender in Court, againſt the liking of the Lord, and where the cuſtom is ſuch, the Tenant may doe it by Attorney, 14 *H.* 4. 1. by *Hankford.* 19 *Aſſ. p.* 9.

And it was ſaid, As he to whoſe uſe a ſurrender is made may be admitted by Attorney: ſo a Copyholder may ſurrender by Attorney in full Court: and the caſe of *Ceſtuy que uſe* ſeemeth to be a ſtronger caſe, becauſe that he who is to be admitted is to doe Fealty, and none can doe Fealty but he who ſhall be admitted, and therefore in ſuch caſe the Lord may refuſe to admit him by Attorney; but if he do admit him by Attorney, it is good enough.

But *Hill.* 28. *Eliz.* in *Chapmans* Caſe it was holden in the Kings Bench, That where the Cuſtom of a Mannor is, That the Copyholder out of Court may ſurrender into the hands of the Lord of the Mannor by the hands of 2. Cuſtomary Tenants, who in effect are but inſtruments or Attorneys of the Copyholder to take his ſurrender, that in ſuch Caſe the Copyholder by his Attorney cannot ſurrender into the hands of the Lord by the hands of 2. Copyhold Tenants; for in as much as in ſuch caſe the ſurrender ought to be warranted by the Cuſtom, the ſurrender without ſpecial Cu- [b.] ſtom to warrant it by Attorney ſhall not be good. Alſo that were upon the matter by Attorney to make a ſurrender by others who are but Attorneys, for that is not warranted by the particular cuſtom of the Mannor to make a ſurrender out of Court. But in the caſe at barr the Common Law, and no particular Cuſtom doth warrant the ſurrender, and therefore it may be well done according to the Rule and reaſon of the Common Law by Attorney. But it was Reſolved, That the Attorney ought to purſue the manner and form of the ſurrender in all points according to the Cuſtom, as the Copyholder himſelf ought to have done; as if the ſurrender by the Cuſtom ought to be by the Roll, or by any other thing, or in any other manner, the Attorney ought to purſue it. And the Chief Juſtice ſaid, That the ſtyle of Copyholder importeth 3. Things: 1. *Nomen*, his Name: 2. *Originem*, his Commencement: 3. *Titul.* his aſſurance: his name is Tenant by Copy of Court Roll, for his name is not Tenant by Court Roll, but by Copy of Court Roll, who is the ſole Tenant by Law who holdeth by Copy of any Record, Charter, Deed, or any other thing. 2. His Commencement, *ad voluntatem domini*; for at the beginning he was but a Tenant at the will of the Lord; 3. His title or aſſurance, *ſecundum conſuetudinem Manerii*, for the Cuſtom of the Mannor hath fixed his eſtate, and aſſured the Land to him ſo long as he doth his ſervices and duties, and performeth the Cuſtoms of the Mannor. And therefore *Danbie* ſaith in 7 *E.* 4. 19. That by the Cuſtom he is as well inheritable to have the Land, as Tenant to hold his Freehold by the Common Law. And it was Reſolved that the caſe was ſtronger, becauſe the Letter of Attorney was made to thoſe who were Tenants by Copy, &c. of the ſaid Mannor. But it was agreed, That where an Infant of the age of 15. years may make a Feoffment, that he cannot doe it by Attorney, becauſe that Cuſtom which enableth a perſon diſabled by the Law, ought to be purſued, and an Infant can do nothing to paſs any thing out of him by Attorney, *Vide* 31 *H.* 4. 33. and it ſhould be hard, if men in priſon, or ſick, or beyond the Sea, could not make ſurrenders of their Lands holden by Copy for payment of their debts, or preferment or advancement of their wives and children, &c. Note Reader, this is the firſt caſe I have known to be adjudged in the point.

2. It was Reſolved, That when any one hath authority, as Attorney, to doe any thing, he ought to do it in his name who giveth the authority; for he appointeth the Attorney to be in his place, and to repreſent his perſon; and therefore the Attorney cannot do it in his own name, nor as his own act, but in the name, and as the act of him who giveth the authority. And it was Object- [77] ed, That in the caſe at barr, That the Attorneys have made the ſurrender in their own names; for the entry is, *Quod idem Willielmus, & Stephanus*, &c. *ſurſum reddat*, &c. It was anſwered and Reſolved by the whole Court, that they have well purſued their authority; for firſt they ſhew their

Letter of Attorney, and then they *authoritate eis per præd. Literam Attornat. dict. ſurſum, reddiderunt*, &c. which is as much as to ſay, as if they had ſaid, We as Attorneys of *Thomas Combe* ſurrender, &c. and both theſe ways are ſufficient; as he who hath a Letter of Attorney to deliver ſeiſin ſaith, I as Attorney to *I. S.* deliver you ſeiſin; Or I by force of a Letter of Attorney deliver you ſeiſin; and all that is well done, and in purſuance of his authority: But if Attorneys have power by writing to make Leaſes by Indenture for years, &c. they cannot make Indentures in their own names, but in the names of them who give them warrant. But if a man by his own Will deviſeth that his Executors ſhall ſell his Land, and dieth, there the Executors in their own name may ſell the Land for neceſſity, becauſe that he who giveth them authority by his Will (which taketh effect by his death) is dead; and yet in ſuch caſe the deviſee is in by the deviſor.

Mich. 8 Jacobi. *In the Common Pleas.*

Henry Peytoe's Caſe.

[b] HEnry *Peytoe* brought an *Ejectione firmæ* againſt *Robert Chittie* and *Agnes* his wife, and *Alice Derbyſhire*, of a houſe and a Garden in *Godalming* in the County of *Surrey*, upon a demiſe made by *Ann Hooke*, 7 *Aprilis*, 8 *Jac. Regis* for 5. years, and that the Defendant the 10. day of *April* in the ſame year did eject him, &c. And the Defendants pleaded, That after the ſaid Treſpaſs and Ejectment, *ſc.* 10 *Maii* 8. *ſupradict. apud Goldalming præd. talis inter Robertum & præfat. Henricum, tam de tranſgreſſione & ejectione præd. quam de omnibus aliis querelis, debitis, & debatis inter eos ante tunc habit. factis, ſive perpetratis*, &c. *habebatur Concordia*; that in ſatisfaction of them the ſaid *Robert* one of the Defendants ſhould pay to the Plaintif 6*l.* 10*s.* at the feaſt of St. *Michael* the Archangel then next following; and for the true payment thereof he became bounden in an Obligation of 13*l.* and pleaded the performance thereof, and Receipt of the ſaid ſum at the Feaſt aforeſaid; and thereupon the Plaintif did demur in Law; and it was Objected, That this action of *Ejectione firmæ* is in the realty, and therein the poſſeſſion ſhall be recovered by *Habere facias poſſeſſionem*, and thereby the poſſeſſion and Inheritance ſhall be veſted in the Leſſor; and the entry of the Plaintif hanging his writ ſhall abate his writ, as it is adjudged in 6 *Eliz. Dyer* 226. for in this action the Term is to be recovered. So in an *Ejectione firmæ*, ancient demeſn is a good plea, as is adjudged in *Aldens* Caſe in the 5. Part of my *Reports*, becauſe it taſteth of the realty. And in actions concerning the realty, although it be but a Chattel, real accord is no plea; and therefore it is adjudged in 11 *H.* 7. 13. *b.* That in an action of waſte againſt Leſſee for years, an accord executed is no plea, becauſe it is mixt with the realty; by the ſame reaſon in an *Ejectione firmæ*. Alſo they did much rely upon 2. Rules put in the caſe in 7 *E.* 6. between *Andrew* and *Boughey*, *Dyer* 75. one, That in all caſes where nothing but amends ſhall be recovered in Damages, there a Concord with execution thereof is a good plea; but in this caſe of *Ejectione firmæ*, *aliquid amplius & magis dignum* ſhall be recovered then damages, *ſc.* the Term. The other Rule put is, In all actions grounded upon a wrong, as Treſpaſs, Conſpiracy, Maintenance, and the like, where nothing in certainty is demanded, nor to be recovered but damages, Concord is a good plea; but in this caſe the action is brought for the recovery of the poſſeſſion of a houſe and Lands demiſed in certain. But it was granted, That if the Term incurr pendant the writ, there accord is a good plea, becauſe that nothing ſhall be recovered but damages: So in an action of waſte againſt Leſſee for years in the *tenuit*: And [78] Queſtion was made in argument amongſt the Serjeants, What ſhould be the reaſon wherefore when a man is bound to deliver a horſe, &c. or to do any collateral thing, wherefore the Obligee cannot by accord betwixt them, give money or other valuable thing in ſatisfaction thereof, as well as where he is bound to pay money, there he may give a horſe, or any other valuable thing in ſatisfaction thereof.

And firſt it was reſolved in this caſe by the whole Court, That the accord in this caſe was a good plea: for in all actions which ſuppoſe the wrong to be done *vi & armis*, (where *Capias* and *Exigent* lie at the Common Law, as it appeareth in 40 *E.* 3. 25. 35. *H.* 6. 6. 22 *E.* 4. 11. *Plow. Com. in the Lord Berkley's* Caſe) there accord is a good plea, for the redeeming of his body from impriſonment, ſo that men may doe their buſineſs, which is good for the Commonwealth. And it was obſerved that this action of *Ejectione firmæ* includeth in it ſelf an action of Treſpaſs, as it appeareth by the commencement, the body, and the concluſion of the Writ; for this Writ doth begin *Si A. fecerit te ſecurum de clamore ſuo proſequend. pone*, &c. and in the like manner begins the writ of Treſpaſs; the body of the writ of *Ejectione firm. Quare vi & armis unum meſſuag.* &c. *intravit*, &c. and the writ of the Treſpaſs is, *Quare unum meſſuagium fregit, & intravit*, &c. and all the addition in the *Ejectione* is, *Et ipſum a firma ſua inde ejecit*: the concluſion of both is, *Et alia enormia ei intulit ad grave damnum*; and therefore the Treſpaſs is a great part of the action of *Ejectione firm.* and [b] the Treſpaſs and Ejectment are ſo woven and mixt together, that they cannot be ſevered. And without Queſtion in Treſpaſs accord is a good plea, and by conſequence in an *Ejectione firm.* And the entrie in an *Ejectione firm.* is, *In pl'ito tranſg. & ejectionis firmæ.* And in 7 *H.* 4. 6. it is holden That by force of the Act of 4 *E.* 3. *cap.* 6. which giveth an action of Treſpaſs *de bonis aſportatis*

in vita teſtatoris, That the Executors ſhall have an *Ejectione firm.* of Ejectment *in vita teſtatoris*, becauſe the ſame is an action of Treſpaſs. And in 44 E. 3. 22 the action of *Eject. firm.* is called action of Treſpaſs. And in 6 R. 2. *Ejectione firm.* 2. that it is an action of Treſpaſs in its nature: *Trinit.* 26 H. 6. *Rot.* 27. *coram Rege*, In an *Appeal of Mahem*, the writ is *felonicè*, yet for as much as it concludeth Treſpaſs, accord is adjudged to be a good plea. And it was Reſolved, that in Raviſhment of Ward, accord is a good plea: becauſe in the action at the Com. Law proceſs of Outlawry lay; and ſo upon the ſtatute of *Weſt.* 2. *c.* 35. And therefore it appeareth, that this caſe is not like to an action of waſte againſt Leſſee for years, nor to the writ of *Quare ejecit infra term'*, which is, *Quare ei deforceat*, &c. and without *vi & armis*: and yet for as much as in theſe alſo but a Chattel ſhall be recovered, is a good plea. And therefore as to the caſe of action of waſte, in 11. *H.* 7. 13. It was anſwered that the Caſe is ill printed, for 1. If it had been adjudged in 11 *H.* 7. truly, the ſame would never have been urged again by the Serjeants and Judges in 13 *H.* 7. 2. And in 16 *H.* 7. *Cur.* 97. in *Fitz.* it was holden, That in an action of waſte, againſt Leſſee for years, accord is a good plea; which the ſame Judges would never have done, if they themſelves had adjudged the ſame caſe to the contrary in ſo ſhort time before. Alſo diligent ſearch by the Prothonotaries hath been made for the Record of the ſaid caſe of 11 *H.* 7. and none can be found. And in *Hil.* 6 E. 6. Reported by Serjeant *Bendloes* it was holden by the whole Court in the Common Pleas, That in an action of waſte againſt Leſſee for years, accord is a good plea. And it was reſolved, that the ſaid Rule in 7 *E.* 6. was conſonant to the Law, *ſcilicet*, That where nothing but amends is to be recovered in damages, there an accord is a good plea, but the ſame doth not oppoſe, That although a Chattel real or perſonal are alſo to be recovered, that accord ſhall be no plea; for in Detinue of Charters concerning Land in Fee, or Freehold, the Charters themſelves ſhall be recovered, and yet in ſuch caſe accord is a good plea, as it is holden in 7 *E.* 4. 23. The ſame Law of Detinue of a horſe, or other perſonal goods; And the other Rule is alſo true, but as the firſt, the ſame, implieth not the Negative; for where certainty is to be recovered, accord alſo is a good plea, as in the caſe of Detinue of Charters: In an action of Debt upon a Leaſe for years, there is a Certainty demanded, and yet accord is a good plea, as it is holden in 47 *E.* 3. 24. and 10 *H.* 7. 24. 2 *R.* 3. *Debt* 100. [79]

And in this caſe, to ſatisfie the ſaid Queſtion moved amongſt the Serjeants, a difference was taken between a Condition in fact to do a collateral act, as to be bound in a Statute to make a Feoffment, to yield a true accompt, and the like, for there accord with execution for money or other thing, is no ſatisfaction to ſave the forfeiture of the Condition, for the Contract being made by writing to doe ſuch collateral act, cannot without writing in ſuch caſe be altered, as it is holden in 12 *E.* 4. 23. 9 *H.* 7. 4. 4 *H.* 8. *Dyer* 1. &c. But when the Condition in a deed by the original contract of the parties is to pay money, there by accord amongſt the parties, any other thing may be given in ſatisfaction of the money; for as the Philoſopher ſaith, *Nummus eſt menſura rerum commutandarum*, which agreeth with a rule in Law, *Res per pecuniam æſtimatur, & non pecunia per res*, and in this ſence it is true, *quod pecuniæ obediunt omnia*: But it is not ſo in any other caſe; and it is not material, whether the money mentioned in the Condition be a collateral ſum, or be parcel of the Obligation, or not; For if a man be bound by Obligation in 200 Quarters of Wheat, upon Condition to pay 20 *l.* the Obligor may by accord betwixt them, give to him a horſe, or a gold Ring, &c. in ſatisfaction of the money, although the money in ſuch caſe is collateral to the Obligation. And therefore if a man enfeoffeth another by Deed, upon condition that the Feoffor ſhall pay a certain ſum of money, &c. the Feoffor may by accord betwixt them give the Feoffee a Horſe, or a gold Ring, &c. in ſatisfaction; and yet the mony in ſuch caſe is collateral having reſpect to the Land, for if tender be made and refuſal, he ſhall never pay the money, therefore it is a meer collateral, *quia reprobata pecunia in hoc caſu liberat ſolventem*: and therewith agreeth *Lit. cap. Conditions*, 79. *b.* So if a man by Obligation be bound in 100 Quarters of wheat, upon condition to pay 50 Quarters, he cannot give money or other thing in ſatisfaction thereof, becauſe the contract originally was not for money, but for a collateral thing: and in ſuch caſe if the Obligor tendreth the ſame at the day, and the other refuſeth he ſhall plead the ſame, without ſaying that he is yet ready, becauſe that Corn is *bonum periturum*, and it is a charge to the Obligor to keep it; and ſo was it holden in 28 *H.* 8. in the Common Pleas, as *Carrel* hath Reported. So if a man be bounded a Statute, Recogniſance, or Obligation; and afterwards a defeaſance is made to pay a leſſe ſum, now this ſum in the defeaſance is collateral; and therefore if the Obligor tendreth the ſame at the day, and the ſame is refuſed, the Obligee ſhall loſe it for ever, as it is holden in 33 *H.* 6. 2. and yet in ſuch caſe the Obligor by accord betwixt them, may give a Horſe, &c. in ſatisfaction of the money in the defeaſance, for the Contract was originally for money. But if a man by Contract, or *Aſſumpſit* (without deed) be to deliver a horſe, or to build a houſe, or to do any other collateral thing, there money may be paid by accord in ſatisfaction of ſuch contract: For as a contract upon conſideration may commence by word: ſo by agreement by word for any valuable conſideration, it may be diſſolved; and ſo you will better underſtand the reaſon of your books, in 12 *H.* 4. 23. 33 *H.* 6. 2. 22 *H.* 6. 58. 7 *E.* 4. 4. *b.* 20 *E.* 4. 1. *b.* 3 *H.* 7. 4. 9 *H.* 7. 4. 18. 16 *H.* 7. 13. 4 *H.* 8. *Dyer* 1. 19 *H.* 8. 12. 22 *E.* 3. 5. *a.* 26 *E.* 3. *Annuity* 45. And every accord, ought to be full, compleat, and perfect, for if divers things are to be performed by accord, the performance of part is not ſufficient, but all ought to be performed, and therewith agreeth 17 *E.* 4. 2. 6 *H.* 7. 10. *Plow. Com.* 5. Alſo if the thing be to be performed at a day to come, tender and refuſal is not ſufficient without actual ſatisfaction and acceptance. And accords are favoured in Law, becauſe that *Expedit Reipublicæ ut ſit finis litium: & concordia parvæ res creſcunt, diſcordia maxima dilabuntur. Vide* 30 *E.* 3. 4. 22 *E.* 4. 25. The Biſhop of *Bathes* caſe, 11 *R.* 2. *barr.* 243. 16 *E.* 4. 11. 19 *Eliz. Dyer* 356. And in a writ of Covenant for want of Reparations although the action is founded upona deed, yet it is mixt with wrong, for which [b]

damages ſhall be recovered. It was adjudged *Paſch.* 3. *Jacobi* 1033. between *Eden* and *Blake*, that accord with ſatisfaction was a good plea in barr.

And it was Reſolved in the caſe at barr, That the accord and ſatisfaction by one ſhould diſcharge all the Ejectors and Treſpaſſors. *Vide* 13 E. 4. 1. 35 H. 6. 6 H. 7. 36 H. 6. *tit. Barr.* And of antient time that the Term was recovered in *Eject. firm.* appeareth by *Bracton lib.* 4. *cap.* 36. *f.* 220. *in tractatu de Aſſiſæ novæ diſſeiſinæ. Dictum eſt ſupra qualiter quis reſtituatur cum fuerit ejectus de libero tenemento ſuo. Nunc dicendum eſt ſi quis ejiciatur de uſufructu, vel uſu & habitatione alicujus tenementi quod tenuit ad terminum annorum ante terminum ſuum.* And there againſt the Leſſor he ſaith, That the Leſſee ſhall have a Writ of Covenant, and againſt his Vendee he ſhall have a *Quare ejecit infra terminum*, and as well againſt the Leſſor as againſt a ſtranger in *Ejectione firmæ*: and there [80] de after he ſaith, *Non magis poterit aliquis firmarium ejicere de firma ſua quam tenentem aliquem de libero tenemento ſuo, & unde ſi ille ejecerit qui tradidit ſeiſinam, id eſt, poſſeſſionem reſtituat cum damnis: Si autem alius quam qui traddidit ejecerit, ſi hoc cum authoritate & voluntate trademis; uterque tenetur hoc judicio, unus propter factum, alius propter authoritatem. Si autem ſine voluntate, tunc tenetur ejector utrique, tam Domino proprietatis quam firmario, firmario per illud breve Domino proprietatis per Aſſiſam novæ diſſeiſinæ. Et unus rehabeat terminum cum damnis, & alius liberum tenementum ſuum ſine damnis.* By which it appeareth how the Law was taken in the Reign of *H.* 3. which was the time that *Bracton* wrote. In 3 E. 3. *Quare ejecit infra terminum* 4. it was adjudged, That the Plaintif in this action ſhould recover his Term and damages: And the like Judgments are given in 18 E. 2. and in 20 E. 2. *ibid. pl.* 5. & 6. which agreeth with *Bracton.* And with him *F. N. B.* 197. And in 38 *Aſſ. p.* 9. And 12 H. 4. 10. in *Ejectione cuſtodiæ* the Term ſhall be recovered *pari ratione* in *Ejectione firmæ.* See 44 E. 3. 22. in *Oyer and Terminer.* And it is holden in 11 *H.* 6. 6. that although the Term be incurred pendant the Writ of *Ejectione firm.* the writ ſhall abate. 7. *H.* 4. 16. 12 *H.* 6. 8. 33 *H.* 6. 42. 38 H. 6. 27. 7 E. 4. 6. 21 E. 4. 30. & 13 H. 7. 21. that the Term ſhall be recovered in *Ejectione firm.* And 14 *H.* 7. in an *Ejectione firmæ* brought againſt a ſtranger in the Common Pleas, the Plaintif had Judgment to recover his Term, and thereupon the Defendant brought a writ of Error, and the Judgment was affirmed, and execution awarded to the Plaintif. And in *Anno* 17 *H.* 8. ſuch Judgment was given in the Common Pleas, That the Plaintif in an *Ejectione firmæ* ſhould recover his Term and damages, as Juſtice *Fitzh.* Reporteth in his *N. B.* 220 *b.* and the book of 6 *R.* 2. *Ejectione firmæ* is ill Reported, for it ſeemeth the Court agreed only to the ſaying of *Belknap*, That if the Leſſee be ouſted by the Leſſor, that he might recover his Term in a writ of Covenant: And afterwards in the ſame caſe *Belknap* ſaith, That at the Common Law, if the Leſſee be ouſted by a ſtranger, an *Ejectione firmæ* lieth: And to what purpoſe was this Writ inſtituted, if thereby the Term ſhall not be recovered, for he ſhall not recover damages but for the Ejectment only, *Vide* 19 *H.* 6. 56. 37 *H.* 6. 8.

And it was alſo Reſolved, That in a Writ of *Quare ejecit infra terminum*, accord was a good [b] plea. And afterwards in the principal caſe Judgment was given for the Plaintif. Note Reader, the beſt and moſt ſecure pleading of an accord, is to plead it by way of ſatisfaction; and not by way of accord; for if he plead it by way of accord, he ought to plead the preciſe execution thereof in all, and if he fail of any part thereof, his plea is inſufficient; but by way of ſatisfaction he ſhall plead no more, then the Defendant paid to the plaintif 6*l.* 10*s.* in full ſatisfaction of the ſame action, the which the Plaintif received. Judgment, if he ought to have any action? And the ſame is well approved by the book in 19 *H.* 6. 29. in a writ of Forger of falſe deeds; *Markham* Serjeant for the Defendant, by proteſtation that he did not forge, who pleaded, That the Defendant gave to the Plaintif a Gallon of wine in ſatisfaction of the action, which Gallon of wine the Plaintif did accept of, &c. Judgment if Action? And *Forteſcue* Sergeant of Councel with the Plaintif, It is not any plea, unleſs you ſay, That there was an accord betwixt the Plaintif and Defendant, &c. *Newton* the cheif Juſtice who gave the Rule in the caſe, That is the beſt pleading which *Markham* hath pleaded in my conceit, and ſubſtantial enough, for if he hath given the Plaintif a Gallon of wine for the Treſpaſs, which the Plaintif hath received, what would you then have more? And afterwards *Forteſcue* denyed the receipt of the Gallon of wine in ſatisfaction of that Treſpaſs.

Mich.

Mich. 9 Jacobi.

Agnes Gore's Case.

BEfore *Fleming* chief Juſtice, and *Tanfield* Chief Baron, Juſtices of Aſſiſe this caſe fell out before them in their Weſtern Circuit. *Agnes* the daughter of *Roper* married one *Gore*, *Gore* became ſick, *Roper* the Father in good will to the ſaid *Gore* his Son-in-Law, went to one Dr. *Gray* a Phyſician for his advice, who made a Receipt directed to one *Martyn* his Apothecary, for an Electuary to be made, which the ſaid *Martyn* made, and ſent the ſame to the ſaid *Gore*, *Agnes* the wife of *Gore* ſecretly mingled Ratsbane with the ſaid Electuary, to the intent therewith to poiſon her Husband, and afterward 18 *May* ſhe gave part of it to her Husband, who eat thereof and preſently became grievous ſick: The ſame day *Roper* the Father eat part of it, and preſently became alſo ſick, 19 *May* *C.* eat part of it, and became alſo ſick; but all theſe recovered and are yet alive. The ſaid *Roper* obſerving the working of the ſaid Electuary, carried the ſaid box with the ſaid Electuary, 21 *May* to the ſaid *Gray* the Phyſician, and informed him of the Accidents, who ſent for the ſaid *Martin* the Apothecary, and asked him if he had made the ſaid Electuary according to his direction, who anſwered that he had, in all things but in one, which he had not in his ſhop, but put in another thing of the ſame operation, which the ſaid Dr. *Gray* well approved of; Whereupon *Martin* the Apothecary ſaid, To the end that you may know that I have not put any thing in it, which I my ſelf will not eat, I will before you eat part of it, and thereupon *Martin* took the box, and with his knife mingled and ſtirred together the ſaid Electuary, and took and eat part of it, of which he died the 22 of *May* following. The Queſtion was, if upon all this matter *Agnes* had committed Murder. And this caſe was delivered in writing to all the Judges of *England* to have their opinions in the caſe. And the doubt was, Becauſe that *Martin* himſelf of his own head, without incitation or procurement of any, not only eat of the ſaid Electuary, but he himſelf mingled and ſtirred it together, which mixing and ſtirring had ſo incorporated the poyſon with the Electuary, that it made the working more forcible than the commixture which the ſaid *Agnes* had made; For notwithſtanding the mixture which *Agnes* had made, thoſe who eat of it were ſick, but yet live, but the mixture which *Martin* hath made by mingling and ſtirring of it with his knife, made the working of the poyſon more forcible, and was the occaſion of his death. And if this Circumſtance will make a difference between this caſe and *Saunders* caſe in *Plow. Com.* 474. was the Queſtion. [81] [b]

And it was reſolved by all the Judges that the ſaid *Anne* was guilty of the murder of the ſaid *Martin*, for the Law doth joyn the murderous intent of *Agnes* in putting the poyſon into the Electuary to kill her Husband, with the event which followeth upon it; *ſc.* the death of *Martin*, and the putting of the poyſon into the Electuary is the occaſion and cauſe; and the poyſoning and death of the ſaid *Martin* is the event, *quia eventus eſt qui ex cauſa ſequitur, & dicuntur Eventus quia ex cauſa eveniunt.* And the ſtirring of the Electuary by *Martin* with his knife without the putting in of the poyſon by *Agnes* could not have been the cauſe of his death.

And it was alſo Reſolved, That if *A.* putteth poyſon into a Pot of wine, &c. to the intent to poyſon *B.* and ſetteth it in a place where he ſuppoſeth *B.* will come and drink of; and by accident *C.* (to whom *A.* hath no malice) cometh, and of his own head taketh the pot and drinketh of it, of which poyſon he dieth, the ſame is Murder in *A.* for the Law doth couple the event with the intention, and the end with the cauſe. And in the ſame caſe if *C.* thinking that ſugar is in the wine, ſtirreth it with a knife, and drinketh of it, it will not alter the caſe; for the King by reaſon of the putting in of the poyſon upon a murderous intent, hath loſt a Subject; and therefore in Law he who putteth in the poyſon with ill and felonious intent, ſhall anſwer for it. But if one prepare Ratsbane to kill Rats and Mice, and other Vermine, and leaveth the ſame in certain places to that purpoſe, and with no ill intent, and one finding it eateth it, it is not felony, becauſe he who prepareth the poyſon hath no ill or felonious intent; but when one prepareth poyſon, with a felonious intent to kill any reaſonable creature, whatſoever reaſonable creature be killed with it, he who hath the ill and felonious intent ſhall be puniſhed therefore, for he is as great an offendor, as if his intent againſt the other party had taken effect. And if the Law ſhould not be ſuch, this horrible and heinous offence ſhould be unpuniſhed, which ſhould be miſchievous, and a great defect in the Law. [82]

Mich. 9 Jacobi *In the Common Pleas.*

Conney's Case.

[b] IN a Replevin between *John Crane* Plaintif, and *Bartholmew Colpit* Defendant, which began *Trinit. 6 Jacobi. Rot.* 1611. in the Common Pleas the case was such, *Hennry Conny* Esquire was seised of 2. acres of Land in *Tidde* St. *Giles* in the County of *Cambridge*, by descent from his Father, in his demesne as of fee, and held them of *William Stermyn* Esquire, as of his Mannor of *Richards*, by Fealty, and 13 *d.* rent, and sute to the Court of the said Mannor, &c. *William Stermyn* enfeoffed *John Wellby* Gent. in fee of the said Mannor; to which feoffment the said *Henry Conny* then being within age of 21 years, *sc.* of the age of 20 years did attorn; and if this attornment were good or not to bind the said *Henry* to the payment of the said Services, or not, upon a special verdict found at the Assises in the County of *Cambridge*, was the Question. And it was Objected, That this attornment shall not bind the Infant, because if it shall be good it shall turn to his prejudice, and the Law doth protect Infants from such prejudice during their minority, *quia ferre in omnibus minori etati & succori sub potestate viri succurritur*; and when an Infant hath the Tenancy by descent he shall have his age in a *Per quæ servitia*; and in such case when the Infant at full age attorneth, the Lord shall lose the arrerages during the minority, as it was collected upon the opinion of *Thorp* in 26 E. 3. 63. Then if the Infant shall not be compelled by the Kings writ to attorn during his minority, (which trencheth to his benefit to discharge him of the arrerages incurred during his minority;) *à fortiori* his at-
[85] tornment in *pais* shall not prejudice him, nor barr him of the previlege and immunity which the Law giveth him during his minority in such case; but they conceived, that if the Infant had the Tenancy by purchase, in such case he should be driven to attorn, because that in case of his own purchase he shall not have his age: And in the case at barr, for as much as the said *Henry* had the Tenancy by descent, and was within age, his attornment shall not bind him to charge him with the arrerages during his minority. It was also Objected, That if an Infant who hath the Tenancy by descent shall be compelled in a *Per quæ servitia* to attorn, yet for as much as in the case at barr he hath taken his estate by Feoffment in *pais* of the Mannor, &c. and hath not taken his estate by fine, upon which he might have a *Per quæ servitia*, his attornment in *pais* shall not bind him, for as much as in this case he is not compelled to attorn. As to this, it was answered and Resolved by the whole Court, *sc. Coke* Chief Justice, *Walmsly*, *Warburton*, and *Foster* Justices, That in the case at Barr the Attornment was good, and should bind the Infant.

And first it was Resolved by them, That in a *Per quæ servitia* against an Infant who hath the Tenancy by discent, that he shall not have his age, and the reason is, because the Lord at first did depart with the Land, in consideration that the Tenant should hold of him, and should do him services, and pay to him a yearly rent; and the Tenant is in Law called Tenant peravail, because the Law doth presume he hath benefit and avail over and above the services which he doth, and the rent which he payeth to the Lord; and therefore it shall be against reason and the purpose of the creation of the tenure, That when the heir hath the Tenancy peravail by descent that he shall not pay the yearly rent, &c. which was reserved upon the creation of the Tenancy; and that is the reason that the heir of the Tenant, who hath the Tenancy by descent, may be distrained for the rent, &c. behind, during his minority, and therefore he shall not have his age, *Vid.* 4. *Ma. Dyer* 173. And *Vid.* 21 E. 3. *Age* 85. and in Avowry, and 7 E. 2. *Age* 140. In a writ of Mesne the parol shall not demur for the Nonage of the Plaintif, because it is not reason that the Infant shall be distreined for the services of the Mesne during his Nonage, and shall not have any remedy till his full age; but forasmuch as his Nonage doth not privilege him from the payment of rent during his Nonage, the Law also will give remedy to him during his Nonage, But in a Writ of customs and services (which is a Writ of right in his nature, and in which final judgment shall be given) against an Infant who is in by descent, the book in 6 *H.* 3. *Age* 148. is adjudged that he shall have his Age. So in a *Cessavit* against an Infant who hath the Tenancy by discent, he shall have his
[b] Age, although it be of his own Cessor; because he cannot know what arrerages to tender before Judgment, and this is a Writ of Right in his nature, and if he maketh no true tender, he shall lose his land, and so it is adjudged in 28 E. 3. 99. *Vid.* 9 E. 3. 50. 14 E. 3. *Age* 88. 31 E. 3. *Age* 54. 2 E. 2. *Age* 132. But although an Infant do attorn in a *Per quæ servitia*, it can be no mischief to him; for notwithstanding his Attornment within age, he may at full age disclaim to hold of him or say, that he holdeth not of him, or acknowledge that he holdeth of him but by lessee or other services, and therewith agree, 26 E. 3. 63. 32 E. 3. *Per quæ serv.* 9. and *Age* 33. *Vi.* 2 E. 2. *Age* 77, & 78. 37 H. 8. *br. Attornment.* And *Coke* Chief Justice cited the book in 43 E. 3. 5. Where in a *Quid juris clamat* brought by an Infant within age, who said that he held the land for term of life, of the lease of the Ancestor of the Infant, who granted by deed, that he should not be impeached of waste, which he shewed forth in Court, and said that he was ready to attorn, saving to him the advantage by the deed; and because the Plaintif was within age, he cannot know the Deed during his Nonage, it was adjudged, he should attend till his full age: And further he said, That he hath seen an old Report in writing, in 32 E. 3. in which in the same

same case the Infant when he cometh to his full age, and the Defendant doth attorn by Judgment of the Court, that the same shall not turn the Infant to any prejudice; for although that the Attornment be after his full age; yet forasmuch as no Lacheſſe was in the Infant; but that he brought his writ of *Quid Juris clamat* to compel the Tenant to attorn, the delay which is till his full age (which the Law provideth for his benefit) shall not turn to his prejudice, and therefore by Judgment of Law (which doth wrong to none) he shall have asmuch advantage as well for the arrerages of the rent, or for waste done, as if the Tenant had attorned at the time of his plea pleaded. 2. It was Resolved, That although the Infant in the case at Bar was not compellable to attorn, because the Mannor was not conveyed by fine; yet becauſe that by a mean he was compellable to attorn, *&c.* if a fine had been levied, the attornment was good: And so it is holden in 9 *E.* 3. 38. in Waste; That though the husband out of Court do a thing which he and his wife may be driven to do by Law, the thing shall be eſtabliſhed, and therewith agreeth 8 *E.* 4. 4. 11 *R.* 2. *Waste* 98. and for that equal partition in such case shall bind, the same Law, if the husband and wife attorn in *pais* to a grant by deed, the same shall bind the wife, and therewith agreeth 15 *E.* 3. *Attornment*, 3 *E.* 3. 42. Sir *John Boſviles* Case, 44 *E.* 3. *Fines* 37.

3. Attornment doth not give any intereſt, but is but a bare aſſent, and therefore 11 *H.* 7. 13. it is no Infranchiſement to a Villain, and cannot be upon condition, as it is reſolved in *Tookers* case, in the 2 part of my Reports.

4. The end of an attornment is to perfect a grant, and the Law doth favour the conſummation and perfection of things; for the end is all *Finis coronat opus*. And with this reſolution agree the books in 12 *E.* 4. 3. & 4. where it is holden, That Tenant in tayl, an Infant, Feme Covert may be bound by an Attornment *gratis* in *pais*; And in 18 *H.* 6. 2. *Forteſcue* holdeth; That if one granteth the ſervices of his Tenant who is within age, who within age attorneth, shall he be afterwards in an Avowry admitted to say that he was within age at the time of the Attornment? I say not, for he did but that which he ought to do, therefore the Attornment is good. And afterward Judgment was entred for the Avowant accordingly. [86]

Paſch. 9 Jacobi.

Pinchon's Case.

Error.

[b] TRinit. 7 *Jac. Regis*, *Rot.* 533. in the Kings Bench; *Edward Pinchon*, and *Richard Weſton* Knights Executors of *Jerom. Weſton* Knight, Executor of *Roſe Pinchon* were Plaintiſs againſt *Tho. Legate* Eſquire, Executor of *John Legate* Defendant, in an action upon the caſe, And declared where the said *Roſe* 7 *Feb.* 1595. *mutuò dediſſet & accommodaſſet præfato* Johanni Legate 200*l. legalis monetæ* Angliæ, *idem* Johannes *in conſideratione inde adtunc & ibidem ſuper ſe aſſumpſit*, & *præfatæ* Roſæ *in vita ſua fideliter promiſit*, *quod ipſe idem* Johannes Legate 200l. *lagalis monetæ* Angliæ *eidem* Roſæ, *executoribus*, *vel adminiſtratoribus ſuis*, *cum inde requiſitus eſſet*, *bene & fideliter ſolvere & contentare vellet*, &c. *ac licet bona & catalla quæ fuerunt præd.* Johannis Legate *tempore mortis ſuæ ad manus præd.* Thomæ *poſt ipſius* Johannis *mortem*, *devenerunt*, & *adhuc in manibus ipſius* Thomæ *exiſtunt ſufficientia*, *tam ad ſolvend. & exonerand. omnia debita & funeralia expenſ. ejuſdem* Johannis *quam ad ſatisfaciend. prædict.* Edwardo & Richardo, *de præd. ducentis libris*, *non ſolver.* &c. The Defendant pleaded that he made no such promiſe; and it was found for the Plaintiſs, and upon the verdict Judgment given for the Plaintiſs: Upon which Judgment a writ of Error was brought: And in this case the Principal Error which was aſſigned was, That no action upon the case upon an *Aſſumpſit* for the payment of the said debt lieth againſt Executors.

And it was urged for the Plaintif in the writ of Error, That the action did not lie; for it is a Maxim in Law, That Executors shall not be charged with a simple contract, and that for 2 reasons; one becauſe that by the preſumption of Law they cannot have knowledge neither of the beginning of the debt, being by word without writing, nor of the continuance of it, becauſe the Teſtator might pay him privately betwixt themſelves, and therefore it is adjudged in 15 *E.* 4. 16. That an action of Debt lyeth not againſt Executors for the meat and drink of the Teſtator, although it be of neceſſity, and for which an Infant shall be bound for his contempt; as it is holden in 18 *E.* 4. 2, and 21 *H.* 6. 31. *b. Vid.* 41 *E.* 3. 23. 25 *E.* 3. 40. So no action of Debt lieth againſt the Executors of the Lord for the ſurpluſage of the accompt before Auditors, for the reasons and causes aforeſaid; and theſe are ſtronger caſes than the case at the Bar: And if an action upon the caſe lie againſt Executors, the same shall impugne the same Maxim at the Common Law; for every contract executory doth imply an *Aſſumpſit* in Law, and by conſequence the Executors shall be charged with every Contract executory, which shall be directly againſt the said Maxim. Alſo another reaſon was added, That this action upon the caſe upon *Aſſumpſit*, is a perſonal action, and dieth with the perſon, and therefore lieth not againſt Executors no more than if a Gaoler ſuffereth one who is in Execution to eſcape, the Plaintif might have an action upon the caſe at the Common Law againſt the Goaler; but after the death of the Gaoler no action lieth againſt [87]

his

his Executors, for that was grounded upon a wrong, which dieth with the perſon. *Vid.* 41. *Aſſ. p.* 15. and 40 E. 3. *Executors* 74.

And this caſe depended in conſideration divers Terms, and after many arguments by Counſel on both ſides, and conference amongſt the Judges, *viz. Coke* Chief Juſtice of the Common Pleas, *Tanfield* Chief Baron, *Warburton* Juſtice, Baron *Snigge*, Baron *Altham*, *Foſter* Juſtice, and Baron *Bromely*, It was reſolved by them all *una voce*, *nullo contradicente*, That the action upon the caſe in the caſe at Barr did well lie againſt the Executors, and that not only without impugning any Rule or reaſon of Law, or any book Reſolved in the point, but alſo well warranted and confirmed by diverſe authorities in Law, Judgments, and Reſolutions late and antient. And as to the Objections which have been made (for the confuting of them is a confirmation that the action doth well lie.) It was anſwered, That the ſaid book in 15 E. 4. is, That Debt lyeth not againſt Executors upon a contract for meat and drink of the Teſtator, but the reaſon thereof is not, (as hath been urged) becauſe the Executors cannot have knowledge of the contract, nor of the continuance thereof, becauſe the Teſtator might have privately paid it: But the reaſon of the
[b] Law which is given in the book in the ſame Caſe is, becauſe the Teſtator might have waged his Law, it was ruled that the Plaintif ſhould take nothing by his Writ. And the like Judgement is in the ſame year, *fol.* 25. *a.* That an action of debt lieth not againſt Executors (and the reaſon of the Judgment is) for know, That a man ſhall never have an action againſt the Executors (where the Teſtator in his life time might have waged his Law) and the reaſon thereof is becauſe the Executors ſhall be deprived of the benefit of waging of Law, if an action ſhall lie againſt them; which reaſon ſtrongly proveth, that in the caſe at Bar the action will lie againſt the Executors, becauſe the Teſtator in an action upon the caſe againſt him, could not wage his Law; and therefore his Executors ſhall not be deprived of it. But if a priſoner in the Tower for Treaſon hath meat and drink from the Lieutenant, and dieth, the Lieutenant ſhall have an action of debt againſt his Executors for the meat and drink of the Teſtator, and the reaſon is, becauſe in ſuch caſe the Teſtator could not wage his Law, as it is adjudged in 27 *H.* 6. 4. in *Thomas Bodulgates* Caſe, and the reaſon why no wager of Law lyeth in ſuch caſe is, becauſe that every Gaoler ought to keep his Priſoner in *ſalva & arcta Cuſtodia*, ſo that ſuch Priſoner by the Common Law ſhall avoid a deſcent caſt, and a fine levied during his impriſonment, becauſe the Law preſumeth that he, in reſpect of his ſtrict keeping cannot have knowledge of a diſſeiſin or a fine to command an entrie, or claim to be made, and therefore the Keepers in a manner are compelled to find victuals to his priſoner; and therefore the priſoner ſhall not wage his Law in ſuch caſe. But if *A.* agreeth with *B.* for his Commons by the week or month, &c. there in debt brought againſt *A.* he ſhall wage his Law; as the books are adjudged in 22 *H.* 6. 13. *b.* 9 E. 4. 1. *Vid.* 39 *H.* 6. 18. *b.* If a Victualer or Common Innkeeper bringeth an action for his gueſts victuals delivered to him, the gueſt may wage his Law; for a Victualer or Innkeeper is not compellable to deliver victuals till he be paid for them in hand. And therewith agreeth 10 *H.* 7, 8. *a.*

In 4 *H.* 6. 19. *b. R. G.* brought an action of debt of 10 marks againſt *Tho. Timberhull*, and others
[83] executors of *William Webbe*, and declared that the Teſtator had retained the Plaintif with him for a year, in the art of limming of Books, paying 10 marks by the year; and there *Martin* held that the action was not maintainable againſt the executors, and took a difference between the caſe of a Labourer and a Limmer; for a Common Labourer ſhall be forced to labour in deſpite of him, and his ſalary is certain by the Statute, which it is not reaſon the ſervant ſhould loſe by the death of his Maſter, where he was bound by the Law to ſerve, which ſhall not be ſaid his default, but the Act of the Law; but in the caſe of a Limmer he was not forced by the Law to ſerve, and ſo when he made the contract it was his own act and folly, and not the act of the Law; and he might have taken a ſpecialty: And the opinion of *Martin* in this caſe is good Law; But the true reaſon of his difference is, becauſe that in this caſe of a Common Labourer, the Teſtator could not have waged his Law, as he might have done in the caſe of the Limmer. And the ſame appeareth in 11 *H.* 6. 48. Where the Gardian of the Friers Minors of *Coventry* brought an action of debt againſt *Jo. Burton* of *Coventrey* Executor of *John Goot*, and declared how the ſaid *John Goot* retained at *Coventry John Bredon*, one of the Friers of the ſaid Gardian in the ſaid houſe, by licenſe of the Gardian, to ſay Maſſe for him by the year; and alſo did retain him to ſay Saint *Gregories* Trental in the next year after, and ſhewed in what ſervices Saint *Gregories* Trental did conſiſt, taking for the ſame 40 *s.* and within 4 days after *John Goot* died, and made the Defendant his Executor, and the ſaid *John Burton* granted and gave ſurety to pay the ſaid ſum to do the ſaid ſervice, according to the Reteiner of the Teſtator; which divine ſervices he had done according to the ſaid Reteiner; and that the whole ſallary was behind. And there a good difference is taken. A Labourer may have an action of Debt againſt Executors, without a ſpecialty, becauſe he ſhall be forced to ſerve if he be required by the Statute, and the Teſtator ſhall not wage his Law in ſuch caſe, becauſe the Labourer ſhall be bound to ſerve him: But here a Prieſt or a Frier is not bound to ſerve by no Law in ſaying Maſſe, if he will not agree to it; and for this cauſe the Teſtator might have waged his Law, and in every Caſe where the Teſtator might have waged his Law, the action ſhall not be maintainable againſt his Executors, without a ſpecialty; for the Executors cannot wage their Law of anothers Contract. And that is the reaſon that a *Quo minus* lieth in the Exchequer for the death of the Teſtator upon a ſimple contract, becauſe the Teſtator himſelf could
[b] not in ſuch caſe wage his Law; and yet it may be ſaid, that the Executor cannot by preſumption of Law have knowledge of the beginning or continuance of it; but theſe are not material, for the wager of Law is the true reaſon and cauſe allowed by the Law. And therewith agreeth 8 *H.* 5. *fey* 66. 32 *H.* 6. 24.

In

In 2 *H.* 4. 14 *B. Lawrence* Saint *Martin* retained one for the term of his life in time of peace and war, for 5*l. per annum*, which service he as a Servant did for 2 years, for which he brought his action of debt against *John Felton* and others Executors of the said *Lawrence* Saint *Martin*, and Judgment was given against the Plaintif, for the reason, and upon the difference aforesaid, *Vid.* 39 *H.* 6. 18. *b.* And therefore the Judgment in *Slades* case (which was resolved by the advice of all the Judges in the Exchequer Chamber in 44 *Eliz.* as it appeareth in the 4th part of my *Reports* in effect doth over-rule this point. For if an action upon the case upon an *Assumpsit* lieth upon every contract executory, thereupon it followeth, that forasmuch as the Testator cannot wage his Law, that the action shall lie against his Executors; And therefore also it is true, That an action upon *Assumpsit* made by the Testator, shall lie agaist Executors, because in such action the Testator cannot wage his Law; as in the same case, an action of debt lieth not against Executors, because in such action the Testator might have waged his Law. So no birthright or privilege of the Subject is taken away by this resolution, but thereby Justice and Right is advanced, for as much as the Creditor shall be paid his just and true debt. And the Executors who in truth have the goods in another right, *&c.* to pay debts, &c. of the Testator, shall not convert them to their private use, without paying the just and true debts of the Testator; for that should be against Justice and Right, and against the Office of Executors, who are but Ministers and dispensers of the goods of the dead; and notwithstanding the death of the Testator the debt doth remain, for death is no discharge of the debt, and it should be a great defect in the Law, that no remedy should be given for it, *Curia Domini Regis deficere non debet conquerentibus in justitia perquirenda. West.* 2, *cap.* 24. *Vid. Doctor & Student lib.* 2. *cap.* 10, *&* 11. Debts due by Obligation shall be paid by Executors before debts by simple Contract, and debts by simple Contract before Legacies; which proveth that the Debt by simple Contract doth remain due and payable after the Testators death, and that it shall be paid before Legacies, for which remedy is given in the Ecclesiastical Court. And therewith agreeth 21 *E.* 4. 21. And debts by simple contract shall be paid before the reasonable part of the Wife and Children. *Vid.* 2 *E.* 4. 13. 2 *H.* 6. 16.

As to the other Objection, That this personal action of Trespasse upon the Case dieth with the [89] person: Although the same is called a Trespasse, in respect the breach of promise is alleged to be mixed with fraud and deceipt to the special prejudice of the Plaintif, and for this cause it is called Trespasse upon the case; yet the same doth not make the action so personal, and annexed to the persons of the parties, that the same shall die with the persons; for then if he to whom the promise is made dieth, his Executors should not have any action, which no man will affirm. And an action *sur Assumpsit* upon good consideration, without speciality to doe a thing, is no more personal, *&c.* annexed to the person, Then a Covenant by specialty to do the same thing.

Now for authorities in Law, Judgments and Resolutions. 1. The Case in 3 *E.* 3. *Itin North.* cited in *Norwood's* case in *Plow. Com.* 183. in the case of Debt. The case in 12 *H.* 8. 11. which is entred *Mich.* 12 *H.* 8. *Rot.* 40. Between *Oliver Cleymond* Plaintif, and *Robert Vincent*, and *Thomasin* his wife, Executors of the Testament of *Robert Penson* Defendants; the Record of which Case I have seen; And that the Plaintif declareth, That where Communication was had between one *Roger Penson* and the said *Oliver* for 6 barrels of Salt Salmon from the Maze of the said *Oliver* to the value of 6 *l.* to be brought by the said *Roger* to the said *Oliver*, the said *Robert Penson* desired and requested the said *Oliver* to sell and deliver to the said *Roger* the said 6 barrels, and assumed and promised for himself his Executors, *&c.* to the said *Oliver*, *quod ipse executores seu assignati sui dictas sex libras pro barrellis & piscibus præd. præfato* Olivero *infra unum annum proximè sequend. benè & fideliter solvere & contentare debuissent*, *idemque* Oliverus *dictis assumptioni & promissioni præd.* Roberti Penson *fidem adhibens*, *bona & mercimonia sua prædicta præfat.* Rogero *ad desiderium & requisitionem dicti* Roberti Penson, *eo ut præmittitur fact. pro præd.* 6 *libris sibi ut prefertur solvend. adtunc & ibidem vendidit*, *tradidit & deliberavit*, And declared that the said *Robert Penson* in his life, nor his Defendants after his death did not pay the said 6 *l.* &c. and alleged in the Declaration, That the goods and chattels of the said *Robert* were sufficient to pay the said 6 *l.* and all other the said *Robert's* debts, remaining in the hands of the said *Robert Vincent* and *Thomasin*, &c. which goods they have converted to their own uses, to his damages of 20*l.* The Defendants by protestation that the said Bill was insufficient in Law, to which they are not bound in Law to answer; for plea say, That the said *Robert Penson* did not assume and promise to the said *Oliver*, *&c. modo & forma*; upon [b] which issue was joined and tried before Sir *John Fineux* chief Justice of the Kings Bench, by *Nisi prius*, and found for the Plaintif, and damages assessed to 9 *l.* upon which Verdict the Court will advise till *Hillary* Term, and there the Judgment is entred. *Et super hoc visis & per Cur. Domini Regis hic diligenter inspect. omnibus & singulis præmissis*, *maturaque deliberatione superinde habit. consideratum est*, *quod præd.* Oliverus *recuperet versus præfat.* Robertum Vincent *damna sua præd. per Juratores in forma præd. assessat. &c.* Which I have Reported out of the Record it self at length, to the intent the Reader may be assured of the truth of the Case. Which Judgment being given in the Kings Bench with so great deliberation by Sir *John Fineux*, *Conisbie* and his Companions, Judges of profound knowledge, and remaining upon Record in force it ought not to be discredited or disgraced by the bare saying of the Judge, upon a sudden motion at the Barr, And it is to be observed in the same case of 22 *H.* 8. That *Knightly* gave the true reason why no writ of Debt should lie against Executors, *&c.* because the Testator might have waged his Law, and the Executors cannot so do, and therefore they are not chargeable in an action of Debt. And *Knightly* further saith, in the Exchequer it is a Common course, That the Kings Debtors shall have a *Quo minus* against the Executors of their debtors, who were indebted to them by simple Contract; To which the same Judge answereth, that it is not so, and there is no such course in the Exchequer

and the Law is otherwise; which is apparent by that which hath been seen said before, that the Jugde denied (upon the sudden) the Law in this point; And it is the Common course in the Exchequer. Which Judgement being given, was a leading case to many others, not onely in the Kings Bench, where the Judgment was given, but also in the Common Pleas; And therefore *Hill.* 15 *H.* 8. *Rot.* 306. in the Common Pleas, an action upon the Case upon *Assumpsit* of the Testator for debt, was brought against Executors, who pleaded, Fully administred, &c. And in the book of Entries, *tit. Action upon the Case, Division de Debt, pl.* 2. Action upon the case in the Kings Bench against Executors, upon *Assumpsit* made by the Testator, 5 *Martii* 28 *H.* 8. upon sale of Corn to him. And *ibid. p.* 3. another Action upon the case in the Kings Bench against Administrators, upon *Assumpsit* by the Testator, 28 *Martii* 31 *H.* 8. upon a contract for Carpenters wares: And *ibid. in the division of payment, p.* 2. the like action in the the Kings Bench by Executors against Executors, upon *Assumpsit* for repayment of money which was before delivered, if a Marriage took not effect. And many actions more you may see in the Court of Common Pleas, *Mich.* 15. & 16. *Eliz. Rot.* [90] 1959. in the time of Sir *James Dyer.* An action upon the case by *Henry Beecher* and others, Executors of *Henry Beecher*, against *Ann Montjoy*, administratix of *John Bonham* Knight, upon *Assumpsit* of the Administratrix, in consideration that the administration was committed to her, and that she hath assets to pay, &c. *assumpsit super se ad solvend.* 59 *l.* in which Sir *John* the Intestate was indebted to the said *Henry Beecher* the Testator. The Defendant pleaded *Non assumpsit*, and found against her, and Judgment was given generally, and not *de bonis defuncti.* Which Judgment proveth, that the debt perished not by death, and that the Administrator was chargeable to pay it, otherwise there was not any consideration. *Pasch.* 24 *Eliz. Rot.* 1530. in the time of Sir *Edmund Anderson* chief Justice of the Bench. In an action upon the case by *Johan Michell*, Executrix of *Rafe Michell*, against *William Viall* and others, Executors of *John Arundel* Esquire, upon *Assumpsit* made by the said *John Arundel*; in consideration that the said *Rafe Michell in vita sua vendidisset & deliberasset eidem Johanni diversa mercimonia, &c. super se assumpsit*, to pay, &c. The Defendant pleaded, That he made no such promise, and Judgment was given *De bonis Testatoris. Trinit.* 27 *Eliz. Rot.* 107. In an action upon the case by *Horne* against *Borough* Executor of *Borough*, upon a promise made by the Testator in consideration that the Plaintif had sold to the Testator, *bona & catalla*, &c. *assumpsit ad solvend.* &c. and upon *Non sum Informatus* pleaded, Judgment was given for the Plaintif. And a multitude of Judgments have been given in the Kings Bench in the like cases; and the Judges relyed much upon the case in *Hill.* 4 & 5. *Phil. & Ma.* in the Kings Bench, between *Norwood* and *Rede*, *Plow. Com.* 181. where it appeareth upon a demurrer in Law upon the Declaration, It was adjudged, That the action upon *Assumpsit* made by the Testator, was maintainable against the Executors, upon a Contract for Wheat: in which case the Judgment given in 12 *H.* 8. in *Cleymond's* Case, is approved. So that upon all these Authorities, Judgments and Resolutions, and for the reasons aforesaid being 3. 1. That the Testator could not wage his Law: 2. That after the death of the debtor the debt doth remain, and that it should be a defect in the Law, if no remedy should be provided for it: 3. It is more consonant to Justice and Common Right, that the just debt should be paid, then that the Executors, who have the goods in anothers Right, should convert the goods to their private use, without payment of the Testators debts; It was unanimously upon long and mature deliberation adjudged, That the Judgment given in the Kings Bench should be affirmed. And you who make payment or other satisfaction of debts, take acquittances, or sufficient proof of the payment or satisfaction thereof, otherwise you or your Executors or Administrators shall be in danger to pay the same again.

Lastly, It was Resolved in this case, That he needed not averr that the Defendants had assets to pay Legacies; as it was Resolved also in the Case of *Norwood* and *Read*, for debts upon simple Contract, are to be paid before Legacies. And the Report of the said Case of 12 *H.* 8. as to the averrment for payment of Legacies is not warranted by the Record; For in the Record the averment is onely taken that the Executor had Assets to pay all debts. And in *Mich.* 29 & 30 *Eliz.* in an action upon the case brought by *Codington* against *Hulet*, as Executor, &c. upon an *Assumpsit* made by the Testator for payment of a debt, the Defendant pleaded *Non assumpsit*, and it was found against him; and in arrest of Judgement it was moved, that the Declaration was insufficient, because the Plaintif had not averred that the Defendant had Assets to satisfie the Testators debts. And it was adjudged by Sir *Christopher Wray*, Sir *Thomas Gaudie*, and the whole Court, that the Declaration was good enough; and that the same shall come on the other part; *sc.* on the Defendants part. As in an action of Debt against Executors, or against the heir, no averrment is in the Declaration that they have Assets, and the Law intendeth that every one will in discharge of his Conscience leave Assets to pay all his debts, which he ought to pay to any one.

Hill. 9. Jacobi. *In the Kings Bench,* *Rot.* 1112.

William Bane's Case.

William Banes brought an action upon the Case upon an *Assumpsit* against *Edward Pain* and *Mary* his wife, and declared, That where *William Harvet* was indebted to the Plaintif in 77*l.* which the Plaintif had lent unto him; that the said *William Harvet* made his will, and thereof made the said *Mary* Executrix, and died, and that the said *Mary* did take upon her the charge of the will; and that she was possessed as Executrix of an Interest of a Term for divers years yet to come of certain gardens, and of a Bowling alley in *Moor* fields in the Parish of St. *Leonrads* in *Shoreditch* in the County of *Midd.* The said *Mary* perceiving the said *William Banes* would sue her for not paying of the said debt, in consideration that the said *William Banes* at the request of the said *Mary* should not trouble or sue the said *Mary* for the said 77*l.* but would defer the payment thereof till *Michaelmas* following, assured to pay the said debt at the said Feast, or otherwise the said *Mary* then and there would assign to the said *William Banes* for his security in that part for payment of the said 77*l.* all the interest of the term of years aforesaid, &c. in default of payment of the said 77*l.* and averred, that the Plaintif did not trouble or sue her, *&c.* and that at the said Feast did not pay her money, nor made assignment of the said interest; and afterwards the said *Mary* married the said *Ed. Pain*: The Defendants pleaded *Non assumpsit*, and it was found against them to the damages of 88*l.* &c. Upon which a general Judgment was given against *Ed. Pain* and his wife, *&c.* that the Plaintif should recover against them his damages: Upon which Judgment, the Defendants brought a Writ of Error in the Exchequer Chamber, by the Statute of 27 *Eliz. c.* 8. And the principal Error assigned was, because the Plaintif hath not averred, That the Executrix had assets in her hands at the time of the *Assumpsit* made of the goods of the dead amounting to the value of the debt; and if she had not, then it is but *nudum pactum*, for there is no Consideration to Charge her, nor to bind her to her promise; and so much the rather, because by this promise she shall be charged generally, and not onely of the goods of the dead; and therefore, because the *Assumpsit* chargeth her self, and transferreth the charge of her as Executrix, into another Right to her self as for her proper debt, in respect to her promise, reason requireth, that there ought to be some good Consideration thereof, which cannot be, if she hath not Assets. [b] [94]

But it was Resolved by all the Judges of the Common Pleas and Barons of the Exchequer, that the Declaration was well enough, for it shall be intended *prima facie*, that she hath Assets; and therefore in debt against Executors, or against the heir, the Plaintif shall never averr in his Declaration, that they have Assets, for the Law doth presume that *prima facie*; for the Law doth presume that the Testator or the Ancestor will not lay a greater charge upon his Executors or heir, then he leaveth benefit to discharge it. And the Consideration in the case at barr is good; For it is as much as if a Stranger had said to the Plaintif, forbear your debt, and doe not sue the Defendant until *Michaelmas*, and at the said Feast I will pay you your debt, that is a good Consideration, although it cannot be any benefit to him who maketh the promise; yet because it is a damage to the Creditor to forbear his sute and dutie, it is a good Consideration: and as in the same case he who maketh the promise for another shall be generally charged upon his own promise; So where one is Executor, and maketh such a promise, the debt is due by him in right of his Executorship, and the promise is made in his own right; and therefore without Question he shall be charged in an action brought upon his *Assumpsit* generally, and yet the money which he payeth in satisfaction of the debt of the Testator, shall be allowed to him as parcel of his accompt as Executor; for his promise doth extend to pay the debt with which he is chargeable as Executor; But I conceive, If the truth of the case be that in the case at barr there had not been any debt, and if there had been a debt, and the Executrix had nothing in her hands at the time of the promise, she might have given the same in Evidence, and thereupon have been helped, for then in truth there was not any Consideration, for to forbear the debt where there was none, or with which she was not chargeable, is not any benefit to the Defendant, nor damage to the Plaintif. Also the case at barr was much the stronger, because the Defendant did promise either to pay the money, or to assign the Interest in the Lease which she had as Executrix, for it was in her Election to doe which of them she would. And so Note that the principal point is resolved in both Courts.

Hill. 9 Jacobi *In the Chancery.*

Sir *George Reynel*'s Caſe.

[95] THE Caſe in the Chancery, between the King and Sir *George Reynel*, heard before the Lord Chancellor, *Coke* chief Juſtice, *Tanfield* chief Baron, *Warburton* Juſtice of the Common Pleas, and Sir *James Altham* one of the Barons of the Exchequer, was ſuch, *Edward Peacok* had and held the office of the Marſhal of the Marſhalſea before our Lord the King for the term of his life. The King that now is, 2 *Sept.* in the 1. year of his reign, granted the ſaid office to Sir *James Elphinſton*, [b] now Lord *Balerinoth*, and to his aſſigns for 31 years in Reverſion, who 26 *Jan.* 2 *Jacobi* by Deed aſſigned the ſame to *Henry Spiller*; *Ed. Peacock* died 7 *Decemb.* 3 *Jac.* who deputed Sir *George Reynel* by word to exerciſe the ſaid office as his Deputy at will: and afterwards in *January* following *Henry Spiller* by his Deed aſſigned the ſaid office to Sir *George Reynel*. And it was further found by force of a Commiſſion under the great Seal, and returned in the Chancery, that Sir *George Reynel* had committed divers forfeitures of the ſaid office by ſuffering voluntary eſcapes of Priſoners, *&c.* And the only Queſton which was argued at the bar in the Chancery by order of Court was, If upon this office the King might ſeiſe without a *Scire facias*, (for no queſtion was made upon the validity of the office;) But after the Arguments I moved, If this office might be granted for years, or not. And then the Lord Chancellor conceived it could not, but deſired us to conſider of 2. points. 1. If the King might ſeiſe without a *Scire facias*; and 2. If ſuch an office might be granted for years. And we took advice thereof till this Term; and in the vacation 4. Judges ſeverally did conſider of 2. points, and in the beginning of this Term we met and conferred together.

And as to the firſt it was Reſolved by us, That the King might ſeiſe without ſuing forth any *Scire facias* for the reaſons and cauſes which *Coke* chief Juſtice delivered this Term openly in the Chancery. And becauſe that divers Authorities were cited at the bar, and ſome ſeem to contradict the other, he made Report in this manner. 1. In ſome caſe the King ſhall be in poſſeſſion by ſeiſure without office, as in 21 *H.* 7. and *Stamford* in the Caſe of the Temporalties of a Biſhop and of Priors aliens, becauſe the certainty of them appeareth in the Exchequer, *& fruſtra fit per plura, quod fieri poteſt per pauciora.* 2. In ſome caſe the King ſhall be in poſſeſſion by office without ſeiſing, as of Lands, Tenements, offices which are local, or whereof continual profit may be taken: as where it is found by office that a Condition is broken or that a perſon attaint is ſeiſed of Land, *&c.* or in the caſe of Ward of Land, *&c.* in all theſe caſes the King preſently by office is in poſſeſſion before any ſeiſure. *Vide* 2 *H.* 7. 8. 9 *H.* 7. 2. 12 *H.* 7. 1. *&* 19. 14 *H.* 7. 21. 15 *H.* 7. 6. 21 *H.* 7. 18. *Stamford* 55. 56. *&c.* *Vide* 26 *Eliz. Dowties* Caſe in the 3. part of my *Reports*, and *Trin.* 26 *Eliz.* the Company of *Sadlers* Caſe in the 4. part of my *Reports*. 3. In ſome caſe the King ſhall be in poſſeſſion by office and ſeiſure, as in caſe of Advowſon, *&c.* the right Patron ſhall not be ouſted by ſuch falſe office found thereof, till the King preſent, and his Clerk be admitted and inſtituted; for if the King's Clerk be refuſed, and the King bringeth a *Quare Impedit*, he may traverſe the King's Title found by the office in the ſame action, and is not put firſt to traverſe the office as he is put in the Caſes before ſaid of Inheritances manual, where by office the King is in poſſeſſion; for there he ought [96] firſt to avoid the office by traverſe, *&c.* and till the office be avoided, the King ſhall be in poſſeſſion, 17 *E.* 3. 10. 20 *E.* 4. 10. and 14. 21 *E.* 4. 1. and *Dowtie*'s Caſe before. As if the Mannor of *Dale* holden of the King be aliened in Mortmain by one who hath nothing in it; and it is found falſly by office, that he who aliened was ſeiſed in fee and aliened in Mortmain by this office the King is in poſſeſſion preſently, and in any ſute or Information commenced for the King for the profits thereof, the right owner ſhall not traverſe the King's title found by the office, but firſt he ought to avoid the office by traverſe, *&c. Vide* 9 *H.* 7. 2. But if one alieneth an Advowſon in Mortmain, in which he hath nothing, and it was found falſly that he was ſeiſed in fee, and aliened in Mortmain, the King thereby is not in poſſeſſion of the Advowſon until he preſent, and his Clerk is admitted and inſtituted; and if in ſuch caſe his Clerk be refuſed, and the King bringeth a *Quare Impedit*, the right Patron may traverſe the King's title in the *Qu. Impedit*, before he avoid the office by traverſe, *&c.* becauſe the Advowſon is not manual, but *hereditas incorporea*, and ſo much the rather, becauſe the Right to preſent, when the ſame falleth, is caſual and not continual. 4. In ſome caſe the King ſhall be in ſeiſin, without any office or ſeiſure; As where the King's Tenant dieth without heir, *&c.* the Law caſteth the ſeiſin upon the King, without office or ſeiſure, as in 9 *H.* 7. 2. See *Dowtie*'s, and the Company of *Sadlers* Caſe. 5. When 2. diſtinct matters of Record amount to an office, there ought to be a *Scire facias* before the King ſeiſeth, although a Common perſon in ſuch caſe may enter or ſeiſe, if it be not in ſpecial caſes; As if it be found by office, that the Mannor of *D.* is holden of the King, and it appeareth by fine of Record that the Mannor of *D.* is aliened in Mortmain, there ought to be a *Scire facias*, in which it ſhall appear by averment that all is one and the ſame Mannor, for there may be divers of one name, and that he who aliened was ſeiſed, for both without ſuch averment ſhall not put the party to anſwer, but when there is identity of a thing, and it appeareth to the Court that they cannot be divers, there 2. matters of Record ſhall amount to an office: As in the caſe of Sir *John Savage*, who was Sheriff of the County of *Worceſter* for life by Letters Patents under the Great Seal, he was indicted of 2. voluntary eſcapes of Felons, and it was holden by the Court

Court in the King's Bench that theſe Records doe amount to an office, and that the King might ſeiſe without a *Scire facias*; and the reaſon was, that it appeareth to the Court, that there cannot be but one Sheriff in a County, and therefore there needeth not any *Scire facias* in ſuch Caſe: *Mich.* 8 *H.* 8. *Rot.* 21. reported by *Dyer* 4, and 5 *Phil. & Ma.* 151. *b.* Note a good difference, *Vide* 16 *E.* 3. *bre.* 651. 21 *Aſſ.* 36. 40 *Aſſ.* 46. 50 *Aſſ.* 2, 2 *E.* 3. 10. *b.* 4 *Eliz. Dyer* 211. 30 *E.* 3. 41. 6. In all caſes when a Common perſon is put to his action; there upon an office found the King is put to his *Scire facias*, as in Caſe of Waſte, *Ceſſavit*, &c. But when a Common perſon may enter or ſeiſe, there an office without a *Scire facias* ſhall ſerve for the King. 12 *H.* 7. 21. 14 *H.* 7, 2. 15 *H.* 7. 6. *Stamf.* 54. *Vide Dowtie's* Caſe aforeſaid; and by theſe differences apparent in our Books, all the Books are well reconciled and agreed. [b]

And for Authorities in Law in caſes of offices, 8 *H.* 4. 8. The Abbot of St. *Albans* had a Gaol, and detained Priſoners, becauſe he would not be at the charge to ſue forth a Commiſſion for their delivery, the King hath cauſe to ſeiſe the franchiſe into his hands; 20 E. 4. 5. The Abbot of *Crowland* had a Gaol in which Priſoners were impriſoned, and becauſe that once he kept men who were acquitted of felony, and alſo would have paid their fees, the King reſeiſed the Gaol for ever, and that was for miſuſing of the Franchiſe. 5 E. 4. 3. The Duke of *Norfolk* being Marſhal of *England*, granted the office of the Marſhal of the Marſhalſea of the King's Bench to one *John Bouchier* for term of his life, with warranty, who was admitted accordingly of Record, and afterwards the Duke died, his heir within age; and it was found by office that the Duke died ſeiſed of an eſtate tayl in the ſaid office, and that the ſame deſcended to his heir within age; And there it is holden, by this office *Bouchier* was out of poſſeſſion, and the King is in poſſeſſion till he hath avoided the office by traverſe, *&c.* And *Coke* chief Juſtice cited a Record in *Trinit.* 21 E. 1. *Rot.* 33. *Cant. coram Rege: Fulco de Vallibus Attornatus, ſive Vicegerens Rogeri Bigot Com. Norff. & Mareſchal. Angliæ, quia permiſit Alanum Oſmond qui utlegatus fuit pro morte Henrici Hagam qui fuit ſub Cuſtodia ſua ſicut nullo crimine rectatum, & miſſas in duabus eccleſiis audire, & per plateas, vicos, & tabernas, ſine compedibus ambulare & vagari, forisfecit officium ſuum mareſchal una cum virga, quæ capiantur in manibus Regis, & committitur Vicecom. Cantiæ.* And the ſaid Caſe of Sir *John Savage* was cited again to this purpoſe: for which cauſe it was concluded, That in the Caſe at Bar the King might ſeiſe without any *Scire facias*; and all this was agreed by the Lord Chancellor of *England*.

As to the other Queſtion, it was Reſolved by the chief Juſtice, chief Baron, and Juſtice *Warburton*, that the ſaid grant for years of the ſaid office was void. 1. Becauſe this office is an office of great truſt annexed to the perſon, and concerneth the adminiſtration of Juſtice, and the life of the Law, which is to keep thoſe who are in execution in *ſalva Cuſtodia*, to the end they may ſooner pay their debts, *&c.* and this truſt is individual and perſonal, and ſhall not be extended to the Executors or Adminiſtrators. For the Law will not repoſe Confidence in matters concerning the adminiſtration of Juſtice in perſons unknown. 2. This office doth require a continual attendance in Court, and perhaps the Leſſee may die Inteſtate, and then who ſhall be Officer till Adminiſtration be granted? Shall the Ordinary, or who elſe? And if the Officer dieth in debt and none will prove the Will, or take Adminiſtration, who then ſhall be Officer? *&c.* 3. Every ſuch Officer ought to be admitted by the Court, and ſworn there; but if ſuch Officer ſhall be admitted for years, then the Executors, or Adminiſtrators ſhall be Officers without allowance, or admittance, which ſhall be inconvenient. 4. This is an antient office, and hath alwaies been granted for their life, or at will, ſo that the perſon was certainly known, and before this time there was never any grant thereof for years, and in theſe caſes Innovations are dangerous. 5. If it may be granted for years, it may be demanded if it ſhall be forfeited by Utlary, or ſhall be Aſſets to his Executors, and many other Queſtions will ariſe upon it. *M.* 16 *H.* 6. *rot.* 63. in the King's Bench, this office was granted for life. 39 *H.* 6. 32. granted to *Brandon* for life. 5 *E.* 4. 3. this office was granted to *Bourchier* for life, *M.* 10 *&* 11 *Eliz. Dyer*, to *Gawdie* for life, and in no Book or Record can it be found before this time, that this office hath been granted for years. But yet by an Act in Law, a Term which is but a Chattel may be in ſuch office, as it appeareth in 5 *E.* 4. 3. The Duke of *Norfolk* had an eſtate tayl in the office holden of the King *in Capite*, and died, his heir within age, and the ſame found by office, in this caſe the King hath a Chattel in the office, *ſc.* during the minority, and if the King dieth, it ſhall deſcend to the next King, and ſhall not go to his Executors nor Adminiſtrators, ſo an Act in Law doth not introduce any inconvenience. But there it is put, That if the King grant the office for life, or during the minority, there ought to be a *Scire facias* againſt the Patentee; and without queſtion the grant for life in ſuch caſe, the King having but a Chattel, is void. And ſo for the cauſes aforeſaid it ſeemeth the grant thereof, during the minority, for if the Grantee ſhall die, his Executors or Adminiſtrators ſhould have it, which ſhould be inconvenient. And the principal caſe of 5 *E.* 4. 3. The King having the office in Ward, granted the ſame to *Wingfield* at will, which without queſtion ſtood good in Law. And where the chief Baron in 39 *H.* 6. 32. ſaith, If a man granteth an office to another for life or for years, and he will not execute his office, or otherwiſe miſdoth in his office, the Grantor ſhall ſeiſe his office: Firſt it doth not appear what manner of office he meaneth, *ſc.* of great truſt, or Adminiſtration of Juſtice. 2. It is but a ſudden opinion, and not pertinent to the caſe there in queſtion: And there neither *Priſot*, nor any of the other Judges do affirm, That the ſaid office of Marſhal may be granted for years. And where it was objected, That the King may grant the Cuſtody of a Gaol to another in fee; and alſo to be Sheriff of the County to one and his heirs, which eſtate in fee ſimple doth include all other eſtates, and the heir in ſuch Caſe is as well unknown at the time of the grant, as the Executors or Adminiſtrators in the caſe of a grant for years. To that it was anſwered, That it is true, That ſuch grants may be made by Law, but they differ from the caſe at Bar for divers cauſes. [97] [b]

1. There

1. There cannot be ſuch intermiſſion, for preſently by the death of the Anceſtor, the office doth deſcend to the heir. 2. Such eſtate cannot be forfeited by Outlawry. 3. In antient time the Earl had the Cuſtody of the County, and was called *Præpoſitus Comitatus*, Shire-reeve, *ſc.* Reeve of the Shire, which is as much as *Præpoſitus Comitatus*, and afterwards it was transferred to the Sheriff, who is *Vicecomes, id eſt, in Vice Comitis*; but as the King cannot grant to one, that he and his Executors or Adminiſtrators ſhall be Earls for years, for then his Executors or Adminiſtrators, one being appointed by himſelf, and the other by the Ordinary, ſhould be Earls: for without queſtion the King may Create an Earl for life in tail, or in fee. 4. This office of Marſhal, *&c.* ought to come in by admittance or allowance of the Court; ſo cometh not in the Sheriff, or Gaoler. 5. Grants of ſuch offices in fee, or for life, have been allowed and approved, but ſuch grants for years, were never allowed or approved. *Et periculoſum exiſtimo quod bonorum virorum non comprobatur exemplo.* And if this, and other ſuch offices may be granted for years, then the offices of *Cuſtos Brevium*, of the Cirographer, or of the King's Silver, *&c.* may be leaſed in poſſeſſion or revertion for 1000 years or more; So of the Clerk of the Pipe, and of the King's Remembrancer in the Exchequer; and ſo of the office of Clerk of the Crown in this Court, and of other offices in other Courts, upon which would follow the ſubverſion of Juſtice, by reaſon of Ignorance in the Officers: For good Clerks ſhall be deterred to apply themſelves to get knowledge and experience, when ſuch offices ſhall be ſaleable, and transferred from one to another for lucre and gain; upon which alſo will follow corruption in the Officers, and Extortion from the Subjects, and other great In-
[98] conveniencies. And the Lord Chancellor hearing theſe reaſons, agreed clearly with this Reſolution, and ſaid, That ſuch was the Opinion of Sir *John Popham* late chief Juſtice of *England*, in all ſuch Caſes; as he had often affirmed to the ſaid Lord Chanchellor, and to me alſo when I was Attorney General.

And it was alſo Reſolved, That for as much as the office was found by force of a Commiſſion under the Great Seal and returned in this Court, that (although the Office be to be executed in another Court) yet the Award of the ſeiſure ſhall be in this Court, where the office is returned, and in this Court the party ſhall have his traverſe, or *Monſtrans de droit*, as his Caſe is, to avoid the office, and when ſuch Award ſhall be made, the Cuſtody of the Priſoners is to be committed to another, to avoid the Eſcapes of thoſe who are in the Priſon, and ſo hath it alwaies been uſed, but the admittance and allowance of ſuch perſon to whom the Cuſtody ſhall be newly in the interim committed, belongeth to the Court of King's Bench. Then the Lord Chancellor demanded, how this ſeiſure ſhould be made? And I anſwered, That by the office and the award of the ſeiſure, the King is in poſſeſſion without any Writ or Commiſſion awarded to this purpoſe; but that there ſhall be a Writ of Diſcharge directed to Sir *George Reynel*, according to the effect of the Writ in the *Regiſter*, 295. when an Eſcheator is removed. *Et mandatum eſt nuper Eſcheatori R. in Com. præd. quod eidem I. rotulos, brevia, & omnia alia Offic' illud tangentia quæ in Cuſtodia ſua exiſtunt per Indenturas inde inter eos debite conficiend' liberet, &c.* And the like Writ ſhall be directed to Sir *George Reynel*, to deliver by Indenture all the Priſoners, *&c.* which are in his Cuſtody; and as when the King is falſly entituled by Office, and upon Petition, Traverſe, or *Monſtrans de droit*, Judgment is given, *quod manus Dom. Regis amoveantur*, that without other Writ the hands are removed, as it is holden in 10 *Aſſ. p.* 2. 10 *E.* 3. 2. *Aſſ.* 156. 5 *E.* 3. *Qu. Imp.* 34. *Stamf. prærogat.* 78. and ſo it was adjuged in the Common Pleas between *Brown* and *Terry*, *Hil.* 37 *Eliz. rot.* 620. and yet in ſuch caſe the uſe is, to have a Writ of *Amoveas manum*: ſo that when an Office findeth a forfeiture, preſently by the Law the party is out of poſſeſſion, and the King is in poſſeſſion, and yet the uſe is, and to good purpoſe, to have ſuch a Writ of Diſcharge as is aforeſaid; and yet till he be actually removed he ſhall anſwer for all eſcapes. For he who holdeth, or hath the Cuſtody of a Gaol wrongfully or of right, ſhall be charged with eſcape of Priſoners, 11 *H.* 4. 73. And he who hath the Cuſtody of a Gaol in fee, and doth ſubſtitute another at will, or for life under him, the action upon the eſcape will lie againſt him who hath the actual poſſeſſion of the Office, 13 *E.* 3. *bar* 253. The Abbot of *Weſtminſter*'s caſe againſt a Gaoler at will, 10 *Eliz.* 278, 279. *Dyer. Gaudy*
[*b*] Under-Marſhal for life; But if they are ſufficient; *reſpondeat ſuperior, ſc.* he who granted at will, or for life, as appeareth in 39 *H.* 6. 32. for the inſufficiency of *John Brandon* who had the Marſhalſey for life, the Duke of *Norfolk* who had the Inheritance was charged for eſcape of Priſoners. And a Caſe was cited which began in this Court *Paſch.* 21 *Eliz. Rot.* 1. *inter placita Reginæ*, the Record of which began in this manner. *Midd. Conſtat quod Dom. Philippus & Domina Maria nuper Rex & Regin. Angliæ, ſoror Dom. Reginæ nunc perchariſſimæ, pro ſe & heredibus & ſucceſſor. dict. Reginæ Mariæ, per eorundem nuper Regis & Reginæ Philippi & Mariæ literas patentes ſub magno ſigillo ſuo Angliæ confect. gerend. Dat. apud Weſt. 23 die Septemb. annis eorund. nuper Regis & Reginæ* 3. & 4. *Dederunt & Conceſſerunt Marco Steward generoſo officium Serdien. eorund. ſuper Regis & Reginæ Mariæ ad arma, attendend. ſuper Cancell. Angliæ pro tempore exiſtent. Ac ipſum Marcum Servientem ſuum ad arma fecer. ordinaverunt, & conſtituerunt per eaſdem Literas patentes, Habend. & gaudend. Officium illud pro termino vitæ ſuæ*, with all fees, and a certain fee of 12 *d.* by the day, By force whereof the ſaid *Mark* was ſeiſed of the ſaid office for term of his life; and it was found by office 24 *Junii* 19 *Eliz.* by force of a Commiſſion, *&c.* directed to *Randal Harleſton, John Nuthall* Eſquires, and others, and returned in the Chancery, *quod præd. Marcus non deſervivit in officio Servientis ad arma præd. juxta effectum & tenorem præd. literarum patent. ſibi confect. de* 8. *die Octob. anno regni dict. Dom. Reginæ nunc* 12. *uſque* 1. *diem Feb. tunc ult. præterit. ante captionem Inquiſit. præd. ſed per totum idem tempus ab eodem officio ſe abſentavit. Et modo ad hunc diem, ſc.* 7. *diem Maii, Anno reg. dict. dom. Reginæ nunc* 21. *venit hic præfat. Marcus Steward, & queritur ſe ratione & colore inquiſit. præd. ab exercitio officii ſui præd. amotum*

amotum esse, & hoc minus juste, (by which appeareth that presently by the Inquisition he was in Law removed from the said Office, which also appeareth by the Judgment) *pro monstratione recti sui in hac parte, idem Marcus dicit, quod Domina Regina nunc*, sc. *ult. die Novemb. Anno Regni sui* 11. *apud West. in Com. Midd. dedit eidem Marco licentiam, ad se absentand. ab exercitio Officii sui præd. durante beneplacito ipsius Marci, donec per ipsam Dom. Reginam ei perciperetur ad deserviend. in officio suo præd.* And that from the time of the License till this day, the Queen did not command him to exercise the said Office &c. *Gerrard* the Queens Attorney General took issue, *Quod eadem Domina Regin. non dedit eidem Marco licentiam ad se absentand. ab exercitio Officii sui præd. durante beneplacito ipsius Marci, donec per ipsam Dom. Reg. nunc ei perciperetur ad deserviend. in officio suo præd. modo & forma, &c. Et hoc idem Attornat. &c. pet' quod inquiratur per patriam, & præd. Marcus similiter: Ideo dies datus est coram eadem Domina Regina in crastino Ascension. Dom' ubicunque tunc fuerit in Anglia ad faciend. & recipiend. quod juste fuerit in præmissis, & Venire facias* awarded to the Sheriff of *Midd.* returnable in the King's Bench at the same day. [99] And Sir *Thomas Bromley* Knight Chancellor of *England, die Lunæ post cr'um ascensionis Domini termino Pasch.* 21 *Eliz. Reginæ per manus suas proprias deliberavit record. præd. coram ipsa Regina in Cancell. sua habitum, in Cur. coram Domina Regina*, sc. the Court of King's Bench, and *in crastino Ascensionis* a Jury was returned who appeared and gave a special verdict, They found the said Letters Patents of King and Queen *Phil.* and *Ma.* to the said *Mark Steward* of the said Office, which are entred *in hæc verba.* And further found, that at the humble Petition of the Earl of *Leicester*, and Dr. *Huit, Domina Regina præd. ult. Novembris Anno Regni dict' Dom. Regin. nunc Concessit quod idem Marcus seipsum absentaret ab exercitio dict' officii sui durante beneplacito ipsius Marci quousque eadem Regina ipsum perciperet deservire in officio suo præd.* And that *Augustine Steward*, Brother of *Mark Steward*, 6 *Marcii Anno* 11 *Reg. per dict' Dom. Regin. admissus ad attendend. loco & vice ipsius Marci fratris sui nuper* N. Bacon *militent adtunc Dom. Custodem magni sigilli*, and then in the presence of the Queen was sworn, *&c.* by force whereof the said *Augustine* did exercise the said Office, *usque* 20 *Junii, Anno* 18 *Eliz. Sed utrum dict' Dom. Regin. per verba tantum absque script. sigillar. potest sufficient.. in lege licentiam dare eidem* Marco *ad se ipsum absentand. ab exercitio officii sui præd. Jur. præd. penitus ignorant; & inde pet. auxil. & advisament. Cur. in præmiss.* And this Case was argued at the Bar and Bench, and depended in advice till *Michaelmas* Term, and then it was Resolved by Sir *Ch. Wray*, chief Justice, and the whole Court, That the licence by word was good enough, and because that all pleas in the Chancery, according to the Ordinary power are *coram Dom. Regin. in Cancel.* and the Keeper of the Great Seal or Chancellor of *England*, is but the Queens Deputy during her pleasure, and therefore the service of the Sergeant at Arms made to the Queens Deputie, is in Law done to the Queen her self. And the same well appeareth by the said Letters Patents, for King and Queen *Phil. & Mary concesserunt, &c. officium servient. eorund. nuper Regis & Reginæ ad arma attendend. super Cancellar. Angliæ, &c.* so that he is the King and Queens Sergeant at Arms, and therefore the Queen may well license him to absent himself, *&c.* which in a manner is a refusal of his service for a time, for it is at her pleasure if he will accept his service or not, another reason was given, that the Queen doth not depart with any interest in this Case, but suspendeth the service of a Sergeant for a time, and therefore such license by Word was good enough. Also it was Resolved that it is true, That not attendance upon their office is a cause of forfeiture, but the same ought to be a voluntary negligence, and not when he hath the Queens assent, who is to take advantage of the forfeiture for not attendance. [b] And afterwards Judgment was entred in this manner, *Super quo visis & per Curiam hic intellectis omnibus & singulis præmissis maturaque deliberatione inde habita, Servient. dictæ Dominæ Reginæ ad legem ac ipsius Reginæ Attornat. ad hoc convocat. & præsent', consideratum est, quod dictum officium dicti servientis ad arma in manibus Dominæ Reginæ retent. eidem restituatur, & quod præd.* Marcus *ad exercitium officii sui præd. à quo amotus fuit, una cum vadiis & feodis inde eidem officio debitis & pertinen', à dicto tempore amotionis suæ, ab exercitio officii sui præd. hucusque percept. & detent. restituatur, salvo semper jure Reginæ si, &c.*

The Record at large of Mark Steward's *Case being a large Latin plea, is printed in the Book, but I have not thought fit to translate it, but you shall find it entred,* Ter. Pasch. 21 *Eliz.* Rot. 1. inter placita Reginæ.

Pasch. 10 Jacobi, *which began Mich.* 8 Jac. *Rot.* 3648. *In the Common Pleas.*

Margaret Podger's Case.

IN a Replevin between *Rafe Bicknel* Plaintif, and *John Tucker* Defendant, the Plaintif declared of taking his Cattel, *viz.* Sheep at *Curririvel*, in the County of *Somerset*, in a place called *Hilfield Close*, the Defendant made Conusance as Baily to *Margaret Podger*, because the place where, &c. was the freehold of the said *Margaret*, for damage feasance, &c. In Bar of which Avowry the Plaintif said, That before the said *Margaret* had any thing in the place [104] where,

where, &c. One *Thomas Wiſe* Eſquire was ſeiſed of the Mannor of *Hampenbridge* in the County aforeſaid, whereof the place where was parcel, And that the place where, &c. was demiſed, and demiſable by Copy of Court Roll, &c. for one, two, or three lives. And that within the ſaid Mannor, there was, &c. a Cuſtom, *Quod ille vel illa qui vel quæ, primus vel prima nominat. foret in tali Copia*, ſhould have the Lands and Tenements to him only for his life, and he who was ſecond named ſhould have the ſame only for his life, after the death of him who was firſt Tenent, and ſo of the third after the death of the ſecond. And that the ſaid *Tho. Wiſe* Lord of the ſaid Mannor, at a Court holden 15 *Oct.* 9 *Eliz.* granted the place where, &c. to *John Podger* and *Eliz.* and *Mary* his daughter for their lives, &c. for which *John* entred, &c. and died, after whoſe death *Eliz.* entred, and married the ſaid *Raſe Bicknell* the Plt. for which he entred, and took the Cattel, &c. and averred the life of *Elizabeth*: The Avowant replied and confeſſed the ſaid *Tho.*
[b] was ſeiſed of the Mannor, and that within the ſaid Mannor there were ſuch cuſtoms, as the Tenant in Bar of the Avowry had alledged and confeſſed, alſo the grant made to *John Podger*, *Eliz.* and *Mary*, *prout*, &c. but further ſaid, That the ſaid *John Podger* of the place where, &c. ſo ſeiſed, The ſaid *Tho. Wiſe* Lord of the ſaid Mannor, *Anno* 23 *Eliz.* by deed indented and inrolled in the Chancery, according to the Statue for 46 *l.* 13 *s.* 4 *d.* bargained and ſold to the ſaid *John Podger*, the place where, &c. to have and to hold to him his heirs. By force of which, and of the Statute of transferring of uſes into poſſeſſion, the ſaid *John Podger*, was ſeiſed of the place where, &c. in fee, and the ſaid *John Podger* ſo ſeiſed, The ſaid *Tho. Wiſe Menſe Mich.* 23 *Eliz.* levied a fine *come ceo*, &c. of the place where, &c. to the ſaid *John Podger* and his heirs with Proclam. according to the Statute of 4 *H.* 7. And afterwards 39 *Eliz. John Podger* died ſeiſed, after whoſe death the ſame deſcended to *Marmaduke Podger* his Son and heir, who thereof 4 *Jac.* levied a fine to *Collins* and *Northover*, and to the heirs of *Collins*, which was to the uſe of the ſaid *Marmaduke*, and *Margaret* his Wife, and to the heirs of the ſaid *Marmaduke*, (but this fine was not pleaded to be with Proclamations) and afterwards 24 *Junii* 8 *Jac.* the ſaid *Marmaduke* died, and *Margaret* ſurvived him, and was thereof ſeiſed for the term of her life, and afterwards the Plaintif entred into the ſaid Tenements, and put in his Cattel, &c. and that 10 years and more after the death of the ſaid *John Podger* were paſt, and that the ſaid *Eliz.* 1 *Nov.* 39 *Eliz.* accompliſhed her age of 21 years, and that ſhe was not married, nor *Non compos mentis*, nor out of the Realm, nor in Priſon; And that the ſaid *Eliz.* after the death of *John Podger*, and after her full age, nor the ſaid *Raſe* and *Eliz.* after their marriage within 5 years, and not any entry or claim, &c. by which ſhe was barred of all right and claim of and in the place, where &c. Upon which the Defendant did demur in Law. And in this caſe 3 Queſtions were moved. 1. If cuſtomary eſtates granted by Copy, at the will of the Lord, according to the cuſtom of the Mannor, &c. be within the Statue of 4 *H.* 7. *cap.* 24. of Fines, to be barred by fine with Proclamation and Nonclaim by 5 years. 2. Admitting that ſuch eſtates were within the ſaid Statute, if by acceptance of the ſaid bargain
[105] and ſale, they in the remainder of the Copy-hold eſtate were put out of poſſeſſion of their Remainder, or if their Remainder doth continue in them. 3. If after the ſaid bargain and ſale to *John Podger*, *Eliz.* in the Remainder might enter. As to the firſt it was Objected, that ſuch Cuſtomary eſtates are not within the ſaid Act, for divers cauſes. 1. In reſpect of the buſineſs of the eſtate; for in the Judgment of Law, they have but a Tenancy at will, which is ſo weak, that the makers of the Act never meant to include them within the general words of the Act, no more than the Statue of *Weſt.* 2. *de donis*, &c. did extend to ſuch baſe eſtates granted by Copy at will, as it was reſolved by the whole Court in the laſt Term, upon evidence to a Jury in Treſpaſs, between *Thornton* and *Lucas* for lands in *Lambeth*, in the County of *Surrey*, which began 9 *Jac. Rot.* 5129. *Vide Heydon's* caſe in the third part of my *Reports*. Secondly, it ſhall be very prejudicial to Lords of Mannors; for if a diſſeiſor of land holden by Copy levieth a fine with Proclamation, it ſhall be dangerous to Lords, that they loſe not only their fines upon alienations or deſcents, and the benefit of forfeitures, but alſo ſhall be in hazard to loſe and be barred of theſe freehold and inheritance of lands holden by Copy, without any fault in them. But it was reſolved by the whole Court, That lands holden by Copy are within the words and intent of the ſaid Act of 4 *H.* 7. for the words of the Act are general. And the ſaid Proclamation ſo had and made, the fine to be final, end and conclude as well privies as ſtrangers to the ſame. And if no exception had been in the Statute by the words aforeſaid, all perſons general ſhould be concluded, as it is holden in 19 *H.* 8. 6. and 7. Then it is to ſee what things are ſaved by the ſaid Act; the words of the ſaving are. And ſaving to every perſon, &c. ſuch right, claim, or intereſt, &c. ſo that they purſue their intereſt, title, or claim, within 5 years after the Proclamations: Within which words and principally this word (Intereſt) a leaſe for years is included, ſo that if he make not his entry or claim within 5 years, he ſhall be barred, as it was Reſolved in *Saffin's* Caſe in the 5 part of my *Reports*. And there the words of the preamble of the ſaid Act are well obſerved. *That fines ought to be of greater ſtrength to avoid ſtrifes and debates, and to the final end and concluſion*, &c. And there it is inferred, That great miſchief, vexation and trouble would follow, if leaſes for years (which now many times are made for a greater number of years, &c,) ſhould not be within the ſaid Act. But greater miſchief, vexation, and trouble would follow if the ſaid Act ſhould not extend to cuſtomary lands holden by Copy, for a great part of them is granted in fee-ſimple, ſo that it ſhould be more miſchievous, and greater cauſe of ſtrife, than the ſaid caſe of an eſtate for years. And as to the ſaid Objections, they are anſwered by the ſaid Reſolution of the Caſe of eſtate for years, for ſuch prejudice might be Objected in ſuch caſe to the Leſſor, as well for his benefit of forfeiture, &c. as for the hazard of his inheritance, as in this caſe of Copy-hold to the Lord. But if Leſſee for years, or a Copy-holder aſſent by Covin to Bar the Leſſor or Lord of his Inheritance,

ritance, maketh a feofment, and levieth a fine with proclamation, in the ſame mannor as appeareth in *Farmers* Caſe in the 3 part of my *Reports*; ſuch fine ſhall not barr the Leſſee or the Lord for the reaſons there given at large. And the eſtate of a Copyholder is not meerly an eſtate at will, but according to the cuſtom of the Mannor, which cuſtom hath fixed and made firm his eſtate.

Note Reader a difference betwixt a leaſe for years, and a leaſe for life, and alſo betwixt a grant by Copy, &c. for life, or in fee, by cuſtom, &c. and a leaſe for life by the Common Law: for if Leſſee for years be ouſted, and he in the reverſion diſſeiſed, and the diſſeiſor levieth a fine with proclamations, and 5 years paſſe, as well the Leſſor as the Leſſee is barred by their Non-claim, and the Leſſor ſhall not have five years after the years expired. So if a Copyholder for life, or in fee be ouſted, and the Lord diſſeiſed, and the Diſſeiſor levieth a fine with proclamation, and 5 years paſs, as well the Lord as the Copyholder is barred, and the Lord in ſuch caſe ſhall not have 5 years after the death of the Copyholder for life. And the cauſe of theſe differences ariſe upon the words of 2 ſavings in the ſaid Act of 4 *H.* 7. the firſt ſaving is *Saving to every perſon, ſuch Right, Claim, and Intereſt, &c. ſo that they purſue their title, claim, or intereſt by way of action, or lawful entrie within* 5 *years, &c.* The ſecond Saving is, *And ſaving to all other perſons ſuch Action, Right, Title, &c. as ſhall grow, remain, or deſcend, or come to them after the ſaid fine, &c. by force of any gift, &c. or by any other cauſe or matter had or made before the ſaid fine.* The firſt ſaving extendeth to thoſe who have preſent Rights, and may preſently enter and have their action to recover their lands, and therefore they are confined to 5 years after the fine levied. And the ſecond Saving extendeth to thoſe who at the time of the fine levied, cannot preſently have the action, nor make Entry, but *in futuro*, and therefore they ſhall have Five years after that their action, &c. firſt accrueth. Then when Leſſee for years, or Tenant by Copy &c. for life, or in fee, be ouſted, and the Leſſor or Lord diſſeiſed, the Leſſor or the Lord may preſently have an Aſſize or other real action to recover the land, and therefore they are within the firſt Saving, and by conſequence, if they do not bring their actions within five years after the fine levied, they are for ever barred. And they are not within the ſecond Saving, before the Leſſor or Lord hath a preſent action or remedie, and therefore he is out of the Second branch, for the action *&c.* doth not accrue firſt to him after the fine. And although a ſtranger of his own head cannot enter, in the name of him who hath right to avoid the fine without a Commandment precedent, or a ſubſequent aſſent within the five years, as it was Reſolved in the Lord *Audleys* Caſe, *M.* 38. *&* 39 *Eliz.* in the Kings Bench, where the Caſe was, That the Lord *Audley* being ſeiſed of certain lands, *Anno 6 Eliz.* levied a fine with [106] proclamation; and within the five years a meer ſtranger, who had not any right or intereſt in the land comprized within the fine, made an entry in the name of him who had right within the five years, without any requeſt or precedent Commandment, or ſubſequent aſſent within the 5 years, that this entrie ſhould not avoid the fine, for the ſaving in the ſaid Act hath appropriated the ſute by way of Action or lawful Entire to him who hath right either by precedent commandment, or ſubſequent aſſent within the five years *omnis enim ratihibitio retrotrahitur et mandato equiperatur:* And of ſuch opinion were all the Judges at Sergeants Inn in *Fleetſtreet*, as *Popham* Chief Juſtice openly reported in Court againſt the opinion in 31 *H.* 8. Entry Congeable, *br.* 123. *Vid.* 45 *E.* 3. *Releaſes* 28, Gardian by nurture or in ſocage may enter in the name of the Infant who hath right of entrie, and the ſame ſhall veſt the eſtate in the Infant, without any commandment or aſſent, for there is privity betwixt them, *Vid.* 10 *H.* 7. 12. 11 *Aſſ. p.* 11. and 26 *E.* 3. 62. *b.* by *Thorpe*. Yet he in the Reverſion expectant upon an eſtate for life or years, or the Lord of a Tenant by Copy, *&c.* may well within the ſaid Act enter in the name of the Tenant for life, Leſſee for years, or Tenant by Copy, and in his own right to ſave as well their freehold and own inheritance, as the ſaid particular intereſts, for the Leſſor or the Lord are not ſtrangers, for they are privies in eſtate, and as the entries of thoſe particular Tenants peravail the Leſſor and the Lord in ſuch caſes for the privity of their eſtate, ſo the entry of the Leſſor or the Lord in the names of the particular Tenants ſhall avail them for the privity of their eſtates, and for the ſalvation of their ſeveral Rights without requeſt precedent, or ſubſequent aſſent. For in ſuch caſe the Leſſor or Lord purſueth their title and claim which they have to the Inheritance by lawfull entry within the five years, but ſo doth not he who is a meer ſtranger, who hath not any right, becauſe the ſaving annexeth the entry to him who hath right, *&c.* as afore is ſaid. As to the ſecond point, It was Reſolved by the whole Court, That no fine nor warrantry ſhall barr any eſtate in poſſeſſion, reverſion, or remainder which is not deveſted and put to a right: for he who hath the eſtate or intereſt in him cannot be put to his Action, entrie or claim, for he hath that which the action, entry or claim would veſt or give him. 2. When the Lord made the bargain and ſale by Deed indented and inrolled to *John Podger*, The ſame did not deveſt the eſtate in them in remainder for divers cauſes. 1. Becauſe the Lord did [*b*] that which he might do by Law; and the Copyholder accepted that which he might well take. 2. The Copyholder was in lawfull poſſeſſion, and was only paſſive in this caſe, and not active; and by acceptance he who is in lawfull poſſeſſion, by force of a particular eſtate, cannot deveſt the eſtate of him who hath the freehold or Inheritance. And therefore if Tenant for life accepteth a fine of a ſtranger, *come ceo &c.* the ſame is a forfeiture 1 *H.* 7. but the ſame ſhall not deveſt the eſtate of him in the reverſion or remainder. 3. *John Podger* the Bargainee was in by force of a bargain and ſale by Deed indented and inrolled, by force of the Statute of 27 *H.* 8. of Inrollments, and an act of Parliament ſhall do no wrong. And thereupon the Chief Juſtice put a Caſe which was adjudged *Trinit.* 31. *Eliz.* in the Exchequer, between the Queen and the Lady *Greſham*, late the wife of Sir *Tho. Greſham* Knight, which was ſuch, Sir *Tho. Greſham* being ſeiſed of the Mannors of *Mileham*, *Caſtleacre*, *&c.* in the County of *Northfolk*, levied a fine thereof to *A. Stringer* and

Phil. Cely, *Anno* 12 *Eliz.* to uſes declared by certain Indentures, *ſc.* to the uſe of himſelf and the Lady *Anne* his wife, and their heirs (for ſo it was in effect, for there were divers particular mean eſtates limited, but they were all determined, or never came in *eſſe*) with power of revocation, contained in the ſaid Indentures) That if Sir *Tho. Greſham* ſhould pay 40 *s.* to *Stringer* and *Cely*, or to the heirs of *Stringer*, that then the fine ſhould be to the uſe of the ſaid Sir *Thomas* and his heirs; And afterwards the ſaid Sir *Thomas* levied a fine, 13 *Eliz.* to the ſame Conuſees of the Mannors of *N.* and *F.* in the County of *York*, *Darbie*, &c. to the ſame uſes declared in another pair of Indentures with the like power of revocation upon payment of 40 *s.* as was contained in the other Indentures *mutatis mutandis*; And afterwards the ſaid *A. Stringer* died, and afterwards the ſaid Sir *Thomas* paid one ſum of 40 *s.* to *Cely*, and to the heirs of *Anthony Stringer*, for revocation of the uſes raiſed upod both the fines; And this payment was teſtified by an Inſtrument in writing under the ſeals of the parties by good advice, as Sir *Thomas* was perſwaded, and after he raiſed divers uſes and eſtates of divers Mannors holden in *Capite*: And aftewards Sir *Thomas* died. After whoſe death, *viz. Hill.* 23 *Eliz.* by the opinion of the Judges it was Reſolved, That the uſes were not revoked, but that the revocation was utterly void, becauſe the two ſeveral ſums of 40 *s.* ought to have been tendred, and not one ſum of 40 *s.* for they were
[107] ſeveral Indentures, and ſeveral Mannors, *&c.* and could not be ſatisfied with one ſum, for which all the ſaid Mannors came to the Lady *Greſham* by ſurvivor. And afterwards the ſaid Revocation was enacted and adjudged to be good and ſufficient in Law, by a private Act of Parliament, made 23 *Eliz.* And becauſe the ſaid Sir *Tho. Greſham* had by Indentures of Covenants raiſed new uſes after the ſaid ſuppoſed revocation of divers of the ſaid lands holden *in Capite*. The Lady *Greſham* was called by proceſs into the Exchequer, to anſwer a fine to the Queen for the ſaid alienation of the ſaid Mannors, being holden of the Queen *in Capite*, without licenſe, becauſe that now the ſaid new uſes raiſed were good, and the Mannors paſſed according to the limitation of them, foraſmuch as now the revocation by authority of Parliament was adjudged good. But becauſe that at the time of the death of the ſad Sir *Thomas*, which was before the ſaid *Act* of 23 *Eliz.* the Lady *Greſham* was diſcharged by Survivor, and every allienation without licenſe, doth imply a wrong and treſpaſs, and an *Act* of Parliament, to which the Queen, and all her Subjects are parties, and give their conſent, cannot do wrong; for this cauſe the Lady *Greſham* was diſcharged of the fines for the ſaid alienations, which upon the matter had their eſſence by means of the ſaid *Act* of Parliament.

As to the 3 point (which did not go directly to the concluſion of the Caſe) it was Reſolved, That after the bargain and ſale *Elizabeth* could not enter, for her eſtate was to begin in poſſeſſion after the death of the ſaid *John* by the ſaid Cuſtom. And ſo if a Copyholder for life, where the remainder is over for life, commit a forfeiture, he in the remainder ſhall not enter, but the Lord, and he ſhall keep it during the life of him who committed the forfeiture, but it ſhall not deſtroy the Remainder, without an expreſſe cuſtom in ſuch caſe. And Tenant by Copy for life, where the remainder is over, may ſurrender to the Lord, and he in the remainder ſhall not enter till after his death, for his eſtate is to begin in poſſeſſion *poſt mortem*, and no incident of the Common Law is belonging to him, if not by Cuſtom. And the chief Juſtice ſaid, That the ſurrender of Copyholds are not to be likened to a ſurrender at the Common Law; For if a Copyholder in fee ſurrendreth to the uſe of another for life, no more ſhall paſſe from him then ſhall ſerve the eſtate limited to the uſe, and he who made the ſurrender ſhall not pay any fine for readmittance to the Reverſion, for the ſame continueth always in him. And the Chief Juſtice further ſaid, That he conceived, that if the Lord in the Caſe at Barr had charged the inheritance of the Copyhold, that *John Podger* ſhould not hold it charged during his life, for the mean eſtats in remainder preſerve the eſtate of *John*
[*b*] *Podger* by Copy from the Lords Incumbrances. *Vid.* in *Wroteſleys* Caſe in *Plow. Com.* That if Tenant for life granteth a Rent charge and he in reverſion granteth a Rent charge to another, and afterwards Tenant for life ſurrendreth, the grantee of the Tenant for life ſhall be preferred.

Paſch. 10 Jacobi. *In the Common Pleas.*

Meriel Treſhams Caſe.

[108] HElen *Brokesby* and *Anne Vaux* Adminiſtrators of *Hen. Vaux* Eſq, brought an action of debt againſt *Meriel Treſham* Adminiſtratrix of Sir *Tho. Treſham* Knight, upon an Obligation of 600 *l.* made by the ſaid Sir *Thomas* to the ſaid *Henry Vaux.* 23 *Maii* 25 *Eliz.* which plea began *Trinit.* 9 *Jac. Rot.* 917. The Defandant pleaded, That the ſaid Sir *Thomas Treſham*, and *Francis* his Son, 1 *Julii* 43 *Eliz.* before the Barons of the Exchequer for a juſt and a true debt, did acknowledge themſelves to owe to the ſaid late Queen 100 *l.* to be paid in the Feaſt of Saint *Michael* the Archangel next following. And that the ſad *Tho.* and *Francis* his Son 8 *Junii*, 3 *Jac.* did acknowledge a recogniſance in the nature of a Statute, before the Lord *Anderſon* Chief Juſtice of the Bench, to *John Brudenel* in 800 *l.* to be paid at the Feaſt of Saint *James* following, for a juſt and a true debt: And that the ſaid Sir *Tho.* and *Fran.* his Son, &c. 16 *December*, 45 *Eliz.* did acknowledge another Recogniſance in the nature of a Statute ſtaple before the ſaid Chief Juſtice to *John Moore* Alderman of *London* in 1000 *l.* to be paid to the ſaid *John* for a juſt and true debt in the Feaſt of

of the birth of our Lord God then next following. And that the ſaid Sir *Thomas* 16 *Sept.* 45 *Eliz.* before the ſaid Chief Juſtice, did acknowledge another Recogniſance in the Nature of a Statute ſtaple to *Anne Offeley* in 1000*l.* for a juſt and due debt, payable the Feaſt of the birth of our Lord God next following: And another Recognizance of ſuch nature, 17 *December.* 2. *Jacobi* to *John Ireland* in 1000*l.* for a juſt and due debt, payable the Feaſt of the birth of our Lord God next following: and pleaded that ſhe had fully adminiſtred, *Et quod ipſa nulla habet bona ſeu catalla quæ fuerunt ejuſdem* Thomæ Treſham *tempore mortis ſuæ in manibus ſuis adminiſtranda, nec habuit die impetrationis brevis originalis præd. nec unquam poſtea, præterquam bona & catalla ad valentiam*, of the ſaid debt to the King, and of every of the ſaid Recognizances, and averred that all the ſaid Recognizances remain yet in force. *& quod ipſa nulla alia ſive plura habet bona & catalla quæ fuer. præd.* Thomæ Treſham *tempore mortis ſuæ in manibus ſuis adminiſtranda præterquam bona & catalla quæ non ſufficiunt ad ſatisfaciend. præd. ſeperalia debita eiſdem Dom. Regi nunc*, Johan Brudnel, Johan. More, Anne Offely, *&* Johan. Ireland *de eorum debit. ſupradict. ac quæ eiſdem debit. obligat. onerabilia exiſtunt*, &c. And the Defendant did averr, that neither the ſaid Sir *Tho.* in his life time, nor the ſaid Adminiſtratrix after his death had the ſaid debts, &c. The Plaintifs replied and ſaid, That as to the ſaid Recognizance of 800*l.* to the ſaid *John Brudenel*, that the ſaid Recognizance was for ſecurity of payment of 400*l.* &c. And that the Defendant after the death of the ſaid Sir *Thomas*, paid to the ſaid *John Brudenel* the ſaid 400*l.* of the principal debt, in diſcharge of the ſaid Recognizance of 800*l.* which 400*l.* the ſaid *Jo. Brudenel* received in full diſcharge of the ſaid Recognizance of 800*l.* And as to the 100*l.* to the ſaid *John More*, that the ſaid Recognizance was for ſecurity of performance of certain Covenants contained in certain Indentures Tripartite, bearing date 15 *Decemb.* 45 *Eliz.* on the part of the ſaid *Thomas* to be obſerved, performed, and kept, which were all performed, and none of them broken. And as to the ſaid Recognizance of 1000*l.* to the ſaid *Anne Offeley*, that the ſaid Sir *Thomas* in his life time had paid the ſaid 1000*l.* to the ſaid *Anne*, &c. and as to the ſaid one thouſand pound to *John Ireland*, that the ſaid Sir *Thomas* had alſo paid them to the ſaid *John Ireland*, &c. *quodque ſeparales recognitiones præd.* &c. *ſic ut prefertur ſeparatim recognitæ per fraudem & covinam ipſius* Meriellæ, *& ea intentione ad ipſas* Helenam *&* Annam Vaux *de debito ſuo præd. defraudand. minime exonerat. & non cancellat. adhuc remanent.* And further the Plaintiffs ſaid, That the ſaid *Meriel* the day of the writ brought, *ſc.* 14 *Feb.* 6. *Jac. Regis*, had divers goods and Chattels which were the ſaid Sir *Thomas* the day of his death, in her hands to be adminiſtred, to ſatiſfie the Plaintiffs debts, *præterquam bona & catal. ad valentiam præd. cent. librarum præd. nuper Regin. in forma præd. Recognit.* &c. upon which the defendant did demurr in Law. And the caſe was argued by the Defendants, and by the Plaintiffs Counſel at the Barr in ſeveral Terms; And the Defendants Councel did conceive that the Replication was inſufficient, as well for the manner, as for the matter: Concerning the manner for 4 cauſes. 1. Becauſe the Plaintiffs in their Replication have alleged, that the ſaid Recognizance of 800*l.* to the ſaid *John Brudenel* was made, *pro ſecuritate ſolutionis*, 400*l.* &c. and ſo have taken a bare averment againſt the Recognizance, which is matter of Record: For Sir *Thomas* by the ſaid Recognizance doth acknowledge himſelf to be endebted to the ſaid *John Brudenel* in 800*l.* to be paid ſuch a day, and the Plaintiffs have alleged that it was made for ſurety of payment of 400*l.* but the Plaintiffs ought to have ſhewed that there was a defeazance made by deed in writing, but not by bare agreement. 2. The like exception was taken, becauſe they have alleged, That the ſaid Recognizance to the ſaid *John Moore* was made *pro ſecuritate performationis quarundam conventionum*, &c. 3. If ſuch general pleading ſhall be admitted; yet it ought to have been ſhewed when the 400*l.* were paid; but now it doth not appear whether he paid it at the day, before the day, or after the day; for Replications ought to contain convenient certainty; ſo that it may appear to the Court, that the Plaintiff hath cauſe of action. 4. Where they allege that the Recognizance to the ſaid *John Moore* was made for performance of Covenants, and that none of the Covenants were broken, they ought to have traverſed, *ſc.* That it was not acknowledged *pro vero & juſto debito*, for that was expreſly alleged by the Defendant in the barr.

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As to the Matter, the Defendants Counſel conceived the Replication inſufficient for 2. cauſes. 1. Becauſe that although that *John Brudenel* hath accepted of 400 *l.* in ſatisfaction of the Statute of 800 *l.* yet in Law the Statute doth remain in force, and he may ſue execution againſt the Defendant upon it when he will: and therefore, if ſhe ſhall pay debts by ſpecialty before this debt of Record, the Defendant may be charged in a *Devaſtavit*, and therefore not onely his lands and goods, but his body ſhall be alſo ſubject to execution upon the ſaid Recognizance of 800*l.* And it was ſaid, that this caſe at barr doth differ from *Turners* caſe in the 8th. part of my *Reports*. For there *Billet* who had the Judgment, not onely accepted 60*l.* *in plenam ſatisfactionem & exoneracionem* of the Judgment of 100*l.* *& obtulit & adhuc offert ad relaxand.* &c. *vel ad cognoſcend. ſatisfactionem in Cur.* &c. and that the Defendant *deceptivè & ea intentione ad defraudand. & decipiend. præd. Ed. Turner*, &c. *de juſto debito ſuo cogn. ſatisfactionis*, &c. *diſtulerunt & adhuc differunt*, &c. but in the caſe at bar it doth not appear, that the ſaid *John Brudenel* ever offered either to releaſe, or acknowledge ſatisfaction, *&c.* for then default had been in the Defendant, as it was in *Turners* Caſe, but in this Caſe no ſuch fault appeareth to be in the Defendant. 2. The Plaintiffs in their Replication averr, that the ſaid Recognizances remain not diſcharged by Covin of the Defendant, *&c.* to the intent to defraud the Plaintiffs of their debt; and ſhe alone cannot commit Covin, for Covin ought to be betwixt two, and therewith agreeth 39 *H.* 6. 19. where in debt by the Prior of *D.* againſt *Hugh Lacy*, the Defendant pleaded a foreign Attachment in *London* at his own ſute; the Plaintiff would have averred, that the Pleint which was entred by the ſaid *Hugh* againſt the Prior, was to make the Prior loſe his debt: And there *Priſot* Chief Juſtice ſaid, As to the Covin he conceived it is

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not to the purpoſe, for the ſaid *Hugh* cannot affirm the ſaid pleint by Covin of himſelf alone; for Covin ought to be betwixt two, *&c.* And in *Plow. Com.* in *Talbois* Caſe, 54 *b* it is holden, That Covin (according to the true diſtinction of it) is a ſecret aſſent determined in the hearts of two or more men, to the prejudice of another. And afterwards the caſe was argued by the Juſtices: and Judgment was given for the Plaintifs. And in this caſe theſe points were Reſolved.

1. That the Defendants barr was repugnant in it ſelf; for firſt the Defendant pleads, *Quod ipſa plene adminiſtravit omnia bona & catalla quæ fuer. præd. Thomæ tempore mortis ſuæ, & quòd ipſa nulla habet bona & catalla quæ fuer. ejuſdem Thomæ tempore mortis ſuæ in manibus ſuis adminiſtrand. nec habuit die impetrationis brevis originalis præd. præterquam bona & catalla ad valeniam* of the ſaid debt to the King, and the ſeveral debts by the ſaid Recogniſances; by which ſhe confeſſeth, that ſhe hath ſufficient in her hands to ſatisfie them. And afterwards ſhe pleads, *quod ipſa nulla alia ſive plura habet bona ſeu catalla, quæ fuer. præd. Thomæ tempore mortis ſuæ in manibus ſuis adminiſtrand. præterquam bona & catalla, quæ non ſufficiunt ad ſatisfaciend. prædict' ſeparalia debita*, which is meerly, and *ex diametro*, repugnant to that which ſhe hath confeſſed before.

2. It was Reſolved, That if ſhe had only pleaded, *quod ipſa non habet, nec die impetrationis originalis præd. habuit, aliqua bona & catalla quæ fuer. præd. Thom. Treſham, tempore mortis ſuæ, præterquam bona & catalla non attengentia, ad ſatisfaciend. debita prædict. aut quæ non ſufficiunt ad ſatisfaciend. debita*, or a plea to ſuch effect, that ſuch plea had been ſufficient. For the Executor or Adminiſtrator either ought to plead as the Defendant did in this caſe, *ſc.* That ſhe had not goods or chattels, &c. *præterquam bona & catalla ad valentiam debit. præd.* and ſo confeſs that ſhe hath ſufficient to ſatisfie them; or if the truth be, that ſhe hath not Aſſets to ſatisfie the debts of Record, then to confeſs how much ſhe hath, *ſc.* that ſhe hath not goods and chattels, &c. *præterquam bona & catalla ad valentiam* of a ſum certain, *& non ultra, quæ eiſdem debitis obligat. & onerabilia exiſtunt*, but ought not to ſay,
[110] *præterquam bona & catalla non excedentia, aut quæ non ſufficiunt ad ſatisfaciend. debita prædicta*: for the in certainty, for to that the Plaintif cannot reply, whereupon a certain iſſue may be taken; for if the truth of the caſe be, that ſhe hath aſſets to ſatisfie all the debts of Record but a peny, or a half-penny, or other ſmall ſum, ſuch plea ſhould be true; and an Executor or Adminiſtrator is privy and repreſenteth the perſon of the Teſtator or Inteſtate, and by indentment of Law hath notice of the certainty, and certain value of the goods, and therefore he ought in ſuch caſe to plead certainly as is aforeſaid; As the heir when he pleadeth a deteinment of Charters in a writ of Dower, he ought to ſhew the certainty, becauſe he is privy, or otherwiſe it ſhould be in the caſe at barr a device to barr poor Creditors (a uſual attempt in theſe dayes) of their true and juſt debts; and therefore ſuch Innovation in pleading, tending to ſo dangerous Conſequence, was *una voce* condemned by the whole Court.

3. It was Reſolved, That ſuch general pleading, *ſc.* that ſuch Recognizance was made *pro vera ſolutione*, &c. or *pro performatione Conventionum, &c.* becauſe the Creditor who is a ſtranger to it, hath no means in Law to know the particular certainty, was good enough. *Vide Plow. Com.* in *Crokes* Caſe, and 18 *H.* 8. 1. *&c.* And although they do not ſpecifie the certain day of payment, nor that the leſſer ſum was paid before, or upon the day, yet the pleading is good in this caſe, for admit that the payment was after the day of payment, yet when the ſaid *John Brudenel* doth accept of the leſſer ſum in full diſcharge of the ſaid 800*l.* This is a good ground for the Plaintifs to aver, that by fraud of the Defendant, and to the intent to defraud the Plaintifs of their debt, the Recogniſance was not diſcharged nor cancelled: the which the Defendant hath not confeſſed by her Demurrer, but ſhe might have taken iſſue upon it, and left the ſame to tryal of the Country upon the Evidence, declaring the truth of the caſe.

4. It was Reſolved, That although they have not alleged ſpecial matter, as in *Turners* Caſe; *ſc.* that the Conuſee did offer and was ready to releaſe, or acknowledge ſatisfaction; yet it was Reſolved, that the general allegation of fraud in the caſe at barr was ſufficient, as it is Reſolved in *Talbois* caſe, That general averrment of Covin was good, becauſe Covin is ſo ſecret, whereof a man by intendment cannot have knowledge. And if of the ſpecial manner of Covin which (as it is there
[*b*] holden) *ex vi termini*, ought to be betwixt two, by Intendment of Law a ſtranger cannot have knowledge, *à fortiori*, in the caſe of fraud, which may be in the heart of one only, for if one by deed maketh a fraudulent gift of his goods to diverſe who know not of it, the ſame is fraud onely in him who doth it; and ſo it was adjudged in *Turnors* caſe, that fraud may be in one, or of one part onely. And for as much as the Replication was good, as to the debt of 800*l.* to *John Brudenel*, and the Defendant hath confeſſed in her barr, that ſhe hath Aſſets to ſatisfie all the Recognizances, for this cauſe the Plaintifs ſhall recover their debt 600*l.* due by the ſaid Obligation. And although of it ſelf, and *ex vi termini*, Covin ought to be betwixt two: yet when it is coupled with fraud, which may be by one onely, the Court ſhall adjudge upon the matter, and not upon the ſtrict Etimologie of the word; and if the addition of Covin be in vain, then the Court ought to adjudge upon the word Fraud, which may be by one, *& plerumque dum proprietas verborum attendit ſenſus veritatis amititur.* And the Chief Juſtice ſaid, *quod ſæpe in Captione Juris fuit digitus Dei*; for the Defendants barr was altogether inſufficient; For the Defendant hath averred, That Sir *Thomas* had not paid the ſaid debts due by the ſaid Recognizances in his life, nor his Adminiſtrator after his deceaſe; but hath not averred, That *Francis* who was joyntly bound with him in all the Recognizances had not paid them, for which cauſe the barr was inſufficient. And if the barr be inſufficient in matter, and the Writ and Declaration good and the Replication ſuperfluous, without any matter which impugneth and deſtroyeth the action, the Plaintif ſhall have Judgment, as it hath oftentimes been ruled and adjudged. Which was granted by the whole Court. And afterwards Judgement was given, and entred for the Plaintifs, and execution awarded accordingly. See the 3 point in *Turnors* caſe,

case, a good judgment in these dayes, where Executors and Administrators contend by fraud, and subtil and cunning pleadings and devices to barr Creditors of their just and true debts: and mark well the 3. point Resolved in *Turnors* case.

Note Reader, At the Common Law; If there be Lord, Mesne, and Tenant, and the Mesne truly doth his services to the Lord paramount, and yet the Lord doth distrein the Tenant peravail for them, at this time the distress is tortious, and the Tenant is not distreined in default of the Mesne; but in this case if the Tenant peravail request the Mesne to take his cattel out of the pound, and put in his own Cattel in lieu of them; or if the Tenant hath a Replevin of his own Cattel, and request- [111] eth the Mesne to joyn and acquit him, and he refuseth, by this matter *ex post facto*, the Law shall adjudge that the Tenant peravail was distreined in default of the Mesne, and if in a Writ of Mesne, the Mesne pleads not destreined in his default, it shall be found against him, otherwise the Tenant peravail shall be in no default, and shall have wrong, and yet shall be without remedy: and it is all one to the Tenant, if the distress be wrongful or not, if he shall not have any redress, *Vide* 39 E. 4. 34. 17 E. 3. 17. & 44. 7 H. 4. 18. 12 E. 4. 2. 13 E. 4. 6. F.N.B. 136. By which it appeareth, That Judges in all ages have endeavoured to put the Rule of *West.* 2. in execution, *Curia Domini regis non debet deficere conquerentibus in Justitia exhibenda, Justitia est suum cuique tribuere.*

Trin. 10 Jacobi *In the Common Pleas.*

Robert Mary's Case.

EDward *Crogate* brought an action upon the Case against *Robert Marys*, and declared, That *William Winter* Gent. was seised in fee of the Mannor of *Townbarningham*, whereof a house and 2. acres, and 2. roods of Land in *Townbarningham* are parcel, and demised and demisable by Copy, &c. in Fee, for life, or years. And where the said *William* and all those whose estate he hath in the said Mannor with the appurtenances, *pro tenentibus Custumariis suis præd. messuagii 2 acr. & 2 Rod. terræ cum pertin. habuerunt & à toto tempore cujus contrarii memoria hominum non existit, habere consueverunt communiam pastur' in quadam pecia pastur' cont' per estimationem septem acras, vocat.* Townbarningham Common, *jacen' in Townbarningham præd. pro omnibus equis & vaccis suis levant' & cubant'* &c. *quolibet an. omni tempore anni tanquam ad præd. messuag'* &c. *pertin.* and conveyed a grant by Copy of Court Roll of the said Mannor of the said House and land with the appurtenances to the Plaintif and his heirs, according to the Custom of the Mannor, by force of which he entred, and was and yet is seised of the said Messuage with the appurtenances. *Et præd. Robertus machinans & intendens ipsum Edw. de communia pastur. præd. in præd. pecia pastur. continent. per estimationem 7 ac. vocat.* Townbarningham Common, *habend' minus justè impedire, & de proficuo suo inde totaliter deprivare, prim. die Maii, ann. regn. Domini Reg. nunc Angl. sept. equos, boves, & vaccas suas in præd. peciam pastur, cont. per estimat. sept. acr' voc.* Townbarningham Common, *posuit & herbam ibid. crescen. cum* [112] *equis bobus, & vaccis suis depastus fuit, conculcavit, & consumpsit,* with continuance, *à præd. primo die Maii ann. septim. suprad. usque festum Sanct. Mich. Arch. tunc proxime sequen. per idem Edw. existens per totum idem tempus tenens Customarius præd. Messuag. & 2. Acr. & 2. Rod. terræ cum pertin. communiam pastur' suam præd. pro equis, bobus & vaccis suis, in tam amplo & beneficiali modo prout ipse per antea habuit,* &c. *per tempus illud habere non potuit, sed proficuum suum inde per totum idem tempus amisit ad damnum,* &c. 40*l.* The Defendant pleads Not guilty, and the Jury found, *Quod quo ad positionem equorum bovium, & vaccarum ipsius Rob. Marys in infra script. peciam pastur. vocat.* Townbarningham Common, *interius per præd. Robert. fieri suppositi. dicunt super Sacram. suum quod præd. Rob. Marys non est inde culpabilis, prout,* &c. *& quoad depastum conculcationem & consumptionem herbæ infrascript. in infrascript. pecia pastur' vocat* Townbarningham Common, *infrascript. equis, bobus, & vaccis per tempus infrascript' Jurator' præd. dicunt super sacram'. suum, quod præd.* Robert. Marys *est inde culp. & ass. damna,* &c. And this plea began *Hill.* 7. *Jac. rot.* 336. and was oftentimes debated by the Serjeants at barr, and by the Justices at the bench: And it was argued on the Defendants part, That the wrong found by the Jury is not the wrong whereof the Plaintif complains in his Action upon the case: For he hath complained of a Misdoing, and they have found a Not-doing, which is against the Plaintif, for he hath declared that the Defendant *posuit averia sua,* &c. which is wrong and misdoing, and the Jury have found, *quod non posuit,* &c. but that his Cattel have depastured, &c. which ought to be by escape, which is not doing, and many cases were put upon this ground.

But as to that it was Resolved, That the Action notwithstanding that was maintainable; for the Judges in finding of Verdicts doe respect the Substance, rather than the Circumstance; and therefore in the case which concerneth the life of a man, which is more favoured than any thing in the world, Judges regard the substance, and not the Circumstance: As if *A. B.* and *C.* were indicted of killing *I. S.* and that *A.* strook him, &c. and the other were present, abbetting, &c. And the Jury find, that *A.* did not strike him, but that *B.* strook him, and the other 2. were present abbetting, &c. the same is a good verdict, for it is but Circumstance who strook him, for in Law it is the stroke of them all.

2. It was well observed, That the Declaration is. That the Deft. put in his Cattel 1 *Maii,* &c. and that from the 1 *Maii* they continued there till the Feast of S. *Michael*; Now the Jury have found,

quoad positionem non culp. prout, &c. which is the first day of *May:* but the Jury have found *quoad depastum conculcat. &c. per tempus infra contentum,* sc. *à primo die Maii usque festum Sancti Michaelis,* they found him guilty, *prout:* So that the Jury have found the continuance, *&c.* in the same manner, and for the same time the Plaintiff hath alleged; and the Plaintiff is a stranger to it, and therefore come the Defendants cattell by escape, or otherwise, the eating of his grass, and so the destruction of his Common, the same is the substance and cause of the action: And so it was adjudged, *Hill.* 5 *Jac.* in this Court, as it after appeareth.

[b] 2. It was Objected, That one Commoner shall not have an action for eating of the Common, for then every Commoner might have an action for the same cause, and so actions should be multiplied for small causes, which the Law will not suffer. And therefore *William's* Case in the 5th part of my *Reports*, for not doing divine service in a Common Chapell, or Church, an action upon the case doth dot lie, nor for a Common Nusance done in the High-way, *Vide* 27 *H.* 8. 26, 27. and 5 *E.* 4. 3, *&c.* where the Law denieth an action to any one in particular, for avoiding infinite actions in small causes.

To which it was Answered and Resolved, That notwithstanding this Objection, the action lyeth for divers causes. 1. It is evident, That a Commoner may take the Cattel of a stranger damage feasant, as it is holden in 24 *E.* 3. 42. 46 *E.* 3. 23. 15 *H.* 7. 2, & 12. which proveth that it is a wrong and damage done to him; and it shall be a great mischeif if the Commoner shall not have an action, for then all the feeding might be taken, and eaten by many sheep and other Cattel, and with strong hand detained, till all the grass is eaten up, and likewise with strong hand driven out, so that the Commoners cannot take them damage feasant, or the Cattel after the grass eaten may escape out, and then by the argument which hath been made, the Commoner shall not have any Remedy; and then the Lord, or other great Man might at their pleasure deprive them who have Common in their Wastes, of their Common there. 2. If the Commoner hath a Freehold in his Common, and the Lord or others will feed and eat up all the grass in the Land where the Common is to be taken, the Commoner shall have an Assise; and by Consequence the Commoner in the case at Bar having Common but at will by Copy, shall have an action upon the case: As if a Man hath Common of Estovers in the wood of another in Fee, or for life, and the Owner of the Wood, or any other, cutteth down all the wood, he who ought to have the Estovers shall have an Assise, for it is a disseisin of his Common, *F. N. B.* 158, 159. and if he hath but a Term in the Estovers, he shall have an action upon the case. *Hill.* 5. *Jac.* in the Common Pleas, *Edward Buttolph* brought an action upon the Case against *Robert Kipping* and others, and declared, That *Sir Henry Gawdy* Knight, was seised of a house and 100 acres of land in *Sowood* in *Norfolk*, and that the said Sir *Henry* time out of mind, had used for him and his Tenants of the said house and land, to fell and take brakes in a peice of Heath called *Caronhill* in *Sowood* aforesaid, for their fewell to be spent in the said house, as to the said house appertaining; And so being thereof seised, demised the said house and land, with the appurtenances for term of years, *&c.* by force of which he entred, and was thereof possessed, the Defendants *præmissorum non ignari* cut down, and carried away 3 loads of brakes in the said place, by which the Plaintiff could not have brakes for his fewel in as ample and beneficial manner as before, and of as right he ought, *&c.* The Defendant pleaded Not guilty, and it was found by verdict for the Defendant, and he had judgment accordingly.

[113] 3. For every feeding by the cattel of a stranger, the Commoner shall not have an assize nor an action upon the Case, as his case is, but the feeding ought to be such for which the Commoner, *&c.* ought to have common of pastures for his Cattel, *sed proficuum suum per totum idem tempus amisit, &c.* So that if the Trespas be so little, that he hath not lost his Common, but sufficient doth remain for him, the Commoner shall not take there damage feasance, nor have any action for it; but the Tenant of the Land may in such case have an action. And therefore, If my servant be beaten, the Master shall not have an action of battery, if the battery be not so great that by reason thereof he loseth his service of his servant, but the servant himself for every little battery shall have an action; and the cause of the difference is, that the Master hath not any damage by the personall beating of his servant, but by reason of a *per quod, viz. per quod servitia amisit*; so that the original Act is not the cause of his action, but the consequent upon it, *viz.* the loss of his service is the cause of his action; for be the battery great or little, if the Master doth not lose the service of his servant, he shall not have an action. So in the Case at Bar, The Lord of the Soil shall have an action for Trespas done in the Waste or Common, as an immediate Trespas to him, be it little or great; but the Commoner shall not have an action but by consequent; *viz.* If the Trespas be such, *per quod proficuum suum Commun. suæ amisit, &c.* Or that he cannot have his Common in so beneficial manner as he had before. 4. In this case it doth not judicially appear to the Court, that any other hath Common there but the Plaintiff; and therefore the colour of multiplication of sutes is not to be likened to this case: And it is true that for a Nusance in a High-way, without special damage, none shall have a private action, for it is not *damnum privatum*, but *damnum commun.* and therefore it ought to be onely punished and reformed at the Kings sute; for a publick Nusance shall not be reformed at the sute of a private party; for the damage is not private, but publick. But *privatum damnum sive nocumentum* shall be reformed by the action of the private party grieved, and *Commune nocumentum* at the sute of the King, who is the head of the whole Commonwealth: But a Trespas done to many Commoners is *Privatum*, and not *Commune nocumentum:* And so it is adjudged in 27 *Ass. p.* 6. It was presented in the Leet, that *I. N.* had enclosed such lands, which ought to lie in Common for all the Inhabitants of the Town, *&c. ad Commune nocumentum Inhabitantium vill. præd.* and this presentment was adjudged void: For the same is a private wrong to the particular Inhabitants of this particular Town, and no publick common Nusance. And

And the Chief Juſtice in his argument in this caſe cited two Judgements in the point in this Court. *Trinit.* 41 *Eliz. Rot.* 1536. *John Holland* Eſquire brought an action upon the Caſe againſt *Tho. Lovell* Eſquire, and other Defendants; and declared that the Plaintif was ſeiſed of the [b] Manor of *Chalkhill* in *Laringford*, in *Norfolk*, and preſcribed to have Common for 400 ſheep in a place called the plains in *Larlongfield*, as belonging to his Mannor, the Defendants *promiſſorum non ignari*, with their ſheepe did eat the graſſe growing in the ſaid place, called the plains, *per quod* the Plaintif could not enjoy his Common in as ample and benificial mannor as he had before, and of right ought to have, to his damages of 40*l.* The Defendants pleaded not guilty, and it was tried by *Niſi prius* before Sir *John Popham* Chief Juſtice of *England* and found for the Plaintif, and he had Judgement and execution. *Hill.* 5 *Jac. Rot.* 1427. in the Common Pleas. *Norf. George England* brought an action upon the caſe againſt this *Edward Crogate*, and declared that the Biſhop of *Norwich* was ſeiſed in the right of his Biſhoprick of the Mannor of *Thurgarton* in the County of *Norfolk*, and preſcribed in the Biſhoprick, &c. to have Common for the Copyholders of the ſaid Tenement, for all Horſes, Cows, and Hoggs in a peece of Paſture in *Baſingham*, called *Baſingham Common*, &c. at all times of the year, as to the ſaid Tenements belonging. The Defendants *præmiſſorum non ignarus*, put in his Horſes and Cows into the ſaid peece of paſture called *Baſingham*, by which the Plaintif could not have his Common in as ample and beneficial mannor as he had uſed before, *&c.* The Defendant as to the putting in of the Cattel pleaded Not guilty, which iſſue was found for the Defendant; and as to the eating of the graſs he pleaded, That the ſaid peece of paſture called *Baſingham* Common, did adjoyn to another paſture called *Barningham* Common, in which the Defendant had right of Common, and that theſe two Commons lay open the one to the other, and claimed to have Common in *Baſingham* for the cauſe of vicinage, upon which Common for cauſe of vicinage iſſue was joyned, and found for the Plaintif: Whereupon Judgement was given, and execution awarded. In which caſe both the points now in the Caſe at Barr in queſtion were adjudged. 1. Although the Plaintif declared that the Defendant put in his Cattle, &c. and it be found that he put them not in, but that they came in by eſcape, yet the Plaintif ſhould have Judgement, for the eating of the graſſe is the ſubſtance. 2. It was adjudged, That the Commoner in this caſe ſhould have his action upon the Caſe.

Trinit. 10 Jacobi *Regis.*

The Lord Sanchars Caſe.

Robert Creigton, Lord *Sanchar* Baron of *Scotland* of forethought malice at *Weſtminſter* in the County of *Middleſex* did incite and procure *Robert Carliſle* to kill *John Turner*, who accordingly adjoyning himſelf with one *James Irweng*, the 11 of *May* laſt paſt killed the ſaid *John Turner* within the City of *London*. [117] And the King in his zeal to Juſtice in this caſe, preſently ſent for the two Chief Juſtices, and chief Baron, and commanded there ſhould be ſpeedy proceeding againſt the Lord *Sanchar*, according to Law. To which the Juſtices anſwered, That the Lord *Sanchar* was but an acceſſory in this caſe, and therefore he could not in Law be tried before the Principal were attainted; but if the Principal might be apprehended, then both might be attainted with more expedition than it might be if the Principal ſhall be attainted by Utlagery: Then it was asked how the Lord *Sanchar* being an ancient Baron of *Scotland* ſhould be tried: And it was anſwered by them, That none within this Realm of *England* is accounted Peer of the Realm, but he who is a Lord of the Parliament of *England*; for every Subject either is a Lord of the Parliament, or one of the Commons, and the Lord *Sanchar* was not a Lord of the Parliament within this Kingdom, and theſe ſhould be tried by the Commons of this Realm, *viz.* Knights, Eſquires, [b] or other of the Commons: And therewith agree our books, as well old as others, 11 *E.* 3. *br.* 473. 8 *R.* 2. *Proceſs ult.* 20 *E.* 4. 6. 20 *Eliz. Dyer* 360. Then the King asked in what Court, after the Principal be attained, the Lord *Sanchar* ſhall be tried. And the Juſtices anſwered, forasmuch as the procurement was in *Middleſex*, it was moſt convenient to try him in the Kings Bench. And thereupon the *King* reſolved he ſhould not be committed to the Tower, but to the Kings Bench, where he might be, if need were, ſooner and eaſier examined then he ſhould be being committed to the Tower: And the King commanded the Judges that all things ſhould be made ready for legal proceeding; and that he would indeavour to cauſe not only the principal, but others who might diſcover the truth of the fact, to be apprehended. And thereupon the ſaid Chief Juſtices conferred with the other Judges of the Kings Bench before whom the Lord *Sanchar* ſhould be tried. And before them divers Queſtions were moved concerning the Legal proceeding in this caſe. 1. Upon the Statute of 2 *E.* 6. *cap.* 24. by which it is enacted, as to this purpoſe, in this mannor. *And further be it enacted by the authority afore ſaid, That where any murther or felony hereafter ſhall be committed or done in one County, and another perſon or more ſhall be acceſſory or acceſſories by any mannor of wiſe to any ſuch murther or felony in another County, that then an Indictment found or taken againſt ſuch acceſſorie, or acceſſories, upon the circumſtance of ſuch matter before the Juſtices of Peace, or other Juſtices or Commiſſioners, to inquire of felonies, where ſuch offence of aeceſſory or acceſſories in any manner of wiſe ſhall be committed or done, ſhall be as good and effectual in Law, as if the Principal offence had been committed or done, within the ſame County where ſuch Indictment ſhall be found: And that*

the

the Juſtices of Goal delivery, or Oyer and Terminer, or two of them, of or in ſuch County where the offence of any ſuch acceſſory ſhall be hereafter committed and done, upon ſute to them made, ſhall write to the Cuſtos Rotulorum, *or keepers of the Records, where ſuch principal ſhall be hereafter attainted, or convicted, to certifie them whether ſuch principal be attainted, convicted or otherwiſe diſcharged of ſuch principal felony, who upon ſuch writing to them or any of them directed, ſhall make ſufficient Certificate in writing, under their Seale or Seals, to the ſaid Juſtices, whether ſuch principal be attainted, convicted, or otherwiſe diſcharged, or not. And after they that ſo ſhall have the cuſtody of ſuch Records do certifie that ſuch principal is attainted, convicted, or otherwiſe diſcharged of ſuch offence by* [118] *the Law, that then the Juſtices of Goal delivery, or of Oyer and Terminer, or other there authorized, ſhall proceed upon every ſuch acceſſory, in the County or Counties where ſuch acceſſory, or acceſſories became acceſſory, in ſuch manner and form as if both the ſaid principal offence and acceſſory had been committed and done in the ſaid County where the offence of the acceſſory was or ſhall be committed or done. And that every ſuch acceſſory, and other offenders above expreſſed, ſhall anſwer upon their arraignments, and receive ſuch trial, judgement, order and execution, and ſuffer ſuch forfeitures, pains and penalties, as is uſed in other Caſes of felony: Any Law or Cuſtom to the contrary heretofore uſed in any wiſe notwithſtanding.* And upon this Statute divers Queſtions were moved. 1. If in the Indictment in the County of *Middleſex* of the Acceſſory ſhall be recited, that the principal was indicted before Commiſſioners of Oyer and Terminer in the City of *London* (as in truth it was) Or if the Indictment ſhall recite *in facto*, that the principal committed the murder in *London*, for the recital, that the principal is indicted of murder in *London*, is no direct affirmance that the principal committed Murder; for the Indictment is but an accuſation, and in place of the Kings Declaration, which may be true or falſe; and this agreeth with former preſidents: And accordingly the Indictment was drawn, upon which the Acceſſory was convicted, as appeareth by the Indictment.

The 2 Queſtion moved upon the Statute was, If the Juſtices of the Kings Bench are within theſe words, Juſtices of Goal delivery, or Oyer and Terminer. And it was objected, That the Kings Bench is the higheſt Court of Ordinary Juſtice within the Realm, and above the authority of Juſtices of Goal delivery, and Commiſſioners of Oyer and Terminer; and as it is holden in 27 *Aſſ.* 1. is more than the Eyre; for they examine the Errors of the Juſtices in Eyre, Gaol delivery, and Oyer and Terminer. And therefore in as much as the Juſtices of the Kings Bench are paramount and ſuperiours over all the others, they cannot be included within their Inferiours, *viz.* Juſtices of Gaol delivery, or of Oyer and Terminer. Alſo the Juſtices of the Kings Bench have a diſtinct and ſupreme Court, and the Juſtices of Goal delivery, and Oyer and Terminer another diſtinct and ſubordinate Court. And therefore it was adjudged *Hil.* 30 *Eliz.* in the Kings Bench That where *Richard Smith* was indicted of forgery of a falſe deed at the Seſſions of Peace in the [*b*] County of *Oxfod*, and the Statute of 5 *Eliz. cap.* 14. which inflicteth the puniſhment, and upon which Act the Indictment was grounded, provideth that the Indictment ſhall be taken before Juſtices of Aſſize, and Juſtices of Oyer and Terminer; And although the Juſtices of Peace by their Commiſſion have power to hear and determine felonies, Treſpaſs, &c. and have an expreſſe clauſe *ad audiendum & terminandum*, ſo that they are as it was urged Juſtices of Oyer and Terminer: Yet it was Reſolved by the whole Court, That becauſe there was a Commiſſion of *Oyer* and *Terminer* known diſtinctly by that name, that the Indictment was not well taken, and therefore was quaſhed. But it was reſolved, That the Juſtices of the Kings Bench are the Soveraign Juſtices of Goal delivery, and of *Oyer* and *Terminer*, and therefore they are included within the ſaid words: and therefore it is holden in 7 *E.* 4. 18. and 4 *H.* 7. 18. That if an Indictment of forcible entry be removed into the Kings Bench, the Juſtices of the Kings Bench ſhall award reſtitution, and yet the Stat. of 8 *H.* 6. *c.* 9. ſpeaketh only of Juſtices of the Peace; but the reaſon is, becauſe they have the Soveraign and ſupreme authority in ſuch Caſes. And according to this Reſolution, the Juſtices of the Kings Bench write according to the ſaid Act to the Juſtices of *Oyer* and *Terminer* and Goal delivery in *London*, before whom the Principal was arraigned, &c. who certified the Record, as appeareth by the Record.

3. It was moved, If the Lord *Sanchar* could not in Term time be indicted, arraigned, and convicted at *Newgate* before Commiſſioners of *Oyer* and *Terminer* in the County of *Middleſex*? And it was Reſolved he could not; for the Kings Bench, as hath been ſaid, is more than Eyr. And therefore in Term time no Commiſſions of *Oyer* and *Terminer*, or Goal delivery, by the Common Law, may ſit in the County where the Kings Bench ſitteth, for *præſentia majoris ceſſat poteſtas minoris*: and therewith agreeth 27 *Aſſ. p.* 1. But *Carlile* and *Erweng* were indicted and arraigned in *London*, where the Murder was committed, before Juſtices of *Oyer* and *Terminer* in the Term time, becauſe in another County then where the Kings Bench ſit.

4 It was moved, If the Lord *Sanchar* being indicted in the Kings Bench, if it be needfull there be 15. days for the Return of the *Venire facias*; for if 15 days be requiſite, he cannot be arraigned this Term; And it was Reſolved not, becauſe the offence was committed in *Midd.* where the Court ſitteth; but if the Indictment had been taken in another County, and removed thither, there ought to be 15 days, &c. and therewith agreeth the Preſidents, and the continual uſage of the ſame Court.

5. It was Reſolved, that for as much as there was not any direct proof, That *James Irwing* was commanded or procured by the Lord *Sanchar* to commit the Murder, but that he joyned him- [119] ſelf to *Robert Carlile* who was procured by him, that the beſt way is to indict the Lord *Sanchar*, as acceſſory to *Robert Carliſle* only, for Indictments which concern the life of Men ought to be framed ſo near the truth as may be, and ſo much the rather, becauſe they are to be found by the Oath of

of the Grand Inqueſt, the which finding is called *Veredictum, quaſi dictum veritatis*, and yet it was Reſolved, that if one be indicted as acceſſory to two, and he is found acceſſory to one, the verdict is good. *Vide* the Statute of *Weſt.* 1. *Cap.* 14. by which it is enacted, *That none be Outlawed upon appeals of Commandment, force, ayd, or receit, until he that is appealed of the deed be attainted, ſo that one like Law be uſed therein through the Realm*; which is but an affirmance of the Common Law; for there cannot be an acceſſory, unleſs there be a Principal, no more then there can be a ſhadow, unleſs there be a body. But this word (*Appeal*) hath 2 ſignifications in Law, one general, and that is taken for a general accuſation, and *accuſatio eſt duplex*, either by Inquiſition, *viz.* Indictment, and that is at the ſute and in the name of the King, or by Appeal, *viz.* accuſation of an Approver, and therewith agreeth all our books: And *Stamford lib.* 2. 142. where he ſaith, After the Confeſſion of the Crime the Felon may appeal, that is, accuſe other Coadjutors with him to doe the felony, and in this particular ſenſe for accuſation of the party it is the rather taken. And as there are 2 manner of Accuſations, ſo there are 2. manner of Attainders of Felony, *viz.* by Judgment given, *viz.* one at the Kings ſute, and the other at the ſute of the party, and both theſe Attainders are in 2. manners, one after appearance, and the other upon default after appearance, 2. wayes, either by verdict, or confeſſion, and at the ſute of the party a third way, *viz.* by battel, upon default by proceſs of Outlawry, where Judgment is given by the Coroners, or by thoſe whom an Act of Parliament and Cuſtom have enabled. And in the ſaid Statute of *Weſt.* 1. Theſe words, *By Appeal of Commandement*, &c. are to be intended of an accuſation generally, *viz.* by Indictment, as by bill or writ, &c. *Till he that is appealed of the deed be attainted*, is meant of all manner of Attainders, either at the Kings ſute, or at the ſute of the party, and either upon appearance or upon default. And afterwards in the ſame Act proviſion is made for the Appeal of the party, which implieth that the word Appeal ſhall be taken in the general ſence.

6. It was Reſolved, That if the Principal be erroniouſly attainted, either for Error in the proceſs, or becauſe the Principal being out of the Realm, *&c.* is outlawed, Or that he was in priſon at the time of the Outlawry, *&c.* yet the Acceſſory ſhall be attainted, for the attainder againſt the Principal ſtandeth till it be reverſed; and therewith agreeth 2 *R.* 3. 12. the Reſolution of all the Judges in the Kings Bench: And in 18 *E.* 4. 9. the Principal was erroniouſly Outlawed for felony, and [b] the Acceſſory taken, indicted, arraigned, convicted, attainted, and hanged, and afterwards the Principal did reverſe the Outlawry, and was indicted and arraigned of the ſaid Felony, and found Not guilty, for which he was acquitted, and all the ſame appeareth in the ſaid book. Then it will be demanded, That foraſmuch as there cannot be an Acceſſory, if there be not a principal, and *in this* caſe there is no principal, how the heir of the Acceſſory ſhall be reſtored to his Land which his father hath forfeited by the ſaid unjuſt Attainder? To that it is to be Anſwered, That the heir may enter, or bring his action, for now upon the matter by Act in Law the Attainder againſt his Father is without any Writ of Error utterly annulled, for by the Reverſing of the attainder againſt the Principal, the attainder againſt the Acceſſory, which dependeth upon the attainder of the Principal, *ipſo facto*, is utterly defeated and void; and the ſame notably appeareth in an old book, *in.* *E.* 1. *Mortdaunceſter* 46. where the caſe is, *A.* was indicted of Felony, and *B.* of the receipt of *A.* *A.* eſſoined himſelf (and is utlaged) *B.* was taken, and put himſelf to tryal, and found guilty, for which *B.* was attainted, and hanged, and the Lord entred, as into his Eſcheat, and afterwards *A.* came, and reverſed the Outlawry, and pleaded to the Felony, and was found Not guilty, by which he was acquitted; whereupon the heir of *B.* brought a *Mortdaunceſter* againſt the Lord by Eſcheat, who came and ſhewed all the ſpecial matter: And there was a Demurrer upon it; and it was Ruled, that the heir of *B.* ſhould recover ſeiſin of the Land, for if *B.* were alive, he ſhall goe quit by the Acquittal of *A.* becauſe he cannot be Receiver of a Felon, when *A.* is no Felon, and all the ſame appeareth in the ſame Book. *Vide* 4 *E.* 3. 36. *in Dower* 43 *E.* 3. *in Aſſiſe and Redeſſeiſin.* 8 *H.* 4. 4. 11 *H.* 4. 4. 4 *E.* 4. 20. 6 *E.* 4. 9. 13 *E.* 4. 4. 9 *H.* 6. 38. *b.* 8 *H.* 7. 10. And ſee the Caſe of ſentence of Deprivation of one, and preſentment, inſtitution, and induction of another, and after by Relation of a general Pardon *ipſo facto*, all are reſtored without Appeal, or new preſentation, admiſſion, or Inſtitution, *quod Vide Dyer.* Note Reader, to ouſt all queſtions to what Goal offenders ſhall be committed, It is enacted by the Statute of 5 *H.* 4. *cap.* 10. that none ſhall be impriſoned by any Juſtice of Peace, but onely in the Common Goal, Saving to Lords and others, who have Gaols, their Franchiſes in that caſe. By which it appeareth, how Juſtices of Peace offend who commit Felons, *&c.* to ſome of the Counters in *London*, and other Priſons, which are not Common Gaols.

The Circumſtances of the matter of fact and proceeding in the Caſe are Reported in French by the Lord Cook; *wherein there being no matter of Law, I thought it not much material to tranſlate the ſame into* Engliſh, *but refer the Reader to the Original.*

Caſes in the Court of Wards.

Trin. 7 Jacobi *In the Court of Wards.*

Anthony Lowe's Caſe.

[b] ANnthony *Lowe* held 59 acres, and a rood of Land in *Alderwaſley*, of the Mannor of *Alderwaſley*, by Knights ſervice, and ſute of Court to *Bewraper*, from 3. weeks to 3. weeks, of which Mannor of *Bewraper* the Mannor of *Alderwaſley* was parcel; the ſaid Mannors of *Bewraper* and *Alderwaſley* were parcel of the Earldom, and afterwards of the Dutchy of *Lancaſter*, which Mannors were holden of the King by Knights ſervice *in Capite* before they came to the Crown. The Dutchy of *Lancaſter* together with the ſaid Mannors came afterwards to the Crown by Deſcent: The ſaid *Anthony* held alſo a Place where a capital Meſſuage was ſituate, and half an acre of land in *Alderwaſley* holden of the ſaid Mannor of *Alderwaſley* by Socage Tenure, and Fealty and Rent, amongſt other Lands *H.* 8. by Letters Patents under the great Seal, dated 22 *Junii*, *Anno* 15. granted to the ſaid *Anthony Lowe* and his heirs, anceſtors to the Plaintif, whoſe heir he is, the aforeſaid Rent, and further ratified, remiſed, releaſed, and confirmed [123] *totum ſtatum præd. Anthonii in terris & tenementis præd. Habend. & tenend. præd. Anthonio & hæredibus ſuis, de nobis hæredibus & ſucceſſoribus noſtris per fidelitatem tantum pro omni ſervitio ſeculari exactione & demand.* And the ſaid *Anthony Lowe* ſo ſeiſed of the ſaid 59 acres, *&c.* and of the place where the Capital Meſſuage was ſituate 22 *Martii* 19 *H.* 8. The ſaid King granted the ſaid Mannor of *Alderwaſley*, and all Lands, Tenements, Rents, Reverſions, and Services in *Alderwaſley* & *Aſhleyham* parcel of the Dutchy of *Lanc.* to *Anth. Lowe* Anceſtor of the Plaintif, whoſe heir he is, & his heirs, to hold the ſaid Mannor, Lands, Tenements, Rents, Reverſions, and Services of the King, his heirs and Succeſſors, by the yearly Rent of 26 *l.* 10 *s.* and Fealty onely for all Services, exactions, and demands: and the ſaid grant was executed by livery and ſeiſin: all which premiſes are parcel of the Dutchy of *Lancaſter*, and out of the County Palatine of *Lancaſter*. And it was Objected, That when the King granteth his Seignorie to his Tenant, to have to him and his heirs, by that the old Tenure is extinct, and then the Law ſhall create a Tenure in *Capite* by Knights ſervice, for the beſt ſhall be for the King; As if the Kings Tenant granteth Lands to another, whithout any Reſervation or mention of any Tenure, the Law ſhall create a Tenure by Knights ſervice in *Capite*, for that is the beſt for the King. And ſo if the King granteth Lands *ſine aliquo inde reddendo*, the Law ſhall create the like Tenure, and therewith agreeth 33 *H.* 6. 7. for of neceſſity all land ought to be holden of ſome perſon. 2. When the King hath extinct the Services which are parcel of the Mannor of *A.* then the Tenure ſhall be holden as the Mannor of *A.* was holden, and that was a Tenure in *Capite*, and the Act of 1 *H.* 4. and divers other Acts, have devided the poſſeſſions of the Dutchy from the Crown.

But it was Reſolved, That the Tenure of the ſaid 59 acres, and toft and a half ſhall be holden by Fealty onely; And as to the ſaid Objections it was anſwered, That when the King granteth or releaſeth the Services to the Tenant and his heirs, the ſame cannot extinguiſh the Tenure in all for neceſſity of Tenure, and the King cannot by his Charter alter the Law, but it ſhall be expounded ſo near the Kings intent as may, and that is to extinguiſh all the Services, but that onely which is an inſeparable incident to every Tenure, which is Fealty, For that the King may doe by the Law, and *id Rex poteſt quod de jure poteſt*, *Vide* 8 *H.* 7. *ult*,

And as to the caſes which have been put out of the book of 33 *H.* 6. they were agreed and affirmed for good Law; but a difference was taken when Land paſſeth from the King by his grant, and in his grant no Tenure is reſerved, or when the clauſe is added *abſque aliquo inde reddendo*, there the Law ſhall create a Tenure which is the beſt for the King. But when the Land paſſeth from a Subject, and the Law for neceſſity changeth one Tenure for another, there the Law, which is [b] *æquiſſimus judex*, ſhall create a Tenure ſo near the freedom of the firſt Tenure as may be. As if a Biſhop or other Man of the Church held Land of the King in Frankalmoigne, and at the Common Law had infeoffed another and his heirs of the ſame Land, in this caſe the Feoffee ſhall hold by Fealty onely, for that is as near the freedom of the Tenure of Frankalmoigne as may be, and ſo was it Reſolved in *Lone's* Caſe.

And the reaſons and cauſes of this difference is, becauſe that in the firſt caſe the Land moveth from the King, and therefore ſhall be Subject to ſuch Tenure as the Law ſhall create; But when Tenent in Frankalmoigne enfeoffeth another, there the Feoffee is in by a Subject, and not by the King, for in ſuch caſe the King departed with nothing. Alſo in this latter caſe the Law doth not create any Tenure originally, as ſhe doth in the firſt caſe, but onely changeth one Tenure into another, *viz.* a Tenure in Frankalmoigne into a Tenure by fealty onely,

And it was Reſolved, That when the King granteth any Land without reſervation of any Tenure, or *abſque aliquo inde reddendo*, or the like, there the Land by operation of Law ſhall be holden of the King by Knights ſervice in *Capite*, according to the rate and proportion of Land which belongeth to a Knights fee, and ſo of more more, and of leſs leſs; For the act of Law doth reſpect Equity, and will never charge any one with more or leſs then in Equity and reaſon he ought to be. *Ipſe etenim*

etenim Leges cupiunt ut jure regantur. And the Caſe at barr is ſtronger, becauſe the King upon the grant of the ſervices, doth limit the Tenure to be by Fealty onely, for all ſervices, exactions and demands. And the Juſtices took no regard of the Tenure before the Crown and Dutchy were united in one perſon, for as long as they remain in one perſon, the ancient Tenure of the Crown *dormiunt perpetuo ſomnio*, for the King cannot hold of himſelf.

Note Reader, there are many and divers opinions of the content of a Knights fee; Some ſay, that a Hide or a Carve of Land doth contain 100 acres, and that 8 Hides or 800 acres of Land make a Knights fee: and others hold, that 680 acres of Land make it. Others ſay, That *bovata terræ continet* 15 *acres*, & 8 *bovatæ faciunt carucatam terræ*, by which accompt a Caruce of Land doth contain 120 acres, and divers other opinions are concerning theſe matters. But I concieve, That a Knights fee, or Hide, or Carve, or Yard, or Oxgang of Land, doth not contain any certain number of acres: but a Knights fee is properly to be eſtimated according to the Quality, and not the Quantity, *ſc.* [124] by the value, and not by the Content; and therefore it is true, *quod Doctiſſimus Cambden in ſua Britania, pag.* 126. *aſſerit, viz. Subſequenti ætate ex cenſu ut colligitur facti fuer. Equites, &c.* and Antiquity thought that 20 *l.* Land was ſufficient to maintain the degree of a Knight, as it appeareth in the old Treatiſe *De modo tenendi Parliamentum tempore Regis Edwardi filii Regis Etheldredi*; where it appeareth, *Quod Comitatus, (viz.* an Earldom*) conſtat ex viginti feodis unius militis, quolibet feodo computato ad viginti libras*; *Baronia conſtat ex* 13. *feodis, & 3. parte unius feodi militis ſecundum computationem prædictam*; *unum feodum militis conſtat ex terris ad valentiam* 20 *l.* which Antiquity I cite, becauſe it concurreth with an Act of Parliament, *Anno* 1 E. 2. *de militibus*, by which Act *cenſus militaris* the eſtate of a Knight is meaſured by the value of 20 *l.* Land *per annum*, and not by any certain content of acres: and therewith agreeth the Statute of *Weſt.* 1. *cap.* 35. and *F. N. B.* 82. where 20 *l.* Land in Socage is put in equipage with a Knights fee, and that is the more reaſonable eſtimation, for one acre may be better than many others, ſo that he who had 680 acres, or 800 acres of ſome barren Land hath not a ſufficient Revenue to maintain the degree of a Knight; and he who had a leſs number of acres of ſome Land, had a living (in thoſe days) ſufficient for the maintenance of a Knight. So Antiquity thought that 400 marks of Land *per an.* was a Competent living of a Baron; and 400 *l. per annum, ad ſuſtinendum nomen & onus* of an Earl; and of late time 800 marks *per annum* of a Marqueſs, and 800 *l. per annum* of a Duke: So that their annual Revenues was eſtimated by the value, and not by the content. And a Carve of Land *Curucata terræ*, or a Hide of Land, *Hida terræ*, (which is all one) is not of any certain content, but as much as a Plough can plough in a year, and therewith agreeth *Lambard, verbo Hyde.* And a Plough land may contain a houſe, wood, meadow, and paſture, becauſe by them the Plough men and the beaſts of the Plough are maintained. And therewith agreeth, *tit.* E. 1. *br.* 860. 4 E. 3. 47. *Plow. Com.* in *Hill.* and *Grange*'s Caſe 168. *Vid.* 6 E. 3. 42. *&* 39 H. 6. 8. *a.* And venerable *Bede* calls a Plough land *familiam*, becauſe it containeth neceſſary things for the maintenance of a family. And *Priſot* well ſaid in 35 *H.* 6. 29. That a Plough may till more land in a year in ſome Country than in another; and therefore it ſtands with reaſon that a Plough land ſhould be leſſe in one place than in another, 41 E. 3. *Fine* 40. and 13 E. 3. *Fine* 67. A fine was not received *de una virgata terræ* for the incertainty, *Vid.* 39 H. 6. 8. But an acre of land is certain by the Statute *de terris menſurandis.* Note alſo Reader, That ſome Plough land was of old time of the yearly value of 5 nobles *per annum*, and that was the living of a Sokeman, or Yeoman, *& ex duodecim carucatis conſtabit unum feodum militis*, which amount to 20 *l. per annum.* And you may ſee that *Termino Paſch.* 3 E. 1. *coram* Rogero *de* Seyton *& ſociis ſuis Juſticiariis apud* Weſtm. Ebor. *rot.* 10. Radulphus *de* Normanville *petens in brevi de medio queritur contra* Luciam *de* Kyme *quod cum ipſa teneat de ipſo duas carectatas terræ in* Coningſton *per homagium & ſervitium militare, unde duodecim carucatæ faciunt unum feodum militis pro omni ſervitio, ipſa diſtrinxit ipſum ad faciendum ſectam ad curiam ſuam de* Thornton *in* Craven, *&c.* And it is to be obſerved that the Relief of a Knight and all ſuperiours who are Nobles, is the 4th part of their revenue by the year, as of a Knight 5 *l.* which is the 4th part of 20 *l.* So *Una Baronia conſtat ex* 13 *feodis militum, & de* 3 *parte unius feodi militis*, which amounteth to 400 marks, and therefore his Relief is the 4 part of it, *ſc.* 100 marks; and an Earl doth conſiſt of 20 Knights fees, which amount to 400 *l.* and therefore his Relief is 100 *l.* And the ſame appeareth by the Statute of *Magna Charta, chap.* 2. and by the Equity of that Statute, foraſmuch as a Marqueſdom conſiſteth of the Revenues of 2 Baronies, which amount to 800 marks, he ſhall pay according to juſt proportion for Relief 200 marks; and becauſe that a Dukedome doth conſiſt of the Revenues of 2 Earldoms, *ſc.* 800 *l. per annum*, a Duke ſhall pay 200 *l.* for Relief, which is alſo the 4th. part of his Revenue, and therewith agree the Records of the Exchequer.

Note Reader, that at the time of the making of the Statute of *Magna Charta, ſc.* 9 *H.* 3. there was not any Duke, Marqueſſe, or Viſcount in *England*, and therefore the Statute does not make mention of them. And the eldeſt ſon of King E. 3. called the Black Prince, was the firſt Duke in *England* after the Conqueſt. And *Robert* Earl of *Oxford*, in the reign of *Rich.* 2. was the firſt Marqueſſe, *ſic enim inter ordines* Angliæ *in ſua Britania teſtatur* Camben, *ubi ſupra. Et titulus Marchionis ſerius ad nos devenit, nec ante* 2 R. 2. *tempora cuiquam delatus, ille enim* Robertum *Vere* Oxoniæ *comitem delicias ſuas primum Marchionem* Dubliniæ *deſignavit, merumque erat honoris nomen. Hæc ille.* And before the Reign of *H.* 6. there was not any Viſcount, *ſic enim idem Author ubi ſupra aſſerit. Poſt comites, Vicecomites ordine ſequuntur, Vicounts nos vocamus; hæt vetus officii ſed nova dignitatis appellatio, &* H. 6. *tempore ad nos primum audita. Hæc ille. Et Dominus de Bello monte* was the firſt Viſcount [125] created by K. *H.* 6. *Vid. Caſianeum in gloria mundi, parte* 4. *conſider.* 55. That this Dignity of Viſcount is of great Antiquity in other Realms.

Hill. 8 Jacobi. *In the Court of Wards.*

Floyer's Case.

[b] ANthony *Floyer* and *Anne* his wife were seised in their demesne as of fee, in the right of the said *Anne* of the 4th. part of the Mannor of *Burdocester*, *alias Burston*, holden by Knights service *in Capite*, and 36 *Eliz.* levied a fine thereof to *Cribbe* and *Radway*, and to the heires of *Cribbe*, and the Conusees did grant and render the said 4 part to the said *Anthony* and *Anne*, and the heirs of the said *Anthony* on the body of the said *Anne* lawfully begotten, and for want of such issue to the use of the right heirs of the said *Anthony*. And afterwards the said *Anthony* and *Anne*, 2 *Jac. Regis* levied a fine *come ceo, &c.* of the said 4 part of *Wadham* and *Manwayring*, to the use of the said *Anthony* and *Anne*, for the term of their two lives, and afterwards to the use of *Anthony* their eldest son in tail, and afterwards to the use of *William* their second son in tail, and afterwards to the use of *John* their third son in tail; and afterwards to the use of the heirs of the body of *Anthony* and *Anne*, and for want of such issue to the use of the right heirs of the said *Anne:* And afterwards *Anthony* the Father died, *Anthony* his son being within age, *sc.* of the age of 14 years, the said *Anne* being yet alive. And the Question was, If the King in this Case shall have the Wardship of the body of *Anthony* his son, and of the 3 part of the said 4 part, or any of them; and it was argued on the Kings part; That the King in this case hath 2 titles to the wardship of the body; and ought also to have the third part of the fourth part of the Mannor. And the first title to the body was by the Proviso, and in the end of the Statute of 32 *Hen.* 8. *cap.* 2. For by the first fine the fourth part was rendred to *Anthony* the Father and *Anne*, and to the heirs of *Anthony* of the body of *Anne*; and although the Statute saith; *Where two or more persons now hold, or hereafter shall hold any manners lands, tenements, or hereditaments of the King by Knight service jointly to them, and to the heirs of one of them, and he that hath the inheritance thereof dieth, his heir being within age. That in every such case the King shall have the ward and marriage of the body of such heir so being within age, the life of the freeholder or freeholders, &c. notwithstanding.* Yet if two be seised to them, and to the heirs of the body of one, and he who hath the estate tail dieth, his heir within age, he shall be in ward, for the same is in equal degree, *quod fuit quod hoc concessum per totam Curiam, Vid. 7 Eliz. Dyer* 237 & 35 *H.* 8. 54. Sir *David Owen's* Case. And it was said, that although the husband and wife have altered the estate before the death of *Ant.* the Father, yet forasmuch as they have not conveyed the land but to the use of themselves and their issues, it shall not take away the Kings interest which he hath by the first fine, by force of the said Act. The 2 title which the King hath to the ward of the body, was upon the second fine, for by the second fine the use is limited to the wife for life, which is directly within the said Act of 32 H. 8. and also of the Act of 34 *H.* 8. and for this cause also the King shall have the wardship of the third part of the fourth part of the Mannor.

[126]

As to the first point upon the Statute of 32 *H.* 8. It was Answered and Resolved, That forasmuch as the estate limited by the render of the first fine doth not continue till the death of *Anthony* the Father, this case was out of the said Proviso, for the words thereof are *And he that hath the inheritance thereof dieth, &c.* So that he ought to have the Inheritance (either in fee simple, or in tail) at the time of his death. But in this case *Anthony* the Father had but an estate for life in possession, and although that the second conveyance was but a voluntary conveyance for the establishing of the Lands upon the issues; yet forasmuch as thereby the said *Anthony* had not any estate of inheritance at the time of his death, the same is out of the same Proviso; for as the first was voluntary for the advancement of the husband and his issues, so was the second voluntary also.

As to the second, It was Resolved, That although by the second fine, the estate which the Wife had by the first fine was barred and altered, and now she hath the estate by the second fine, out of the estate which the Husband had by the first fine, yet it is out of the Statutes of 32 and 34 *H.* 8. for the words of the Statutes are, to and for the advancement of the Wife: And it was Resolved that the estate which the wife had by the limitation of the use upon the second fine was not any advancement of the wife; for it is no more then she had by the first fine, for by both she had an estate for life; and the first estate for life by the first fine cannot be any advancement of the wife by the husband, for there the land was the inheritance of the wife, and moved from her; and by the second fine, if no estate had been limited, the Law would have reserved to her such estate in the use as she had in the land, as it is agreed in *Colgate* and *Blythes* case in the second part of my Reports; and therefore it is not any more advancement to her then she had before; and therefore it is out of the said Statutes.

It was also Resolved, that forasmuch as the estate of the wife was out of the Statutes, no wardship either of the body or of the Land could accrue to the King in respect of the estates in remainder limited to the sons, *&c.* during the wives life, for the wife was Tenant to the King during her life, and the advancement of the Sons in remainder shall not give to the King wardship either of the body or of the land. But if a man hath a Reversion in fee expectant upon an estate for life, holden of the King by Knights service, if he conveyeth this reversion to the use of his wife, or his Children, *&c.* and dieth, the same shall give cause of wardship of the body during the life of the Tenant for life, because the Tenant for life is not the Kings Tenant, but he in the Reversion.

And

And it was ſaid, That if a man holdeth of the King by Knights ſervice, the remainder to two, and the heirs of one of them, if he who hath the fee dieth, leaving the Tenant for life, the ſame is within the Letter of the proviſo of the Act of 32 *H.* 8. For the words are, Where 2 or more hold, *&c.* any Mannors, Lands, Tenements, or Heriditaments joyntly to them, and the heirs of one of them, and he that hath the inheritance thereof dieth, *&c.* And this Remainder is an hereditament, and is holden of the King. But during the life of the Tenant for life, it is not immediately holden of the King; and therefore in ſuch caſe the heir of him who hath the fee ſhall not be in ward. And *Hill.* 25 *Eliz.* in the Court of Wards, *Wray* Chief Juſtice ſaid, That it was Reſolved by the 2 Chief Juſtices, and the Cour of Wards; That if the heir of him who hath the fee be of full age, and the heir dieth, leiving the Tenant for life, his heir withing age, that he ſhall not be in ward for his body within this Proviſo, for the words of the Act are, And he that hath the Inheritance thereof dieth, *&c.* his heir within age, that in every ſuch caſe; ſo that the heir at the time of his death ought to be within age, which is to be intended of the immediate heir, and not of the mediate heir, *Vid.* 2 *Eliz. Dyer.* 172. in *Lowe's* Caſe. [127]

Hill. 8 Jacobi *In the Court of Wards.*

Sonday's Caſe.

MErick *Sonday* being ſeiſed in fee of a houſe in *Lambeth* holden by Knights ſervice *in Capite* 7 *Aprilis*, 1587. by his will in writing deviſed the ſame to *Margaret* his Wife, for life, *and after her deceaſe his ſon* William *to have it, and if his ſon* William *marry, and have by his wife any male iſſue lawfully begotten of his body, then his Son to have it; if he have no male iſſue lawfully begotten of his body, then his Son* Samuel *to have the houſe; if* Samuel *marry, and have iſſue male of his body lawfully begotten, that then his ſon to have the houſe after his deceaſe; if no iſſue male, then his ſon* Thomas *to have the houſe, if* Thomas *marry, having a male iſſue of his body lawfully begotten, then his ſon to have the the houſe after his deceaſe; if he have no iſſue male, then his ſon* Richard in like manner. And then he addeth this clauſe, *And his will and mind was, that if any of his Sons, or their heirs males iſſue of their bodies go about at any time to alienate, or mortgage the houſe, that then the next heir to enter upon the houſe and enjoy it.* And afterwards *Merick* died, and *William* died without iſſue male, having iſſue *Margaret*, (who had the 3 part of the houſe in reſpect of the Tenure) *Samuel* alſo died without iſſue male, *Thomas* entred into the 2 parts, and *Trinit.* 6 *Jac.* he and his wife ſuffered a common recovery with ſingle voucher, which was to the uſe of the ſaid *Thomas* and his heirs, and afterwards 17 *Decemb. Thomas* died without iſſue male, and in this caſe the Queſtions were moved, 1. What eſtate *Thomas* had. 2. If by the ſuffering of the ſaid Common Recovery, he hae forfeited his eſtate, and that thereupon the entry of the ſaid *Richard* be lawfull or not. [b]

As to the firſt it was Objected, That when *Merick* deviſeth, that *Thomas* his ſon ſhall have his houſe, if the will had not gone further, he had but for life, Then when he addeth, *if* Thomas *my ſon marry, having a male iſſue, that then his ſon to have the houſe*, that is an expreſs deviſe to the ſon that he ſhall have it, and not himſelf. But it was anſwered and Reſolved, That as well the ſaid *Thomas* as the other ſons have an eſtate tail to them ſeverally, and to the heirs males of their bodies; And that for 3 reaſons. 1. Becauſe the Father ſaith, *if he have no iſſue male, his ſon* Richard *to have it*, which is as much as to ſay, as if *Thomas* dieth without iſſue male, which words are ſufficient to create an eſtate in tail in him. 2. The ſaid latter clauſe, *if any of his ſons, or their heirs males of their bodies goe about, &c.* which explaineth the firſt words, that the male iſſue ſhall be heir, and take by diſcent, the firſt words, *that his ſon ſhall have the houſe after his deceaſe*, that is, ſhall have it as heir; for the words of the will make it manifeſt; *and if any of their ſons, and their heirs males iſſue of their bodies, &c.* alſo after it is ſaid, *that then the next heir to enter.* 3. The thing forbidden proveth it alſo; for as well the ſons as their heirs males are prohibited to alien or mortgage, and every reſtreint implyeth (and eſpecially in a will) that the parties (if the reſtraint had not been made) had power to do that which is prohibited, which is the cauſe that he reſtraineth them. And if the ſons had but one eſtate for life, this clauſe of reſtraint, That if they alien, *&c.* that then the next heir enter, *&c.* ſhould be idle, and of none effect.

As to the ſecond pont, it was reſolved by the two Chief Juſtices, Chief Baron, and the Court of Wards, That no Condition or Limitation, be it by Act executed, or by Limitation of uſe, or by device in a laſt will can barr Tenant in tail to alien by Common Recovery for the cauſes and reaſons reported at large in the 6 part of my *Reports*, in Sir *Anthony Mildmay's* Caſe; and according to this Reſolution the Caſe was decreed, *&c.* [b]

Pasch. 9 Jacobi *In the Court of Wards.*

Quick's Case.

[129] Queen *Elizabeth* Lessor, *John Northcote*, and *Tho. Quick* Tenants in Common of the Manor of *Newton* (being the Mesnalty) holden of the Queen by Knights service *in Capite*, and one *Will. Bodley* Tenant peravail of 3 acres of meadow called *Warram Meadow*, holden of the Mannor of *N.* by Knights service. *Tho Quick*, 34 *Eliz.* did infeoff *Babb* and others of his moyetie of the said Mannor, to the use of himself for life, and after to the use of *John Quick* his son and heir apparent in tail, and afterwards to the use of the heirs of *Tho. Quick*; and afterwards *Will. Bodely* of the said 3 acres of Meadow did enfeoff the said *John Quick* and his heirs, and afterwards *John Quick* 5 dayes before his death, and being sick, by Collusion betwixt him and his Father, did enfeoff his Father and his heirs, to the entent to defraud the said *John Northcote* of the Wardship of *Andrew*, son and heir of *John Quick*, being an Infant within age, and afterwards *John Quick* died; after whose death *John Northcote* seised the body of *Andrew Quick*, and afterwards *Tho. Quick* died, after whose death the moyety of the said Mannor descended to *Andrew Quick*. The Question was. Whether the Wardship of the body and of the moyetie of the said 3. acres of Meadow, doth appertain to the King, or to the said *John Northcote*. And this case was argued by Councel learned on both sides, in *Hill.* and *Easter* Term, and 2. Questions were moved in this case.

1. When *John Quick* Tenant in tail in Remainder of the Menalty dieth, his heir within age, then occurreth to the King beginning of Wardship, *viz.* when Tenant for life died, and by the death of *John* accrueth to *Northcote* Wardship of the body, in respect of the Feoffment by collusion [b] of the said 3 acres of Meadow, and of the moyety of the said 3 acres, and after when *Tho. Quick* who was Tenant for life of the Mesnalty dieth, then the Kings title, which was begun before, is consummated; and therefore it was argued, that the Kings title should be preferred; for now the Kings title is by descent of him in the Remainder, and the death of the Tenant for life is but the removing of the impediment: *Et quando jus Domini Regis & Subditi insimul concurrunt, jus Regis preferri debet.* As in the Lady *Hale*'s case, Husband and Wife Joyntenants of a Term for years, the Husband is *felo de se*, he shall forfeit the whole. *Plow. Com.* 262. and yet there it surviveth till office, but after office it hath relation, either before, or at least to the time of the death. So in the case at barr although the Kings title is not full till the death of the Tenant for life, yet when he dieth, then the Kings title is by the descent which accrueth together with the title of *Northcote* by the death of *John Quick*. Note the Case put by *Weston* in Dame *Hale*'s Case of discent to a Villain being Ideot, 263. *Vide* 44 E. 3. 25. If the King and a common Person join in a Foundation, the King is Founder. To that it was Answered and Resolved, That in this case the interest vested in *John Northcote* shall not be devested; for the title of *Northcote* was consummated by the death of *John Quick*, but by his death the King had but a possibility if *Thomas* should die during his minority; for if *Andrew Quick* had come of full age, during the life of *Thomas Quick*, he should never be in Ward, although he were within age at the time of the descent of the Remainder: And *Bingham*'s Case in the 2. part of my *Reports* proveth, that it is but a possibility: for if after the descent of the Remainder, and before the death of the Tenant for life, the Seignory be granted over, and afterwards the Tenant for life dieth, the heir of him in the Remainder within age, neither the Grantor, nor the Grantee shall have the wardship of him. *Vide* 24 E. 3. 25. the Case of the Duke of *Lancaster:* but the said point never came in Question, for by the Feoffment of *John Quick* of the said 3 acres to *Thomas*, the Menalty as to the said 3 acres was extinct, because that *Tho. Quick* hath the Reversion of the Menalty; so that the Reversion being extinct, no particular estate of the Menalty, either for life or intail, can remain. And that was the clear opinion of the 2. Chief Justices and Chief Baron. *Vide* 3 H. 6. 1. 15 E. 4. 12. & 40 E. 3. 14. The case of Warranty.

2. It was moved, That when the Tenant maketh a Feoffment to certain persons by collusion, that the Lord ought to recover the Land by Writ of Right of Ward, before he shall have a Writ of Ravishment of Ward: and therewith agreeth *F.N.B.* 134. *k.* 12 H. 4. 13. *b.* 33 H. 6. 16. by *Prisot*, and the Statute of 34 *H.* 8. in case of Collusion giveth a Writ of Right of Ward for the body and Land, [130] and therefore in this case *Northcote* could not seise the Ward till he had recovered the Land; And then it was Objected, That the title of the King by the death of *Tho. Quick* is in possession, and shall be preferred before the title of *Northcote*, which is onely in Action. To that it was Resolved, That the title of Wardship which accrued to him by the death of *John Quick*, (although it be in action) shall not be devested by the death of another Ancestor, *viz.* of *Thomas Quick*.

Trin.

Trin. 9 Jacobi. *In the Court of Wards.*

Bewley's Case.

Leonard Bewley seised in fee of a house and certain Lands in *Culgath* in the County of *Cumberland*, died thereof seised 25 *January* 38 *Eliz.* after whose death it was found by office, that the said House and Lands, with the Mannor of *Culgath* (whereof they were parcel) by the attainder of Treason of *Andrew Hartley* were forfeited to King E. 2. and afterwards King E. 2. by his Letters Patents granted the said Mannor, whereof, *&c.* to *Morisby* in fee, *tenend. de nobis & hæredibus nostris per servicium medietat. feodi unius militis imperpetuum, & reddend. inde nobis & hered. nostris per annum ad Scaccar.* 10 *l. & faciend. aliis Capital. Dom. feodi illius si qui fuer', reddit. & servitia quæ inde debebantur antequam ad manus nostras devenerunt, Salvis nobis & hæred. nostris feodis militum, & advocationibus ecclesiarum, &c,* and found further the other points of the writ: By office after the death of *Morisby*, *Anno* 22 E. 3. it is found, that the Mannor of *Culgath*, whereof, *&c.* is, and before the attainder of *Hartley* was holden of *Robert Nevil de Horneby, qui illud tenuit de domino Rege in capite per servitium* 16 *s. &* 8 *d. ad cornagium solvend. ad festum assumptionis beatæ Mariæ pro toto anno. Et Juratores prædict. ulterius dicunt, quod post mortem Christopheri Morisby 3. partes dicti manerii tenentur de Dom. rege per servitium militare:* and by an office found 29 E. 3. and another 48 E. 3. and by a Record in 8 *H.* 4. *in computo Collectorum rationabilis auxilii*, &c. and by office in 17 *H.* 8. and by office in 38 *H.* 8. it was found (although it was not in one and the same manner) that the said Mannor of *Culgath* was holden of the King by Knights service. [b]

And it was Resolved by the 2. Chief Justices, and Chief Baron, that by the Patent of King E. 2. that the Tenure of them should be revived, although that the King in the first place hath reserved to himself other services, *viz.* Knights service, where the Mesne before the attainder held of the King in Socage, as appeareth by the said office in 22 E. 3. and although the King hath reserved another Rent, yet because the King for his honour, and in advancement of the antient Right according to Equity and Conscience, expressly intended that the Mesnalty should be revived (which by the Attainder of the Tenant peravail by Rigour of Law, without the fault of the Mesne was extinct) the Clause of Revivor of the Mesnalty shall be preferred before his profit; and therefore the Tenant peravail shall hold of the Mesne, as he held before the attainder, and thus restitution of an antient Right shall be preferred. And Sir *John Molyn*'s Case in the 6. part of my *Reports*, was affirmed for good Law. *Vide* 2 E. 3. 33. *vid.* 60 *b.* 8 E. 3. 283. 17 E. 3. 59. 25 E. 3. 46. 46 E. 3. *Petition* 19. 49 E. 3. 10. 22 *Ass.* 53. 21 *Ass. p.* 30. 4 *H.* 6. 20. 33 *H.* 6. 7. Note upon the said books a difference betwixt a Creation of a new Tenure, without any aspect to the antient right, for there the first Reservation shall stand; and betwixt a Restitution of an antient Tenure; for that shall be preferred before the Reservation, which is first in words. Note the difference. [131]

Mich 9 Jacobi. *In the Court of Wards.*

Holt's Case.

Francis Holt the Grandfather had issue *Thomas Holt* the Father, his eldest son, and 4. other sons, *Thomas* had issue *Francis*; *Francis* the Grandfather being seised of divers Lands in fee in the County of *Lancaster*, part of which were holden of the King by Knights service *in Capite*, and the rest holden of others, did convey part of his Lands holden, and of the other Lands not holden, to the use of *Thomas Holt* the Father, and *Constance* his wife, yet living, for their lives: and afterwards to the use of *Francis* the son, and the heirs males of his body, with divers Remainders over in tail, the Reversion in fee to the right heirs of *Francis* the Grandfather, and conveyed other Lands holden, *&c.* to the use of himself for life, with several Remainders to other of his younger sons then living, for term of their lives severally, the Remainder to *Thomas* the Father for life, the remainder to *Francis* the Grandfather, and to the heirs males of his body, with divers other Remainders, the Reversion in fee to *Francis* the Grandfather and his heirs; *Francis Holt* the Grandfather died, *Thomas* the Father being of full age, who tendred his Livery, and died before Livery sued, or office found: *Francis* the son being of full age, and all is found by office, *Francis* the son continueth the Livery, *Constance* the wife of *Thomas* the Father, and the 4. younger sons of *Francis* are yet living. And 2. Questions were moved in this Case. 1. If the King shall have any primer seisin in this case in possession. 2. If he shall have any primer seisin for the Reversion in fee (expectant upon the said estate tails) which descended after the death of the said *Thomas* the Father. And in this case these points the case being often debated, and good Consideration had) were Resolved. As to the first, [b] [132]

3. points were Resolved.

1. That by the death of *Thomas* before any Livery sued, the King hath lost to have any primer seisin

ſeiſin after the death of *Francis* the Grandfather, as before in *Northcote*'s Caſe, and in *Hale*'s Caſe in the 8th part of my *Reports*, and oftentimes it hath been reſolved. And there is a difference betwixt Primer ſeiſin or Livery, and Mean rates, for Livery or Primer ſeiſin is loſt by the death of the heir, but not mean Rates, if any are due, for they are abſolutely veſted in the King.

2. That *Francis* the ſon ſhall not ſue Livery, or pay any Primer ſeiſin, becauſe that he was out of the Statute of 32 *H.* 8. and 34 *H.* 8. as alſo it hath been often times reſolved, becauſe that after the death of the Grandfather Primer ſeiſin was due by the Father, and the ſon living the Father is not within the Statute.

3. That where the Statute of 32 & 34 *H.* 8. giveth to the King Primer ſeiſin in caſe of Acts executed, that if the King hath a Primer ſeiſin, the Statute is ſatisfied, and he ſhall not have of others in the Remainder, or of the younger ſons, as the Common experience is in the Court of Wards.

Then it was ſtrongly urged, that in this caſe for as much as a Right and Intereſt of Primer ſeiſin was veſted in the King, although that afterwards by the act of God by the death of *Thomas* the Primer ſeiſin by act in Law is diſcharged, yet for as much as the King ſhall have but the Primer ſeiſin, that for the Land conveyed to the younger ſons, the King ſhall not have any Primer ſeiſin; but it ſhall be accompted the Laches of the Kings officers, that they did not force *Thomas* to ſue his Livery, or have taken ſecurity of him to anſwer it. But it was Reſolved, That the King ſhall have Primer ſeiſin for the Lands conveyed to the younger ſons in this caſe, becauſe they are within one of the 3. caſes in which Wardſhip and Primer ſeiſin are given to the King by the ſaid Acts, *viz.* Advancement of his wife; Preferrment of his Children; and Payment of his debts: And the reaſon and cauſe of this Reſolution was, That when the ſaid Acts give to the King Primer ſeiſin, it is intended of an actual and effectual Primer ſeiſin, and not of any one which is mathematical or imaginary for the King ought alwayes to have the full and compleat effect of the thing which is due to him; and therefore if one who is within the ſaid 3. caſes dieth before Livery, ſo that the King hath loſt his Primer ſeiſin, and hath not the effect of the Statute, the King ſhall have Primer ſeiſin of others who are within the ſaid 3. caſes (but not of any other who is out of the ſaid 3. caſes.) And this Reſolution is proved by former Reſolutions and Authorities in the like caſes: and therefore if the King hath title to preſent for lapſe *hac vice*, and he preſent, and his Clerk is admitted and inſtituted, and dieth before Induction, the King ſhall preſent again, for he hath not the full and compleat effect of his preſentation; as it was Reſolved by Sir *James Dyer* and the whole Court in *Giles* Caſe 18 *Eliz.* in the Common Pleas. So if the King marrieth a daughter who is in his Wardſhip, *infra annos nubiles*, and before the age of Conſent the Husband dieth, the King ſhall have the marriage of the heir again, becauſe that the firſt Marriage was not compleat, as it is Reſolved in *Ambroſia Gorges* Caſe in the 6. part of my *Reports*. And yet in theſe caſes a Common perſon ſhall be barred. In [b] 6 *E.* 3. 56. the Caſe was ſuch, The King granted the Honour of *S. Wolry* with the Advowſon of *Mixby* to the ſame appendant, to *Richard* Earl of *Cornwal*, and King of the *Almains*, and to the heirs of his body, Saving the Reverſion to the King, which Earl had iſſue *Edmond* his ſon, and died, *Edmond* his ſon *Octab. Purific.* 8 *E.* 1. levied a fine of one acre of Land parcel of the ſaid Honour, with the Advowſon of the ſaid Church of *Mixby*, to the Biſhop of *Rocheſter*, &c. which alienation was before the Statute of *Donis Conditionalibus*, made 13 *E.* 1. and afterwards the ſaid *Edmond* Earl of *Cornwal* died without iſſue. And by the Authority of this book it appeareth, that although the alienation was made before the Statute, and *poſt prolem ſuſcitatam*, the Donees and their iſſues *habuerunt poteſtatem alienandi*, to barr the Reverſion of Common perſons; yet it ſhall not barr the Kings Reverſion, although it be with Collateral warranty, if there be not aſſets deſcended, So that the King may have a full ſatisfaction and recompence, for without warranty and recompence it is not ſuch compleat alienation, becauſe it moveth from him who hath not a compleat eſtate, which ſhall barr the King of his Reverſion: and therewith agreeth 45 *Aſſ. p.* 6. and yet in the caſe of a Common perſon ſuch bare alienation before the Statute, without any warranty, or collateral warranty, without any alienation ſhould barr the Donor in ſuch caſes.

As to the 2. It was Reſolved, and ſo was it affirmed by the Attorney of the *Wards*, That the Uſage hath alwayes been in ſuch caſes, That *Francis* being of full age at the death of *Thomas* the Father, the King ſhall not have Primer ſeiſin of the ſaid ſeck and fruitleſs Reverſion in the caſe at barr: And the reaſon is, becauſe that the words of *Prærogativa Regis* are, *Rex habebit primam ſeiſinam, &c. capiendo exitus eorundum terrarum & tenementorum, donec, &c.* So when no rent or profit is reſerved, the King cannot take *exitus, &c.* in ſuch caſe. But if the Kings Tenant by Knights ſervice in *Capite* maketh a gift in tail, rendring an yearly Rent or other profit to him and his heirs, and dieth, his heir of full age, the King may take Primer ſeiſin of the Rent or profit which deſcendeth to the heir for one year: And ſo Note, that for ſuch a Rent-ſeck and fruitleſs Reverſion the heir ſhall be in Ward if he be within age, but ſhall not pay Primer ſeiſin for ſuch fruitleſs Reverſion, if he be of full age at the time of death of his Anceſtour.

Mich. 8 Jacobi. *In the Court of Wards.*

Matthew Mene's Caſe.

Matthew Menes the Grandfather being ſeiſed in fee of divers Meſſuages, Lands, and Tenements in the County of *Kent* of the Cuſtom of *Gavelkind*, and of a Houſe holden of the King by Knights ſervice *in Capite*; and the reſt of Common perſons in Socage, had iſſue *Andrew*, who had iſſue *Matthew*, *Thomas*, *John* and *Andrew*: *Andrew* the Father died, *Matthew* the Grandfather by his will in writing deviſed all his ſaid Lands, *viz.* to *Matthew* eldeſt ſon of *Andrew* the Father one part, and to the heirs of his body, and to *Thomas* ſecond ſon of *Andrew* the Father another part, whereof the houſe holden *in Capite* was parcel and of like eſtate; and to the other ſons of *Andrew* the Father, other parts of the like eſtate. *Matthew* the Grandfather died ſeiſed of the ſaid Meſſuages, Lands and Tenements, *Matthew* the ſon being of the age of 15 years, and all the ſaid brothers of *Matthew* being alive, and all this was found by office. And in this Caſe 2. Queſtions were moved. [133]

1. If the King ſhall have a 3. part of the ſaid Meſſuage only, and not of the other Lands not holden of the King?

2. Admitting that he ſhall have a 3. part of the whole, whether he ſhall have a full third part of the eldeſt ſon only, or out of the part of every brother?

And as to the firſt, It was ſtrongly urged, That the King ſhould have but a 3. part of the Land holden, becauſe if no will had been made, the King ſhould have but the 3. part of that which deſcended to the eldeſt ſon, for where the Statute of *Prærogativa Regis* ſaith, *Dominus Rex habebit Cuſtodiam omnium terrarum eorum qui de ipſo tenent in Capite per ſervitium militar.* &c. *de quocunq; tenuerunt*, &c. it is meant, if the Land deſcend to the ſame heir, to whom the Land holden deſcendeth; but if any part deſcendeth to another heir, the King ſhall not have it, and therewith agreeth 12 E. 4. 18. and *Stamf. prærog.* 8 *b.* And the Statutes enable one to deviſe 2. parts of his Lands for the benefit of his Children, where the King had all if no deviſe were made, but in all caſes where no Will is made the King had nothing, for the Statute gave not any Wardſhip or Primer ſeiſin, although a will be made, and thereby the Land deviſed as his ſons, for the ſame is not within the purview of the ſaid Act. [b]

To which it was anſwered and Reſolved, That it is true that if no Will had been declared, the King ſhould not have the Lands holden of others in Socage, which deſcend to younger ſons, but when by the Will (to which he is enabled by the Statute) he deviſeth the ſame to his ſons, in ſuch caſe the Saving in the Same Statute giveth to the King Wardſhip and Primer ſeiſin; and therefore a ſtronger caſe was agreed for Law. Tenements deviſable by Cuſtom n *London* came to King *H.* 8. by the diſſolution of Abbies, and afterwards the King by his Letters Patents granted them in Fee to hold by Knights ſervice *in Capite*, and the Patentee by his Will deviſed them for the preferment of his wife, advancement of his children, and payment of his debts, and died, his heir within age, the King ſhall have the 3. part in Ward: and yet the deviſe is good for the whole Land by the Cuſtom, without any help of the Statutes of 32 & 34 *H.* 8. And notwithſtanding the King in ſuch Caſe ſhall have the Wardſhip of the 3. part by force of the ſaid Saving in the ſaid Statutes; and therewith agreeth 5. *Ms. Dyer* 155. 6 *Eliz. Dalliſon* 4. *Paſc.* 20 *Eliz.* between *Barbor* and *Eliz.* his wife Plaintif, and *William Long* Defendant in a *Partitione faciend.* Judgment was given upon a ſpecial Verdict Reported by Serjeant *Bendloes*, by which it was Reſolved, that the King, *à fortiori* in the caſe at barr ſhall have a 3. part of the whole.

As to the ſecond point, It was alſo Reſolved, That the King ſhall have the 3. part out of every ſeveral part, ſo that the charge ſhall be equal, and ſhall not fall upon one only. *Vide* 35 *H.* 8. *Teſtaments, br.* 19. 4 E. 3. *Aſſiſe* 178. *Vide* 21 & 22 *Eliz. Dyer* 366. *b.*

Mich. 9 Jacobi. *In the Court of Wards.*

Aſcough's Caſe.

It was found by Office, after the death of *William Aſcough* Eſquire, that Sir *Edw. Aſcough* Father of the ſaid *William* was ſeiſed in fee tayl of the Mannor of *Darcie*, and of the Mannor of *Belbie* in *Stallingborough*, in the County of *Lincoln*, the remainder to *Francis* his brother in tayl, the remainder to the ſaid Sir *Edward* in fee, And that the ſaid *William Aſcough* was ſeiſed in fee of a houſe, 31 acres and a half of land, 9 acres of meadow: and 2 acres and a half of paſture in *Stallingborough* aforeſaid, and held them of the ſaid Sir *Ed. Aſcough*, as of his Mannor of *Darcie*, *ſed per que ſervitia Juratores ignorant.* And that the ſaid *William* was alſo ſeiſed of a houſe, and 40 acres of lands, &c. in *Owresbie* in the ſaid County, and held them of Sir *Thomas Munſon*, as of his Mannor of *Owresbie* in the ſame County, And afterwards, upon the Marriage of *William* with *Katherine* the [134]

daughter of *William Henage*: the said Sir *Edward* and *Francis* levied a fine of the said Mannors to the uses following, *viz.* of some part in certain of the Mannor of *Darcie*, and some of part in certain of the Mannor of *Selbie*; to the use of *William* and *Katherine* for their lives, and to the heirs males of the body of *William*, the remainder to the said Sir *Edward* in tayl, with divers remainders in tayl, the remainder to Sir *Edward* in fee; and for the residue of the said Mannors to the
[b] use of the said Sir *Edward* for life, and afterwards to the use of the said *William* and his heirs males of his body, with divers remainders over in tayl, the remainder to the right heirs of the said Sir *Edward*; and afterwards the said *William* died, as aforesaid seised, *Edward Ascough* his son then being within age, and that the said Mannors of *Darcie* and *Selbie* are holden of the King by knights service *in Capite*; and that Sir *Ed. Ascough* the Father, *William* and *Katherine* are yet alive.

And the sole point in this case was shortly this. The King Lord, Mesne, who hold by Knights service *in Capite*, Tenant paravail in socage, the Mesne granteth the Mesnalty to the use of himself for life, and afterwards to the use of the Tenant peravail in tayl; if in this case the Mesnalty be suspended during the life of the Mesne, by force of this remainder in tayl. And it was Resolved, That a remainder in tayl, or for life expectant upon an estate for life or in tayl, shall never suspend a Mesnalty, Seignory, Rent, &c. For although that the remainder vesteth presently, yet it cannot suspend the present freehold of the Rent during the life of the first Tenant for life, because that the Tenant for life is Tenant to the Lord, or to him in the reversion so long as he liveth, and shall do the services, and the Avowry shall be upon him, for he is the very Tenant by the Mannor; and during his life the heir of him in the remainder in tayl shall not be in ward, &c. And as a Seignory, Rent, &c. cannot be suspended in part and *in esse* for part, in respect of the land out of which it is issuing; neither can a Seignory, Rent, &c. be suspended in remainder, and *in esse* for a particular estate in possession, for then would follow fractions of estates, and particular estates should be created without Donors or Lessors, against the rules and Maxims of the Law: But in this case aforesaid, if the Mesne grant his Mesnalty to one for life, or in tayl, the remainder to the Tenant paravail in fee; there the Mesnalty is extinct, because he hath as high estate of inheritance of the Mesnalty as he hath in the Tenancy, and there is not any possibility to revive the Mesnalty. And in the same case the Mesnalty is not extinct for the inheritance, and *in esse* for the particular estate for life, or in tayl in possession, but the Mesnalty by the remainder in fee is extinct in the whole, for otherwise in the same case this absurdity will follow, *sc.* that there shall be a fee-simple of the Tenancy peravail, and also a fee-simple of the Seignorie paramount, and but an estate for life, or in tayl of the Mesnalty only; and so a Tenancy in fee-simple shall be only holden of a Mesnalty for life, or in tayl, and a Seignory in fee shall be issuing out of a Mesnalty for life or in tayl only, which is impossible, and by no means may be. *Vid.* 3 *H.* 6. 1. 15 *E.* 4. 12.

Note Reader I conceive, That if the Lord granteth his Seigniory for years, the remainder to the
[135] Tenant peravail for life, in this case the Seigniory is suspended, because the Tenant for life hath the freehold of the Seigniory, and he is Tenant to every *Precipe* of the Lord, as in the case of *Littleton, cap. attorn.* 128. If lands be leased to a man for term of years, the remainder to another for term of life; and afterwards the Lessor granteth over the reversion, and he in the remainder for life attorneth, it is a good Attornment, and shall bind the Lessee for years, without any Attornment by him, for he was Tenant of the Freehold, and at the Common Law the Termor for years was subject, and under the power of the Tenant of the Freehold, for he shall not falsifie a Recovery at the Common Law, against the Tenant of the Freehold, because he hath but a Chattel. And whereas it is said in this Case, That the Seigniory cannot be suspended in part, and *in esse* for part, as it is holden in 32 *H.* 8. *br. Extinguishment* 48. the same is regularly true, but *habet hec regula plures fallentias*, all which may be well explained with this difference between the Act of the party, and Act in Law, For by Act of the party, be it right or wrong, all the Seigniory, &c. is suspended, and therefore if the Lord, or Lessor disseise, or oust his Tenant or Lessee of any part, the whole is suspended, as it is holden in 11 *E.* 3. *Cessavit* 21. 7 *H.* 6. 26. 35. *H.* 6. *Avowrie* 46. 9 *E.* 4. 1. *a.* 4 *H.* 7. 6. *b.* 32 *H.* 8. aforesaid. And the book in 21 *E.* 4. 29. *a.* is mistaken in the printing, for there it is said, *Quod fuit negatum* by all; where it should be *quod fuit concessum* by all the Justices, *Vid.* 9 *E.* 3. 7. The same Law, If the Lord taketh a Lease of any part of the Tenancy, the whole Seigniory is suspended, as it is resolved in 32 *H.* 8. before. So if a Commoner taketh a lease of any part of the Land, in which, &c. the whole Common is suspended; and therewith agreeth 11 *H.* 6. 22. But in the Case of a Rent service, if the Lord purchaseth part of the Tenancy in Fee, part is extinct, and *in esse* for the residue. Now for the other part of the difference by Act in Law a Seigniory may be suspended in part, and *in esse* for part; And therefore if the Lord seiseth the wardship of the Land of his Tenant by Knights service, now the Seigniory is suspended, but if the Gardian endoweth the wife of the Tenant of the third part of the Tenancy, now the third part of the Seigniory is revived, and the Tenant in Dower shall be
[b] attendant to the Gardian for 3 parts of the Services, because the Tenant in Dower is in by Act in Law, as it is holden in 33 *E.* 3. *Dower* 138. And for the same reason, If a man seised of lands in fee taketh a wife, and infeoffeth another, and the Husband dieth, the wife is endowed of the 3 part of the land, out of which the Rent is issuing, the 3 part of the Rent in such case which the wife hath for life is extinct, and the 2 parts of the rent remain to him, issuing out of the other 2 parts; for although it is a Rent charge, yet by Act in Law it shall be apportioned, as it is adjudged in *Jurdens* case, 5 *E.* 2. *Avowry* 206. *Vid.* 30. *Ass. p.* 12. where a Rent charge shall be suspended in part, and *in esse* for part by Act in Law; And 29 *Ass. pl.* 10. If Gardian in Knights service seiseth the land of one daughter and heir within age, the other daughter being of full age, there the Seigniory is suspended for one moiety, and *in esse* for another moiety: So if two Coparceners be of a Seigniory,

and

and one diſſeiſeth the Terr-Tenant, or cometh to the land by deforceable title, the other may diſtrein him for her moiety of the Seignory, for the Act of one Coparcener cannot prejudice the other in ſuch caſe. And where it is ſaid in the caſe before, That where the Tenant maketh a leaſe for life, or a gift in tayl, the remainder over in fee, that the Tenant for life, or Donee in Tayl is very Tenant by the mannor to the Lord paramount. True it is, that at the Common Law there are four manner of Avowries for Rents, Services, &c. 1. By reaſon of the Tenure upon one, as upon his very Tenant, and that is when the Lord hath fee in the Seigniory, and the Tenant hath fee in the Tenancy, *ut ſuper verum tenentem ſuum.* 2. Upon one as his very Tenant by the manner, *ut ſuper verum tenentem ſuum in forma præd.* and that is when the Tenant maketh a leaſe for life, or a gift in tayl, with the Remainder in fee; in this caſe, if the Lord hath fee in the Seignory, he ſhall avow upon the Tenant for life, or Donee in tayl, as upon his very Tenant by the manner. 3. Upon one, as upon his Tenant by the manner, leaving out this word (*very*) and that is when the Lord hath a particular eſtate in a Seigniory, as an eſtate in tayl, eſtate for life, or leſs intereſt *ſuper tenentem ſuum in forma præd.* ſo ſhall the Donor upon the Donee, Leſſor upon the Leſſee for life, or years. 4. Upon the matter in the Land, as within his fee and Seigniory; as where the Tenant by Knights ſervice maketh a leaſe for life, rendring rent, and dieth, his heir within age, the Gardian ſhall make ſuch avowry upon the Leſſee, *ſc. ſuper materiam præd. in tetris & tenementis præd. ut infra feodum & Dominium ſuum.* And all theſe forms of Avowries you ſhall find in your books, 20 *H.* 6. 9. 2 *H.* 4. 24. 12 E. 4. 2. 26 *H.* 6. *Avowry* 17. 9 *Eliz. Dyer* 257. a. 5 *H.* 7. 11. 7 E. 4. 24. 20 E. 3. *Avowry* 131. 47 E. 3. *ult.* 38 *H.* 6. 23. But now by the Statute of 21 *H.* 8. *cap.* 19. The Lord may avow the taking of the diſtreſs within the Tenancy, as in lands and tenements within his fee or Seigniory, without making any Avowry upon any perſon certain; but the Lord hath liberty, if he will, to make his Avowry according to the Common Law. [136]

Hill. 9 Jacobi *In the Court of Wards.*

Thoroughgood's Caſe.

[b]

IT was found by Office in the County of *Cambridge* 21 *Jan.* 36 *Eliz.* by force of a writ of *Diem clauſit extremum* after the death of *Robert Thoroughgood*, that he was ſeiſed in fee of a houſe, &c. and divers lands and tenements in *Tadlow* in the County aforeſaid, and that the ſaid houſe, &c. was holden of the King by Knights ſervice *in Capite*; and he being ſo ſeiſed, made and ſealed in the ſaid Meſſuage a certain writing indented in theſe words, To all Chriſtian people, &c. *Robert Thoroughgood* ſendeth greeting, &c. Know ye, that I the ſaid *Robert* for divers good cauſes, &c. have given, granted, and enfeoffed, and by theſe parties do give, grant, and enfeof and confirm to *Henry Hutton* and *Edward Eliot* all that my capital Meſſuage, &c. Lands and Tenements, &c. *Habendum* to the ſaid *Henry Hutton*, and *Edward Eliot*, and their heirs, &c. Dat. 18 *Julii* 35 *Eliz.* And further they ſay that the ſaid *Robert* lying ſick, delivered in the aforeſaid Meſſuage the ſaid 18 of *July* the aforeſaid writing indented to the aforeſaid *Henry Hutton*, and *Edward Eliot*, for and in name of ſeiſin of the ſaid Meſſuage, and all the reſidue of the Lands and Tenements contained in the ſaid writing indented; and further found the other points of the writ. And upon this caſe 2 Queſtions were moved. 1. If in this caſe the Jury have found a ſufficient delivery of the Indenture, to make the ſame a deed in Law. 2. If this delivery of the Indenture in the houſe, in the name of ſeiſin of the houſe, and reſidue of the Lands and Tenements aforeſaid, were ſufficient livery of ſeiſin in Law, or not. As to the firſt, it was Reſolved, that the actual delivery of a writing ſealed to the party, without any words, is a good delivery; for *In traditionibus ſcriptorum non quod dictum eſt, ſed quod geſtum eſt inſpicitur:* But here he ſaith, *I deliver this writing unto you*, which clearly is ſufficient, although he doth not ſay as his deed, or as his Act. And therefore if *A.* maketh a writing to *B.* and ſealeth it, and delivereth the ſame to *B.* as an eſcrow, to take effect as his deed when certain conditions are performed, it hath been adjudged to be preſently his deed, for the Law doth reſpect the delivery to the party himſelf, and doth reject the words which ſhall make the expreſs delivery to the party upon the matter no delivery. And therefore in 12 *H.* 8. *Rot.* 751. *in Banco*, *Anne Quilter*, late the wife of *John Quilter*, and others, Executors of the will of *John Quilter*, brought an action of debt againſt *Edw. Cobham* upon an Obligation, &c. the Defendant pleaded that he delivered the Obligation to the Teſtator as a Schedule, upon condition, that if the Plaintif made Indentures between the Defendant on the one part, and the ſaid Teſtator of the other part, *de certis conditionibus convent. & agreament. inter eaſdem partes adtunc concord,* &c. *pro adnullatione præd. ſcript. oblig.* &c. *ante feſtum* Mich. *Archang. deliberand. quod tunc præd. ſcript. Obligator. in omni ſuo robore ſtaret, ſin aliter, vacua foret: & idem defendens dicit quod præd. Teſtat. non fecit aliquam Indent.* &c. *& ſic idem defendens dicit, quod ſcript. præd. in forma præd. deliberat. dictis Indent. inter eaſdem partes minimè confectis non eſt factum ſuum, & hoc,* &c. Judgment if Action? And thereupon the Plaintif did demur in Law, And it was reſolved that the ſaid delivery was good in Law, although the Condition were not performed, and the Plaintif had Judgment to recover. And *Trinit.* 13 *H.* 8. *rot.* 405. *in Banco*, between *Thomas Bodenham* Eſquire Plaintif, and *Ed. Marmion* Clerk [137]

Defendant, in debt upon an Obligation the like plea was pleaded, and a demurrer upon it, and Judgment was given for the Plaintif, which Judgments upon search (which I commanded to be done) I have seen. And therewith agreeth the Report of 19 *H.* 8. 8. *a.* and took the difference when it is delivered to the party himself, and when to a stranger, as it was there agreed 35 *Ass. p.* 6. A deed may take effect by actual delivery of the party himself, without any words. And as a writing may take effect by actual delivery to the party without words, so it may take effect by words, without actual delivery: As if a writing be sealed, and lieth in a window, or upon a Table, and the Obligor saith to the Obligee, do you see the writing, take it as my deed, and he taketh it accordingly, it is a good delivery in Law: The same manner if one maketh a Charter of Feofment, and within the view of the Land, saith to another, see you the Land, enter into it and enjoy it according to the effect of this Charter, and the Feoffee doth enter, it amounts to a good livery of seisin of the land. And if words in such case shall amount to a livery of seisin, by
[b] which a freehold shall pass, *a fortiori* words shall amount to a delivery of a deed; for which cause it was concluded *a fortiori* in the case at Bar, when *Robert Thoroughgood* delivered the writing to the parties, saying, *Here I deliver unto you this writing*, it is a good delivery thereof to take effect as a deed. *Vid.* 33 *Ass.* 2. 33 *E.* 3. *Assise* 367. 43 *E.* 3. 28. 13 *H.* 4. 8. 8 *H.* 6. 26. 9 *H.* 6. 37. *Vid.* 4. *H.* 6. 5. If the Obligee bail the Obligation to the Obligor to rebail to him, the Obligee may detain the obligation for ever, and these words to rebail to him are void, *Vid.* 29 *H.* 8. 34 & 35 *Dyer*, and *Trin.* 43 *Eliz.* between *Hawskston* and *Catcher* in the Kings Bench, where some opinions upon the suddain were conceived, that the Obligor might deliver an obligation as an escrow to the Obligee; but believe you the said Judgments given upon demurrer in Law in the point. Wherefore as to this first point it was clearly resolved, that the said writing sealed took effect as a deed by the delivery aforesaid. As to the second point, First it was clearly Resolved, That the delivery of the Deed upon the land, doth not amount to a livery, for the same hath another effect, *sc.* to take effect as a deed, as it is Resolved in *Sharps* case, *Anno* 42 *Eliz.* in the Common Pleas Reported in the 6 part of my *Reports*; and there it is agreed, That to every livery of seisin there is requisite, either an Act, which the Law doth adjudge livery, or apt words which do amount to it, And there the case of 43 *E.* 3. *Feofments* and *Faits* 51. is cited, which is to this effect. In an assise the Recognitors found a special verdict, *sc.* That the Plaintif was seised of lands in fee, and the Tenant drew and engrossed a Charter of Feofment of the land in veiw, &c. in the name of the Plaintif to the Tenant himself and his heirs, and the Tenant delivered the Charter to the Plaintif, and prayed him to deliver seisin in the same land, and the plaintif would not deliver seisin in the same land, but he delivered back the Charter to the Tenant upon the land, and kept himself in; and if the delivery of the Charter upon the Land was sufficient livery of seisin, was the Question, and there *Kirton* Justice said, If the plaintif had spoke in this manner, Sir I deliver to you this Charter in the name of seisin, of all the lands and tenements contained in the Charter, it had been a good delivery of seisin; but so he doth not do in this Case, for which cause the Court adjudged that the Plaintif should recover seisin. And it was Resolved, That although most properly livery and seisin be made by delivery of a Twig or Turf of the land it self; whereof seisin is to be given, and so it is good to be observed; yet delivery of a Turf or Twig growing upon the Land; or a peece of gold or silver, or any other thing upon the land in the name of seisin is sufficient, for the Turf or Twig which groweth upon the land, when it is severed is no parcel of the land, and when the Feoffor is upon the land, his words without any act are sufficient to make
[138] livery and seisin; as if he saith, I deliver seisin of this Land to you in the name of all the Land contained in this deed, Or enter you into this Land, and take seisin of it in the name of all the Land contained in this deed, or other words, without any ceremony or act done; and that is the reason that the delivery of any thing upon the land in the name of seisin is sufficient, because that the only words without any thing were sufficient; For if only words of the Land which is within the view are sufficient in Law; *à fortiori* when they are spoken upon the Land it self, and yet it is not wisely done to omit usual ceremonies and acts in such cases, for they do imprint more remembrance of the thing done, because they are subject to sight, than only words, which are only heard, and usually slip out of memory: for which Cause it was Resolved, That the delivery of the deed upon the Land in the name of seisin was sufficient in Law. And *Sharps* Case was affirmed for good Law in this case. 3. It was Resolved, That this delivery of the writing amounted to 2. several acts at one instant, *viz.* to deliver the writing as a deed, and to deliver seisin of the land according to the deed.

Pasch.

Pasch. 10 Jacobi *In the Court of Wards.*

Beaumont's Case.

SIr *Humfry Foster* seised in Fee of the Site of the Monastery *Gracedieu*, and other Lands in Question, gave them to *John Beaumont* and *Elizabeth* his wife, and to the heirs of their 2. bodies begotten, the Remainder in fee to *John Beaumont*, *Anno* 6 E. 6. *John Beaumont* levied a fine *come ceo* to King E. 6. his heirs and successors with proclamations, King E. 6. *Anno* 7. granted the said Site, &c. by his Letters Patents to *Francis* Earl of *Huntington* and his heirs, *John Beaumont* died, after whose death *Elizabeth* within 5 years entred claiming her estate, the said *Francis* Earl of *Huntington* died, *Henry* his son and heir 16 *Eliz.* by Indenture reciting the said gift by Sir *Humfrey Foster* to the said *John* and *Eliz.* his wife in special tayl, and that *Eliz.* was then seised in her demesne as of Fee tayl, by force of the said gift, did ratifie, allow, and confirm to the said *Eliz.* her estate, *Habendum* the Lands to her and to the heirs of the body of the said *John Beaumont* deceased, and the said *Eliz.* The said *Elizabeth* died seised, having issue *Francis Beaumont* one of the Justices of the Common Pleas, son and heir of both their bodies. *Francis Beaumont* entred into the Site, &c. and took the profits, &c. and afterwards accepted a fine with proclamations *sur Conysans de droit tantum* of 2. Strangers, with a render for 99 years after the death of the said *Francis*, if *Ann* his wife should so long live, the proclamations pass, *Francis Beaumont* having issue Sir *Henry Beaumont* his eldest son, and *John* his younger son, Sir *Henry* in Gard to the Queen attained to his full age 45 *Eliz.* and before Livery by Indenture 2. *Jacobi* Covenanted upon good Consideration to stand seised to the use of himself and the heirs males of his body, and afterwards to the use of *John Beaumont* his brother and the heirs males of his body, with divers Remainders over. Sir *Henry Beaumont* died without issue male, having issue *Barbara*, who now is of tender years, and in ward to the King. The Question was, Whether the said Site and Land did appertain to *Barbara*, or to the said *John Beaumont*: And in this case two points were moved and urged by Councel on both parts, *viz.* in the Terms of *Trinit. Mich.* and *Hill.* by *Coventrey*, *Thomas Crewe*, and *George Crooke* on the Kings part, and by *Finch*, *Walter*, and *Harris* Serjeant on the part of the heir male: And the first point was, If by the fine levied with proclamations, and the death of *John Beaumont*, the wife had but an estate for life dispunishable of wast, as Tenant in tayl after possibility of issue extinct? The 2. Admitting she had an estate tayl, what is wrought by the said Confirmation, if thereby the issue in tail shall inherit or not? As to the first it was Objected, That by the fine levied by the Husband, the estate tayl was barred, because the issue ought to make himself heir to both their bodies, as it is adjudged in 18 *Eliz.* 351. *b.* So, and for the same cause, If one Donee be attained of Treason, the estate tayl is extinct, as it is expresly holden in 16 *Eliz. Dyer* 332. *b.* and therewith agreeth 5 *H.* 7. 32. by *Brian* Chief Justice, from thence it followeth, that the wife cannot be seised of an estate tayl, because that the estate tayl by fine was barred and extinct; and therefore for necessity of reason, the estate of the wife shall be changed into an estate for life dispunishable of wast: And the same was resembled to the case in 7 *H.* 4. 16. Husband and Wife Tenants in special tayl are divorced (which is intended of a divorce which dissolveth the marriage *ab initio*, and the Husband and Wife *à vinculo matrimonii*) the Donees have an estate but for their lives, because the estate tayl is determined and extinct. It was also urged, That if the wife should have an estate in tayl, then she might suffer a Recovery, or levy a fine, and so barr the Conusee of her Husband, or prevent the King of his forfeiture for Treason, which should be against the Resolutions aforesaid reported by the Lord *Dyer*. Then if the estate be converted into an estate for life dispunishable of wast, in the nature of a Tenant in tayl after possibility of issue extinct, it followeth, that the Confirmation doth enlarge her estate, and make *Barbara* daughter of Sir *Henry* inheritable to the Land. But admitting for the Argument of the 2. point, That the said *Eliz.* had an estate in special tayl, the Reversion expectant to the said *Henry* Earl of *Huntingdon* to take effect in possession (in respect of the said fine levied by the Husband) presently after the death of the said *Elizabeth*, Then the 2. point is, If against the said Confirmation made by him who hath the Reversion in fee expectant as is aforesaid, he shall enter into the Land after the death of the said *Elizabeth*, or if the Confirmation to *Eliz.* in tail as above, maketh the issues of the said *John* and *Elizabeth* inheritable; It was strongly urged, That the issues should be inheritable by the said Confirmation for 2. causes: one in respect of the estate of him who hath made the Confirmation by way of extraction of a new estate out of the Reversion: the other, in respect of the estate of him to whom the Confirmation is made, by way of incorporation and alteration of the Quality of the estate. As to the first, The said Earl hath the entire Reversion in fee, out of which he may raise and create as many estate tayls one after the other, as he will, and therefore when he confirmeth the estate of the wife, To have and to hold to her and to the heirs of the body of the said *John* and *Elizabeth*, thereby the Earl hath excluded himself and his heirs by expres words, so long as the said *John* and *Elizabeth* had heirs of their bodies to claim the Land: As if a Feme Covert be Tenant for term of life, the reversion over in Fee, if he in the reversion confirm the estate of the Husband and Wife, to have and to hold to them for their lives, in this case the Husband shall have an estate for life after the death of his wife for it shall be against reason, that he who hath the Reversion in Fee, out of which he may derive as many estates for lives as he will, should enter into the land after the death of the Wife, during the life of the Husband,

[b] [139] [b]

and againſt his own Confirmation, when the Husband hath ſuch eſtate upon which the Confirmation may enure, by way of extraction of a new eſtate out of the Reverſion; and therewith agreeth *Littleton* 120, 121. and 17 E. 3. 68. *b*. So in the caſe at barr, it ſhall be againſt reaſon that the Earl who made the Confirmation after the death of *Eliz.* ſhould enter into the Land, againſt the limitation of his own Confirmation; *viz.* ſo long as the ſaid *John* and *Eliz.* have heirs of their bodies. Secondly, in reſpect of the eſtate of the ſaid *Eliz.* for this Conformation doth alter the Quality of her eſtate, and thereby incorporate a new quality in the eſtate; For where the Earl after the death of *Eliz.* might have entred and excluded all the heirs in tayl, now by this Confirmation he hath added this enlarging quality, to make all the heirs in tayl inheritable. And that a Confirmation may alter or add to the quality of the eſtate in Land, appeareth in our books. And therefore, if the Leſſor confirmeth the eſtate of his Leſſee for life, (and addeth this clauſe) without impeachment of waſt,
[140] it is good. So if the Lord paramount confirm the eſtate of the Meſne with clauſe of acquittal, it is good. 6 E. 3. 7. 19 H. 6. 63. F. N. B. 136. *v.* 4 E. 4. 35. *Iſabel de Upſeys* caſe. So a Confirmation may alter the quality of eſtate of land; as if the eſtate of the Feoffee be upon Condition the Feoffor may confirm his eſtate abſolute, and ſo alter the quality or eſtate of Land; as if the eſtate of the Feoffee be upon Condition the Feoffor may confirm his eſtate abſolute, and ſo alter the quality of the eſtate of the Land; *viz.* conditional into abſolute; 7 H. 6. 7. *b. Mayowes* caſe in the 1. part of my *Reports*. So in 49 E. 3. 7. If the Lord in antient demeſne confirm the eſtate of the Tenant, to hold by certain Service at the Common Law, although the eſtate of the Tenant be not changed, nor any tranſmutation of the poſſeſſion, yet the quality of his eſtate is changed; for the Tenant ſhall not be afterwards impleaded by Petit writ of *Droit cloſe*, and the Land by the confirmation is diſcharged from the cuſtoms of the Mannor. So in the caſe at barr, although the eſtate of *Eliz.* is not changed, nor any tranſmutation of poſſeſſion had, yet the quality of eſtate of the ſaid *Eliz.* is changed, by incorporating of a Quality to the eſtate of the ſaid *Elizabeth*, *viz.* that the heirs in tayl ſhall inherit. As to the firſt point, It was anſwered and Reſolved, That the wife after the death of her Husband had an eſtate in ſpecial tayl; and for the better underſtanding of the true reaſon thereof, it is to ſee, by what Law the eſtate of the wife ſhall be altered and changed to an eſtate for life; And firſt, it was Reſolved, that it was not by the Common Law; for at the Common Law, If Lands had been given to the Husband and wife, and to the heirs of their two bodies, and after iſſue the Husband had aliened and died, this alienation had not barred neither the wife, nor the iſſue in tayl, becauſe the Husband alone had not power of aliening, for as much as he had an undivided eſtate jointly with his wife; and therewith agreeth 12 H. 4. *Formedon* 15. 21 E. 3. 45. and by the Statute of *Weſt.* 2. *de donis*, &c. it is enacted, that a fine levied by Tenant in tayl *ipſo jure ſit nullus*. As to the caſe of 16 *Eliz.* of Treaſon whereof the Husband is attainted, it is to know, that ſuch barr and forfeiture is by the Statute of 26 H. 8. *Cap.* 13. by which it is enacted, That every offender convicted of high Treaſon, &c. ſhall loſe and forfeit to the King, his heirs and ſucceſſors, all ſuch Lands, &c. whereof any ſuch offender ſhall have any eſtate of Inheritance; but in the ſame act there is a Saving to every perſon (other than the offenders,) their heirs and ſucceſſors, all rights, titles, intereſts, &c. So that it appeareth, that the eſtate of the wife, if ſhe overliveth the Husband, is ſaved by this act, and that the barr by the Statute is only as to the iſſues in tayl, and not to the wife; and the reaſon of the Reſolution that the heir is diſabled in ſuch caſe is, becauſe he ought in his lineal Conveyance make him heir as well to the Father as to the Mother by the opini-
[*b*] ons of *Catlyn*, *Wray*, *Saunders*, and *Dyer*. And as to the ſaid Caſe of fine with proclamation in 18 *Eliz.* levied by the Husband alone, the barr is made by the Statutes of 4. H. 7. *cap.* 24. & 32 H. 8. *cap.* 36. And in the Statute of 4 H. 7. there is a Saving for the wife, if ſhe bring her action or Lawful entry within 5 years after ſhe ſhall be uncovert, as ſhe did in this caſe; and by the Statute of 32 H. 8. the fine levied with proclamation of Lands intailed to him who levieth the fine, or any of his anceſtors, ſhall be a ſufficient barr againſt the ſaid perſon and his heirs claming by force of any ſuch intayl, and againſt other perſons claming only to their uſe, or to the uſe of any manner of heir of their body, in which caſe there needeth not any Saving for Strangers, for the purview of the act is ſpecial, and *ſecundum quid*, *viz.* againſt the heirs in tayl, and others claiming to their uſe; and therefore *diſtinguendum eſt*, That the fine with proclamations levied by the Husband, Or the attainder of the Husband of high Treaſon is a barr to the eſtate tayl, *quoad* the iſſues in tayl, but not *quoad* the wife, but that ſhe overliving ſhall be ſeiſed of an eſtate tayl, which eſtate is ſaved to her by all the ſaid Acts. And the ſame is proved by the ſaid books of 18 *Eliz.* for there the Husband being jointly ſeiſed with his wife in ſpecial tayl, levied a fine with proclamations, to the uſe of him and his heirs (which fine is a barr to the iſſue in tayl) and afterwards the Husband deviſed the Land to the wife for life, and died, there the wife entred and wayved the eſtate tayl, claming for life by force of the deviſe, which proveth, that if ſhe had not waived the eſtate tayl, that ſhe ſhould have had it, and not an eſtate for life, as is ſuppoſed by the other ſide. And in the Indenture of Confirmation which was made in 16 *Eliz.* it is recited, That the ſaid *Eliz.* had an eſtate tayl, by which it appeareth that the Law was ſo taken at that time. And as to that which was Objected, That the ſaid *Elizabeth* could not have an eſtate tayl, becauſe that as to the iſſues in tayl the eſtate tayl is barred, Alſo it was asked, To what end ſhould ſhe have an eſtate tayl, when it cannot deſcend? It was Anſwered and Reſolved, That one may have an eſtate tayl, and yet all the iſſues in tayl ſhall be barred to inherit, as in Sir *George Browns* Caſe in my 3. Reports, Sir *Richard Bridges* ſeiſed of certain Lands in fee, did thereof infeoff *Winchcomb* and others, upon Condition that they ſhould give the ſame to him and his wife, and to the heirs of their 2. bodies begotten, the Remainder to the right heirs of Sir *Richard*, which was done accordingly; They have iſſue *Anthony Bridges*, Sir *Richard* died, *Anthony* in the life of his Mother levied a fine with proclamations

mations to Sir *George Brown* in fee, the wife living, the ſaid *Anthony* made a Leaſe for 3 lives, which was not warranted by the Statute of 32 *H.* 8. And there it is Reſolved, That the ſaid fine levied by the ſaid *Anthony*, ſhould barr the eſtate tayl; yet there it is clearly admitted, that the wife doth remain Tenant in tayl; for there the Queſtion was, If the ſaid diſcontinuance for lives without warranty was within the Statute of 11 *H.* 7. but if the eſtate of the wife had been changed to an eſtate for life, then without Queſtion the ſaid Leaſe for 3. lives had been forfeit by the Common Law, and all the argument upon the Statute of 11 *H.* 7. had been in vain, and to no purpoſe, and in ſuch caſe the wife had an eſtate tayl reſtrained of alienation by the Statute of 11 *H.* 7. and not deſcendable to the iſſues. So in *Archers* Caſe 20 *Eliz.* in the 3. part of my *Reports*, If the ſon Tenant in tayl in the life of the Father levieth a fine with proclamations, the ſame after the death of the Father ſhall barr the eſtate tayl, and yet without queſtion the Father doth remain Tenant in tayl, although the eſtate tayl doth not deſcend. So if Lands be given to an Alien and the heirs of his body, he hath an eſtate tayl, and yet ſuch eſtate after his death is not deſcendible to his iſſues. And if a Diſſeiſor maketh a gift in tayl, the Donee maketh a Feoffment to *A.* and afterwards levieth a fine with proclamation to *B.* who hath nothing, this fine ſhall barr the iſſues in tayl, becauſe the iſſues in tayl being privies ſhall not plead *Quod partes finis nihil habuerunt*, but ſhall not barr the diſſeiſee by Nonclaim, becauſe the fine as to him was void: ſo as in ſuch caſe *quoad* the heirs in tayl the fine ſhall bind, but not *quoad* the diſſeiſee, who is a ſtranger: *pari ratione* in the caſe at barr, this fine levied by the Husband, as to the iſſues ſhall be a barr, but not as to the wife, who is a ſtranger to it. Husband and Wife are Tenants in ſpecial tayl, the reverſion to the Donor, they have iſſue, the Husband levieth a fine with proclamations to a ſtranger, and dieth, the wife entreth, the wife hath deveſted the whole eſtate out of the Conuſee; and reveſted the eſtate in her, the immediate reverſion to the Donor, and left nothing but a poſſibility in the Conuſee: *Ergo*, the eſtate of the wife is not changed into an eſtate for life, for there if Error be in the fine, the iſſue in tayl ſhould have a Writ of Error upon the Statute of 9 *R.* 2. in the life of the wife, and ſo the iſſue in tayl ſhould have an eſtate in the Land in the life-time of the Donee, which ſhould be abſurd; for he hath not any eſtate by purchaſe, and living the Donee he can have nothing by deſcent. As to the Caſe of 7 *H.* 4. 16. where after divorce the eſtate of the Donees is changed to an eſtate for their lives, it is not like to the caſe at barr for divers cauſes: 1. there the eſtate tayl is diſſolved *ab initio*, and ſo the iſſue Baſtard; but in the caſe at barr the eſtate tayl is barred, and not diſſolved or determined, but hath continuance as long as the wife liveth, or the heirs in tayl do remain. As to the ſecond point, It was Anſwered and Reſolved, That the Confirmation did work nothing: And 1. It was admitted, That the Reverſion or Remainder in fee had been in a ſtranger, and not in *John Beaumont*. Then it is to ſee when *Elizabeth* entreth and was ſeiſed in tayl what eſtate was left in the Conuſee; and it was Reſolved that no part of the eſtate tayl was left in him, for the wife was ſeiſed of the whole eſtate tayl, and no part of the Reverſion doth remain in the Conuſee, for it was reſettled in him to whom the reverſion or remainder did appertain, and from thence it followeth, that nothing doth remain in the Conuſee in ſuch caſe, but only a poſſibility to have the Land after the death of the wife (who had the whole eſtate tayl) ſo long as the iſſues in tayl did remain, if any were alive at the time of the death of the wife; and without Queſtion ſuch poſſibility ſhall not paſs by the ſaid Confirmation. Then when *John Beaumont* hath the Remainder in fee, the Confirmation made by the heir of the Conuſee can paſs nothing in reſpect of the poſſibility which was gained by the fine during the Continuance of the eſtate tayl, but it ought to be drawn out of the remainder in fee, and that it cannot be in this caſe for divers cauſes. 1. The old eſtate tayl as to the iſſues is barred and cannot deſcend. 2. A Confirmation cannot add a deſcendible quality to him who is diſabled to take by deſcent; As if Lord and Tenant be of a Carve of Land, and the Tenant hath iſſue, and is attained of Felony, and the King pardoneth him, and afterwards the Lord confirmeth the eſtate of the Tenant, and the Tenant dieth, The Lord ſhall have the Land againſt his own Confirmation, for the Confirmation cannot add to the eſtate of the Tenant a quality deſcendible to him who was diſabled to take the Land by deſcent. So in the caſe at barr, the Confirmation of the Earl to *Elizabeth* cannot add a quality deſcendible to the iſſue in tayl, who was diſabled by the fine to take by deſcent. 3. If this Confirmation in this caſe, ſhall add to the eſtate of the wife a deſcendible quality, the ſame in effect as to this point, ſhall repeal 2. Acts of Parliament, *viz.* the Act of 4 *H.* 7. and 32 *H.* 8. by which (as appeareth before) the eſtate tayl is barred as to the iſſues, and the iſſues diſabled to claim the Land by force of the eſtate tayl; *Sed pacta privata juri publico derogare non poſſunt*, and theſe Statutes are *jura publica*, for they are two of the principal pillars of the Law. 4. In the ſaid Caſe of Sir *George Brown*, after that *Anthony* had levied a fine to him in the life of his Mother, Put caſe that Sir *George* had confirmed the eſtate of the Mother, yet after the death of the Mother the Land ſhall not deſcend to *Anthony*, for the Confirmation doth not increaſe the eſtate of the wife, but ſhe hath her old eſtate; And as it hath been ſaid, the ſaid Earl by his confirmation cannot add a deſcendible quality. 5. The Law is, If Tenant in Dower grant over her eſtate, yet for waſt done the Action ſhall be brought againſt Tenant in Dower, and damages ſhall be recovered againſt her, and the ſame is a deſcendible quality to the heirs of him in the Reverſion. In this caſe to ouſt and take away the Charge of Tenant in Dower, he in the Reverſion by his deed doth confirm her eſtate, to have and to hold for term of her life, and dieth; and afterwards ſhe granteth over her eſtate; And for waſt done by the aſſignee, the heir bringeth an action of waſt againſt Tenant in Dower, who pleadeth this confirmation to her to have and to hold the Land for term of her life; in this caſe, notwithſtanding this Confirmation, the action ſhall be maintainable againſt her, for the Confirmation doth not enlarge her eſtate, and therefore cannot take away this deſcendible quality to the heirs, to have an Action of waſt againſt her after her aſſignment made of her eſtate, and

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ſo is the book adjudged in 38 E. 3. 23. a principal caſe: *pari ratione*, in the caſe at barr, for as much as the Confirmation doth not enlarge the eſtate of *Elizabeth*, it cannot add a deſcendible quality. 6. Every Confirmation, *aut eſt perficiens*, *creſcens*, or *diminuens*: *perficiens*, as in *Mayowes* Caſe in the firſt part of my *Reports*. If Feoffee upon condition maketh a Feoffment over, and the Feoffor confirmeth his eſtate to him and to his heirs, this is *confirmatio perficiens*, for it doth not make any tranſmutation of the eſtate, but doth corroborate and perfect the eſtate, and make it abſolute, where it was before conditional; and therewith agreeth 7 *H.* 6. 7. cited before. So if the diſſeiſee confirmeth the eſtate of the diſſeiſor, or his Feoffee, the ſame maketh the eſtate indefeſible. 2. *Confirmatio creſcens*, is when it enlargeth the eſtate of him to whom the Confirmation is made; As to the eſtate at Will to encreaſe for years, &c. to an eſtate for years, to increaſe for life, and to an eſtate for life, to increaſe it to an eſtate in tayl, &c. or to an eſtate in tayl, to increaſe it in fee-ſimple. But in the caſe at barr, the ſaid Confirmation was not *creſcens*, for it doth not enlarge the eſtate of the wife, for ſhe had as high an eſtate in point of eſtate by the firſt gift, as ſhe had by the Confirmation. 3. *Diminuens*, As where the Lord confirmeth the eſtate of his Tenant who held
[b] by Knights ſervice, to hold in Socage, or to hold by leſſer Rent, or for Tenant in antient demeſne to hold at the Common Law, for thereby the Cuſtoms of the Mannor are diminiſhed; But upon a Confirmation to the Tenant the Lord cannot reſerve new Services; as a Hawk for Rent, or Rent for a Hawk, and the like. And the Confirmation in the caſe at barr, is neither *perficiens*, *creſcens*, nor *diminuens*; for the ſaid *Elizabeth* had as perfect and large eſtate before the Confirmation, as ſhe after had. And as to that which was Objected, That if the wife ſhould have an eſtate tayl; that ſhe hath power to levy a fine or ſuffer a Recovery, &c. To that it was anſwered, That if the wife hath not ſuch power, the reaſon is, That ſhe cannot barr that which was utterly barred before by the priority of her Husbands act: but this point was not then in Queſtion.

FINIS.

THE REPORTS OF Sir Edward Coke Kt, &c.

PART X.

The Caſe of *Sutton*'s Hoſpitall.

BEtween *Simon Baxter* Plaintiff, and *Richard Sutton* and *John Law* Defendants, in an action of Treſpaſs, for entring a Houſe and Cloſe, 30 *May*, 10 *Jac.* [23] a Capitall Meſſuage called the *Charter-houſe*, in the pariſh of St. *Sepulchers*, in the County of *Middleſex*. Upon not guilty pleaded; The whole ſpecial matter was found, (which you may ſee at length, *Mich.* 10. *Jacobi Rot.* 574. in the Kings Bench.) And the ſame was adjorned out of the Court of Kings Bench by the Judges of the ſame Court, into the Exchequer Chamber; and was there argued at the Barr by *John Walter*, *Telverton* of *Grayes-Inne*, and by *Bacon* Solliciter General for the Plaintiff, and by *Coventry* of the *Inner-Temple*, *Hutton* Serjeant at Law, and by *Hobart* Attorney General for the Defendant. And the Plaintiffs Councel argued very ſtrongly in general: 1. That there was not any Incorporation created by the Kings Letters Patents, dated 22 *Junii* 9 *Jac. Reg.* 2. Admitting the Incorporation was good; yet there was not any Foundation made by *Sutton* according to the authority given to him. 3. That the bargain and ſale made by *Sutton*, bearing date 11 *No.* 9 *Jac.* was utterly void, and by conſequence all the ſaid poſſeſſions deſcendible to the Plaintiff. And in the argument of this Caſe, theſe points upon theſe grounds were moved.

1. It is Objected that by the Act of Parliament, 9 *Feb.* 7. *Jac. Reg.* mentioned in the Record, An Hoſpital was legally erected and Incorporated, at *Fallingbury* in the County of *Eſſex*; and all the ſaid Mannors given to it; and by conſequence the ſaid Corporation made after the ſaid Act by the Letters Patents, 22 *Junii.* 9 *Jac. Reg.* was utterly void. Note Reader, the ſaid Act cannot give [b] the ſaid Houſe called the *Charter-houſe*, for *Sutton* purchaſed the ſame afterwards, 9 *May* 9 *Jac. Reg.* as appeareth by the Record.

2. It was Objected that no Hoſpital was founded by *Sutton*, and therefore the Incorporation failed; becauſe that *Sutton* had the Kings Licence to Found, Erect and eſtabliſh an Hoſpital, which was an act precedent to be performed by *Sutton* before the Incorporation, which he hath not done; and ſo he hath not purſued his Licence; which Licence the King might have countermanded; and which was countermanded in Law by the the death of *Sutton*.

3. That the King by his Charter cannot name the Houſe and Inheritance of *Sutton* to be an Hoſpital, for that ſhould be to give a name to an Hoſpital in *alieno ſolo*.

4. The place of every Corporation ought to be certain, for without a certain place there cannot be any Incorporation; but here the Licence to *Sutton* is to found an Hoſpital at or in the *Charter-houſe*; ſo that he may found it in all or any part of the ſame houſe. And therefore till *Sutton* hath

founded it certain, there is not any certain place, and by consequence no Corporation. To which was added, That a place by a known name is not sufficient to support the name of an Incorporation, but the same ought to be described by metes and bounds. And divers presidents were cited and shewed, where the Scite of Hospitals, Priories, *&c.* were so particularly described.

5. The King by his Letters Patents doth intend, to make a present Incorporation, and so his words do expresly import. 1. From henceforth, *&c.* And yet no Incorporation can be till *Sutton* hath named a Master. And the Letters Patents bear date 22 *Junii* 9 *Jac. Reg.* And the writing of Nomination, 30 *Octob. Anno* 9. And so the Letters Patents are repugnant in themselves and void.

6. Untill there be an actual Hospital and poor in it, there cannot be Governours of them, for Governours ought not to be idle, or as Cyphers in Algorisme; for Governours and Government, are Relatives, *quæ sunt simul tempore*, and as well in his Will as in other Instruments, he hath called it many times his intended Hospital.

7. To every Corporation a Foundation is requisite; and here is not any Foundation made by *Sutton.* For first he ought to have *per verba præscripta & in terminis terminantibus*, Founded, Erected, and established the said House of *Charter-house* an Hospital, *&c.* And the same was likened [24] to Cases of Exchange, Frankalmoigne, Dedi, Warrantizo, Frankmarriage, which are *verba legalia & incompatibilia, &c.* And divers presidents were shewed to the Justices of building of Hospitals, Schools, *&c.* wherein the said words of *Fundo, erigo, &c.* were used. Secondly, before such lawful foundation made by *Sutton*, a Stranger could not have given any land or other thing to the Governours. Thirdly, without such Foundation, in time to come it shall not be known who should be the Founder; whereupon confusion would follow.

8. The nomination of the Master by *Sutton* is void for two causes; one, that he was named to be Master but at will, where he ought to be named for life, in as much as he is to have a Free-hold in the Land. Also there ought at least an actual Hospital be founded by *Sutton* according to the Licence, before he could nominate the Master of it; For otherwise it shall be a Mathematical or Utopical Hospital.

9. The said bargain and sale made by *Sutton* to the Governours was void for three causes. 1. That the monies which was the consideration thereof, were paid by the private persons of the Governours, and therefore the bargain and sale of the Mannors, *&c.* cannot enure to them in their politick capacity. 2. The *Habendum* is to the Governours upon trust and confidence; and a body Politick aggregate of many cannot stand seised in trust or confidence to the use of another. 3. Because that no Hospital was founded by *Sutton* according to his Licence; And for all the other Objections made against the Foundation and Incorporation, the said bargain and sale was void, and by consequence all the said Mannors descended to the Plaintiff as Cousin and heir to *Sutton.*

10. That no Hospital was Incorporated by the said Letters Patents and therefore it was objected, That the King cannot Incorporate them by the name of Governours, *&c.* of the Hospital, but of an Hospital in Law, or a Legal Hospital, as it was called; For the Governours cannot plead, that they are seised *in jure Hospitalis sui*, because in Law there was not any Hospital.

Which brief Report I have made of these Objections, because I think them, or the greater part of them were not worthy to be moved at the Bar, nor remembred at the Bench. And that this Case was by the Justices adjourned into the Exchequer Chamber, more for the weight of the value, then for the difficulty of the Law in this Case. And the entire Record, as appeareth by the Exceptions, ought to be the Case; the which was argued openly in the Exchequer Chamber by all the Judges of *England*, and Barons of the Exchequer, (except the Chief Justice of the Kings Bench, who was then sick.) Sir *Robert Houghton*, Sir *Augustine Nicholls*, Sir *John Dodderidge*, Sir *Humfrey Winch*, Sir *Ed. Bromly*, Sir *John Croke*, Sir *James Altham*, Sir *George Snigge*, Sir *Peter Warburton*, Sir *Lawrence Tanfield* Chief Baron, and Sir *Ed. Coke* Chief Justice of the Common Pleas. And it was Resolved by them all in their arguments (except by Baron *Snigge* and Justice *Croke*) that judgment should be given against the Plaintiff *Et quia rectum est judex sui & obliqui*; A right line maketh discovery not onely of that which is right, but of that which is wrong and crooked; and the confirmation of right and truth, is the confutation of error and falshood. I will report the effect of the reasons and causes which affirm and confirm the Resolutions of the Judges, which are of so great authority, perspicuity and gravity, that the Objections need not have any particular answer. And yet for the satisfaction of all men, every one of them shall be particularly answered. And because that this Case doth chiefly depend upon the Letters Patents; And the best Exposition of the Kings Charter is upon the consideration of the whole Charter, to expound the Charter by the Charter it self, *verba cartæ regiæ æquè portant suam expositionem*; and the Kings Letters Patents in this case are *viscera causæ, & expositio quæ ex visceribus causæ nascitur est aptissima & fortissima in lege.* All the parts of the Letters Patents were considered, and every material part thereof explained according to the true natural sense, which is the best method, upon the consideration of many others, for the more clear Report of this Case.

The first part of the said Charter doth contain a short recital of two things, 1. of the title of the Act of 9 *Feb. Anno* 9. An Act to confirm and enable the erection and establishment of an Hospital and Free Grammar School, given and intended to be given by *Thomas Sutton*, Esquire; which title proveth that no Hospital was founded by the Act it self; but the scope of the Act was to enable *Sutton* to erect and establish an Hospital, *&c.* and therefore the title saith, intended to be given and performed by *Thomas Sutton*, Esquire. And the same also appeareth by divers parts of the body [25] of the Act, which are in future and nothing in the present. 1. Be it enacted, That in the Town of *Halingbury*, &c. there may be builded one meet house for abiding of poor people and Scholars,

lars, &c. which are words in future, and it is not certain in what part of the Town the House shall be built. 2. And that the same shall and may be called and named the Hospital of King *James*; which words are also in the future. 3. And that the Lord Arch-Bishop of *Canterbury*, &c. shall and may be Governour, &c. 4. And that the same Governours, &c. shall for ever hereafter stand and be incorporated: which words ought to be intended to take effect after the erection of the Hospital, &c. in a certain place, &c. And so the construction is *in futuro*, which well appeareth with the future words following, and may have perpetual succession. 5. And may for ever hereafter, have, hold, and enjoy, Lordships, Mannor, &c. without Licence of Alienation, or Licence of Mortmain; By which it appeareth that this clause is not in effect, but a Licence to give Mannors, Lands, &c. holden in *Capite* without other Lincence of Alienation, and also without other Licence of Mortmain. But this clause was superfluous and impertinent if the Land should pass by the Act it self, for then no Licence in this case were requisite. And without question if it were admitted that there was a Corporation, yet no Lands are given to them by those words, *de futuro*. Also although the said Lands were given them, yet the King by his Letters Patents cannot create and incorporate an Hospital in the *Charter-house*, which was purchased after the Act, and the Action of Trespass in the case at Bar is for Trespas done in the *Charter-house*. But it was answered by all the Justices and Barons of the Exchequer (except Justice *Croke*) that the Act of 9 *Jac.* doth not Incorporate the Governours, &c. but *in futuro*, which never took nor could now take effect; and by consequence no Land was or could be given to it. The 2. branch of recital is of the purchase of the *Charter-house* after the Act, which as it is there rehearsed, is more fit and commodious then *Halingbury* to be converted into an Hospital.

In the second part *Sutton* is a suitor and petitioner to the King for four things, 1. To give Licence to Found, Erect, and establish an Hospital house, &c. and Free Grammar-School, &c. at or in the *Charter-house*, wherein hath been observed the incertainty of the suite, at or in the *Charter-house*: but of that after. 2. Incorporate the Governours hereafter named; so that *Sutton* himself doth name the Governours which the King doth Incorporate. 3. By such name of Incorporation as is hereafter mentioned to have capacity and ability, &c. by which also it appeareth that *Sutton* doth devise and prescribe the name of the Incorporation; and by all these three clauses it appeareth, That the suit of *Sutton* and his expresse consent was, that the Governours should be named of the said House called the *Charter house*. 4. *Sutton* was suitor, that the Governours, &c. might take in Mortmain for the better maintenance of the said Hospital, Free-School, Preacher, &c. [b]

The third part of the Letters Patents containeth Grants and Acts made by the King in two manners, *sc.* by way of Licence and by way of Grant; of the Licences some are requisite, some abundant and not requisite; and some requisite for the sustentation of the poor, &c. and not of the essence of the Corporation; and of the Grants, some are in *præsenti*, and some in *futuro*, and every of these, some are of necessity, and some explanatory and not of necessity; and those which are of necessity, some are of necessity to the creation of this body politick, and some to the continuance and preservation of it. And into those branches the whole Letters Patents are devided, which shall be observed as they arise and have place in the same Letters Patents. But before all the Licences and Grants, the King doth prefix a preamble, *sc.* The King affecting so good a work, of his Princely disposition and care for the furtherance thereof, and that the same may take the better effect, &c. (wherein appeareth the Honour, Charity, and pious disposition of the King) giveth Licence to *Thomas Sutton*, his Heirs, Executors, Administrators and Assignes, at all times hereafter at their will and pleasure, to place, erect, found and establish at or in the said House called the *Charter house*, one Hospital house and place of abiding for the finding, sustentation, and relief of poor, aged, maimed, needy, or impotent people, &c. Also to erect, found, &c. one Free-School for the instruction, teaching and maintenance of poor Children or Schollars, &c. And to place and maintain a learned School-master and Usher to teach and instruct the said Children in Grammar. And also one Godly and learned Preacher, to Preach and teach the Word of God to all the said persons, poor people and children, members and officers at or in the said House. That in the first place doth contain the end of *Sutton's* piety and charity: For *Sapiens incipit à fine, & quod primum est in intentione, ultimum est in executione.* And that was a grand motive to the King of his Royal authority to give him means, *sc.* by Creation of a capable body Politick by way of Incorporation, to have perpetual succession, to perfect and perpetuate so pious and charitable a work. And that the Incorporation ought to precede the execution of this Licence, is evident by the words and coherence of the Letters Patents, *sc.* For this Licence is in *futuro*, *sc.* To *Thomas Sutton* his Heirs, Executors, Administrators and Assigns, at all times hereafter at their will and pleasure, &c. so that is future as well in persons, Heirs, Executors, &c. as in the thing to be done. But when he cometh to the clause of Incorporation, he doth it by words of the present tense. And the said persons and their Successors by the name, &c. We do by these presents for ever hereafter really and fully Incorporate, &c. By which it followeth, that the Incorporation being present, and the execution of this part of the Licence future, the Incorporation ought of necessity precede the execution of the Licence. Then forasmuch as the principal foundation of the scruple was conceived upon these words, to found, erect, and establish; the true Etymology and genuine sense of them was considered; and *ex vi termini fundare, nihil aliud est quam fundamentum jacere seu ponere, &c.* to lay the foundation of a building; and in this sense the Holy Ghost (which moved *Sutton* to this work of piety) in the Scripture taketh it. And therefore in the 1 *King. Chap. 6. verse 37. Fundata est domus anno primo, & Anno* 11 *perfecta fuit domus in omni opere suo.* And 1 *King. Chap. 16. verse 34. Edificavit in diebus illis Hiel de Bethel Jerico in Abiram primitivo suo fundavit, & in Segub novissimo suo posui portas.* By which it appeareth, that to found is to lay the foundation of a building, which is [26]

the first mechanical part of Archietecture. Then when the foundation is laid, then cometh the erection of the House, as it is said by the son of *Sirach* 49. 15. *Erexit nobis muros & erexit domus nostras.* And although that the Foundation be well laid, and thereupon a building be erected, yet it ought to be well joined and established, and therefore this word (establish) is added to make the building to have continuance. 2 *Kings* 13. *Stabiliam thronum ejus*; That is, I will make his throne to have perdurance and continuance. So that to Found, Erect, and establish are works of labour, and the labours of builders. And that appeareth by the words of the Charter it self, *sc.* The King affecting so good a work, *tam bonum opus:* Also the subsequent words prove it also; to found, and erect and establish, what? an Hospital house. So that it clearly appeareth, that the effect of this Licence is to make fit and to finish and furnish an Hospital house for the habitation of the poor, *&c.* See after, *Mich.* 34 and 35 *Eliz.* the Case of the Hospital of *Bridewell* for the exposition of these words, *fundo, erigo, & stabilio*, which is a stronger case then this is, And this word (place) in the first place is
[b] to be intended, as it hath been said, in the last place, *sc.* To place poor in it, to erect a Free-School for instruction of youth, and for the maintenance of a Preacher. But how shall this holy and charitable intention (that the same may remain for ever) be produced to end and effect? The Charter it self sheweth it in effect in this manner: It is impossible to take in succession for ever without capacity; and a capacity to take in succession cannot be without incorporation; and the incorporation cannot be created without the King; for this cause the Charter saith, And for the maintenance and continuance of the said Hospital, *&c.* And that the same may take the better effect, That the said persons, *&c.* be one body Corporate and Politick to have perpetual succession to endure for ever. We do by these presents for ever hereafter fully and really incorporate, *&c.* to have capacity and ability to take, *&c.* Without this capacity the end cannot take effect, for inhabitants of a Town or other single persons (who have not capacity to take in succession but onely to their singular heirs) have capacity to take an incorporation, and after their incorporation they have capacity to take in possession any lands, tenements, or heriditaments: whence it follows, that the incorporation which giveth capacity ought to precede the giving of any land, *&c.* Another Licence is given to this new Incorporation to take in Mortmain. This Licence is not of necessity, either of the essence of the incorporation or of the continuance of it; but yet it is requisite for the establishing and maintenance of the end, *scil.* to have the poor sustained, and schollars instructed, *&c.* For they cannot be maintained without a Revenue, and they cannot take or keep the Revenue (as hath been said) without a Licence in Mortmain; and therefore these two, *sc.* Incorporation and Licence in Mortmain ought to precede the donation. For words to Found, Erect and establish an Hospital house cannot be extended to the Incorporation, for that belongeth onely to the King, and that the King doth; Nor to any dotation, for as yet (as hath been said) there is not any capacity. Therefore it extendeth onely to the building and finishing of the said house to be a fit habitation for poor, &c. *Sutton* thinking and rethinking, that as well the incorporation as the Licence in Mort main were in their several degrees requisite to bring his good and charitable purpose to effect, to the end the King should grant that which was onely in his power to grant, and which himself without the King could not do;
[27] he was a suitor to the King to grant him Licence to do that which of himself in respect of the ownership of land he might do without the King. *scil.* To build, finish, and furnish the said house for the habitation of poor, as well before the Incorporation as after: But to give it possession, *&c.* as hath been said he could not, and therefore this Licence was but explanatory to declare what *Sutton* as owner of the Land might do, either with the Kings Licence or without the King; and therefore the King cannot countermand this Licence, becaufe it is but declaratory of that which *Sutton* might do as owner of the Land without any Licence. And this appeareth by the book in 3 *H.* 7. *Fitzh. Grant* 36 the Record whereof I have seen, Between *John Buckland* Vintener Plaintiff, in an action of Trespass, and *Richard Fowcher* Chaplain Defendant. *Termino Sancti Mich.* 2 *H.* 7. *Rott.* 155. in the Kings Bench, and in the report at large, 2 *H.* 7. 13. where the case in effect is, That King *H.* 4. by his Letters Patents *Anno* 6. *regni sui*, Reciting that *Robert Ramsey* was seised in Fee of an house in the parish of St. *Margaret* in *London*, called the Sun, *&c.* notwithstanding the Statute of Mortmain of his especial grace, and for 20 *l.* gave Licence to R. *Ramsey*, that he might give 20 marks rent, going out of the said House, *cuidam capellano divina ad altare beatæ Mariæ in Ecclesia Sancti Magni London singulis diebus pro salubri statu præd. Rob. & Johan. uxor. suæ*, &c. *Habend. & tenend. eidem capellano & successoribus suis cappellanis Cantariæ præd. divina in Ecclesia præd. ad altare præd. pro salubri statu*, &c. *juxta ordinatione præd. Rob. in hac parte faciend. celebrat. imperpet*, *&c.* And afterwards that the said *Robert Ramsey* by his deed indented, 10 *Junii* 1407. Founded, Ordained and erected the said Chauntry, and ordained and named one *John Medowe* to be the first Chaplain to do the said Divine services; And further by the said deed granted to the said *John Medowe* the first Chaplain 10 marks of yearly Rent issuing out of the said house, To have and to hold to him and his Successors Chaplains of the said Chauntry at four usual Feasts in *London* to be paid, with clause of distress to him and his Successors; And further appointed by the same deed, That he himself should present the said Chauntry during his life; and after his decease, that *Johanne* his wife should present to the same during her life, and after her decease, that the Parson and Churchwardens of the said Church of St. *Magnus*, and their Successors; And afterwards the said *John Meadowe* died, and after divers vacations the said *Richard Fowcher* was presented to the said Chauntry, and for the said Rent behind he entred into the said house the door being open, and took a Cup of the Plaintiffs for a distress, *&c.* for which taking the action was brought, upon which matters the parties have demurred in Law: And this Case was adjourned into the Exchequer Chamber, and there before all the Judges of *England* divers Objections were made against this Licence and Grant. 1. That they were *cuidam capellano*, and named none in certain; and when the Kings Grant is uncertain it is void;

as

as if the King licence one to give 20 marks Rent *cuidam Abbati*, the Grant is void, because it is in- [b]
certain. 2. There is not such Chaplain till *Robert Ramsey* hath named or ordained one, so that it appeareth that the Grant should be to such a one who is not in *rerum natura*; as if the King gave Licence to grant to the Major and Commonalty of *Islington*, although the Inhabitants of *Islington* be afterwards incorporated by the name of Major and Commonalty, the Grant is void, because there was no such Corporation at the time of the Grant. 3. It was objected that in that case the King hath not made any Incorporation, and Incorporation is a thing to be done onely by the King himself; and these words *juxta ordinationem Rob. Ramsey fiendam*, shall not enable the said *Ramsey* to make an Incorporation, for the King cannot give Licence to one to make an Incorporation, but the said words shall give him power to make ordinances, first touching Masses, and other Divine Services, 2. of what manner of habit he shall be, 3. to have perpetual succession, *scil.* elective, presentative, or donative, and that is the effect of the said words, and not to make a Corporation; and the Kings Grant shall not be taken by implication; *scil.* by the words to make an Incorporation, and also to give Licence to grant the said Rent, for then the Kings Grant shall enure to two intents. 4. Admitting that there shall be an Incorporation by implication; yet the Incorporation ought to be before the Licence, and here the Licence is before the Incorporation, and therefore it is void. 5. The Grant ought to have been that the King gave Licence *facere & erigere Cantariam, &c.* and there were not any such words in the Charter; but onely Licence to grant a Rent, &c. *cuidam Capellano, &c.* 6. The Licence is *secundum ordinationem per R. Ramsey fiendam*; and therefore the King is deceived, because he cannot have knowledge what ordinance it shall be. 7. It was objected, that the distress was without warrant, and void, because the Licence did extend to grant a Rent onely without mentioning of any distress. Which objections I have gathered out of the book Reported at length, 2 *H.* 7. 13. and the Reports of *Fitz* in 3 *H.* 7. *Grant.* 36. and out of the Record it self.

As to the first and second Objections, it was Resolved, That the Grant was good, for all the Grants of Chantrys are of such form, *scil. cuidam Capellano*, and although there be not such Chaplain at the time is not to the purpose; For if the King granteth to the Commonalty of *Islington* that they shall be Incorporated of a Major and Bayliffs, and that they have power to choose one, it is good although the Election of the Major is future. So Note Reader, a difference betwixt an estate or interest which none can take without present capacity, and a power, liberty or Franchise, or thing newly created, which may take effect in *futuro*. As to the 3. it was Resolved, That whereas the King by his Charter saith *cuidam Capellano*, it was a sufficient Incorporation; and when he saith in the [28]
Habendum sibi & successoribus suis, the same maketh a sufficient succession. And so Note Reader, that this Grant of the King doth enure to three intents, *scil.* to make an Incorporation; to make a Succession, and to grant a Rent. As to the 4. it was Resolved, That where the Licence to found the Chauntry shall be first, and to grant after, that needeth not, for it is not marerial which is before, for the Law shall construe that first to take effect which ought, but here they are *simul & semel*. As to the 5. That in the Licence there were not words of *fundare, erigere, facere*; It was Resolved, That notwithstanding the Grant was good. Note Reader from this, That to the Essence of a Chauntry, or other body politick two things are onely requisite; *sc.* an Incorporation, and a gift, and not any words of *fundare, erigere, & stabilire*, or words to such effect; for no such words were contained in the grant of *H.* 4. and yet it was adjudged a good Chauntry lawfully incorporated and founded. And if such words had been requisite and necessary in Law, the judgment ought to have been given against the Chauntry, because they were left out in the Kings grant. And thereby it appeareth, that in the Case at bar that they were explanatory and of abundance; which is a judgment in Law in the point by the resolution of all the Justices in the Exchequer Chamber. As to the sixth point, it was resolved that the words, *secundum ordinationem per R. Ramsey fiendam*, import sufficient certainty, *sc.* to make *Ramsey* to ordain, 1. what Masses and other divine services shall be celebrated, 2. of what habit or order the Chaplain shall be, and 3. whether he shall be elective, presentative, or donative. And by force of these words *Ramsey* in the Case did ordain the same to be presentative by the Rector of the parish of St. *Magnus* for ever. As to the 7. objection, It appeareth by the Report of *Fitzherbert ubi supra*, that the opinion of the two chief Justices *Hussey* and *Brian*, and *Starkey* chief Baron, and *Fairfax* Justice, was, That the distress was without warrant, but *Townsend* conceived it to be good. But *inspecto recordo*, it was adjudged that the distress was good and well warranted by the grant. For the Chauntry Priest did distrain in the said house for the Rent, and his distress was adjudged lawfull, and the Plaintiff barred. And the reasons, as I conceive, were, because that the Kings Charters made for the erection of pious and charitable works shall be alwayes taken in the most favourable and beneficial sense; and the most beneficial rent that a man can grant is a rent charge. 2. The distress is a necessary incident to the Rent, for without that the Grantee shall be without remedy: *Verba sunt accipienda cum effectu*, and words are to be taken with the effect. 2 *Edw.* 3. 3. Which case I have cited at large because it is [b]
notable and pertinent, and stronger (as I conceive) then the case in question. Secondly, power is given to *Sutton* to place a Master of the said Hospital. 3. At all times hereafter to place, erect, found and establish in the said house, *&c.* one Free-school for instructing youth, *&c.* (which well expoundeth the precedent words concerning the Hospital, for these words extend onely to make fit and to finish and furnish a Grammar-school within the said *Charter-house*) and a Preacher to teach all in the word of God. 4. We do by these presents ordain, constitute, limit and appoint, That the said House and other the premisses shall from henceforth be ever hereafter named, incorporated and called the Hospital of King *James*, founded in the *Charter-house* within the County of *Middlesex*, at the humble petition and at the onely cost and charges of *Thomas Sutton*, Esquire. And the same Hospital and Free school by name of the Hospital of King *James*, &c. We do firmly by these pre-

sents erect, found, establish and confirm, to have continuance for ever. By this clause the King *in præsenti* giveth the name of the Hospital, but as it appeareth before, *Sutton* had devised it, and hath sued to the King to name it accordingly; and that name of the incorporation it self, *sc.* At the humble suit of *Thomas Sutton*, doth import, so that as it is said in 38 E. 3. 44. and 21 E. 4. The name of incorporation is as a proper name or name of baptisme: In this case *Sutton* as God-father giveth the name, and by the same name the King doth baptize the incorporation: By which it appeareth, that the objection, That the King cannot give a name to an house which is the Inheritance of another, is not of any value, and here *Sutton* hath consented and assented to it, and all the same is done at his humble suit. And this objection doth tend to the dissolution of all ancient Deans and Chapters: For at the first, as it appeareth in the 3. part of my Reports in the case of the Dean and Chapter of *Norwich*: All the possessions were to the Bishop, and yet by his assent the Dean and Chapter were incorporate and named of the Cathedral Church, which did then belong to the Bishop onely; and afterwards a certain portion was assigned to the Chapter; So that the Chapter was before that they had any possessions; And that is the cause that of common right, the Bishop is Patron of the Prebends, because that their possessions were derived from the Bishop, and therefore he
[29] was their Patron and Founder: And therewith agreeth 17 E. 3. 40. 25 *Ass. pl.* 8. 10 E. 3. 10. 50 E. 3. 26. 15 H. 7. 11. So that at the first the Dean and Chapter were by the assent of the Bishop incorporated and named of the Church Cathedral of the Bishop. And it was said, that questions moved in the Exchequer used to be like to spirits which may be raised with much ease, but suppressed and vanquished with much difficulty; but these questions were like to ruinous buildings, more easily thrown down then raised and set up. And all the arguments which have been made against this honourable work of Charity, are hatched out of meer conceit and invention without any ground of Law. And such which have any colour were utterly mistaken. And as to the fourth Exception, That the place of every corporation ought to be certain; and *Sutton* sueth, and the King licenseth *Sutton* to found, erect, *&c.* an Hospital at or in the *Charter-house*, which was incertain; To that the Charter expresly answereth, That the King by this clause doth ordain, *&c.* That the said House and other premisses shall from henceforth for ever hereafter be, remain, *&c.* and shall ever hereafter be named and called the Hospital of King *James*, founded in the *Charter-house*: So that all the house and premisses are baptized by the King by the name of the Hospital, *&c.* in which is no shadow of incertainty, and therefore *Sutton* as to the Licence for the mechanical part which (as hath been said) was abundant, to get and finish all or any part of the house for an Hospital, *&c.* yet all the house it self, Orchards and Gardens, &c. are named by the name of Hospital. And it was observed, That the King by this clause not onely nameth the said house to be an Hospital; *but by* the name of the Hospital to be erected, founded, and established and confirmed; so that the King nameth it, and leaveth the mechanical part to *Sutton* to perform. And of the same importance is the other Objection, That a known name is not sufficient to found an Hospital, but it ought to be described by metes and bounds, *sc.* as in divers presidents hath been used; for it appeareth in *Will'm de Londres* case, 2 E. 3. 36. *Adam* brought a *Scire facias* against *Will'm de Londres* of the Mannor of E. the Defendant pleaded that he himself is Master of the Hospital of St. *Bartholomew*, and so beareth the name of dignity not named, judgment of the Writ: To which the Plaintiff replied, That which the Defendant calleth an Hospital is the Mannor of *East-Smithfield*, and was a Mannor at the time of the fine levied: And it was holden by the Court, That by this Writ he ought to have the Mannor, as the Mannor was at the time of the fine levied: And whereas the Mannor was made an Hospital after the time, by this suit he is to defeat your estate and your name, and accordingly it was ruled that the Writ was good. Which proveth that a Mannor (which carrieth more incertainty and variety then an house known by a certain name) may be created into an Hospital. And in 15 *Ass. pl.* 8. *John de Derbi*'s
[*b*] Case, a Mannor was the corps of a Prebend. The 5. Clause stands upon two Branches, 1. for the better maintenance and continuance of the said Hospital, *&c.* and that the same may take the better effect, and that the Revenues may be the better governed and imployed, there shall be sixteen Governours, and names fifteen of them by expres name, and such person as from time to time shall be Master, to be the first and present Governours. 2. And the said persons and their successors, by the name of Governours of the Land, *&c.* one body incorporate and politick, by that name to have perpetual succession for ever to endure, We do by these presents for ever hereafter really and fully incorporate; and the words of this clause are *verba operativa*. And it is to know, That every Corporation or Incorporation, or body Politick and Incorporate, who are all one, either stand upon one sole person, as the King, Bishop, Parson, *&c.* or aggregate of many, as Major and Commonalty, Dean and Chapter, and these in the Civil Law are called *Universitas sive Collegium*. Now it is to see what things are of the essence of a Corporation. 1. Lawfull authority of Incorporation; and that may be by four means, *sc.* by the Common Law, as the King himself, *&c.* by authority of Parliament; by the Kings Charter (as in this case) and by prescription. The 2. which is of the essence of the Incorporation, are persons to be incorporated, and that in two manners, *sc.* persons natural, or bodies incorporate and political. 3. A name by which they are Incorporated; as in this case Governours of the Lands, *&c.* 4. Of a place, for without a place no Incorporation can be made; and here the place is the *Charter-house* in the County of *Middlesex*. *Vide* 3 H. 6. *Dett.* 20. 17 E. 3. 59. & 45 E. 3. 27. 5. By words sufficient in Law, but not restrained to any certain, legall, and prescript form of words. And for as much as good pleading is *lapis Lydius*, the touch-stone of the true sense and knowledge of the Common law; the form of pleading of an Incorporation by prescription is to be observed, for in such case he ought to prescribe in every thing which is of the essence of the Incorporation. In the Book of *Entries*. *Quare impedit* 1. the pleading is, *Quoddam Hospitale Sanctæ Mariæ de Bristow de uno Magistro & Conventu à toto tempore, &c. incorporat. fuerunt per nomen Magistri*

gistri & Conventus Hospitalis Sanctæ Mariæ de Bristow: and there it appeareth that they purchased Lands and Tenements, and were impleaded without any prescription for the one or the other, because they are incorporated by prescription by a certain name; then to implead and be impleaded to grant and purchase are incidents to a body incorporate. *M.* 15. *H.* 7. *rott.* 522. in the Common Pleas, there the prescription is *Custos & vicarii Collegii vicariorum in choro Hereford sunt & à toto tempore, &c. fuerunt incorporat. per nomen Custodis & Vicar. Collegii Vicariorum in choro Hereford:* and there also they purchased and were impleaded as incidents to the incorporation. *Lib. Dent. Ass.* 68. *Magister, fratres, & sorores fraternitatis sive guildæ novem ordinum sanctorum Angelorum juxta Brainford* brought an Assise, the tenant pleads, *quod villa de Brainford est quædam fraternitas incorporata infra tempus memoriæ de Magistro, fratribus & sororibus novem ordinum Angelorum juxta Brainford Bridge, absq; hoc quod habetur aliqua talis fraternitas:* which is reported in 22 E. 4. 34. where the tenant at the first pleaded, No such incorporation, and if it be not found, and naught because two barrs, and then he pleaded the said plea, *quod est quædam fraternitas incorporata, &c.* and yet there they were infeoffed by *Bocking* upon condition, and capable thereof as incident to a Corporation. And therewith agreeth the Bishop of *Exeter*'s Case in the book of *Entries*, 445. 2 *H.* 7. 17. the Corporation of *Godmanchester* 34 *H.* 6. 27. in the Case of the Hospital of *Wycome.v.* 26 *H.* 8. 1. In 9 *E.* 4. 20. The Master of the Hospital of *Burton S. Lazar* prescribed, *quod ipse & omnes predecessores sui magistri Hospitalis prædict. à toto tempore,* &c. *nominati & cogniti fuerunt,* &c. *tam per nomen magistri Hospitalis Sancti Lazari de Burton, de ordine Sancti Lazari de Jerusalem in Anglia, quam per nomen Magistri de Burton Sancti Lazari Jerusalem in Anglia:* By which it appeareth that this word *incorporo*, or any of the derivation thereof is not in Law requisite to create an incorporation, but other equivalent words are sufficient, as *nominati & cogniti:* and therewith agreeth 44 *Ass. p.* 9. in the Prior of *Plimpton*'s Case, and 4 *E.* 4. 7. in the case of the Abbot of *Glastenbury*, and in none of these Books or Records was any mention made of these words, *fundo, erigo, &c.* or any other like words; for as it hath been said, they are onely declaratory words, and the effect of them may be done by the owner of the land without any grant. And it was well observed, that in old time the Inhabitants or Burgesses of a Town or Borough were incorporated when the King granted to them to have *Gildam Mercatoriam* in the *Register* 219. where the Writ doth recite, *quod cum inter cæteras libertates civibus civitatis Winton per cartas progenitorum nostrorum quondum regum Angliæ quas per cartam nostram confirmavimus, concessum sit eisdem, quod nullus eorum qui fuerunt infra Gildam Mercatoriam placitet extra murum, &c.* where *Gildam* doth signifie *contubernium seu fraternitas incorporata.* And upon that the place of their meeting and assemblies was called the *Guild-hall.* And I have seen the Charter made by King *H.* 1. *Textoribus Lond.* by which he granteth to them that they shall have *Gildam Mercatoriam*, and a confirmation made by King *H.* 2. by which Charters they were incorporated. And where the opinion of *Fineux* in 13 *H.* 8. 3. *b.* and of *Prisot* in 39 *H.* 6. 13. was cited at barr, that a Corporation aggregate of many cannot be a body without a Head; the same was utterly denied: For at the first most part of the Corporations were a body without a Head by force of these words *Gilda Mercatoria.* And that a Corporation aggregate of many may be without a head, See 18 *E.* 2. *Annuity* 48. 5 *E.* 3. 11. 22 *Ass.* 67. 29 *Ass.* 17. 2 *H.* 6. 9. 18 *H.* 6. 16. 19 *H.* 6. 80. 21 *E.* 4. 55. 56. 7 *E.* 4. 14. 2 *Mariæ Dyer* 100. And it appeareth by Record that *Paulinus* the first Archbishop of *York*, after he had baptised the inhabitants of *Notingham shire* in the River of *Trent*, founded a Collegiate Church in *Southwel* of Prebendaries, consecrated to the Virgin *Mary*, which continueth a body without a head even to this day. See for this word *Guild* or *Fraternity* in the book of *Entries*, 68. 37 *E.* 3. *c.* 5. 15 *H.* 2. *c.* 5. the Statute of 1 *E.* 6. of *Chauntries.* In which three things were observed, 1. how prudent Antiquity did alwayes comprehend much matter in a narrow room: 2. that to the creation of an Incorporation the Law had not restrained it self to any prescript and incompatible words: 3. that when a Corporation is duely created, all other incidents are *tacite* annexed to it. And for direct Authority in this point in 22 *E.* 4. *Graunts* 30. it is holden by *Brian* chief Justice and *Choke*, That a Corporation is sufficient without words, to implead, or be impleaded, *&c.* and therefore divers clauses subsequent in the Charter are not of necessity but onely declaratory, and might well have been left out; as 1. by the same to have authority, ability, and capacity to purchase, &c. but no clause is added that they may alien, *&c.* and it needeth not, for it is incident: 2. To sue and be sued, implead and be impleaded, 3. To have a Seal, *&c.* that is also declaratory, for when they are incorporated they may make or use what seal they will: 4. to restrain them to alien or demise but in certain form; that is an Ordinance testifying the Kings desire, but it is but a precept which doth not bind in Law; 5. the survivors shall be the Corporation, that is a good clause to oust all doubts and questions which might arise, the number being certain: 6. If the Revenues encrease, the same shall be imployed to encrease the number of the poor, *&c.* that is but explanatory as appeareth by the Case of *Thetford* School in the 8 part of my *Reports:* 7. To be visited by the Governours, *&c.* the same is also explanatory; For in this case the poor which shall be resident in the house of the *Charter-house* shall not be incorporated, but certain in whom the possessions are vested, who shall not be resident there but onely to have the generall government and ordering of the poor therein; so that this Case is out of the Statute of 2 *H.* 5. *cap.* 1. and 14 *Eliz. cap.* 5. for if no visitor had been appointed by the Charter, the Governours should visit; and the books in 8. *E.* 3. 28. and 8 *Ass.* 29. do not gainsay it, where it is holden, That if the Hospital be Lay, the Patron shall visit, and if Spirituall, the Bishop shall visit, so that every Hospital is visitable; it is true, but in the Case at the barr the poor of the Hospital are not incorporated, and so no legal Hospital: 8. To make Ordinances; the same is requisite for the well ordering and governing of the poor, *&c.* but not of the essence of the incorporation: 9. The exemption from the Ordinary is but declaratory, for being a Lay-incorporation he neither can nor ought to visit. 10. The licence to purchase in Mortmain

[30] [b] [31]

is neceſſary for the maintenance and and ſuſtentation of the poor; for without Revenues they cannot live, and without a licence in Mortmain they cannot lawfully purchaſe Revenues, and yet it is not of the eſſence of the Corporation, for the corporation is perfect without the ſame; ſo that by that which hath been ſaid, it appeareth what things *in genere* are requiſite to a compleat body incorporate, and which are *verba operativa* in this caſe (which are neceſſary to be known in every caſe) for the reſolution of which, it appeareth how neceſſary it is, that the Law and Experience joyn in hands together.

1. As to the fifth Objection, That no Incorporation was preſently made as the Letters Patents import, nor can be till the Maſter was named, and therefore the Charter is repugnant and void. To that it was anſwered, That this Objection doth extend to the overthrowing of a great number of Incorporations; for when a Corporation is created by Letters Patents, by the ſame Patent power is given to them to chooſe a Maſter, Aldermen, or Bailiffs, or Governours, or the like, and yet they are preſently incorporated by the ſame Letters Patents; and therewith expreſly agreeth *Plo.Com.* 592. 21 E. 4. 59. & 3 H. 7. *Grant.* 36. vouched at large before to the firſt and ſecond Objections. *Vide* 32 E. 3. *Aid* 39. 13 E. 4. 8. 16 E. 3. *Grant* 65. And it is true, it is preſently by the Letter Patents a Corporation *in abſtracto*, but not *in Concreto*, till the naming of the Maſter. And a Caſe adjudged in the Kings Bench *Mich.* 34. & 35. *El. rott.* 172. *coram reg.* was ſtrongly urged: the
[b] Governours of the poſſeſſions, revenues, and goods, *Hoſpitalis Ed. regis Angliæ ſexti* brought a bill of debt againſt *Elias Germain*. The Defendant pleaded, That King *Ed.* 6. reciting the care of the city of *London* for the relief of poor people and infants *conceſſit Majori, Civibus & Comunitati London, Domum manſionalem vocat' Bridewell, &c.* and the King declareth his intent, that *Bridewell* ſhall be founded, &c. an Hoſpital for the ſaid poor, &c. *idem Rex ut intentio ſua meliorem capiat effectum*, and to the end the Lands which ſhall be granted to them ſhall be the better governed, *per eaſdem literas patentes voluit & ordinavit quod Hoſpitale præd', cum ſic fundat. erect. &, ſtabilit. fuer'. Hoſpital E. 6. regis Angliæ Chriſti Bridewell, & S. Tho. Apoſt. nominetur & appelletur imperpetuum, & quod Major Civitas & cives civitatis præd. forent unum corpus corporatum per nomen gubernat. poſſeſſ. reventionum & bonorum Hoſpitalis Ed. regis Angliæ Chriſti Bridewell & S. Tho. Apoſt, &c.* and further pleaded, *quod nullum tale Hoſpital. quale in iiſdem Lit. Pat. mentionat. poſt confect. præd. literarum pat. ſic fundat. erect. & ſtabilit. fuit*, &c. Upon which the Plaintiff did demurr in law; and upon argument at the barr and bench it was adjudged for the Plaintiff. For the ſaid Ordinance, that the ſaid Houſe ſhall be an Hoſpital *cum ſic fundat.* &c. *fuer.* is intended onely of the mechanicall part of an actuall Hoſpital, *ſc.* of the fitting and finiſhing of the Hoſpital houſe with poor, *&c.* And this Hoſpital in intention onely is ſufficient to ſupport the name of a Corporation, and the words *de præſenti, ſc. quod idem gubernatores de cætero eſſent & forent unum corpus per nomen, &c.* in law doth incorporate them preſently, and ſhall not ſtay till there be an actual Hoſpital, or till the houſe be fitted or furniſhed, which is the mechanical part of the Hoſpital, *ſc.* for the habitation of the poor; which is the firſt thing to be obſerved by the ſaid judgment, *Vide* 32 E. 3. *Aid* 39 King E. 3. newly founded a Priory and granted to the Monks that they might chuſe a Prior, and before that the Prior was choſen *W.* made a leaſe to one *A.* for life, the remainder to the Prior and Covent; and in a *ſcire facias* againſt *A.* he pleaded, that *W.* was ſeiſed in Fee, and leaſed to *A.* the remainder to the Prior and Covent who were newly founded by the King; and becauſe there was not yet a Prior, the right was in the King untill, and prayed aid of the King, and the aid by award was granted, and a Writ of *Procedendo* came, and then *A.* the Defendant ſhewed, That after the aid granted there was a Prior made and ordained in whom the right remained, and prayed in aid of the Prior; and he was ouſted of the aid becauſe he had aid before, which proveth that the remainder in ſuch is good. The ſecond thing to be obſerved in the ſaid Judgment in the ſaid caſe of the Hoſptal of *Bridewell*, is, That one corporation may be made out of another corporation, *ſc.* the Major, Citizens, and Commonalty of *London*, are created in their politick capacity Governours, *&c.* of the ſaid Hoſpital of *Bridewell*, 9 E. 3. 18. many corporations may be created one out of another, as the Dean and Chapter of *Lincoln* are a joint corporation, the Dean by himſelf is incorporated, and every of the Prebends is incorporate by himſelf, and in a Caſe which is ſo manifeſt this ſhall ſuffice.

[32] And as to the ſixth Objection, That till an Hoſpital be founded that no Incorporation can be, for then there ſhall be idle and mathematicall Governours. It was anſwered, That there was an Hoſpital *in poteſtate*, and an Hoſpital *in exec'*; alſo an Hoſpital *in potentia*, and an Hoſpital *actu*. An Hoſpital *re*, and an Hoſpital *nomine*. And as to the creation of an Incorporation, an Hoſpital *poteſtate, potentia, ſeu nomine* ſufficeth; as one may be by Letters Patents Governour of an Army before there be an army. *Vide* 17 H. 6. *Protection* 56. And the ſame agreeth with Philoſophy and reaſon. *Ariſtotle lib.* 3. *de generatione* ſaith, *quod caro gignit carnem*; and that is true *in poteſtate* and not *actu*; and ſo any fowl ſo ſoon as it is hatcht is *volatilis à volando, quia habet poteſt. volandi, quanquam act. volandi non habet:* So a child ſo ſoon as he is born is ſaid *rationails*, becauſe he hath *poteſtatem*, although he hath not, and perhaps never ſhall have *rationem actu*. And it is alſo proved by old Records, and our books alſo, as in the book of Entries *tit. annuity* 32, 33. *Rex* H. 5. *quandam domum in quodam loco ſive ſolo apud Shene* (and abutteth and boundeth the ſoil) *quam vocari & nuncupari voluit, Domum Jeſu de Bethelem de Shene, duxit ordinand' & fundand' & domum illam quantum in ipſo fuit fundavit & erexit* (which was but a nominative houſe, for none was then built) *& idcirco locum & ſolum præd. de Shene ut primariam fundationem dedit, &c.* by which it appeareth that a void place or ſoil in which an houſe is intended to be built, may by the Kings Charter be named a Houſe, and this nominative houſe ſhall be ſufficient (as there it was) to ſupport the name of the incorporation. Alſo it appeareth by *Matthew Paris* 64. and *Polydor Virgil, Chronic. Chronicorum, &c.* The Hoſpital of St. *John*'s of *Jeruſalem* in *England* was incorporated in *An.* 14. *H.* 1. of the Templers, by the name of *Magiſter*

Magiſter milit' Templi & confrates ſui in Anglia in an. 24. *H.* 1. and yet neither the fabrick of the Temple, nor the houſe of the Hoſpital was founded and builded, *ſed regnante H.* 2. of the one *Jordan Biſet* a holy man well monied; and of the other *Heraclius* Patriarch of *Jeruſalem*, were Founders. *Vide Cambden Britan.* 311. which proveth that a void place to ſupport the name of a Corporation may by the Kings Charter be named an Hoſpital, or Temple, and it is not requiſite, that there be always truth in the name of the Corporation either of an Hoſpital or of any other body politick. King *H.* 8. in the ſecond year of his reign according to the Will of King *H.* 7. granted to divers Biſhops, *Thomas* Earl of *Arundel*, &c. *John Fineux*, and *Robert Read*, chief Juſtices, *John Young* Maſter of the Rolls, *&c.* who were Executors of King *H.* 7. *quandam peciam terræ vocat' Savoy* in the Pariſh of Saint *Clements*, and S. *Mary le Strand ad intentionem qd. jid præd. Hoſpitale in & ſuper præd' peciam terræ vocat. Savoy, erigere, fundare & ſtabilire poſſint.* 4. *H.* 8. The King licenſeth them *quoddam Hoſpitale de uno magiſtro & 5 capellariis ſuper præd' peciam terr' vocat. le Savoy fundare, & Hoſpitale cum ſic fundat' fuerit*, ſhall be incorporated by the name *Magiſtr' & Capellanorum Hoſpital. H. nuper regis Angliæ* 7. *de Savoy*, and yet in truth it was not an Hoſpital in the time of *H.* 7. but in intention only, and yet the King in his Charter doth call it the Hoſpital of King *H.* 7. And the ſame was admitted to be a good name of incorporation by all thoſe who argued the caſe betwixt *Mariat & Paſchal* upon the incorporation of the ſaid Hoſpital, *Trin.* 30 *Eliz.* in the Exchequer, where the Caſe was adjudged; or in the Exchequer chamber, where it depended by Writ of Errour. And therefore in 44 *E.* 3. 16. *Regiſter* 23. there the Corporation was *Prior Hoſpital' S. Johan. Jeruſalem in Anglia*: and ſo 9 *E.* 4. 6. *Hoſpitale S. Lazari de Jeruſalem in Anglia*: which ſufficeth for the name of the Corporation; although it be but a fiction, *i.* that either S. *John* (which was S. *John* the Evangeliſt) or *Jeruſalem* was ſituate in *England*: So *Magiſtri milit' Templi Jeruſalem in Anglia*: and in the Regiſter, *Prior & fr'es ſanctiæ Mariæ de monte Carmeli in Anglia*: So I have ſeen a Record, That *Katherine* the firſt wife of King *H.* 8. had a licenſe to found a Chauntry by the name of the Chauntry *de monte Calvarie extra Algate London.* And it is great reaſon that an Hoſpital in expectancy or intendment, or nomination, ſhall be ſufficient to ſupport the name of an Incorporation, when the Corporation it ſelf is onely *in abſtracto*, and reſteth onely in intendment and conſideration of the Law; for a Corporation aggregate of many is inviſible, immortal, and reſteth only in intendment and conſideration of the Law; and therefore in 39 *H.* 6. 13. 14. a Dean and Chapter cannot have predeceſſor nor ſucceſſor. 21 *E.* 4. 27. & 30 *E.* 3. 15. 6. They may not commit Treaſon, nor be outlawed, nor excommunicate, for they have no ſouls, neither can they appear in perſon, but by Attorney. 33 *H.* 8. *Br. Fealty.* A Corporation aggregate of many cannot do fealty, for an inviſible body cannot be in perſon, nor can ſwear. *Plow. Com.* 213. and the Lord *Barkley*'s Caſe 245. it is not ſubject to imbecillities or death of the natural body, and divers other caſes. A thing which is not *in eſſe* but in apparent expectancy is regarded in Law, as a Biſhop who is elect before he be conſecrated, an infant in his mothers belly before his birth, &c. 5 *E.* 2. *br.* 80. 8 *E.* 2. *voucher* 237. 38 *E.* 3. 30. 41 *E.* 3. 5. 11 *E.* 3. *Quare Impedit* 158. So for the name of a Corporation it is ſufficient to name a place in *England* by the name of *Jeruſalem, mount Calvarie, mount Carmel, Bethelem*, &c. *à fortiori*, the name of a ſpacious and goodly houſe well and actually builded by the name of an Hoſpital, is ſufficient; for the ſame importeth truth and certainty. By which it appeareth, that in the caſe at barr there was a lawful incorporation of the Governours, *&c.* created and inſtituted by the Kings Charter, and by conſequence as well any perſon in *England*, as *Sutton*, might give and grant to them before any foundation laid, or to be laid by *Sutton* (as it was imagined he ought to have done before they were capable, *&c.*) but the ſame is clear anſwered and confuted before; and in truth *hæc recitaſſe, eſt confutaſſe.* [b] [33]

As to the ſeventh Objection, it is to know that there are two manner of Foundations, one *fundatio inçipiens*, the other *fundatio perficiens*, and therefore as to the capacity and ability the incorporation is metaphorically called the Foundation, for that is the beginning, as a foundation, *quaſi fundamentum capacitatis*, preceeding the whole. And therefore in 21 *H.* 6. 4. a Writ was brought againſt *John Arden*, Abbot of S. *John Baptiſt* of *Colcheſter*; the Defendant pleaded, that before time of memory foundation was of the ſame place *per nomen Abbatis Eccleſiæ & Monaſt' de S. John de Colcheſter*, &c. where Foundation is taken for Incorporation, 38 *E.* 3. 14. 38 *E.* 3. 28. 20 *H.* 6. 27. & 18 *H.* 6. 16. in the Dean and Canons of *Winſors* Caſe, and divers other books agree with the ſame, *Sed quatenus ad dotationem*, the firſt giving of the Revenues is called the Foundation, and who giveth the ſame is the Founder in law. For *propriè, fundatio eſt quaſi fundi datio*, and the firſt gift is *fundamentum dotationis ſeu collationis, & appellatione fundi ædificium & ager continentur*; and that is proved by the Statute of *Weſt.* 2. *c.* 41. *Si Abbates, Priores, Cuſtodes Hoſpitalium, & aliarum domorum religioſarum fundatarum ab ipſo rege vel à progenitoribus ſuis alienaver' vel de cætero tenem' domibus ipſis ab ipſo vel à progenitoribus ſuis collata, &c.* In which was obſerved, that in reſpect of Tenements collated or given by the King, the houſe was ſaid to be founded by the King, but more fully in the clauſe following in the ſaid Act, *Si autem domus illa à comite, barone, vel ab aliis fundata fuerit, habeat ille à quo, &c. tenement' ſic alienat' collat' fuer' br'e ad recuperand*, &c. where the collation or gift of the Tenements is called the Foundation. And where the Founder bringeth the ſaid Writ *de contra formam collationis*, the Writ of *Præc' quod reddat meſuag' quod eidem domui collat' fuer'* &c. 9 *H.* 7. 26. *F. N. B.* 211. *old N.B.* 142. 38 *Aſſ. p.* 22. He who giveth the firſt lands is the Founder, *quia fundare* in that ſenſe is nothing elſe but *fundum dare*, and therewith agreeth 14 *E.* 3 *Corrodie* 5. In a Writ of Prohibition, where a common perſon is Founder of an Hoſpital, the Writ as appeareth in the *Regiſt.* 41. ſaith, *Hoſpitale Sancti Egidii leproſorum de Burton per anteceſſor' R. filii I. ad ſuſtentation' leproſorum & aliorum pauperum & infirmorum ibidem totum in temporal' & nihil in ſpiritual' exiſtit*, and the like Writ where the King is Founder, *cum hoſpitale noſtrum ſanctorum innocentium juxta Lincoln' ex fundatione progenitorum noſtrorum Regum Angliæ*, &c. *de terris & poſſeſſionibus pro ſuſtentatione pauper' & infirmor' in eodem*

Hospital' degentium dotatum existit: In which it was observed, that where the first Writ saith *fundat'*, this Writ calleth it *dotat'* 39 E. 3. 17. The Abbot of *Lyra* brought a *Scire facias* against the Dean of *Woborn*, where the Dean said he held of the Patronage (that is of the Kings Foundation) and prayed aid of him, and had aid; and there came a Writ of *Procedendo*, and it was challenged because the
[b] Writ said of the Patronage and not of the Collation, and it was taken all one, 33 E. 3. *Aid* 103. The Dean of *Staffords* case, the Deanry is said to be of the Foundation; and a little after of the Kings Collation, 8 E. 3. 56. in *Sirachs* Case, by the Foundation the land is amortised. *Vid.* 4. E. 3. *Ass.* 177. 21 E. 3. 60. 24 E. 3. 33, 34. 44 E. 3. 23. 44 E. 3. 11. 2 E. 3. 28. the Earl of *Richmonds* case. 6 H. 4. 5. 7 E. 4. 12. And therefore it was resolved, That if the King had incorporated the poor of the said Hospital, *Sutton* needed not have made any instrument comprehending any Foundation or erection, *&c.* But his gift of the land being the first act had made him Founder, and the very first donation is all the Foundation which is requisite in Law; and to the erection of an Hospital, *&c.* there is not in law any thing required, but incorporation and dotation. And in the Report at large I have omitted all the arguments at length either of the one part or the other upon one common ground, where an act to one intent shall enure to divers intents distinct in time; some holding, That the bargain and sale doth amount not onely to a Dotation, but also to a Foundation, and others *totis viribus è contra*; for it now appeareth to you without any question, That the first Dotation is the Foundation. And yet in that also a difference is necessary to be well understood; *s.* when the King expresseth the words, designeth the place, appointeth the number, and giveth them a name by his Charter; so that the same is a complete Corporation; there the Founder or Donor hath nothing to do but to make the Dotation without any instrument comprehending these words, *fundo, erigo stabilio, &c.* or other the like words. For the common person who is the Founder hath nothing to do in the power of incorporation; but when the King by his Charter doth reserve as well the nomination of the persons as the name of the incorporation to the common person who shall be the Founder, there he ought to name the parties, and to declare by what name they shall be incorporated, and here many times, although it be superfluous, he useth these words, *fundo, erigo*, &c. or the like. And when the common person hath done it and declared it in writing according to his authority, then they are incorporated by the Kings Letters Patents, and not by the common person, for he is but an instrument, and the King maketh the Incorporation in such case in the same manner as if all had been comprehended in the Letters Patents themselves: for it is true, that none but the King alone can create or make a Corporation, as it is holden in 49 E. 3. 4. 48. *Ass.* 8. but *qui per alium facit per seipsum facere videtur.* See for this difference 38 E. 3. 14. 22 E. 4. *Grant* 30. 2 H. 7. 13. *Grant* 36. 20 H. 7. 7. And as to the eighth Objection against the nomination of the Master, it was resolved that the same was well. For *Sutton* hath
[34] a liberty at his will and pleasure to nominate him; and when he is named, he is Master by force of the Letters Patents, and now as if he had been named in the Letters Patents themselves at the beginning: and the other part of the Objection is answered before.

And as to the objections against the bargain and sale, it was first resolved without question, That mony given by the Governours or any of them as a private person, is a good consideration to grant the land to them in their politick capacity. But the Indenture importeth that they paid it as Governours, and by such name they are acquitted by the Indenture. Also there is twelve pence Rent reserved to *Sutton* and his heirs, which is a good consideration. 2. Although that in the *Habendum* a trust is declared, the same without question cannot make the bargain and sale void, but the conveyance being by bargain and sale, it was wisely done to declare the confidence and trust. And as to the third, the same is clearly answered and resolved as before.

And as to the last Objection, *&c.* That in pleading, those Governours cannot plead, that they were seised *in jure hospitalis*, because there was not any Hospital incorporate, nor *in esse*, at the time of the incorporation. To that it was answered, That the pleading shall be that they were seised in their demesne as of Fee *in jure incorporationis suæ*, and so was it pleaded in the Cooks case of *London*, *Plo. Com. Vide Fulmerstones* case; also, *Plo. Com.* 102. *vide* 7 E. 3. the case of *Custos altaris*, he counted that he was seised, &c. *in jure altaris*. And as to the presidents which were shewed, it was answered, That there are many clauses inserted in Charters as well of the Kings as others, *ex consuetudine Clericorum*, which are not *de necessitate legis*, but some declaratory and explanatory, and some prolixe and nugatory, but *lex multa proficientia, & perficientia paucis comprehendit.* And all the Judges which argued this case (except the two before-said) did conclude against the Plaintif, and those two also *mutato opinione* did assent to the judgment: so that by the assent of all the said Judges *nullo contradicente* judgment was given against the plaintif: And the Lord *Ellesmere*, Lord Chancellour of *England*, heard all the arguments at the barr and bench and did agree in opinion with the Judges: So that this great
[b] work of Charity hath tasted of such charity which ought to be in Judges, which is declared in the Stat. of *West.* 1. *cap. ult. Summa charitas est facere Justitiam omnibus personis omni tempore quando necesse fuerit.* And it is a good rule for these Governours, and all other Corporations which is expressed in the Statute *de Templariis anno* 17 E. 2. in these words, *Ita semper quod pia & celeberrima voluntas donatorum in omnibus teneatur & expleatur & perpetuo sanctissime perseveret.* And Sir *Thomas Fleming* Knight, after the first day this case was argued fell sick, of which Sickness he afterwards died, so as he never argued this case. The said Sir *Thomas Fleming* was first a Serjeant at Law, and afterwards Solicitour general to Queen *Elizabeth*, and to the King that now is for the space of 12 years, and then was preferred to be chief Baron of the Exchequer after the death of Sir *William Periam*, and then was advanced to be chief Justice of *England* after the death of Sir *John Popham*; all which places he discharged with great judgment, integrity and discretion, and he deserved the good opinion of all that knew him, because he was of a sociable and a peaceable nature and disposition.

Which Case I have reported at length for three causes: 1. For the Confirmation of Incorporations founded for works of Piety and Charity in time past. 2. For the better instruction how they may be after

after ſo founded and eſtabliſhed that no exception may be taken to them. 3. For the reſolving of certain opinions and queſtions which were moved at the barr, and which might have diſturbed the peace of the Law. In the argument of this caſe many other authorities were cited *Sc.* 2 E. 3. 47. 3 E. 3. 83. 5 E. 3 144. 7 E. 3. 57. 8 E. 3. 67. 8 E. 3. 206. 19 E. 3. 1. 20 E. 3. *Nonabilitie* 9. 20 E. 3. *Corone* 225. 21 E. 3. 35. 32 E. 3. *Aid* 55. 40 E. 3. 28. 44. *Aſſ.* 2. 13 R. 2. *Breve* 643. 11 H. 4. 12. 19. 14 H. 4. 8. 3 H. 6. 28. 7 H. 6. 13. 9 H. 6. 13. 14. 16. 20 H. 6. 7. 21 H. 6. 2. 12 E. 4. 17. 15 E. 4. 1. 21 E. 4. 32. 55. 57. *Lib. Ent.* 112. 6 H. 7. 14. 10 H. 7. 16. 11 H. 7. 9. 11 H. 7. 27. 13 H. 8. 13. 14 H. 8. 29. 32 H. 8. *br. Corp.* 78. 1. *Mar. Dyer.* 98. 7 El. *Dy.* 81. the caſe of the College of *Graiſtock*, 10 El. *Dyer.* the caſe of the Colledge of *Landebreuit*, *Pl. Com. Grendons* caſe 494. *Hill.* 16. El. *rot.* 495. Sir *Fr. Flem.* caſe in the *Com. Pl.*

The names of the governors named by *Sutton* and expreſſed in the ſaid Charter, were The moſt Reverend Father in God, *George* Archbiſhop of *Canterbury*, *Thomas* Lord *Elleſmere*, Lord Chancellor of *England*, *Robert* Earl of *Salisbury*, *John* Biſhop of *London*, *Launcelot* Biſhop of *Ely*, Sir *Edward Coke* then Chief Juſtice of the Common Pleas, and now Chief Juſtice of *England*, Sir *Thomas Foſter* one of the Juſtices of the Court of Common Pleas, Sir *Henry Hobart* then the Kings Attorney General, and now Chief Juſtice of the Court of Common Pleas, *John Overal* Dean of the Chuch of S. *Paul* in *London*, *George Mountain* Dean of *Weſtminſter*, *Henry Thursby* one of the Maſters of the Chancery, *Jeffery Nightingale*, *Richard Sutton*, *John Law*, *Thomas Brown*, and the Maſter of the ſaid Hoſpital for the time being; and after the death of the ſaid Sir *Thomas Foſter*, one of the Juſtices of the Court of Common Pleas, (who was a grave and Reverend Judge of great judgment, conſtancy, and integrity) Sir *James Altham* Knight, one of the Barons of the Exchequer, was according to the ſaid Charter with one conſent choſen in his place. And the ſaid Maſter of the Hoſpital which *Sutton* had nominated *durante beneplacito*, our Soveraign Lord the King that now is, after the death of *Sutton*, did by his Letters Patents nominate Maſter for his life.

Trin. 11 Jacobi. *Regis*

Mary Portington's Caſe.

Mary Portington brought an Action of Treſpaſs againſt *Robert Rogers* and *Thomas Barley*, for breaking of her Houſe and Cloſe at *Thorp-Salvyn* in the County of *York*, 20 *Junii*, 7 *Jac. Reg.* And the new aſſignment was of a Houſe and a Croft containing one Acre in the occupation of *Thomas Barley*: The Defendants pleaded in barr, That *Herſie Sanford* Eſq; was ſeiſed of the Tenements, &c. in Fee, and held them of the King, as of his Honor of *Tickill* in Socage; and the 8 of *May* 24 *Eliz.* made his Will in writing, and thereby deviſed them to *Eliz. Sanford* his younger daughter, when ſhe ſhould accompliſh her age of eighteen years, and to the heirs of her body. 20 *Julii*, 24 *Eliz.* the ſaid *Herſie Sanford* died, the ſaid *Elizabeth* then of the age of five years; and afterwards 20 *Junii*, 37 *Eliz.* the ſaid *Elizabeth* accompliſhed her age of eighteen years; and 25 *Marcii*, 38 *Eliz.* entred into the Tenements, and was thereof ſeiſed in Tail, &c. and ſo ſeiſed took to her husband the ſaid *Robert Rogers*, 1 *Nov.* 39 *Eliz.* and juſtified, &c. The Plaintiff replied, and ſaid, That the ſaid *Herſie Sanford* had iſſue *Mary* his eldeſt daughter, *Helen* his ſecond daugter, and the ſaid *Elizabeth* his youngeſt daughter, and confeſſed the deviſe of the Tenements to *Elizabeth*. But farther ſaid, That by the ſame Will, for want of Iſſue of the ſaid *Elizabeth*, the ſaid Tenements was limited to the ſaid *Mary* the now Plaintiff in Tail, the remainder to *Helen* in Tail, the remainder to his fourth, fifth, and ſixth daughters in Tail, the remainder to his Nephew *John Roades*, and to his heirs Males, with divers remainders over in Tail. Provided always, That if my ſaid daughters or any of them, or any other perſon or perſons before named, to whom any Eſtate of Inheritance in poſſeſſion or remainder of, in, or to the ſaid lands, tenements and hereditaments, with their appurtenances or any of them, or any part or parcel of them or any of them is limited, deviſed or appointed by this my laſt Will and Teſtament, or the heirs before mentioned of them or any of them, ſhall jointly or ſeverally, by themſelves or together with any other perſon or perſons, willingly, apparently and adviſedly conclude and agree to, or for the doing or execution of any act or deviſe, whereby or wherewith the ſaid premiſes ſo to them entailed as is aforeſaid, or any part or parcel thereof, or any eſtate or remainder thereof, or any part thereof before limited or appointed to any perſon or perſons by this my laſt Will and Teſtament, ſhall or may by any way or means be diſcontinued, alienéd, put away from ſuch perſon or perſons and their heirs, or any of them, contrary to my intent and meaning in and by this my laſt Will and Teſtament, otherwiſe than for the only Joynture or Dower of any of the wife or wives of any of the perſon or perſons before named, for the only life or lives of ſuch wife or wives: Or ſhall willingly or adviſedly commit or do any act or thing, whereby the ſaid Meſſuages, Lands, Tenements and Hereditaments, or any part thereof ſhall not or may not deſcend, remain or come to ſuch perſon and perſons, and in ſuch ſort and order as I have before limited and declared by this my laſt Will and Teſtament, otherwiſe than is aforeſaid; Then I will, limit, and declare and appoint hereby, That then my ſaid daughter or daughters, or other the perſon or perſons before named and every of them, ſo concluding and agreeing to and for the doing and execution of any ſuch act or deviſe as is aforeſaid, ſhall immediately from and after ſuch concluding and agreeing, loſe and forfeit, and be utterly barred and excluded of and from all and every ſuch eſtate, remainder and benefit as ſhe or they, or any of them ſhould, might, or ought juſtly to have, claim, challenge, and demand, of, in, or to ſo much thereof as ſuch concluſion and agreement ſhall extend unto or concern, in ſuch manner and form, as if ſhe or they or any of them, had never been named or mentioned in this my laſt Will and Teſtament,

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for or concerning the same: And that then and from thenceforth the estate and estates limited and given to her or them so concluding and agreeing as aforesaid, shall from and after such conclusion and agreement forthwith utterly cease, and be determined in, for, and touching so much thereof as such conclusion or agreement shall concern and extend unto, as fully to all intents and purposes, as if she or they so concluding or agreeing as is aforesaid, were dead without heirs of their bodies lawfully begotten, as is aforesaid. And then I will, and further declare and devise, That presently after such conclusion and agreement, such person and persons to whom the estate in remainder doth first and next belong and appertain unto, after such of the said persons having then the actual possession thereof, which shall so conclude and agree as is aforesaid, by force of this my last Will and Testament, shall enter into, have and enjoy so much of the said Lands, Tenements and Hereditaments, with their appurtenances, as such conclusion and agreement shall concern and extend unto, of and for such estates, and with such remainders over, and with such, and in such and the same manner, condition and degree, and with such and the like conditions and limitations before knit and annexed to the same by this my last Will and Testament, and in such manner to all intents and purposes, as if my said daughters, or other the said persons so concluding and agreeing, were naturally dead without such heirs of their bodies lawfully begotten as is before named, and as though the said estate and remainder were vested in him or them for want of such heirs as is aforesaid, Any act, thing or matter before mentioned and declared in and by this my last Will and Testament to the contrary in any wise notwithstanding. And the said *Hersie* being so seised of the demesns aforesaid, died thereof seised, the said *Elizabeth* then being within the age of eighteen years, who accomplished her age of eighteen years 20 *Julii*, 37 *Eliz.* and entred into the Tenements, and was seised in Tayl, the remainder to the said *Mary*; and afterwards she took to husband the said *Robert Rogers*; and afterwards 13 *Aprilis*, 7 *Jac. Reg.* by Deed indented the said *Robert* and *Elizabeth voluntariè, evidenter, & considerate, Anglicè*, willingly, apparently, and advisedly concluded and agreed with *Christopher Bradshaw* and *Gervase Rogers*, to suffer a Common Recovery of the said Tenements upon a Writ of Entry in the Post, &c. to the intent to make void and put away from the said *Mary*, the said remainder of the said Tenements: According to which conclusion and agreement, the said Writ of Entry was brought against the said *Robert* and *Elizabeth* of the said Tenements aforesaid, they being then Tenants of the Freehold of the premises; and thereupon a Common Recovery was had against them, with Voucher over, and Judgment given, and Execution had against the said *Robert* and *Elizabeth*; which Recovery was to the use of the said *Robert* and *Elizabeth*, and their heirs. And the Plaintiff said, That by reason of this conclusion and agreement, *ad permittendam prædictam Communem recuperationem in forma prædicta prædict' Robertus & Eliz. totum statum*, &c. *de & in tenementis prædict' forisfecerunt, & idem status suus de & in tenementis cum pertinentiis penitus determinavit, & vacuus devenit*. For which cause the Plaintiff entred for the said forfeiture as in her remainder, &c. Upon which the Defendant did demur in Law. And this Plea was entred *Mich.* 7 *Jac.* in the Common Pleas, and had depended fourteen Terms, and had been argued at the Barr more than half fourteen times; And now this Term it was argued by the Judges. And at the last it was Resolved by the whole Court, That Judgment should be given against the Plaintiff. Of which I will make the shorter Report, because I have published many Cases in my Reports before to the same effect: In this I will add some Authorities and Reasons, confirming the Rule of this Case, and affirming the Resolutions before, and refer the Reader without repetition unto the Authorities and Reasons recited by me before. On the Plaintiffs part divers Objections, or rather Declamations were made.

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1. That at the time of the making of the Act 13 *E.* 1. *de Donis Conditionalibus*, until 12 *E.* 4. *Taltarums* Case, there was no opinion, That a Common Recovery against Tenant in Tayl with Voucher over should bind the estate Tayl upon the pretence of a feigned Recompence, but it was newly invented in 12 *E.* 4. and before that time was never before imagined by any of the Sages of the Law, in so many generations of Ages incurred after the said Act.

2. Although the Donor cannot restrain the Common Recovery after it is suffered and executed, because that then the reversion or remainder is barred, &c. Yet (as it was agreed on the other side) he may restrain the conclusion and agreement to suffer it, and so prevent the barr by the Recovery, to preserve his remainder or reversion.

3. Such Recoveries are by divers Acts of Parliament mark'd and branded with the blemish of fiction and falsity, as in the Statute of 34 *H.* 8. *cap.* 20. they are stiled feigned and untrue Recoveries, and so in the Statutes of 11 *H.* 7. *cap.* 20. 32 *H.* 8. *cap.* 31. 14 *Eliz. cap.* 8. &c. they are named covenous, and had by collusion. And therefore it stands with Law and Reason, to provide for the preservation of reversions and remainders against such feigned false and convenous Recoveries.

4. That this opinion, That a Common Recovery cannot be restrained by Condition or Limitation, is a new opinion, and late invention; and was never heard of before Sir *Anthony Mildmayes* Case, in the fifth Part of my Reports. For it was admitted to be restrained in the Case of the Earl of *Arundel*, Dyer 17 *Eliz.* 342, 343. Where the said Earl in the time of Queen *Mary* gave the Mannor of *Haselber Bryan* in the County of *Dorset*, by Indenture to *Thomas* late Earl of *Northumberland*, and to the heirs Males of his body; upon condition, That if the said Earl or his heirs Males of his body issuing, *inter alia*, do suffer any Recovery against them, or should discontinue, &c. And in the Argument of *Scholastica's* Case, *Pasch.* 12 *Eliz. Plow. Com.* 403. the said point of restraint of a Common Recovery was never moved; and therefore it was thought to stand with the honour and gravity of the Court, that this Point had been so often argued at the Barr; and therefore now the Serjeants said, That it was ripe for Judgment, after such a mature deliberation. And in this Case all the said Objections were confuted, and thereby the point in Judgment confirmed.

[b]

And

And as to the first, two Questions were moved and resolved: The first, That the Judgment given against Tenant in Tail with Voucher, and recompence in value, shall bind the estate Tail, notwithstanding the said Act of 13 E. 1. whether the Recovery be upon good title, or no.

2. That the Judgment given in such case for the Tenant in tail to have in value, shall bind the estate tail, although no recovery be had. And therefore as to the first of these Questions, it appeareth by our Books, that the Opinion, That a Recovery against Tenant in tail with Voucher, should barr an estate tail, and was not restrained by the Statute of 13 E. 1. of *Donis*, was not newly invented in 12 E. 4. but oftentimes affirmed for Law by the most knowing of the Law that ever were. For Sir *William Thirning* in the time of H. 4. Chief Justice of the Common Pleas, *Anno* 12 H. 4. 13. saith, That the most learned of the law that ever were, (and when there was the best Law that ever was) were in the Reign of King E. 3. which also were near the time of making of the Statute: Let us see then, how the Law was taken in those days in this point. 13 E. 3. *Brief* 324. By recovery in value by Tenant in tail, the estate tail is barred, and he shall have a Formedon of the Land so recovered in value. And therewith agreeth 42 E. 3. 53. for there it is holden, That in some case a man shall have a Writ of Formedon of Land which was never given. As if tenements in tail be lost, and the tenant in tail recovereth in value, the issue shall have a Formedon of the Lands recovered in value, and yet these Lands were not given. 44 E. 3. 21, 22. *Octavian Lumbards* Case, tenant in tail granteth a Rent-charge to one, in consideration that the Grantee having right to the Land in tail, shall release to him, the same shall bind the issues in tail. 48 E. 3. 11. *Jeffery Benchers* Case, A Recovery in value by tenant in tail shall bind the tail, and a Formedon lieth of the land recovered in value. And therewith agreeth 1 E. 4. 5. 5 E. 4. 2. *b.* And the same also appeareth by the like Cases. For if tenant in tail alieneth with Warranty, and leaveth Assets to descend, it is a barr to [38] the issue by reason of the Warranty and Assets descended; but neither the Warranty without the Assets, nor the Warranty and Assets without Judgment in a Formedon, shall barr the estate tail. For if the issue (without Judgment given) alieneth the Assets, his issue shall recover the land in tail; but after Judgment given that he shall be barred in a Formdon, the issues in tail shall also be barred; and therewith agreeth *Temps* E. 1. *garr.* 88. 11 E. 2. *garr.* 83. 4 E. 3. 24. *Henry Sommers* Case 5 E. 3. 14. 40 E. 3. 9. 14 H. 4. 39. 24 H. 8. *Br. Tail* 33. 4 *Mar. Dyer* 139. And in the case of a Common Recovery there is a Judgment against the tenant in tail, and a Judgment against the Voucher to have over in value. And therefore these Resolutions and Opinions of Law did produce the Judgment in 12 E. 4. which was not of any new invention, but proved and approved by the Resolution of the Sages of the Law at all times after the said Act, untill 12 E. 4. And the Judges of the Law then perceiving what contentions and strife had crept into the quiet of the Law by these fettered Inheritances; Upon consideration of the said Act, and of former Expositions thereof by the Sages of the Law at all times after the said Act, gave Judgment, That in such case the estate tail should be barred.

As to the second Question in the first Objection, It is worthy consideration, That the judgment given for tenant in tail to have in value, is a barr to the estate tail; although that no recompence be rendred in value. And that appeareth in 23 *Eliz. Dyer* 376. tenant in tail suffereth a Common Recovery with Common Voucher, and dieth before execution had against tenant in tail, and the issue in tail entreth, the recoverer may enter upon him by reason of the recovery in value; and therewith agreeth *Shelleys* Case, in the first Part of my Reports. And in the Marques of *Winchesters* Case, *lib.* 3. *fol.* 3. If tenant in tail suffereth a Common Recovery, and afterwards disseiseth the recoverer and dieth, his issue shall not be remitted, for the estate tail was bound by the judgment to have in value, although in truth no recompence can be had. And in *Manxels* Case, *Plo. Com. ult.* If there be tenant in tail, and a stranger bringeth a feigned *Præcipe quod reddat* against him, and he voucheth to Warranty, and the Demandant by default of the Vouchee, or by his confession recovereth against tenant in tail, and he over in value against the Vouchee; and before execution the tenant in tail dieth, and the Land descendeth to the issue: yet the Demandant may enter, or sue execution against the issue, and then the issue shall never falsifie the Recovery, because he hath or may have Assets. For if he ought to falsifie the Recovery, then he ought to keep the land in tail, and have execution also of the Assets: And so as it is there Reported, was it taken by the Lord *Mountague*, and other Justices in the Starchamber, in a matter there in the time of E 6. So that where the Act of *West.* [b] 2. saith, *quod finis ipso jure sit nullus*, we may say, That as to a Common Recovery, *Actus ipse sit nullus.*

As to the second Objection, it is absurd to say, That the Recovery it self cannot be prohibited by any condition or limitation; and yet that the conclusion and agreement to suffer a Common Recovery, shall be prohibited; and such condition to prohibite a conclusion or agreement, doth savour of a new device or invention: For till now of late, none ever heard of any condition or limitation to prohibite goings about, or any conclusion or agreement, but they are altogether unknown to the Law. And therefore the said Act of *West* 2. reciting the mischief, saith, *Per factum tamen & feoffamentum eorum quibus tenementum datum sub conditione exclusi fuerunt, &c.* So that the makers of the said Act ought to be taxed of great ignorance, and that the said Act was not necessary, if the going about or conclusion to alien, might have been prohibited: For then when a man hath made a gift to one and the heirs of his body, he might have added a condition, That if the Donee in tail at the Common Law *post prolem suscitatem* had gone about or concluded to alien, that then the Donor should re-enter; and so have reserved his possibility of Reverter, and so against the same provision might have been made such preventing condition; and therefore it was not needful that the Act of *Donis Conditionalibus* should be made. And yet Sir *William Herle* Chief Justice of the Common Pleas, in 9 E. 3. 22. saith, That they were wise people who made that Statute. And that Sir *William Herle* himself was at the making of the said Statute, it appeareth in

41 E. 3. *garr.* 16. and in 5 E. 3. 14. the ſame Chief Juſtice ſaith, That King E. 1. (who by aſſent of his Common Council in Parliament made the ſaid Act) was the wiſeſt King that ever was: And the King and whole Parliament doth prohibite *factum & feoffamentum* (for this imagination of going about and concluding, was not then, nor long time after, hatcht) And ſo in all ſucceeding ages, the alienationit ſelf of tenant in tail hath been prohibited by Condition; as in 33 *Aſſ.* 24. *temps H.* 2. *Richels* Caſe, *Lit.* 162. *temps H* 4. *Thirnings* Caſe, 22 *H.* 6. 33. 10 *H.* 7. 11. 13 *H.* 7. 23. 21 *H.* 7. 11. And it was well obſerved in this Caſe, That to an eſtate tail there are three manner of Incidents; ſome by the Common Law, others by Act of Parliament, and ſome by Cuſtome. By the Common Law, are ſuch as are not reſtrained by the Statute, and cannot be reſtrained by any condition; as Dower and Tenant by the Courteſie after iſſue, are incidents to an eſtate tail, and cannot be reſtrained by Condition; *v.* 22 E. 3. 17. Alſo the eſtate of him, and of tenant in tail after poſſibility of iſſue, are diſpuniſhable of Waſt. So a collateral Warranty is a barr to an eſtate tail, and a Common Recovery alſo, and none of them can be reſtrained by any Condition or Limitation. By Statute Law, as to make Leaſes by the Statute of 32 *H.* 8. *cap.* 28. and to levie a Fine by the Statute of 4 *H.* 7. *cap.* 24. and 32 *H.* 8. *cap.* 36. to barr iſſues, and none of theſe incidents to *his* eſtate by Act of Parliament may be reſtrained by Condition: For when a man maketh a gift in tail, he *tacitè* giveth theſe incidents to it; and therefore for to reſtrain them by Condition or Limitation, ſhall be repugnant. For put caſe that a man maketh a gift in tail, and further granteth, That he may make Leaſes for years or lives according to the ſaid Act; or to levy a Fine with Proclamation, according to the Acts in ſuch caſe, to barr his iſſues; Provided always, That he ſhall not make Leaſes, or levy a Fine, none will deny, but ſuch Proviſo ſhall be repugnant; and by conſequence in the other caſe, when ſuch incidents are implied: for, *expreſſio eorum quæ tacitè inſunt nihil operatur:* By Cuſtome; as to grant Lands by Copy, &c. at the Will of the Lord according to the Cuſtom of the Mannor, &c. And the Opinion of *Littleton*, as to the ſaid caſe of a Common Recovery, was cited in his Chapter *of Conditions*, 84. After he hath ſaid, That feoffee in fee cannot be reſtrained in alienation; he addeth, Item, if tenements be given in tail upon condition, that tenant in tail nor his heirs ſhall not alien in fee nor in tail, nor for anothers life, but for their own lives, ſuch Condition is good, and the cauſe is (which is to be much obſerved) That when he maketh ſuch alienation, he doth contrary to the intent of the Donor, for which the Statute of *Weſt.* 2. *cap.* 1. was made, by which eſtates in tail were ordained; which is as much as to ſay, as if he had ſaid contrary to the intent of the Act of *Weſt.* 2. or the intent of the Donor within the purview of the ſaid Act; and a Common Recovery is not contrary to the ſaid Act, nor to the intent of the Donor within the purview thereof. But the meaning of *Littleton* is, That tenant in tail may be reſtrained to diſcontinue in fee, or in tail, or for anothers life; and ſo he in the next clauſe following doth explain himſelf, *ſc.* when he hath made ſuch diſcontinuance, he doth contrary to the intent of the Donor.

And as to the third Objection, of aſperſion of a ſcandal upon Common Recoveries (which is one of the main Pillars which doth ſupport the eſtates and inheritances of the Kingdom) It was anſwered, That there was never any thing by the wiſdome of man ſo well deviſed, or ſo ſure eſtabliſhed upon Law and Reaſon, which the ingenie and craft of thoſe who are ſubtile and malicious, [b] hath not, abuſed. And therefore it appeareth by the Preamble of the ſaid Act of 34 *H.* 8. That when the King giveth Lands in tail to his loyal and faithful Servants and Subjects, intending not only to advance the Donee, but the heirs in blood of their bodies, to the intent that the heirs of their bodies ſhould have in ſpecial memory the profit which they have by the ſervice of their Anceſtors, and thereby themſelves the better encouraged to do the like ſervice to their Sovereign Lord the King: It was well done by the Parliament to tax the Donees in ſuffering of falſe and feigned Recoveries, to overthrow the intent of the Kings gift and bounty, by diſmheriting of their iſſues, *quis confirmat uſum qui tollit abuſum*: And yet ſuch was the force of a Common Recovery in ſuch caſe at the Common Law, before the ſaid Act of 34 *H.* 8. that the eſtate tail by a Common Recovery was barred, although the reverſion was in the King, and nothing could remedy the ſame, but an Act of Parliament. And therewith agreeth 33 *H.* 8. *Br. Tail.* 41. *in Plo. Com.* 555. And as to the Caſe upon the Statute of 11 *H.* 7. It was anſwered, That when the husband for the advancement of his wife with a competent Joynture, and preferment of the heirs of their two bodies begotten, hath cauſed an eſtate to be made to himſelf and his wife in tail; and after the death of the husband, the wife to diſinherit the iſſues of the former husband, ſuffereth a Recovery, and conveyeth the Lands to ſtrangers to the husbands blood, ſuch Recovery was worthy by the Parliament to be noted with the mark to be ſuffered by Covin; and the act of the wife when ſhe is ſole, or of her and her ſecond husband, is ſo odious, that a Recovery had upon a good Title againſt them by covin, is void by the ſaid Act; and therefore the ſame is not to be reſembled to the Caſe at Barr: and yet there was no remedy in ſuch caſe upon a common Recovery, till the ſaid Act of Parl. was made. So in the ſaid Acts of 32 *H.* 8. and 14 *Eliz.* when a Common Recovery was had againſt tenant for life, to the prejudice of thoſe who had the Inheritance, the ſame might well be called covinous, and by colluſion. And yet in the ſame Caſe, when tenant for life, the remainder to *A.* in tail, the remainder to *B.* in tail, &c. with divers remainders over, and tenant for life ſuffereth a Common Recovery, in which he voucheth *A.* and he the common Vouchee, it ſhall bind all the other remainders, for no covin or colluſion can be ſuppoſed, when the next in remainder in tail who hath the immediate Inheritance is vouched: as it was adjudged in *Jennings* Caſe, *Trinit.* 38 *Eliz. Rot.* [40] 2302. which Caſe having great affinity with the Caſe at Barr, I have Reported after this Caſe. And as to the Caſe of the Earl of *Arundel*, *Anno* 17 *Eliz.* Firſt, nothing is ſpoken unto it by any who

who argued in the Case, so that it is not any Authority for them who cite it. Also in the same Case a Recovery is intended to be restrained, but not a Recovery with Voucher, *&c.* as in every Common Recovery there is. And in divers Acts of Parliament, Common Recoveries have received allowance and advancement. And therefore the Statute of 7. *H.* 8. *cap.* 1. reciteth, That divers, as well Nobles as others, have suffered Common Recoveries against them of divers of their Mannors, *&c.* for performance of their Wills, for assurance of Joyntures to their wives, *&c.* The same Act in approbation of Common Recoveries, giveth remedies to such Recoveries in divers Cases. And St. *Germyn* in his Book of the Doctor and Student, cap. 26. approveth Common Recoveries to bind as well in Conscience as in Law. And by the Statute of 23 *Eliz.* *cap.* 4. it is Enacted, That for the avoiding of the danger to Assurances of Lands, and for advancement of Common Recoveries, That any Common Recovery shall not be avoided for any want of form in words, and not in the matter of substance. Note Reader, *Semper in fictione juris, subsistit equitas, & contra negantem principia non est disputandum.* And in truth, none ought to be heard to dispute against the Legal Pillars of Common Assurances of Lands and Inheritances of the Subjects. And at the Parliament holden in the Reign of the late Queen *Elizabeth*, in the great Case betwixt *T. Vernon* and Sir *Ed: Herbert* (which was argued by learned Councel before the Lords in Parliament) there *Hoord* an Utter-Barrister, of Councel with *Vernon*, rashly, and with great maliciousness, did inveigh against Common Recoveries, not knowing the Reason and Foundation of them; who was with great gravity, and some sharpness, reproved by Sir *James Dyer*, then Chief Justice of the Common Pleas, who said, He was not worthy to be of the Profession of the Law, who durst speak against Common Recoveries, which were the Sinews of Assurances of Inheritances, and grounded upon great Reason and Authority, *Sed non omnis capit hoc verbum.* And as to *Scholastic*'s Case, I respect much the Reporter, and attribute due honour and reverence to the Judges who argued the said Case. But *amicus Plato, amicus Socrates, sed magis amica Veritas.* For the Resolution in the said Case, is grounded upon two Authorities in Law; one in 29 *Ass. p.* 17. and the other in *F. N. B.* 201. *c.* Which Authorities being duly considered, do not warrant the collection [b] or conclusion which is made upon them (arguing in the said Case) but to say the truth, the contrary. And as to the said Case of 29 *Ass. p.* 17. It is there cited in this manner, A man seised of Lands in fee devisible, deviseth them to one for the term of his life, and that he should be Chaplain (when the Book at large is, That the devise was to a Clerk for life, upon condition that he shall be Chaplain, and sing for his Soul) so that after his decease, the said tenements should remain to the Comonalty of the said Town (*s.* of *Lang-stone*) to finde a Chaplain for the same tenements, and dieth; and the Devisee being sufficient to be Chaplain, held them for six years, and was not Chaplain, and the heir of the Devisor did ouste him, and he brought an Assise, and the heir pleaded to the Assise, and all this matter was found by the Assise; and the Justices stirred up the Assise as much as they could for the Plaintiff. And at length they said, That the Plaintiff was seised and disseised: Upon which Case so cited, the Justices, as it is there Reported, did collect, that it seemed to the Court there, That the Limitation that he should be Chaplain, and pray for him, was no Condition for the breach of which the heir could enter, for thereby the remainder should be defeated. In which Case are two great Misprisions; one in the citing, the other in the application of it.

1. That the said devise was to the said Clerk upon express words of Condition, That he should be Chaplain, as appeareth before; the other in the Application, That it should not be taken for a Condition, but for a Limitation; and to that purpose the Case was cited. And without question it ought to be either a Condition or Limitation: and if it was admitted to be a Limitation, then it is not possible for the Plaintiff in the Assise to recover, for then his estate, if it were a Limitation before the bringing of the Assise, was actually determined: for such is the nature of a Limitation, to determine the estate without an Entry, and then the Freehold in Law was vested in the Comonalty of *Lang-stone*, for a stranger shall take advantage of a Limitation, and by consequence it was not possible that the Plaintiff who had lost his estate by force of a Limitation, should recover in the Assise. But in the Book it is taken for a Condition, for there *Birton* saith, That they in the remainder cannot enter, for it is a Condition. And it appeareth, that the heir cannot enter, *unde sequitur*, that the remainder hath destroyed the Condition: for the Book saith, That the heir cannot enter and have the Land onely for the life of the Plaintiff. By which it appeareth, That in such Case words of express condition (which are omitted in the citing of the Case) shall not be taken for a Limitation, but rather void by the Limitation of the remainder over: for when it hath words of condition, the manner of the devise is to be intended that the heir may enter, as it [41] is expresly said in the Book, and therefore it shall not be taken for a Limitation, to give benefit to him in the remainder, and it shall be dangerous to make a construction contrary to the express words. But if the Case had been, as in the said *Scholastica*'s Case it is cited, *s.* That he devised the land to one for life, and that he should be Chaplain, there might be more colour to say that it should be a Limitation by construction, because they are not, neither words of express condition, nor legal words of Limitation; and therefore there peradventure the Law would construe them so, that they might take effect; as in the Case betwixt *Hamond* and *Wellock*, Reported by me in the Third Part of my Reports. This word (*Paying*) shall amount to a limitation in a Will by construction, because that in Law it is not any word, either of Condition or Limitation; and therefore in a Will it shall serve as well for the one as for the other, to supply the intent of the Devisor. And so the Authority of the Book of 29 *E.* 3. 17. is against that which was cited in *Scholastica*'s Case.

And by this see (*Reader*) how dangerous it is to ground an Opinion upon any Abridgement, as in another place I have observed. For *Fitzherbert* in abridging the Case of 29 *Ass. tit. Assise* 281 abridgeth

abridgeth it without expreſs words of condition, as it is cited in *Scolaſtica's* Caſe. But *Bro. tit. Condition* 111. abridgeth the ſame to be upon expreſs Condition, *Sed melius & tutius eſt petere fontes quam ſectari rivulos.* And as to the ſaid Caſe in *F. N. B.* the ſame is cited in *Scolaſtica's* Caſe in this manner: A man deviſeth Lands in *London* to his wife upon condition, That if ſhe marrieth, that the Lands ſhall remain to his Son in tayl, and for want of ſuch iſſue, the remainder to the right heirs of the Donor in tayl; the wife taketh husband, and ſhe and her husband occupy the Lands, he in the remainder dieth without heir of his body; the right heir of the Donor ſhall have a ſpecial Writ of *Ex gravi querela*, &c. So it appeareth, That he in the remainder ſhall have advantage of the Condition if it be broken: but that ſhall be by way of ſuing this Action, and not to enter by force of this condition not performed, which Writ appeareth in the Regiſter. And the Juſtices ſaid, That the words of the condition there mentioned, are not properly a condition but words of limitation, ſo that the ſenſe is ſuch. A man deviſeth land to his wife for a term if ſhe ſo long continueth a wi-
[b] dow, and unmarried, the remainder in tayl, the remainder to his right heir, ſo that the marriage is the limitation there which determineth the eſtate, and ſo the remainder commenceth upon the eſtate ended there; which caſe put by *Fitzherbert* out of an original Writ in the Regiſter was utterly miſtaken in two points:

1. Becauſe the deviſe to the wife in the caſe put in *F. N. B.* was upon expreſs words of condition, but *inſpecto Regiſtro, fol.* 246. the deviſe was upon apt words of limitation, *ſ. Habendum ſibi ad totam vitam ſuam ſi ipſa in pura viduitate ſua tenuerit* (and not upon expreſs words of condition) *ita quod ſi ipſa alicui maritaverit, vel ad aliquem virum ſe traxerit in fornicatione, tunc meſuagium pred' cum pertin' I. & hæredibus de corpore ſuo legitimè procreatis remanſerit, & ſi idem I. ſine hærede obierit, tunc meſuagium prædictum cum pertinentiis ad rectos hæredes ipſius W. reverteret.*

2. Where *Fitzherbert* ſaith, That the right heir cannot enter, it is clear that the right heir may and will enter, becauſe that he hath the reverſion by deſcent, and not by way of remainder. And I have ſeen a Report which *Dyer* Serjeant moved in *Hill.* 3. & 4 *Ph.* & *Mar. William Butts* Doctor of Phyſick was ſeiſed of divers Mannours, Lands and Tenements in fee, and having iſſue three Sons, *William Edmund* and *Thomas*, by his Will in writing deviſed part of them to his wife for her life, *ſub conditione quod ipſa educabit pueros teſtatoris in eruditione & bonis moribus*; the remainder to *Thomas* his Son in tayl, and the reverſion in fee deſcended to *William* his eldeſt Son: The Condition was broken; the queſtion was, If the heir ſhould enter for the Condition, or *Thomas* ſhould enter as for breach of a Limitation; or if the Condition be deſtroyed by the Limitation of the remainder over. And it was reſolved by Sir *Robert Brook* Chief Juſtice, and the whole Court, That clearly it is not a Limitation, for there are expreſs words of condition, and the meaning of the Teſtator was, That his heir, who alwayes is to take advantage of a condition, ſhould enter, and defeat the eſtate of the wife: but his meaning did not accord with the Law, for he could not defeat the eſtate for life, if he did not defeat the remainder, and therefore by the limitation of the remainder over, the condition was deſtroyed: but in ſuch caſe his meaning never was, that he in the remainder ſhould enter for the condition broken.

Note, *Reader*, There are in Law apt and legal words, as well of limitation as condition. Apt words of limitation, are *quamdiu, dummodo, dum, quouſque, durante*, &c. *v.* 14 E. 2. *garr.* 92. a Rent granted out of the Mannor of *D. quamdiu* the grantor ſhall remain there: *v.* 7 E. 4. 16. *quamdiu fuer' amicabiles*, 27 *H.* 8. 29. 3 E. 3. 15. & 3 *Aſſ. p.* 9. A man leaſeth Land *dummodo* the Leſſee ſhall pay 20 l. 27 *H.* 6. 27. A Leaſe is made to a woman *dum ſola fuerit*, 9 E. 4. 20. A man maketh
[42] a feoffment in fee until, *ſ. quouſque* the feoffor hath paid to him certain money. 21 *Aſſ. p.* 18. *v.* 29 *Eliz. Dyer acc' Plo. Com.* 414. 35 *Aſſ. p.* 14. A Leaſe for years, if the Leſſee ſhall ſo long live. 14 *H.* 8. 13. A Leaſe of Lands until he be promoted to a Benefice, &c. *Litt. Chap. Conditions* 90. during the coverture. All which, and many others, are words of limitation, by force of which, the eſtate is determnied without entry or claim. Words of Condition, are *ſub conditione, ita quod, ſi contingat, proviſo*, &c. *v. Lit.* 74. & 75. 3 *H.* 6. 7. 27 *H.* 8. 15. 28 *H.* 8. *Dy.* 13. 4 *Ma. Dyer* 139. 15 *Eliz. Dy.* 319. 32 *H.* 8. *Dyer* 47. But theſe words, *ad effectum, ea intentione, ad ſolvendum*, or other the like, do not make a Condition in Feoffments or Grants, if it be not in the Kings Caſe, or in a laſt Will, as it was reſolved *Paſch.* 18 *Eliz.* by all the Juſtices of the Common Pleas. And ſo you will the better underſtand your Books, in 38 *H.* 8. 33. the Abbeſs of *Sions* Caſe. 31 *H.* 8. *br. tit. Conditions* 19. 8 E. 2. *Aſſiſe* 412. 5 E. 3. *br. Condition* 204. *F. N. B.* 131. 41 E. 3. 17. 41 *Aſſ.* 3. 35 *H.* 6. 7. & 57. by *Moile.* 8 *H.* 4. 22. Sir *Simon Beverleys* Caſe. *Doctor and Student, lib.* 1. *cap.* 20. 10 E. 3. 4. 32 E. 3. *Annuity* 30. 8 *H.* 6. 23. *Plo. Com. in Browning* and *Beſtons* Caſe 142. 7 E. 6. *Dyer* 97. 3 E. 6. *ibid.* 66. But in the caſe of a Grant Executory *(Pro)* maketh a Condition; as a grant of an Annuity *pro conſilio impendendo*, 41 E. 3. 38 *H.* 6. 27. 9 E. 4. 20, 21. A difference betwixt a thing executory and executed, *Dyer*, 23 *Eliz.* 369. It was alſo obſerved, That in *Scoliaſtes's* Caſe, *John Clerk* who was ſo ſuppoſed to be reſtreined, firſt levied a fine (which fine for any thing appearing in the Record, or in the Caſe Reported) was a fine at the Common Law, and then it is a diſcontinuance and wrong, and therefore it might be reſtrained by condition. And *Hill.* 36 *Eliz. Rot.* 539. in the Kings Bench by *Popham* chief Juſtice, and two other Juſtices of the Kings Bench; for the matter in Law, it was reſolved in the ſaid *Scolaſtica's* Caſe, againſt the former Opinion, and Judgment was there given upon an incurable imperfection in the Verdict.

As to the fourth Objection, That this Opinion, That tenant in tail cannot be reſtrained to ſuffer a Common Recovery, was new and a late Invention. It appeareth by the authorities before-cited, and by *Littleton* alſo, that it is not new, but well approved by our old and latter Books: and it is well obſerved by one, *Quod novum judicium non dat jus novum, ſed declarat antiquum, quia judicium eſt juris dictum, & per judicium jus eſt noviter revelatum quod diu fuit velatum.*

And

And it is true, that the Law sometimes sleepeth, and a judgment awaketh it: for, *dormit aliquando lex, moritur nunquam.* And this was the only point whereupon Judgment in this case was given against the Plaintiff. And it was observed, That these perpetuities were born under some infortunate constellation; for they in so great a number of Suits concerning them in all the Courts at *Westminster*, never had any Judgment given for them, but many Judgments given against them. *v. Hil.* 31 *Eliz.* in the Exchequer Chamber, *Chudleighs* Case, *Mich.* 34. & 35. *Eliz. Hunt* and *Capels* Case in the Exchequer Chamber, *Hil.* 37 *Eliz.* between *Cholmley* and *Hunt* in the Common Pleas: and *Hil.* 37. *Eliz.* betwixt *Germin* and *Arscot* in the same Court. *Hil.* 30 *Eliz.* in *Corbets* case in the Common Pleas. *Mich.* 3. *Jac.* in the Kings Bench, Sir *Anthony Mildmay's* Case, and *Sonday's* Case in the Court of Wards. 5 *Jac. Reg.* All which Cases I have Reported, and in all which judgement was given against the Perpetuity, and from these fettered Inheritances the Freeholds of the Subject are set at liberty according to their original Freedom, [b]

But it was moved also, admitting, That such conclusion to suffer a Common Recovery might be restrained by condition, if the conclusion of a Feme Covert in that case by deed indented shall be a forfeiture of her estate. And it was objected, That when a woman levieth a fine, or suffereth Recovery with Voucher, the Law which enableth her to the principal, enableth her to make a declaration of the use thereof, as its agreed in *Blith* and *Colgate's* Case. And so if an Infant, or a man *non compos mentis*, levy a fine, and maketh Indentures to declare the use thereof, the Indentures shall not be avoided for Infancy, or *non sane memorie*, because they are enabled to the principal, and therefore shall not be disabled to do the accessory. And so was it resolved in the Court of Wards by *Wray* and *Dyer* Chief Justices, in the Case of one *Hugh Lewing*, who was an Idiot, and so found by office, and had levied a fine to one *Winne*, and declared the uses thereof by Indentures, which was pretended to be to the use of the Ideot and his heirs, because that the Indentures, as it was objected, were void, but *non allocatur* for the cause aforesaid. And therefore in this case the conclusion of the husband and wife by Indenture to suffer a common recovery, was a breach of the condition. But the Chief Justice held, That this conclusion of a feme covert was of no force, nor any cause of forfeiture. And for that some of the Maximes of Law are to be considered, That no feme covert shall be barred by her confession of her Inheritance or freehold, but when she is examined by due course in Law. 15 *E.* 4. 8. 44 *E.* 3. 28. *v.* 14 *E.* 4, 5. And none hath power to examine a feme covert without a Writ, *v.* 21 *E.* 3. 43. *John de Holborns* Case. And that is the cause, That if the [43] husband and wife acknowledge a Statute or Recognizance, it is void as to the wife, although she over-live her husband, as it was holden *Pasc.* 17 *Eliz.* in the Countess of *Lennox* Case. So if the husband and wife acknowledge a deed to be inrolled, and it is inrolled, the same is void to the wife. *v.* 29 *H.* 8. *br. Faits inroll.* 14. 7 *E.* 4 5. 16 *H.* 7. 5. & 21 *E.* 3. 24. and the reason is, because no such Writ is depending against the husband and wife, upon which the wife by Law may be examined. But if an Infant acknowledgeth a Statute or a Recognizance, it is not void, but voidable by *Audita querela* during his minority; and the cause of the difference is, because the Judge in case of an Infant may by inspection know his age, but not thereby whether a woman be covert or not. And the usage hath alwayes been upon a common recovery against the husband and wife, to examine the wife, and to grant *Dedimus potestatem* to take her acknowledgement upon examination, as in case of a fine; for there is a Writ upon which she may be examined. *v.* 44 *E.* 3. 28. But a common recovery against an Infant, although he appeareth by Gardien, shall not bind the Infant, for the Infant hath not such a disposing power of the land as the husband and wife have, but is utterly disabled by himself to convey or transferre his inheritance or freehold to others during his minority. And in these dayes a common recovery appeareth to us to be a common conveyance and assurance of lands. But if a feme covert alone levieth a fine, it shall bind her and her heirs, if the husband doth not enter and avoid the estate of the Conusee, because she was examined, and hath power of the land. But the reason that it cannot be a forfeiture, or breach of the condition in the Case at Barr, is because the conclusion by the Indenture only, and presently by the pretence of the Plaintiff, was a determination of the estate of *Elizabeth*, and then the recovery was not of any effect, because the estate of *Elizabeth* was determined by the conclusion by Indenture before the recovery, and it was not material whether there was any recovery or not. For the pleading is, That by the conclusion the estate determined. So that in this case it cannot be said, as it was affirmed, That when husband and wife suffer a common Recovery, they being enabled to the principal, shall be disabled to the accessory; for here this proviso doth disable them to suffer a recovery: and against the Indenture the wife may plead, That it is not her deed, and therefore it is no more than that the husband and wife [b] have concluded without common recovery. But this point was not resolved, because that judgment was given upon the other.

Trin. 38 Eliz. Rot. 2302. *In the Kings Bench.*

Jenning's Case.

BEtween *Wiseman* and *Crow* the case was such: *Thomas Wiseman* had Issue two sons, *William* by his first wife, and *Thomas* his younger, and a daughter by *Dorothy* his second wife, and being seised of Lands in fee holden in socage, by his will in writing, devised them to the said *Dorothy* his wife for life, the remainder to *Thomas* his son in tail, and died; by which the wife was seised for life, the remainder to *Thomas* the son, and the reversion in fee descended to the said *William*. The said daughter took husband the said *Jennings*, and after the Statute of 14 *Eliz.* a common recovery was had against the said *Dorothy* being Tenant for life, in which *Thomas* in the remainder in tail was vouched, and in which *Thomas* did vouch over the common vouchee without any assent of the said *William* the heir in recovery; which recovery was to the use of the said *Thomas* and his heirs, and afterwards *Thomas* died without issue. *Jennings* in the right of his wife, being sister of the whole blood to *Thomas*, entred, upon whom *William* the Plaintiff entred, upon whom *Crow* the Defendant by the commandment of *Jennings* did reenter, upon which reentry this action of Trespas was brought. And if the said common recovery had barred the reversion of *William*, notwithstanding the said act of 14 *Eliz.* was the question. And in this case four points were resolved:

1. That at the Common Law a recovery against Tenant for life with voucher upon a bare warranty and recovery in value should bind him in the remainder, as the books are in 19 E. 3. *recovery in value* 20. 23 E. 3. *ib.* 13. *Ass. p.* 35. & 5 E. 4. 2. and the reason is, because the particular estate and [44] the estate in remainder are but one estate, and one warranty may extend to both, and therefore the recompence in value shall enure to both the estates. And it appeareth by the preamble of the Act of 32 *H.* 8. *cap.* 31. That a recovery suffered by the Tenant in a real Action against Tenant for life by covin, and not upon pure warranty, that the same either shall barr him in the reversion, or at least take away their entry. But now it hath been resolved in *Pelham*'s case in the first part of my Reports, That a common recovery had against Tenant for life only is a forfeiture of his estate, because that a common recovery is now but a common conveyance or assurance.

2. It was resolved, That no Act hath been made to preserve any reversion or remainder expectant upon an estate tail, for an estate tail is an estate which by possibility may endure for ever. And Tenant in tail hath power to barr him in the remainder or reversion, and therefore the Statute of *West*' 2. *cap.* 3. (which was made at the same Parliament, that the Statute *de donis conditionalibus* was made) for the preservation of him in the remainder or reversion, gave receit to them, and provideth for them in these words, *Eodem modo si tenens in dote, per legem Angliæ, vel alio alterminum vitæ, vel per donum in quo reservatur reversio, fecerit defaltam, admittantur hæredes, vel illi ad quos spectat reversio*, and although the Statute saith *per donum*, which by the letter extendeth to donee in tail, yet the Judges knowing as well the possibility of the continuance of the estate tail, as his power to barr him in the reversion or remainder, extend the said general words by construction unto the estate of the donee in tail after possibility of issue extinct, who in truth hath an estate but for life, which is but part of the gift, for an estate of inheritance was given, and now the donee hath but an estate for life. And therewith agreeth 20 E. 3. *Resceit* 17. 39 E. 3. 8. b. 33 *H.* 6. 21. and the book 2 E. 2. *Resceit* 147. is ill reported, and is to be meant of Tenant in tail after possibility, and not of an estate tail: and therefore in 42 E. 3. 12. the case is remarkable. Lands were rendred by Fine to *Robert* and *Alice* his wife in tail, the remainder to *Tho.* in tail, saving the reversion to the donor, *Robert* died without issue, *Alice* his wife was impleaded in a *Præcipe quod reddat*, who made default after default, for which one *Simon* the right heir of the donor who had the reversion in fee, surmising that as well *Robert* as *Thomas* were dead without issue, prayed to be received; the De- [b] fendant counterpleaded the Resceit, because that *Thomas* who was in remainder in tail had issue *John*, who yet was alive: and the Defendants counsel made two objections against the Resceit; first, that the estate of the donee was not immediate to the estate of *Alice*, *sed non allocatur*, for that it is said that it was adjudged, That if lands be leased for life, the remainder to another for term of life, saving the reversion to the lessor, that he in the reversion had been received notwithstanding the mean remainder. And it is true, that it is so adjudged in 11 E. 3. *Resceit* 118. where the case was, That there was Tenant for life, the reversion to E. for life, the reversion of the fee to *R.* Tenant for life was impleaded in a *Præcipe*, and living E. *R.* prayed to be received, and there *Hill* did object against the Resceit that the Statute gave, that he to whom the reversion is immediate after the death of Tenant for life should be received; and we have seen that he to whom the reversion was, where there was an estate mean for life, hath brought an action of wast, and was not received to this Writ; which case of Wast was opened; and the difference taken between that and the case at barr, because in the action of Wast it was to the same estate, but here he is saver the mean estate: and 4 E. 2. *Resceit* 160. *acc*'. The second objection in the said book of 42 E. 3. was because there was a mean estate in tail (which the book calleth a Fee mediate) betwixt the tenant for life, and he in the reversion in fee, and where there is a fee mediate, he in the reversion by force of the said Statute shall not be received; and so the case is there ruled, that he was not receivable; and the difference is taken, where the remain-

remainder is limited over for life, there he in the reverſion ſhall be received, and the cauſe is becauſe that he who hath the remainder hath not a greater eſtate then the tenant himſelf, but in the caſe here he hath a fee mediate between him who prayeth now, and the Tenant who might have been received if he had come. And afterwards the Defendant ſaid, That there was no ſuch *John in rerum natura.* But note *Reader*, if he in the reverſion in fee, and he in the meſne eſtate of life at the ſame time pray to be received, the meſne eſtate for life in reſpect of the immediateneſs and proximity ſhall be preferred before the reverſion in fee, for the words of the Statute being general, *ſ. admittantur hæredes vel illi ad quos ſpectat reverſio*, the Law which always expecteth the order of proximity preferred the leſs and next eſtate, be it in remainder or reverſion for life, before the greater and remoter eſtate in fee; and therewith agreeth 24 E. 3. 32. *in Pierce de Grimſteads* caſe. And the Statute which giveth the Writ of Errour and Attaint to him in the reverſion during the life of tenant for life, *&c.* giveth not any remedy to him in the reverſion expectant upon an eſtate in tail. [45]
See the Marqueſs of *Wincheſters* caſe in the ſecond part of my Reports.

And the Statute of 32 *H.* 8. *cap.* 31. provided onely for the preſervation of the reverſion or remainder expectant upon an eſtate for life, *&c.* and not upon an eſtate tail; and to this effect all recoveries by agreement againſt tenant by the courteſie, tenant for life, in Dower, tenant in tail after poſſibility of iſſue extinct of any lands, *&c.* whereof the tenant ſhall be ſeiſed as tenant for life, tenant by the courteſie, or tenant in tail, after poſſibility of iſſue extinct ſhall be void againſt thoſe then in reverſion, *&c.* ſo that by this Statute no proviſion was made for the preſervation of the reverſion or remainder expectant upon an eſtate in tail.

3. It was reſolved, That ſundry evaſions were invented out of the ſaid Stat. 32 *H.* 8. and therefore if after that Statute tenant for life had made a leaſe for years, and the leſſee for years had made a feoffment in fee, and the feoffor had ſuffered a common recovery in which the tenant for life was vouched, and he vouched over the common vouchee, that the ſame was out of the perview of the ſaid Act of 32 *H.* 8. for two cauſes: 1. Becauſe that the tenant for life at time of the recovery againſt the feoffee was not ſeiſed for life, but had but a right; 2. He in the remainder or reverſion had not then but only a right, for all was deveſted by the feoffment of the ſaid leſſee for years. And ſo was it holden in the Common Pleas, *Trin.* 5 *Eliz.* and 15 *Eliz.* that in the like caſe where tenant for life in ſuch common recovery came in as vouchee, that it was out of the Stat. of 32 *H.* 8. as *Bendloes* Serjeant hath reported. And that was the cauſe, as it alſo appeareth by the preamble of the Statute of 14 *Eliz.* of the making of the ſame Act, *ſ.* where divers perſons being ſeiſed, or that had been ſeiſed, *&c.* for life, *&c.* have permitted and ſuffered themſelves to be vouched by other perſons by agreement or covenant between them, *&c.* to the great prejudice of thoſe to whom the reverſion or remainder thereof hath appertained or ought to appertain.

4. It was reſolved, That the Act of 14 *Eliz.* doth not extend to preſerve any reverſion or remainder expectant upon an eſtate tail, where tenant for life is impleaded, and tenant in tail is vouched; and therefore all the parts of the ſaid Act were conſidered.

1. The title of the Act is, For avoiding of Recoveries had by colluſion by tenant for life, *&c.* and this title doth not extend to the caſe at barr for two cauſes: 1. A recovery cannot be ſaid by colluſion, where tenant in tail is in the recovery tenant in fait, or tenant in law, as vouchee, for the law, as incident to his eſtate hath made the land, and all remainders and reverſions ſubject to his pleaſure, and he hath right & power to barr them all, *& jus & fraus nunquam cohabitant*; and therefore the title of the Act being for avoiding of recoveries by colluſion, *&c.* cannot extend to a recovery where tenant in tail is party or privy. [b]

The ſecond part of the Act is the preamble, and that doth not extend to the caſe at barr for four cauſes; 1. The words of the preamble are, *Whereas divers perſons being ſeiſed of lands*, &c. *as Tenants by the courteſie, Tenants in tail after poſſibility of iſſue extinct, or otherwiſe only for term of life, or eſtates determinable upon life or lives*; ſo that the intent of the makers of the Act was to avoid recoveries againſt tenant for life, and not when tenant in tail is party or privy. 2. *By agreement and covin between them*; and (as it hath been ſaid) Covin cannot be when Tenant in tail is party or privy. 3. *Againſt the ſame particular tenant*; and in this caſe the recovery againſt the particular Tenant doth not barr the reverſion, but the vouchee of Tenant in tail and his vouchee over. 4. *Have permitted and ſuffered themſelves to be vouched*, &c. ſo that the vouchee of Tenant for life, and not the Tenant in tail was intended to be prohibited.

The third and principal part of the Act is the body of the Act; 1. *That ſuch recoveries againſt ſuch particular Tenants*, &c. and in the caſe at barr the recovery againſt Tenant for life doth not barr the reverſion, but the judgment given for Tenant in tail to have in value, the ſame bindeth the reverſion, as hath been ſaid before. 2. *Or againſt any other with voucher of any ſuch particular Tenant*; which clearly doth not extend to the caſe at barr, foraſmuch as tenant in tail is vouchee. 3. The proviſo, *That all and every ſuch recoveries* (which relateth to recoveries by covin, *&c.* mentioned before in the title, preamble, and body of the Act) which doth not extend where Tenant in tail is vouched, and that ſuch recovery ſhall bind thoſe who aſſent of Record are affirmative words, and doth not diminiſh the vigour and form of a common recovery in which the Tenant in tail is vouched, and in which he voucheth, who by the Law hath power of the land, as hath been ſaid before; and it ſhall be very miſchievous if this Act ſhall not be ſo taken, or rather if this Act ſhall be expounded againſt the Writ and meaning thereof. For the common aſſurance is, That if tenant in tail of land with the reverſion or remainder over, bargaineth and ſelleth the land by deed indented and inrolled to another, againſt whom the Writ of Entry in the Poſt is brought, and he voucheth the tenant in tail, and he voucheth over. God forbid that the eſtates of Subjects which depend upon ſuch recoveries, ſhould be drawn in queſtion. And yet the bargainee in ſuch caſe hath but an eſtate determinable upon the life of tenant in tail. Alſo if tenant for life be impleaded in a

Præcipe, and maketh default after default, and he in the remainder in tail is received, who voucheth over the common voucher, it ſhall bind the eſtate tail, and the remainder and reverſion alſo.

[46] And therewith agreeth *Knyvetons* Caſe, 8 *Eliz. Dyer* 152. *v. Owen* and *Morgans* Caſe. And judgement in the Caſe at Bar *nullo contridacente* by the whole Court was given for the Defendant againſt the Plaintiff: Upon which the Plaintiff brought a Writ of Error, and the Judges of the Common Pleas, and the Barons of the Exchequer did agree with the Juſtices of the Kings Bench, That the ſaid recovery had barred the Plaintiffs reverſion; but for inſufficiency of pleading, the Judgment was reverſed.

Mich. 10. Jac. Reg. *In the Common Pleas.*

Lampet's Caſe.

[b] RIchard *Lampet* brought a Writ of *Ejectione firmæ* againſt *Margery Starky*, and declared upon a Leaſe made by *William Lampet* and *Elizabeth* his wife by their indenture, 18 *Junii*, 8 *Jacobi Regis* of a houſe, twenty four acres of Land, eight acres of meadow and twenty acres of wood, with their appurtenances, in *Cawe Hamborn* in the county of *Glocester* for four years, and declared of an Ejectment, *&c.* and added the life of *Elizabeth*. The defendant pleaded Not guilty, and the Jury gave a ſpecial Verdict as to the ſaid Meſſuage, and one half acre of land, parcel of the tenements aforeſaid, and as to the reſidue, they found the defendant not guilty. And as to the ſaid meſſuage and half acre of land they found, That *John* Lord *Lumley*, *Richard Lumley*, and *John Lampton* were ſeiſed of the ſaid houſe and half acre of land in fee; and by their indenture 14 *May*, *anno* 35 *Eliz.* demiſed to *John Morrice* the younger, the ſaid houſe and half acre of land for the term of 5000 years, by the force whereof he entred, and was thereof poſſeſſed, and 11 *Octob.* 38. *Eliz.* made his laſt Will and Teſtament in writing, and thereby deviſed to *John Morrice* his father the ſaid houſe and half acre of land, for the term of the natural life of the ſaid *John Morrice* the father, and after his deceaſe, the remainder of the ſaid houſe and half acre to *Elizabeth* ſiſter of the Teſtator, and to the heirs of the body of the ſaid *Elizabeth*, and made *John Morrice* his father his ſole Executor, and 20 *Octob.* 38 *Eliz.* died poſſeſſed of the ſaid houſe and half acre of land; after whoſe death *John Morrice* the father did take upon him the charge of the execution of the ſaid Will, and entred into the ſaid meſſuage and half acre of land, and was thereof poſſeſſed *prout*

[47] *lex poſtulat*; and the ſaid *Elizabeth* took husband *William Taylor* and that afterwards, *v. 26 Julii*, *anno* 1 *Jac.* the ſaid *William Taylor* and *Elizabeth*, at the eſpecial inſtance of the ſaid *John Morrice* the elder, *per quoddam ſcriptum ſuum dederunt, conceſſerunt, remiſerunt, relaxaverunt, ſurſum reddiderunt, aſſignaverunt & tranſpoſuerunt, Anglicè*, yielded up *dict' Johan. Morrice ſen' totum pred' meſuag' & pred' dimid' acr. paſtur' cum pertin', una cum toto recto, tit', intereſſe tempore & termino ſuis de & in eiſdem, habendum & tenendum totum dictum meſuag' & dimid' acr' paſtur' cum*

[c] *pertin' præfat' Johan' Morrice ſen' pro & duran' toto ſtatu, fine, & termino pred' Williel' Taylor & Eliz' pro & durant' reſiduo dict' termini* 5000 *annorum tunc venturorum.* And afterward the ſaid *John Morrice* the father, 1 *Octob.* 2 *Jac.* by Indenture demiſed the ſaid houſe and half acre to the ſaid *Margery Starkey* now defendant for ten years; and afterwards the ſaid *William Taylor* died, and the ſaid *Elizabeth* took husband the ſaid *William Lampet*, and afterwards 15 *Nov.* 7 *Jac. John Morrice* the elder died, after whoſe death the ſaid *William* and *Elizabeth* entred into the ſaid houſe and half acre; and made the leaſe to the plaintiff mentioned in the declaration, by force whereof the plaintiff entred, and was thereof poſſeſſed until the defendant did eject him. And if upon the whole matter the ſaid *Margery* were guilty or not, was the queſtion.

And this caſe was oftentimes in ſeveral Terms argued at the Bar, and now this Term by the Judges; and the effect of all their arguments, was, Firſt, in every matter in Law *ſtatus queſtionis*, id eſt, *cauſa dubitationis*, the cauſe of doubt or queſtion is firſt to be conſidered. And in this Caſe the cauſe of the doubt is, foraſmuch as the whole term *ſub modo* is in *John Morrice* the father, and he ſhall be puniſhed for waſt, and an action of debt lieth againſt him for the rent, as it was reſolved by the whole Court in this Caſe, *v. Weldon's* Caſe in *Plo. Com.* 524. *acc.* If the ſaid grant or releaſe made to the ſaid *John Morrice* the father, then being poſſeſſed of the whole term as aforeſaid, can barr the ſaid *Elizabeth*, becauſe ſhe hath but a poſſibility, and neither intereſt nor right in poſſeſſion, reverſion or remainder; the ſame was the great queſtion of the Caſe. But two other queſtions (as afterwards appeareth) were moved in the Caſe, which without any difficulty were reſolved. This caſe of a deviſe of a leaſe for years to one for life, and after his death to another during the reſidue of the term, hath produced *ſeptem queſtiones venales & ſpinoſas.*

1 When a man being poſſeſſed of land for years deviſeth the uſe or profits of the land, or the land it ſelf to one for life, and afterwards to another during the reſidue of the term, if the deviſe of a chattel after the death of the firſt deviſee was good, and adjudged as appeareth in *Matthew Manning's* Caſe, in the Eighth Part of my Reports, that ſuch executory deviſe was good. And ſo was it

[b] holden by the whole Court in the argument of this Caſe.

The ſecond queſtion hath been, If the executory deviſe after the death, *&c.* be good, when the term it ſelf (and not the uſe or occupation) was deviſed to the firſt for life, *&c.* and afterwards

to

to others; and adjudged, That in ſuch caſe alſo the executory deviſe was good, as in the ſaid *Mathew Mannings* Caſe appeareth; and ſo it was reſolved in the argument of this Caſe by all the Juſtices.

The third queſtion hath been, If the firſt deviſee after aſſent made by the Executor, might bar the executory deviſe, being but a poſſibility, or not; and ſo was it agreed in the argument of this Caſe.

The fourth queſtion hath been, If the aſſent of the Executor of the firſt deviſee ſhall enure to the other, foraſmuch as he hath it by executory deviſe, and not by remainder: and adjudged it ſhall: and ſo it was granted in this Caſe by all the Juſtices.

The fifth queſtion hath been, When the diviſe is (as above) to the Executor for life, and afterwards unto another, &c. and the Executor entreth generally; It hath been adjudged, That he ſhall have it as Executor, which is his firſt and general authority, and not as legatory without claim or ſhewing his election, although the Teſtator were not indebted to any one; and ſo was it ruled by the Court in the argument of this Caſe.

The ſixth queſtion hath been, If ſuch executory intereſt may be granted to a ſtranger during the life of the firſt deviſee; and adjudged it may not, as it appeareth in *Carters* Caſe cited in *Fulwoods* Caſe, in the Fourth Part of my Reports, and therewith agreeth the Opinion of all the Juſtices in the argument of this Caſe,

And now the ſeventh queſtion is, If ſuch poſſibility may be extinguiſhed by grant or releaſe to him in poſſeſſion. And it was objected, That the ſaid poſſibility could not be releaſed, for inaſmuch as the eſtate during the life of a man, is more than any term for years; and that the land in the Caſe at Bar is diviſed unto *John Morrice* the elder for his life, the whole term is in him determinable by his death, ſo that the ſaid *Elizabeth* had nothing but a poſſibility which cannot be releaſed; as in 27 E. 3. *Execution* 130 and 25 *Aſſ. pl.* 7. If Conuſee of a Statute or Recogniſance releaſeth to the terre-tenant all his right in the land, yet he ſhall ſue execution; So if the ſon in the life of his father, releaſeth to the diſſeiſor of his father, and afterwards the father dieth, this releaſe ſhall not barre the ſon, becauſe the ſon in the life of the father hath but a poſſibility. And therewith *Littleton* agreeth in his Chapter *of Releaſes*, 11 H. 4. 33. *and* 17. E. 3. 87. 10. E. 2. *Confirmation* 24. And it is put in 13 E. 1. *tit. Confirmation* 24. as a Maxim, If a man quit claimeth his right before the ſame falleth to him, the quit claim is void. *Vid.* 19 H. 6. 62. And therewith agreeth *Bracton lib.* 2. *fo.* 58. *b. Item videndum quando quis poſſit confirmare; & ſciendum non priuſquam jus ei acciderit.* But in the Caſe at Bar, the releaſe is made by the husband of *Elizabeth*, before the right or intereſt veſts in the wife; and as *Bracton* ſaith, *priuſquam jus ei acciderit.* And it appeareth, That the ſame [48] is but a poſſibility, becauſe it cannot be granted or aſſigned to another, as it was adjudged in *Carters* Caſe, no more than a Rectory which is appropriate *in futuro* after the death of an Incumbent, can be demiſed in the life of the Incumbent, becauſe it is but a poſſibility, as it is holden in 8 *Eliz. Dyer* 244. And *Hoes* Caſe in the fifth Part of my Reports was ſtrongly urged, That in an action of debt brought by *Hoe* in the Kings Bench, *Felix Marſhal* was Bail for the defendant, and afterwards before any Judgement given, *Hoe* releaſed to *Marſhal* all actions, duties and demands, and afterwards Judgment was given againſt the defendant, and upon his default a *Scire facias* iſſued againſt the ſaid *Felix*, who pleaded the ſaid general releaſe, upon which the plaintiff did demurre: And it was adjudged, That the releaſe ſhould not barr the plaintiff, becauſe before Judgment it was but a meer poſſibility, and therefore (as the Book ſaith) it cannot be releaſed. So in the Caſe at Bar before the death of *John Morrice* the elder, *Elizabeth* had but a meer poſſibility, and therefore it cannot be releaſed. But it was reſolved by the whole Court, That the ſaid releaſe hath barred the ſaid *Elizabeth* to claim any thing in the ſaid leaſe after the death of the ſaid *John Morrice* the elder. And firſt was obſerved the great wiſdom and policy of the Sages and Founders of our Law, who have provided, That no poſſibility, right, title, nor thing in action, ſhall be granted or aſſigned to ſtrangers, for that ſhould be a cauſe of multiplying of contentions and ſuits, of great oppreſſion of the people, and chiefly of terre-tenants, and the ſubverſion of the due and equal execution of Juſtice. And as they cannot be granted by the act of the party; ſo a right in action ſhall not be tranferred by act in Law, as to the Lord by Eſcheat, neither ſhall the Lord of a Villain have things in action, as it appeareth in 22 *Aſſ. p.* 37, &c. Alſo it is reſolved in the Marqueſs of *Winchesters* Caſe, in the Third Part of my Reports, That by the general words of an Act of Attainder of Treaſon, by which all lands, tenements, rights and hereditaments of the perſon attainted are given to the King: Yet no right to the land in action is given to the King, and all that was for the quiet and repoſe of the terre-tenants. But all rights, titles and actions may by the wiſdom and policy of the Law be releaſed to the terre-tenant, for the ſame reaſon of his repoſe and quiet, and for avoiding of contentions and ſuits, and that every one may live in his vocation in peace and plenty. And therefore a right or title to the freehold or inheritance (for here it is not ſpoken of collateral powers) *in præſenti* or *in futuro*, may be releaſed in five manners: 1. To the tenant of the [b] freehold in *fait*, or in law, without any privity. 2. To him in the remainder. 3. To him ſeiſed of the reverſion without any privity; but an eſtate cannot be enlarged without a privity. 4. To him who hath a right only in reſpect of privity; as if the tenant be diſſeiſed, the Lord may releaſe the ſervices in reſpect of the privity only and right, without any eſtate. 5. In reſpect of privity only, without right; as if tenant in tail maketh a feoffment in fee, the donee after the feoffment hath not any right; and yet in reſpect of the privity only, the donor may releaſe to him the rent and all ſervices, ſaving fealty: So the defendant may releaſe to the vouchee in reſpect of privity only, but no eſtate can paſs by releaſe, but to him who hath an eſtate in privity, and not in reſpect of the right or privity only. *Vid. Litt.* 105, 106. 19 H. 6. 17. 14 H. 8. 8. 7 E. 4. 13. 14 H. 4. 38. 1 H. 5. *Grants* 43. 7 E. 4. 27. 5 E. 4. 1. 5. E. 4. 3. 48 E. 3. 8. 31 E. 3 *Gard* 116. 13 H. 4.

Confirmation 20. 20 *H.* 6. 29. 8 *H.* 4. 5. 7 *E.* 4. 13. 9 *H.* 7. 25. 18 *E.* 3. 12. 5 *E.* 3. 36. 7 *E.* 3. 46. 22 *H.* 6. 12. *Litt.* 114 *b.* So if the tenant makes a feoffment pendant the Writ, the releaſe of the demandant to him is good in the reſpect of the privity. And if the leſſee for years be ouſted, and he in the reverſion diſſeiſed, and the diſſeiſor maketh a leaſe for years, the leſſee who was ouſted may releaſe to the leſſee of the diſſeiſor, and yet there wanteth privity; but the diſſeiſee cannot releaſe to him, becauſe he hath no freehold, 49 *E.* 3. 28. *v.* 19 *H.* 6. And the ſaid releaſe hath extinguiſhed the future intereſt of the ſaid *Elizabeth*, for divers cauſes.

1. Becauſe it is a future intereſt in a chattel, which as it may be more eaſily created than a freehold; ſo it may be the more eaſily determined. And therefore if a man maketh a leaſe for years, and that upon not performance of a collateral condition, that it ſhall be void, the grantee of the reverſion ſhall take advantage thereof by the Common Law: but otherwiſe it is of a leaſe for life upon the like condition, for the one may more eaſily be determined than the other. And if leſſee for 1000 years be ouſted by his leſſor, and he maketh a leaſe for two years, the leſſee for 1000 years may releaſe to him. But if the leſſor diſſeiſeth his leſſee for life, and maketh a leaſe for 1000 years, the leſſee for life cannot releaſe to him, for a freehold is higher than to drown in a chattel.

2. *Littleton* ſaith, 144. That it is a Maxim in Law, That land in fee ſimple, &c. may be charged by one way or other: So it was ſaid, That it was a Maxim in Law, That every right, or title, or intereſt, *in præſenti* or *futuro*, by the joyning of all who may claim any right, title, or intereſt,
[49] may be barred or extinct; and therefore upon the Maxim which *Littleton* putteth it was concluded, That if at the Common Law the donor and donee had joyned in a grant of a rent-charge, and afterwards the donee had died without iſſue, and the land had reverted to the donor, he ſhould hold the land charged, and yet he had but a poſſibility at the time of the charge made: but all thoſe who have eſtate or intereſt, *in præſenti*, or *in futuro*, joyn in the charge: *à fortiori*, if they had joyned in a leaſe for years, and the donee had died without iſſue, the leaſe is good againſt the donor. So upon the ſecond Maxim, If in the Caſe at Bar *John Morrice* and *Elizabeth* had joyned in a deed of aſſignment to another, without queſtion it had utterly barred the ſaid *Elizabeth*, for no other had intereſt either *in præſenti* or *in futuro*, but thoſe who joyned in the grant. So when the husband of *Elizabeth* releaſeth to him in poſſeſſion, both conſent to it, one in releaſing, the other in accepting of it: And in the caſe when both joyn in the grant, it is the grant of him who hath the term, and the releaſe and confirmation of the other. *Vid. Mayows* Caſe in the Firſt Part of my Reports, a notable Caſe to this purpoſe. And *Paſc.* 4 *E.* 6. in the Common Pleas, as the Chief Juſtice ſaith, he hath ſeen a Report, It was holden by *Mountague*, *Hales*, *Molineux* and *Brown*, Juſtices of the Common Pleas, That if a man maketh a leaſe to another for 21 years, if the leſſee ſo long liveth, and the leſſor and leſſee joyn in a grant by deed of the term to another, and afterwards the leſſee dieth within the term, the grantee ſhall enjoy abſolutely during the reſidue of the term. So in the Caſe at Bar, where the intereſt of *John Morrice* the elder was determinable by his death, now this releaſe hath made his intereſt abſolute during all the reſidue of the term. And if *ceſty que uſe* after the Statute of 1. *R.* 3. and before the Statute of 27. *H.* 8. had diſſeiſed the diſſeiſor of his feoffees, now the uſe is ſuſpended, and doth depend in poſſibility to be revived by the entry of the feoffees; and yet if he maketh a feoffment in fee, it is good and ſhall binde, in reſpect that the Law hath conſideration of this poſſibility of the uſe.

3. *Quando diverſi conſiderantur actus ad aliquem ſtatum perficiendum, plus reſpicit lex actum originalem*, when to the perfection of an eſtate or intereſt, divers acts or things are requiſite, the Law hath moſt regard to the original act, *quia cujuſque rei potiſſima pars eſt principium*, for that is the fundamental part upon which all the other are founded. In this Caſe at Bar there are three things required to the perfection of the intereſt of *Elizabeth* deviſed (in which is included the death of the deviſor) and that is the fundamental part; the aſſent of the Executor, which afterwards appeareth was given in the Caſe; and the death of the firſt deviſee: and therefore this Caſe may fitly be reſembled to the Caſe of Dower. When a man ſeiſed of lands in fee or in fee tail general, ta-
[b] keth a wife, to the perfection of the Dower two things are requiſite, Loialty of the Matrimony, and the death of the husband: For notwithſtanding that the husband is ſeiſed in fee, and the marriage is lawful, yet ſhe hath but a poſſibility of Dower till the death of her husband; in the ſame manner as *Eliz.* hath but a poſſibility till the death of the firſt deviſee. And therefore in 6 *E.* 2. *Dow.* 45. and 19 *E.* 2. *Dower* 165. where it is holden, That in a Writ of Dower brought by the husband and wife, a fine levied by the husband and wife is no bar; and the reaſon there given is, becauſe that before the death of the husband, the wife hath neither right nor action; and therefore by the Rule of the Court iſſue was taken, that the wife at the time of the fine levied had nothing as wife. And the opinion of *Plowden* in *Stowels* Caſe is as followeth: Note *Reader*, that in my opinion, If the husband levieth a fine with proclamations, and five years paſs after the proclamations, the wife ſhall not be bound to the five years after the death of the husband, but is at large, and not touched by the purview of the Act of 4 *H.* 7. For the purview was againſt thoſe who had right at the time of the fine levied, or had future right upon a cauſe ariſing before; to which future right wrong was done before the fine, or by the fine, *&c.* but here in caſe of Dower, the title is accrued after the fine, 1. by the death of the husband, for till the death no title was conſummate: And the other two points, 2. intermarriage and ſeiſin of the husband, are not of any reckoning without the third, ſo that all the three points are but one cauſe after the fine. But at this day the ſaid Book of 6 *E.* 2. and 19 *E.* 2. are taken for Law: For now no queſtion is made, but that if the husband and wife levy a fine, the wife is barred of her Dower for two Reaſons.

1. Becauſe the intermarriage and ſeiſin are the fundamental cauſes of Dower, and the death of the husband but as an execution thereof.

2. All those who have estate, or title, or claim, joyn in the assurance, and therefore in such case, if the husband and wife have granted a rent by fine out of the land, or have made a lease for years, rendring rent to the husband and his heirs, and afterwards the wife recover Dower, she shall hold it charged with the rent and with the term, according to the Maxim *Littleton* putteth before. And the opinion of *Plo.* is not holden for Law, as it appeareth *6 E. 6. Dyer* 72. and in *Damports* Case in 5 *Eliz.* 224 *Dyer.* it appeareth, That it was adjudged to the contrary in 4 *H.* 8. and now common experience without contradiction is against it. And *Litt.* holdeth, That if feoffee upon condition taketh a wife, the feoffor may enter for the condition broken, and the reason is, because the Law hath principle regard to the original and fundamental cause; and yet it may be said, that the title of Dower is not consummated till the death of the husband, and peradventure the wife shall die before the husband. So in the Case at Bar, the devise and assent of the Executor, are the original and fundamental causes of the interest of *Eliz.* and the death of *J. Morrice* the elder is but a mean to produce the same in possession; but the same giveth nothing, but all the interest doth accrue by the devise, and is executed by the assent of the Executor, and therefore as well as in the case of Dower it may be released. And Sir *Anthony Fitzherbert* in his *N. B.* 98. holdeth, That if a man levieth a fine of land in ancient demesn at the Common Law to another, now the Lord in ancient demesn shall have a Writ of *Disceit* against him who levieth the fine, and him who is tenant, and thereby he shall make void the fine, and the Conusor shall be restored to his possession and title which he hath given by the fine. And therewith agreeth 21 *E.* 3. 20. *b.* 7 *H.* 4. 44. against the opinion obiter in 17 *E.* 3. 31. But if the Conusor after the fine release to the Conusee by his deed being in possession, or by his deed confirm his estate in the land, then the opinion of *Fitzherbert* is, That the Conusee shall retain and have the land, notwithstanding the fine be avoided, because that this release or confirmation made to him being in possession, maketh his estate firm and rightful against him and his heirs, who releaseth or confirmeth: Which opinion was confirmed to be good Law by the whole Court in this Case. And yet after the fine levied, the Conusee had not any right in the land, but only a possibility, to have the land again after the fine made void by the Writ of *Disceit* brought by the Lord of whom the land is holden. And Justice *Warburton* cited *Grants* Case, adjudged in this Court, *Hill.* 29. *Eliz. rott.* 824. where the Case was, That *William Grant* seised of land in fee holden in socage, by his Will in writing devised the land to *John Grant* Son of his brother, when he came to the age of 25 years, To have and to hold to him and the heirs of his body, and died, having issue *Christian* his daughter and heir, who married *William Marsh*, who had issue *John*, and the said *John Grant* after the age of 21 years, and before his age of 25 years, *anno* 37 *H.* 8. levied a fine with proclamations, and afterwards he attained to his age of 25 years, and had issue *Margaret*, and died. If the estate tail *in futuro* and contingency at the time of the fine levied was barred or not, was the question. And it was resolved, That the estate tail was barred; and yet the Conusor had but a meer possibility to have an estate tail at the time of the fine levied: and that by force of the words of the Statute of 32 *H.* 8. *cap.* 36. all fines levied with proclamations, &c. of any Manors, Lands, &c. before the time of the same fine levied in any wise entailed to the person or persons so levying the same, or to any of his or their Ancestors, &c. And although the said *John Grant* was not seised by force of the tail at the time of the fine levied, yet by reason of these words (*before the fine levied in any wise entailed*) estate tail *in futuro* is comprehended; and all that by force of the said Statute, for *partes finis nihil habuerunt:* but no Judgment was entred. And it was resolved, That a future right or possibility which may be released, ought to have foundation and original inception as is aforesaid, so it ought to be a necessary and common possibility, which in *Cholmleys* Case in the Second Part of my Reports, is called *potentia propinqua*: and a possibility which dependeth upon the death of a man, hath a necessary and common intendment, *s.* necessary, in respect that all the children of men shall die. *Statutum est hominibus semel mori*; and common, that the death may happen at such a time that the contingency may take effect, as in 15 *H.* 7. 10. If lands be given to a married man and a married woman, and to the heirs of their two bodies begotten, it is a good estate tail, for it is of necessity that death follow, and it is a common possibility that one shall die before the other; so that marriage may follow, but in the same case there shall not be a possibility upon a possibility. And therefore if lands are given to a man and two women, there the Law doth not intend that he shall first marry the one, and that then she whom he shall marry shall die, and that he shall marry the other; and therefore in such case they are several inheritances at the beginning. As if lands be given to two men and their wives, and to the heirs of their bodies begotten; in this case the Law shall not expect second marriages, but they in this case shall have joynt estates for life, and one husband and wife shall have one moity in tail in common with the other husband and wife of the other moity, and so several inheritances. And therewith agreeth 24 *E.* 3. 29. for otherwise there shall be a possibility upon a possibility. And if a man giveth lands to husband and wife (now it is an apparent possibility that they shall have issue) and afterwards they are divorced *causa præcontractus*, so that the possibility is dissolved, the Law shall never expect a second marriage, for by the divorce they have but an estate of freehold; and therewith agreeth 4 *H.* 7. 16, and 17. A woman may enfeoff a married man *causa matrimonii prælocuti*, for it is of necessity that death shall follow, and it is a common possibility that the wife of the feoffee shall die before the feoffee. So the common case of a lease for life, the remainder to the right heirs of *I. S.* who is then alive, the remainder is good for the necessary and common intendment. But the Case at Bar is stronger than any the other Cases, for it is of necessity that *John Morrice* the father shall die, and it were then a common intendment that he shall die within 5000 years; for by the Civil Law *longissimum vitæ hominum tempus est centum ann'*: and so it appeareth that in our Law there is *jus proprietatis, possessionis & possibilitatis.*

[50] [b] [b]

And

And as to the Caſes which have been urged by the Serjeants of the other part. 1. As to the re-
[51] leaſe of the Conuſee in 27 E. 3. and 25 *Aſſ.* It was reſolved, That the Books were good Law, for there the body is the debtor, and not the land but in reſpect of the body, and the land is not charged with the debt till execution ſued. And therewith agreeth *Plo. Com.* 72. in Sir *Thomas Popes* Caſe; and therefore the releaſe made by the Conuſee of all the right in the land, ſhall not barr him of his execution. And it was agreed, That the releaſe of the ſon to the diſſeiſor of his father in the life of the father is utterly void, becauſe the ſon hath not any right, nor foundation, nor original inception of any right in the life of the father. And the Rule put in 13 E. 1. and *Bracton*, is to be agreed for good Law, if it be well underſtood, *s.* that he who releaſeth hath right, or foundation, or original inception of a right. And as to *Hoes* Caſe, it was alſo reſolved to be good Law, for there the thing which ſhould be releaſed, was utterly incertain at the time of the releaſe made; for he who becometh Bail in the Kings Bench, is not bound in any certain ſum, nor any certainty thereof appeareth till Judgment given againſt the defendant; and therefore for the incertainty of the things that ſhall be releaſed, the releaſe of all actions, duties and demands cannot diſcharge it. It was further reſolved, That when there is incertainty in the perſon, no releaſe can be made; and therefore if a leaſe for life be made, the remainder to the right heirs of *I. S.* and the leſſee is diſſeiſed, and the eldeſt ſon of *I. S.* releaſeth to the diſſeiſor, and afterwards *I. S.* dieth, the releaſe is void; for it is incertain whether he ſhould be right heir at the time of the death of his father. And in 17 Eliz. this Caſe was moved at the Bar in the Kings Bench: A man made a leaſe to husband and wife for 21 years, the remainder to the ſurvivor of them for 21 years, and the husband granted over this term; and it was holden by *Wray* Chief Juſtice, and the whole Court, That the grant was void for the incertainty of the perſon, for although that all chattels reals which belong to the wife the husband may diſpoſe of; yet in this Caſe neither the husband nor the wife had any thing till the ſurvivor. And in the *Regiſter Original* 239. there is a Formedon brought upon ſuch gift, *R. dedit W. & Uxori ejus & hæredibus de corpore alterius ipſorum W. & I. qui diutius viveret exeuntibus, & quod poſt mortem W. & I. præfato T. filio & hæredi ejuſdem W. qui prædict' I. ſupervixit deſcendere debet, &c.* So that the gift was to the husband and wife, and to the heirs of the body of the ſurvivor of them: In which as to the eſtate tail, there is incertainty in the perſon, and therefore if they make a leaſe for 21 years, obſerving all the circumſtances required by the Statute of 32 *H.* 8. yet this leaſe ſhall not binde the iſſue; for, for the incertainty of the perſon of the ſurvivor the eſtate tail was not veſted. And theſe Caſes in my Reports, *Albaines* Caſe, *Diggs* Caſe, *Rawlins* Caſe, *Mayowes* Caſe, The Rector of *Chedingtons* Caſe, and *Althams* Caſe, were affirmed for good Law in the argument of this Caſe, and cited to prove the reaſon of the Rule in the Caſe at Bar.

[b] 4. If the ſaid *Elizabeth* had died before the firſt deviſee, the Executors or Adminiſtrators of the ſaid *Eliz.* ſhould have the ſaid term after the death of the firſt deviſee, as appeareth in the ſaid *Weldons* Caſe in *Plo. Com.* which is a good proof that *Elizabeth* her ſelf might releaſe ſuch intereſt, which by her death might come to her Executors or Adminiſtrators. But words make a Plea: For if I be diſſeiſed, and I releaſe all actions to the diſſeiſor, and afterwards the diſſeiſor dieth, I notwithſtanding the releaſe ſhall have a Writ of Entry in the *Per* and *Cui* againſt the heir of the diſſeiſor, for this action was not *in eſſe* at the time of the releaſe made, and *actio nihil aliud eſt quam jus proſequendi in judicio quod ſibi debetur.* And the ſaid Writ of Entry was not maintainable at the time of the releaſe, no more than if I had died, my heir ſhould not be barred by that releaſe to have a Writ of Entry *ſur diſſeiſin* againſt the diſſeiſor, upon a diſſeiſin done to me. *Vid.* 22 *H.* 6 1. If one bail goods to another, and afterwards the bailor doth releaſe to the bailee all actions, the bailee dieth, in a Writ of *Detinue* brought againſt the Executors, they ſhall not take advantage of this releaſe, for the ſame determineth by the death of the bailee, and the action given againſt the Executors, is a new action (although of the ſame nature) grounded upon their own deteiner.

5. The legacy or deviſe to *Elizabeth* is preſent, and *in eſſe*, although that the intereſt is in future; and therefore the legacy or deviſe may be diſcharged, and by conſequence the intereſt it ſelf; for, *qui deſtruit medium deſtruit finem.* And therefore if one deviſe to one 20 l. when he cometh to the age of 24 years, and dieth, the legatee after the age of 21 years may releaſe this legacy and deviſe; and although that after he attaineth to the age of 21 years he ſhall be barred thereof, yet by a releaſe of all ſuits and demands it is not releaſed. As if a man by Indenture covenanteth to do a future thing, and before the Covenant broken, the Covenantee releaſeth all actions, quarrels and demands, and afterwards the Covenant is broken, the ſaid releaſe is no barr in an action of Covenant, becauſe the Covenant was to be performed *in futuro*; but a releaſe of all Covenants had been a good barr, for the Covenant was preſent *in eſſe.* And therewith agreeth 35 *H.* 8. *Dyer* 57. and 4 *Eliz.* in *Bendloes* Reports, which Caſe is cited at large in *Hoes* Caſe before. So in the Caſe at Bar the deviſe is *in præſenti*, although the performance thereof be *in futuro, & qui evertit cauſam evertit cauſatum futurum.* So of the goods and chattels of Felons and Fugitives, &c. the inheritance is *in eſſe*, although the accident be incertain, the ſame Law of *Nomine pœnæ*, re-
[52] lief, *&c.* So the Chief Juſtice ſaid, That although no aſſent had been given to the Legacy, yet foraſmuch as *Elizabeth claimeth* by executory deviſe, ſhe might in the life of the firſt deviſee have releaſed the deviſe and legacy. *Vid. Middletons* Caſe in the fifth Part of my Reports, That Executors before probate may releaſe a debt, becauſe that although they cannot have an action, yet the intereſt of the action is in them, which they may releaſe.

6. It ſhall be inconvenient that ſuch manner of perpetuity ſhall be made of a chattel, when of inheritance neither by act executed by the Common Law, nor by limitation of uſe, nor by deviſes in laſt Wills, any perpetuity can be eſtabliſhed. And if it ſhall be allowed, it ſhall be the cauſe of contention, ſuits, and other inconveniencies. And it was obſerved, That theſe leaſes for ſo many hundred

hundred and thouſands of years, (which were made in truth to deceive and defeat the King or other Lords of their Wards or other lawfull duties) are many times unfortunate, and ſubject to be loſt by Utlawry, or other forfeitures; and if the owner thereof dieth inteſtate, and the Ordinary grant adminiſtration, thereby women loſe their Dowers, men their Tenancies by the Courteſie, and many other inconveniences in ſubverſion of the Common Law will follow; and therefore it ſhall be of all other moſt dangerous to make a perpetuity of them.

And the Chief Juſtice concluded his Argument, as to the firſt point, with a Jugment in this Court, *Trinit.* 28 *Eliz. Rott.* 1974. between *Hammington* Adminiſtrator of *Iſabel Oram* Plaintiff, and *Rudyard* and *Mary* his wife Adminiſtrators of *Lawrence Kidwell*, in debt upon an Obligation made by *Lawrence Kidwell* to the ſaid *Iſabel*; which Obligation was made for performance of Covenants, in an Indenture betwixt *Lawrence Kidwell* and the ſaid *Iſabel:* And the Caſe was ſuch; *William Hammington* poſſeſſed of a houſe in *London* called *Hides houſe* for 31 years, by his Will deviſed the profits thereof to the ſaid *Iſabel*, during the time that ſhe ſhould continue ſole and a widow, and afterwards he deviſed the term to *Reynold* his ſon, and died, 1 *Mar. Iſabel* by the aſſent of the Executor entred, and purchaſed the ſaid houſe in fee, and the ſaid *Lawrence Kidwell* did bargain and ſell by the ſaid Indenture the ſaid houſe to the ſaid *Iſabel* in fee, and covenanted, That the houſe at the time of the ſaid aſſurance ſhould be clearly diſcharged of all former bargains, ſales, titles, rights, and other charges. The Defendant pleaded Covenants performed. The Plaintiff aſſigned for breach the ſaid deviſe to *Iſabel*, and afterwards to *Reynold* as is aforeſaid; and that after the ſaid [*b*] Indenture, *Iſabel* had married *Oram*; whereupon *Reynold* entred, upon which the Defendant did demurr. And in this Caſe four Points were reſolved.

1. That the ſaid executory deviſe to *Reynold* was good.

2. Although the whole term was in *Iſabel quouſque*, *&c.* ſo that by the purchaſe of the fee ſimple, the intereſt of *Iſabel* was extinct; yet the ſame did not defeat the executory deviſe of *Reynold*, but that after the marriage of *Iſabel*, and not before, he might enter.

3. It was reſolved, That *Reynold* could not grant his intereſt over, ſo long as *Iſabel* was ſole.

4. The great difficulty of the Caſe was, foraſmuch as the ſaid *Reynold* at the time of the ſaid Covenant hat but a poſſibility, that the ſaid Covenant did not extend to it: But it was reſolved, That the ſaid Covenant did extend to it, and to this purpoſe had a being, and alſo might be forfeited; and Judgment was given for the Plaintiff, which Judgment ſtrongly proveth that it might be releaſed.

The ſecond queſtion was moved, admitting the releaſe to the firſt deviſee to be ſufficient to extinct the claim and future intereſt of the ſaid *Elizabeth*, if the ſame ſhall amend the eſtate of *John Morrice* the elder, who hath the entire tenure in him, if he live ſo long, or if by his death the leſſors may enter. And it was reſolved, That the ſaid releaſe hath conſolidated and perfected the eſtate of the ſaid *John Morrice*, that whereas it was determinable before by his death, now he hath the whole term in him abſolutely. But this point is over-ruled before in the ſecond Reaſon, upon the Report of the Caſe in 4 *E.* 6. It was ſaid, That *laxare* is properly to ſet priſoners in fetters at liberty; and *relaxare* is to do it oftentimes; and *Metaphoricè*, *relaxare* is to ſet at liberty fettered eſtates and intereſts, and to make them free and abſolute.

The third queſtion was moved in this Caſe, Whether there appeareth any aſſent or agreement of the Executor in this caſe to take the ſaid houſe, *&c.* by force of the deviſe. For it was agreed by all, as it hath been ſaid before, that firſt he ſhall take it as Executor. And it was reſolved, That when *William Taylor* and *Elizabeth* his wife *per ſcriptum ſuum*, at the ſpecial inſtance and requeſt of the ſaid *John Morrice* the elder (who was Executor) releaſe, *&c.* the ſame amounteth to an aſſent, for two cauſes: one, becauſe that he requeſteth it, which implies an aſſent: 2. He accepteth of it, which implieth an aſſent, *Non enim refert an quis aſſenſum ſuum præbet verbis, an rebus ipſis & factis*, as 44 *E.* 3. *Fines* 37. and *Litt. Cap. Attornment.* If the husband accepteth a grant of the reverſion, *&c.* it ſhall amount to an Attornment; and in 37 *H.* 6. 17. he who hath *intereſſe termini*, *ſc.* a future intereſt, cannot by expreſs words ſurrender it; but acceptance of a new leaſe ſhall drown it. And in 7 *E.* 3. 50. the Lord demandeth a *Herriot*, and the heir delivereth a beaſt, in which he himſelf hath property in his own right to the Lord, it amounteth to a gift. And afterwards in this Term Judgment was given and entred, That the Plaintiff ſhould recover nothing by his Writ. [53]

Trin. 11. Jac. *Regis.*

The Case of the Chancellor, Masters and Scholars of the University of *Oxford*.

[b] THE Chancellor, Masters and Scholars of the University of *Oxford*, brought a *Quare impedit* against *Richard* Bishop of *Coventry* and *Lichfield*, *Edward Basset* Gent. and *Hugh Mear* Clerk, to present to the Church of *Draicot* in the Moor in the County of *Stafford*; and counted, That one *John Draicot* Esq; was seised of the Mannor of *Draicot* in the County aforesaid, to which the Advowson of the Church of *Draicot* was appendant in fee, and by his deed granted the next avoidance of the said Church to one *George Eyre*, and afterwards the said *John Draicot* died: After whose death the Mannor with the Advowson descended to *John Draicot* Esq; Cozen and heir of the said *John Draicot*, *&c.* Son and heir of *Philip Draicot*, Son and heir to *John Draicot* the Grandfather; and further counted, That by an Act of Parliament in the third year of our Lord the King that now is, It was Ordained by authority of Parliament, That the Justices of Assise and Gaol-delivery, and Justices of Peace in their Sessions, shall have authority by force of the same Act to enquire, hear and determine of all Recusancies and offences, as well for not receiving of the Sacrament according to the true meaning of the same Law, as for repairing to the Church, according to the true intent of former Laws, in such manner and form as Justices of Assise and Goal-delivery might do by the former [54] Laws in case of Recusancy for not repairing to the Church: And also shall have power at the Assises and general Goal-deliveries, and at the Sessions, in which any Indictment against any person for not repairing to the Church according to the former Laws, or for not receiving of the Sacrament according to the same Law, shall be taken, shall make proclamation, by which it shall be commanded that the body of every such offender shall be yielded to the Sheriff of the same County, *&c.* before the next Assises and general Goal-delivery, or before the next general or quarter Sessions to be holden for the County, Limit, Division or Liberty: And if such offender do not appear, that then upon the Recording of every such default, it shall be as sufficient a conviction in Law of the offence of which such person shall be indited as is aforesaid, as if he had been convicted by Verdict. And where by another Act at the same Parliament it is enacted, That every person that then after shall be a Popish Recusant convict, during the time that he shall remain a Recusant after the end of the Session of the said Parliament, shall be disabled to present to any Benefice with Cure or without Cure, Prebend, or living Ecclesiastical, or to confer or nominate to any Free-School, Hospital or Donative whatsoever: And from the beginning of the said Parliament shall be also disabled to grant any Advowson of any Benefice, Prebend, or living Ecclesiastical, That the Chancellor, Master and Scholars of the University of *Oxford*, so soon as any of them shall be void, shall have the presentation, nomination and collation to every such Benefice, Prebend, or Ecclesiastical living, School, Hospital and Donative, lying or being in the Counties of *Oxford*, *Kent*, *Middlesex*, *Sussex*, *Surrey*, *Southampton*, *Berks*, *Bucks*, *Gloucester*, *Worcester*, *Stafford*, *Warwick*, *Wiltshire*, *Somerset*, *Devon* and *Cornwall*, *&c.* which become void during such time as the Patron of them shall remain Recusant convict, as is aforesaid, as by the said Act amongst other things more fully appeareth. And the said *John Draicot* the Son, of the Mannor aforesaid, to which the Advowson, *&c.* so being seised, at the Assises and generall Gaol-delivery for the County of *Stafford*, holden at *Stafford* within the said County the 29 day of *March*, in the eighth year of the Reign of the King that now is, was indicted as well for not repairing to the Church, as for not receiving of the Sacrament, and then was proclaimed according to the Statutes thereof made: And that at the next Assises [b] holden the 16 day of *August* in the said eighth year, he made default, and yielded not his body to the Sheriff; by which the said *John Draicot* became a Popish Recusant convict: And that the said *John Draicot* of the Mannor aforesaid, to which, *&c.* so being seised as aforesaid, the said Church became void by the death of the said *John Eyre*, and yet is void, and by reason thereof it belongeth to the said Chancellor, Masters and Scholars to present, and the Defendants did disturb them. The Bishop pleaded, That he did not disturb them, *&c.* And *Edward Basset* pleaded, That the said *John Draicot* the son before the said covi&ction of the said *John*, being seised of the said Mannor to which, *&c. sc.* 20 *Junii*, 8. *supradict.* by his deed granted to the said *Edward Basset* the next avoidance to the said Church: after which grant, the Church became void by the death of the said *George Eyre*, for which he presented the said *Hugh Meare*, who was admitted and instituted. And the said *Hugh Meare* pleaded, That *John Draicot* the Cousin was seised of the Advowson aforesaid in fee as in gross, and confessed the Presentment of *George Eyre*; and pleaded, That the said *John Draicot*, 1 *May*, 3 *Jac.* by his deed granted the next avoidance to the said *Edward Basset*, and that the Church became void by the death of the said *George Eyre*, for which he presented, *&c.* the said *Hugh Meare*, *Absq; hoc quod advocatio præd. pertin. ad præd. manerium de Draicot*, *&c.* The Plaintiff as to the plea of the Ordinary, prayed a Writ to the Bishop, *sed cesset Executio*, *&c.* And as to the plea of *Edward*, the Plaintiff did demurre in Law. And as to the plea of the said *Hugh*, the Plaintiff replied, *Quod advocatio præd. pertin. ad manerium prædictum*, *& hoc petit quod inquiratur per patriam*, *& prædict. Hugo similliter.* Upon the demurrer upon the plea of *Edward*, four matters in Law were moved.

1. Forasmuch as the said *John Draicot* the Son was not a Recusant convict at the time of the grant of the said avoidance to the said *Edward Basset*, if the grant be made void by the said Statute of 3 *Jac.*

2. If

2. If this grant being made after the Indictment, if it were not covin apparent, and if ſuch grants ſhall be allowed, to what purpoſe the clauſe in the Statute concerning the ſame ſhall ſerve.

3. Foraſmuch as the ſaid Act giveth the benefit to preſent to the ſaid Church to the Chancellor and Scholars of the Univerſity of *Oxford*, and they have brought this action by the Name of Chancellor, Maſters and Scholars of the Univerſity of *Oxford*, which ſhall be intended their true Name of Incorporation, if they ſhall take any benefit of this Act by reaſon of the ſaid Miſnoſmer.

4. Foraſmuch as the Plaintiffs have not added, That at the time of avoidance of the Church, that the ſaid *John Draicot* continued and remained a Popiſh Recuſant, if the ſame ſhall be intended.

As to the firſt, it was argued by the Councel of the ſaid *Edward Baſſet*, That by the words and meaning of the ſaid Branch of the Statute, no perſon is diſabled to grant the next avoidance, but he who is a Popiſh Recuſant convict; and therefore the words are, Every perſon or perſons that is or ſhall be Popiſh Recuſant convict. 2. He ſhall be diſabled but onely during the time that he remaineth a Recuſant: for the words are, during the time that he ſhall be or remain a Recuſant, ſhall be diſabled to grant any avoidance: And becauſe that at the time of this grant he was not a Recuſant convict, but onely indicted, for this cauſe he is not ſuch a Recuſant as is deſcribed to be diſabled by the ſaid Act; and by conſequence the ſaid grant is good. Alſo it ſhall be miſchievous if other conſtruction ſhall be made. For put Caſe, That one ſeiſed of an Advowſon in fee reſorts and repairs to Church, according to the Law in ſuch caſe eſtabliſhed, and for good conſideration granteth the next avoidance, and many years after he becometh a Popiſh Recuſant, and thereof be convicted, it ſhall be very hard that this grant ſhould be avoided, for *nemo tenetur divinare*, and it is not poſſible that the grantee ſhould have foreknowledge of it, which is meerly a future contingent; and it ſhould be alſo againſt reaſon, that a man by his ſubſequent offence ſhould take away a lawfull intereſt veſted by his own grant, upon good conſideration veſted in a ſtranger. [55]

But it was Reſolved by the whole Court, That this Act hath diſabled the ſaid *John Draicot* the ſon to make this grant, by expreſs words of the Act, which will the clearer appear, if the material words of the Act as to this caſe be ſingled by themſelves in this manner; Every perſon that ſhall be a Popiſh Recuſant convict, during the time that he ſhall be or remain a Recuſant, ſhall be diſabled from the beginning of this Parliament to grant any avoidance. And the ſaid *John Draicot* is within all theſe words.

1. Where the words are, *Every perſon that ſhall be a Popiſh Recuſant convict*, within which words it appeareth that *John Draicot* is.

2. The diſability is temporary, *ſc.* during the time of Recuſancy.

3. From what time he ſhall be diſabled, *ſc.* from the beginning of this Seſſion of Parliament: So that ſo long as he remaineth a Recuſant convict, he ſhall be diſabled to make a grant of the next avoidance from the beginning of the Seſſion of the Parliament, *& ſumma ratio eſt quæ pro religione facit:* And ſuch retroſpects divers Acts of Parliament have had, and allowed by divers Judgments. And therefore it is cited in *Plo. Com.* in *Stradling* and *Morgan*'s Caſe, That where the Statute of 31 *H.* 8. *cap.* 13. enacteth, That the King ſhall have all the poſſeſſions of Abbeys that then were, and afterwards came in his hands by ſurrender, *&c.* and in the ſame ſtate as they then were; It hath been adjudged, as it is there ſaid, That if any Colledge after that Statute maketh a leaſe for years, and the ſame Colledge three or four years after ſurrender to the King, that the former leaſes made before the ſurrender ſhall be void; for the King ſhall have the poſſeſſions in the ſame ſtate as then, *ſc.* at the time of the Act of 31 *H.* 8. they were, and then they were diſcharged and free of any leaſe. And therewith agreeth *Mich.* 6 *&* 7 *Eliz. Dyer* 231. The Abbot of *Ramſey* with the aſſent of his Covent late Patrons of *Upwell* in the County of *Northampton*, in *Aug.* 31 *H.* 8. which was after the Statute of 31 *H.* 8. of Monaſteries, which began 28 *Aprilis*, 31 *H.* 8. granted the next avoidance of the ſaid Church to Sir *Ed. Mountague* Knight, late Chief Juſtice of the Common Pleas; and afterwards in *November* following, the Abbot and Covent did ſurrender to the King, *&c.* The intereſt of the next avoidance was conveyed to one *Leeds*, againſt whom *Beaupree* the Patentee of the fee ſimple by King *E.* 6. brought a *Quare impedit* againſt the Biſhop and Incumbent, and upon pleading to Rejoynder the Caſe aforeſaid appeared; and in the Rejoynder the Saving of the ſaid Act appeared, with ſuch averment, that the ſaid *Leeds non eſt, nec fuit, nec eſſe intelligi poteſt aliquis talis perſona, quæ per, ſive in actu prædicto excipitur.* And by the Opinion of all the Juſtices, the grant was void againg the King, and ſo adjudged; and the Saving cannot extend to ſuch future intereſts, but extends onely to intereſts *in eſſe:* And the Record of this Plea began *Paſch.* 5 *Eliz. Rott.* 129. in the Common Pleas. Alſo it is enacted by the Statute of 13 *Eliz.* That all lands, *&c.* of every Treaſurer, *&c.* or perſon accomptable to the Queen for any Office or Charge, *&c.* which he then had, or hereafter ſhould have, ſhall be liable, *&c.* in like and in as large and beneficial manner, to all intents and purpoſes, as if the ſame Treaſurer had the day he became firſt Officer or Accomptant, ſtood bound by writing Obligatory, having the effect of a Statute Staple to her Majeſty. And in *Anno* 35 *Eliz.* it was Reſolved in the Caſe of Sir *Chriſtopher Hatton* late Chancellor of *England*, who became ſuch Officer to the Queen in the twentieth year of her Reign, That if ſuch Officer accompt well and truly with the Queen, and oweth her nothing, and in the two and twentieth year of her Reign being in ſuch good caſe purchaſeth lands, and the ſame year conveyeth or leaſeth them to others *bona fide* upon good and true conſideration; and afterwards in the ſeven and twentieth year by reaſon of the ſaid Office he becometh in arrerages upon his Accompt for four or five years, which is long time after his conveyance or leaſe; That yet the land ſo conveyed or leaſed, ſhall be liable to theſe arrerages by reaſon of the retroſpect of the ſaid words (as if the ſame Treaſurer, *&c.* had the day he became firſt Officer, *&c.* ſtood bound, *&c.*) So in the Caſe at Bar, after that the ſaid [b] [56]

John Draicot was a Popish Recusant convict, during the time that he remaineth a Recusant, he now shall be disabled to grant any next avoidance, by the retrospect of the Act after the beginning of the said Session of Parliament. And the makers of the Act did intend to inflict greater disability upon them who became Popish Recusants, after the damnable and damned Powder Treason, than before.

As to the second, it was Resolved, That Covin shall never be intended or presumed in Law, if it be not expresly added, *Quia odiosa & inhonesta non sunt in lege præsumenda, & in facto quod se habet ad bonum & malum, magis de bono quam de malo præsumendum est.* And so it was adjudged in the Case of *Meriel Littleton*, *Trin.* 10 *Jac.* in this Court, where the Case was; That *Elizabeth Tirer* Executrix of the Will of *Thomas Tirer*, brought an action of Trespas *vi & armis* against *Meriel Littleton* and *John Daunser*, of an Oxe price 6 *l.* at *Hagley* in the County of *Worcester*, 20 *Octob.* 7 *Jac. &c.* The Defendants pleaded Not guilty; and the Jurors found a special Verdict, That one *Thomas Tirer* was seised in fee of 80 acres of land in *Hagley*, and held them of *John Littleton* Esq; as of his Mannor of *Hagley* in the said County by Fealty, and the rent of 3 *s.* 1 *d. ob.* suit of Court, *& reddend. optimum animal cujuslibet tenentis in feodo simplici post mortem ejusdem tenentis pro Heriotto*; of which Mannor the said *Meriel Littleton* was Tenant for life at the time of the death of the said *Thomas Tirer*. And the said *Thomas Tirer* being so seised 16 *August*, 42 *Eliz.* by his deed in consideration of fatherly affection to *John* his Son and heir apparent, and in consideration of a marriage to be had and solemnized betwixt the said *John* and one *Joyce Grove*, and for the advancement
[b] of the said *John* did enfeoff the said *John Tirer* of the said 80 acres of lands, To have and to hold to him and his heirs, to the use of him and his heirs; by force whereby the said *John* was thereof seised in his demesn as of fee, and so seised the said 10 of *August*, *anno* 24 *Eliz.* by his deed indented, to the intent the said *Joyce* should not be endowed during the life of the said *Thomas*, did redevise the said 80 acres of lands to the said *Thomas* for fourty years, if the said *Thomas* should so long live: And that the first day of *September* following, the marriage betwixt the said *John* and *Joyce* was solemnized; and after the said feoffment the said *John Tirer* did suit at the Court of the said *John Littleton* Lord of the said Mannor; and that after the feoffment, *Thomas* paid the rent for the said 80 acres of lands; and afterwards *Thomas Tirer*, 30 *Junii*, 7 *Jac.* died, being possessed of the said Oxe, which was the best beast which he had, and that the Defendants took the Oxe for Heriot after the death of the said *Thomas Tirer*, as due for the said tenements. And the Jury further found the Statute of 13 *Eliz.* for avoiding and abolishing of feigned, covenous and fraudulent feoffments, gifts, *&c.* as well of lands and of tenements, as of goods and chattels; which feoffments, gifts, *&c.* are devised and contrived of malice, fraud, *&c.* to the intent to delay, hinder or defraud Creditors and others of their just and lawfull actions, suits, debts, *&c.* heriots, mortuaries and reliefs, *&c.* And therefore it is enacted by the said Act, That all feoffments, gifts, *&c.* of lands, tenements and hereditaments, goods and chattels, *&c.* to be made to any intent or purpose before declared or expressed, shall be adjudged and taken (as against the Creditor or other person so defrauded or grieved) to be clearly and utterly void and of none effect. And if upon the whole matter the said *Meriel* and *John Daunser* are guilty, then they find them guilty, and assess damages to 5 *l.* and costs 6 *d. &c.* And this Case was argued at the Bar; and *Trin.* 10 *Jac.* it was argued at the Bench, and it was Resolved, That forasmuch as no fraud is found by the Jury, the Court will not adjudge the said feoffment to be fraudulent: and although the Jury have found circumstances and presumptions to incite the Jury to find a fraud, yet the same is but Evidence to the Jury, and not any matter upon which the Court can adjudge fraud; and the Office of Jurors is to adjudge upon their evidence concerning matter of fact, and thereupon to give their Verdict, and not to leave matter of evidence to the Court to adjudge, which appertaineth not unto them. And therefore the Chief Justice held, That if *A.* bringeth an action upon the Case against *B.* upon Trover and conversion of Plate, Jewels, *&c.*, and the Defendant plead Not guilty, now it is good evidence *prima facie* to prove a conversion, That the Plaintiff did request the Defendant to deliver them, and he refused, and therefore it shall
[57] be presumed, that he hath converted them to his use. But yet it is but Evidence; and if it be found by special Verdict in such case, that the Plaintiff did request them of the Defendant, and he refused them, it is not a matter upon which the Court can judge any conversion: for the conversion ought to alter the action of Detinue, to a Trespas upon the case, which a denial cannot do in Law; for in every action of Detinue there is alledged in the Declaration a request and refusal, yet it is good Evidence, as hath been said, and so hath alwayes been allowed to prove a conversion, That the Plaintiff did demand the goods, and that the Defendant did refuse to deliver them.

2. The Statute saith, to defraud Creditors and others of their just debts, *&c.* Heriots; and the Jury have not found, That the said feoffment was made to defraud the Lord of his Heriot, and so they have not found the case within the Statute.

3. If the Son had died in the life of the Father, the Lord should have a Heriot after his death.

4. It was found, That the intent of the feoffment and redevise for years made before the marriage, was to the intent that the said *Joyce* should not be endowed during the fathers life, but that after his death she should be endowed, although the Son had died in the life of the father: which feoffment being found by the Jury to be made in consideration of marriage, and to this patticular intent concerning the Dower of the Sons wife, shall not be by construction of Law extended to any other intent. And thereupon the Chief Justice put the case in *Mich.* 9 *&* 10 *Eliz.* The Kings Tenant *in Capite* his Son and heir apparent of seven years is indebted to divers, and sued for his debts in divers Courts, and fearing the hindrance and impoverishing of himself, his wife and children by extent of his lands, *&c.* for execution of the said debts doth enfeoff divers persons, upon condition, That when he or his heirs shall pay to the feoffees 50 *l.* that then they shall make such feoffments, and

to

to ſuch uſes as he or his heirs ſhall limit or appoint, or otherwiſe the feoffment to be void, *&c.* And this feoffment and intent is found by *Mandamus* returned in the Chancery, *Et quod nulla alia cauſa, intentio aut colluſio, viz. ad defraudand. regem*, &c. *de Cuſtodia hæredum vel terrarum.* And although this feoffment was found to be made by fraud and covin (which alwayes is unlawfull) yet foraſmuch as the fraud was to one particular intent, *ſc.* to defraud the creditors, it ſhall not be extended to any other fraud, *ſc.* to defraud the King of his Ward, although that in truth and by the event, by this feoffment the King was defrauded of the Wardſhip of the body and lands: And ſo was it reſolved and decreed in the Court of Wards, *à fortiori* when it is found that this feoffment in the caſe of *Meriel Littleton* was in conſideration of marriage, and of advancement of his Son, and that the Sons wife ſhould be endowed againſt the one, and not againſt the other. All which are lawfull conſiderations, and the Court ſhall not extend the ſame to an unlawfull intent, nor adjudge upon the whole matter found in this caſe, That the feoffment was made to any other intent then is found by the Jury. [b]

As to the third Objection in the Caſe at Bar, It was reſolved and anſwered three wayes.

1. In an Act of Parliament miſnaming of a Corporation, when the expreſs meaning appeareth, ſhall not avoid the Act no more than in a Will, for *Parliamentum, Teſtamentum, & Arbitramentum*, are to be taken according to the minds and meanings of thoſe who are parties to them. And therefore when the deſcription of a Corporation in an Act of Parliament or in a Will is ſuch, that the true Corporation meant is apparent, and it is not poſſible to be meant of another Corporation, although that the right Name of the Corporation (which is requiſite to be expreſſed in Grants and Deeds) are not preciſely followed; yet the Act of Parliament and Will ſhall take effect. And therefore in 21 *H.* 2. *Deviſe* 27. where any deviſed certain tenements in *London* for life, the remainder over *Eccleſiæ Sancti Andreæ de Holborn*, it is adjudged there, That this deviſe is good to the Corporation of the Parſon of the Church of St. *Andrew* in *Holborn* and his ſucceſſors; for ſuch deſcription was ſufficient in a Will to expreſs the Parſon of the Church and his ſucceſſors. By the ſame reaſon, if a deviſe be made to Univerſity of *Oxford*, or to the City of *London*, or to *Trinity Colledge* in *Cambridge*, *&c.* ſuch a deviſe is good, and therein the true Name of the Corporation is implied; for by theſe deſcriptions the meaning of the deviſor is apparent, that the incorporate Body of every of them ſhall take. So here, when the Parliament giveth the Benefice to the Chancellor and Scholars of *Oxford* and their ſucceſſors, this deſcription is ſufficient to expreſs the meaning of the makers of the Act, That the Corporation of the Univerſity of *Oxford*, which hath a Chancellor and Scholars, ſhall take it, and no other Coporation can take it.

2. The Record is well, for the Act is pleaded as if the benefit had been given by the ſaid Act expreſly (as it is implied in Law) to the Chancellor, Maſters and Scholars; and the Defendant hath demurred in Law thereupon, and ſo confeſſed it.

3. This clauſe which giveth this benefit to the Univerſity of *Oxford*, is a private clauſe, whereof the Judges without pleading of it cannot take notice, and therefore the Judges ought now to take it as it is pleaded.

As to the fourth Objection, *inſpecto recordo*, It appeareth that the Plaintiff hath averred this feoffment; but after that they have alledged, That the *John Draicot* the ſon was *Papalis recuſans convictus*, they have ſaid, *ac præd. Johan. Draicot de manerio præd. cum pertin. ad quod*, &c. *in forma præd. ſeiſito exiſtent. & Papalis recuſans convict. in forma præd. exiſtens & remanens, Eccleſia præd. vacavit per mortem præd. Georgii Eyre.* But if the Plaintiffs had not averred it, yet the Court was of opinion it had not been ſufficient, becauſe that they had not enabled themſelves to take benefit of the ſaid Act; and they need not aver, That he yet continueth and remaineth a Recuſant, for when once the Preſentation *hac vice* was veſted in the Univerſity, although that afterwards the Recuſant conformeth himſelf, or dieth, yet the Univerſity ſhall preſent. [58]

Trin. 11 Jacobi, *in the Common Pleas.*

The Biſhop of *Salisbury*'s Caſe.

IN a Writ of *Second Deliverance* brought by *Simon Staunton* and *Henry Knap* againſt *John Green*, of the taking of 127 ſheep at *Blewbery*, at a place called *The Parſonage Slay* in the county of *Dorſet*. The Defendant ſaid, That the place where did contain ſixty acres; and avowed the taking, becauſe that *John* Biſhop of *Salisbury* was ſeiſed of the Mannor of *Sherborn* in the county of *Dorſet*, whereof the place where, *&c.* was parcel in his demeſn as of fee in the right of his Biſhoprick, and ſo ſeiſed the laſt of *Septem.* 27 *Eliz.* by his Deed ſhewed forth did grant to *Edward Green* and *John Green*, *& eorum utriq; officium ſuperviſoris omnium maneriorum ſuorum*, &c. *in Com. Wilts, Dorſet, Berks, & Southampt', & alibi infra regnum Angliæ*, by them and their Deputies for whom they will anſwer, To have and to hold to them for time of their lives. And further by the ſame Deed granted to them a rent of 20 Nobles *per ann.* iſſuing out of the ſaid Mannor of *Sherborn*, with diet and reaſonable expences for them and their Deputies, *equitando & alias occupando, arbitrio ejuſdem Epiſcopi & ſucceſſ. ſuorum, aut auditorum eorum:* with clauſe of diſtreſs *ſi debito modo petatur*; and that the ſaid Grant was confirmed by the Dean and Chapter, 5 *Sept.* 28 *Eliz.* in the life of the ſaid [b]

John Biſhop of *Salisbury*; and that the ſaid office is *antiquum officium*, and that the ſaid office,
[59] together with the aforeſaid fee of 6 *l.* 13 *s.* 4 *d.* were granted by the aforeſaid *John* Biſhop of *Salisbury* and his predeceſſors, to ſuch perſon or perſons *quibus ſibi placuerit*. And ſhewed the death of *Edward Green*; and that he demanded the rent, and for want of payment did diſtrain, *&c.* In barr of which Avowry, the Plaintiff pleaded the Statute of 1 *Eliz.* by which it is enacted, That all gifts, grants, feoffments, fines, and other conveyances or eſtates, from the firſt day of this preſent Parliament to be had, made, done or ſuffered by any Archbiſhop or Biſhop, of any Honors, Caſtles, Mannors, Lands, Tenements or other Hereditaments, parcel of the poſſeſſion of his Archbiſhoprick or Biſhoprick, or united, appertaining or belonging to any of the ſaid Archbiſhopricks or Biſhopricks, or to any perſon or perſons, *&c.* as in the Statute. And further pleaded, That neither the aforeſaid Office, nor the aforeſaid yearly rent before the ſaid grant, *&c.* were ever granted by the ſaid Biſhop or any of his predeceſſors, for any longer time then one life, for which the aforeſaid grant by the ſaid *John* late Biſhop of *Salisbury* by force of the ſaid Act was void, *&c.* Upon which barr to the Avowry, the Defendant did demur in Law: And divers dayes it was argued by the Serjeants at the Bar, and this Term it was argued by the Judges at the Bench, and divers Exceptions were taken by the advowants Councel to the barr of the Avowry.

1. That the Avowant in his advowry hath alledged by matter in fact, That the ſaid Office had been granted to ſuch perſon or perſons as the Biſhop pleaſed, *&c.* and the Defendant in his barr hath pleaded in the Negative, That the ſaid Office, *&c.* hath not been granted but for life to one, *&c.* and therefore he ought to have concluded, *& hoc querit quod inquiratur per patriam*, but he hath concluded all his plea, *& hoc paratus eſt verificare*; and the Exception was not allowed: for the Avowant hath not alledged, That the ſaid Office had been granted, *&c.* to divers perſons, but to ſuch perſon or perſons as the Biſhop pleaſed, and *in disjunctivis ſufficit alterum eſſe verum.*

2. Another Exception was taken to the barr of the Avowry, That it doth not appear by the barr to the Avowry, That *John* Biſhop of *Salisbury* the grantor was dead, and it ſhall be intended that he is alive, becauſe the plea of every one ſhall be taken ſtrongeſt againſt him, *ambigua reſponſio contra proferentem eſt accipienda*; and then if he be alive, the grant of the ſaid Office to two was good, although that never the ſame had been granted to two before, and ſhall bind the Biſhop himſelf for his time; as it hath been adjudged in 32 *&* 33 *Eliz.* in this Court, betwixt *Sale* Plaintiff, and the
[b] Biſhop of *Coventry* and *Litchfield* Defendant, in a *Quare impedit*; and *Paſch.* 39 *Eliz.* betwixt *Hunt* and *Singleton:* which Caſes you may ſee cited in *Lincoln Colledge* Caſe, in the Second Part of my *Reports*. Which Caſes were affirmed for good Law by the Court. But the Exception was not allowed, becauſe it appeareth to the Court, that the ſaid *John* was not now Biſhop of *Salisbury*; for the Plaintiff in his barr to the Avowry concludes, by which the ſaid grant by the ſaid *John* late Biſhop of *Salisbury*, implying and importing that he is not now Biſhop of *Salisbury*. See the like implications, 13 *El. Dyer* 304. *&* 14 *El. Dy.* 306. *b.* ſo in 10 E. 4. 18. *b.* If in Treſpaſs the Defendant plead in barr, That B. leaſed to him the land in which, *&c.* at will, by force of which he entred, and was and yet is thereof poſſeſſed by force of the leaſe at will, it implieth that the leſſee is alive, for if he were dead the leaſe were at an end, and then he could not be poſſeſſed by force thereof.

3. Another Exception was taken to the Avowry, *ſc.* That the alledging of the ſame to be *antiquum officium*, was too general and incertain, but he ought to have preſcribed in it, or ſhewed more certainty than now he hath done: and it was holden a good Exception. And this difference was taken betwixt the allegation of the conveyance to the matter, and the matter it ſelf; as in 11 *H.* 4. 89. there one to convey him title to a Leet, preſcribeth that he and all thoſe whoſe eſtate he hath in the Hundred have had a Leet, *&c.* and well; for the preſcription in the Hundred is but the conveyance, and therewith agreeth 19 *H.* 2. Action upon the Caſe 51. but when he claimeth any thing which lieth in grant by preſcription originally and of it ſelf, he cannot preſcribe in by a *Que* eſtate; as *Littleton* holdeth *fol.* 41. 21 *H.* 7. 15. *&c.* So when one will plead Cuſtom in a town, it ſufficeth to ſay that it was *antiqua villa*, and the Cuſtom. *Vid.* 22 *H.* 6. *Preſcription* 47. *&* 6 E. 6. *Dyer* 71. So of an Office, if he claim any thing appertaining to the Office, it ſufficeth to ſay, *Quod fuit antiquum officium*; but when he claimeth the Office it ſelf, it is not ſufficient to ſay that it is *antiquum officium.*

As to the matter in Law, it was objected, That the ſaid grant made by the late Biſhop of *Salisbury* being confirmed by the Dean and Chapter, was not reſtrained by the ſaid Act of 1 *Eliz.* for divers cauſes: 1. That this caſe was out of the words of the Act, for it was not any part of the
[60] poſſeſſions of the Biſhoprick, nor appertaining thereunto. 2. They conceived, that nothing is reſtrained but ſuch heriditaments whereof upon a leaſe made for three lives or 21 years, according to the Statute, a rent may be reſerved, for the words of the Act are, Other then for term of 21 years or three lives, *&c.* whereupon the old and accuſtomed yearly rent or more ſhall be reſerved, *&c.* and in this caſe no rent can be reſerved. 3. A difference was taken betwixt an Office *in eſſe* in the right of his Biſhoprick, for the ſame may be ſaid parcel of his poſſeſſions, and ſuch an Office as the Biſhop himſelf cannot exerciſe, cannot be ſaid parcel of his poſſeſſions. 4. If a grant for two lives with the ancient fee ſhall by conſtruction of the Statute be reſtrained, then by conſequence a grant for one life onely ſhall be alſo reſtrained; for by which words or conſtruction ſhall a grant for two lives of the ſaid Office with the ancient fee, be reſtrained, and not for one life? But it was Reſolved by the whole Court, That the ſaid Office for two lives was void againſt the ſucceſſor by the ſaid Act of 1 *Eliz.*

And in the argument of this caſe, four things were conſidered: 1. What the Common Law was before any Statute made thereof. 2. What alteration the Statute of 32 *H.* 8. *cap.* 28. hath made. 3. What is done by the ſaid Act of 1 *Eliz.* And laſtly, If the ſaid grant to two of the ſaid Office ſhall be reſtrained by the ſaid Act of 1 *Eliz.* againſt the ſucceſſor.

And

And as to the firſt, it was Reſolved, That at the Common Law the Biſhop with the conſent of the Chapter might by their Charters of feoffments, grants or leaſes bind their ſucceſſors; and therefore ſuch grant to two of the ſaid Office for their lives had been good by the Common Law, although the ſame were granted to two before. Wherein was obſerved the Wiſdom of the Sages of the Law, That no ſole Corporation was ever truſted with the diſpoſe of the poſſeſſions, as to bind his ſucceſſors, but in ſuch they ought to have the conſent of others, as the Biſhop of his Dean and Chapter, the Abbot the conſent of his Covent, the Parſon the conſent of the Patron and Ordinary, and ſo of the reſt.

As to the ſecond, The Statute of 32 *H.* 8. hath enlarged the power of the Biſhop, for by this Act he may make a leaſe for 21 years or three lives, with divers limitations. 1. That every old leaſe be expired within one year, *&c.* 2. That the land ought to be uſually demiſed to farm by the ſpace of 20 years, *&c.* and that the Biſhop may do onely by deed indented, following the limitations in the Statute, without the Dean and Chapter.

As to the third and fourth point, it was Reſolved, That by the Act of 1 *Eliz.* the Biſhops are generally reſtrained to any eſtate or intereſt of any lands, tenement or heraditament parcel of his Biſhoprick, or of any charge or incumbrance out of it, or of any other thing in their diſpoſition to bind the ſucceſſor, but onely a leaſe for 21 years or three lives, of ſuch lands, tenements and hereditaments which have been uſually demiſed, and upon which the uſual rent ſhall be reſerved according to the ſaid Act of 1 *Eliz.* And if they make any leaſe of any lands uſually demiſed, and reſerve the uſual rent according to the Statute of 1 *Eliz.* yet if all the limitations preſcribed by the Statute of 32 *H.* 8. be not purſued, as if it be not all in poſſeſſion, or that the old leaſe be not expired or ſurrendred with one year (which is not prohibited by the Statute of 1 *Eliz.* as it was adjudged in *Foxe*'s Caſe) then ſuch leaſe ſhall not bind the ſucceſſor, if it be not confirmed by the Dean and Chapter. For the Statute of 1 *Eliz.* doth not enable any Archbiſhop or Biſhop onely to make any leaſe. And ſuch conſtruction hath been made as is aforeſaid, to diſable the Biſhop to do any thing (if not to make a leaſe for 21 years or three lives as aforeſaid) concerning the Biſhoprick to bind his ſucceſſor; as the grant of the next avoidance by the Biſhop of another to a Benefice, although it be confirmed by the Dean and Chapter, is reſtrained by the Statute of 1 *Eliz.* to bind his ſucceſſor, as it hath oftentimes been adjudged, becauſe it was ſuch an hereditament upon which a rent cannot be reſerved: For all that which is not permitted by the Exception, *ſc.* Other then, *&c.* is reſtrained as to the ſucceſſor by the general purview of the Act. But ſuch grant ſhall bind the Biſhop himſelf, notwithſtanding that the Statute ſaith it ſhall be void to all intents, conſtructions and purpoſes; for the makers of the Act did intend not onely the advancement of Religion, when the Profeſſors of Divinity ſhould have *duplicem honorem*, ſc. *honorem reverentiæ*, and *honorem beneficentiæ*; but alſo the increaſe of good Hoſpitality, and avoiding of dilapidations and the ruine of the Church, which the ſucceſſor, if the acts of his predeceſſor ſhould bind him, ſhould not be able to repair or build again: and therefore the Act regarded more the ſucceſſion, than the Biſhop himſelf. See *Elmer*'s Caſe in the Fifth Part of my Reports, and *Jewel*'s Caſe *ibid.* the Caſe of Eccleſiaſtical Perſons, and *Eitrue*'s Caſe, and divers other Caſes upon the Statute of 13 *Eliz. cap.* 10. concerning Deans and Chapters, *&c.* which Statute is couſin German to this Act of 1 *Eliz.* And theſe words in the Act of 1. (Parcel of the poſſeſſions of his Biſhoprick, or united, belonging or appertaining to the ſaid Archbiſhoprick or Biſhoprick) And it may be well and fitly ſaid, That the gift and diſpoſition of this office, and all other the like, are belonging to the Archbiſhoprick or Biſhoprick: [61] for although the Biſhop by himſelf cannot exerciſe ſuch office, yet he hath an inheritance in the gift and diſpoſe thereof, as it is holden in the Earl of *Rutland*'s Caſe in the Eighth Part of my Reports. And theſe words (belonging to the Archbiſhoprick or Biſhoprick) ſhall be taken for, concerning the Archbiſhoprick and Biſhoprick. And therefore if a Writ of Annuity be brought againſt a Biſhop upon title of Preſcription or otherwiſe, and Judgment be given againſt him upon verdict or confeſſion, the ſame is reſtrained by this Act, becauſe that the Biſhop is charged with the Annuity in reſpect of his Biſhoprick, and therefore the ſucceſſor ſhall be charged with the arrearages incurred in the life of the predeceſſor, as it is agreed in 21 *H.* 7. 4. 34 *E.* 3. *Scire facias* 154. 48 *E.* 3. 26. 22 *H.* 6. 10. 33 *H.* 6. 44. And yet the Annuity is not iſſuing out of the Biſhoprick, as appeareth in 10 *H.* 6. 10, & 10 *E.* 4. 10. But becauſe it concerneth the Biſhoprick, and tendeth to the diminution of the revenues, and the impoveriſhing of ſucceſſors, it is reſtrained by the Statute of 1 *Eliz.* Then to anſwer the Objection which hath been made, Wherefore a grant of the ſaid office to one onely ſhould be good. To that it was anſwered, and reſolved by the Court, That if the office hath been ancient and neceſſary, the grant thereof with the ancient fee is not any diminution of the revenue, nor impoveriſhing of the ſucceſſor, and therefore for neceſſity ſuch grants are by conſtruction exempted out of the general reſtraint of this Act of 1. For as *Bracton* ſaith, *fo.* 247. *Illud quod alias licitum non eſt, neceſſitas facit licitum, & neceſſitas inducit privilegium quod jure privatur.* And if Biſhops ſhall not have power to grant ſuch offices of ſervice and neceſſity for the life of the grantees, but that their eſtates ſhould depend upon incertainties, as upon the death, tranſlation, *&c.* of the Biſhop, then able perſons would not ſerve them in ſuch offices, or at leaſt would not diſcharge their office with any alacrity, if they have not ſuch certain eſtates for their lives, as their predeceſſors had in the ſame offices. But when the ancient office hath been granted to one, it is not of neceſſity to grant the ſame to two, and therefore ſuch grant is not exempted out of the general reſtraint, no more than if the Biſhop grant an office with the ancient fee to one, and afterwards he granteth it in reverſion to another, the ſame is reſtrained by the Statute, becauſe it is not of neceſſity. [b] And if the Biſhop grant ſuch offices to two, he migh grant them without any limitation of lives, and by conſequence *in infinitis*. And ſo if he might grant it to one in reverſion, he might

grant

grant it to others without any limitation; and by the ſame reaſon he might grant it in tail or in fee, which ſhould be altogether againſt the meaning of the ſaid Act of 1 *Eliz.* And of ſuch opinion was *Popham* Chief Juſtice, *Mich.* 44 & 45 *Eliz.* in *Scambler*'s Caſe. *Vide* 23 *Eliz. Dyer* 370. *Horne* Biſhop of *Winchester* after the Statute of 1 *Eliz.* granted to Doctor *Dale* a rent for life out of the Mannor of *Waltham pro conſilio, &c.* The Biſhop died; Doctor *Dale*, becauſe that the rent was void by the death of the grantor, brought an action of debt for the arrerages incurred in his life, againſt his Executors: in which two points are to be obſerved; 1. That the grant was not void againſt the Biſhop himſelf; the other, That although the rent was iſſuing out of the poſſeſſions, and not parcel, it was void by his death. *Trinit.* 30 *Eliz. rott.* 346. in this Court, The Biſhop of *Cheſter* after the Statute of 1. *Eli.* granted to *George Bolton* one Annuity of five Marks *per ann.* for his life *pro conſilio impenſo & impendendo*, which was confirmed by the Dean and Chapter, and afterwards the Biſhop died; *Bolton* brought a Writ of Annuity againſt the ſucceſſor, and in his Declaration averred, That the predeceſſors of the Biſhop had granted reaſonable fees (but did not aver that this fee had been granted before) and averred, that he was *homo conſiliarius & in lege peritus*; and the opinion of the Court was againſt the Plaintiff, and therefore he never had Judgment. But there it was reſolved, That although the ſaid Biſhoprick was founded of late time, *ſc.* in the time of *H.* 8. yet grant of offices of neceſſity to one in poſſeſſion with a reaſonable fee (the reaſonableneſs of which ſhall be decided in the Court of Juſtice in which it ſhall depend) is good, and as hath been ſaid, exempted out of the general reſtraint of the ſaid Act. And the Court took no regard to that, that it did not appear, That *Ed. Green* one of the grantees died. For admit that he died in the life of the ſaid Biſhop, ſo that now againſt the ſucceſſor one onely hath the office; yet the grant by force of the ſaid Act of 1. *Eliz.* is void as to the ſucceſſors, *quia quæmalo inchoata ſunt principio, vix eſt ut bono peragantur exitu, & quod initio non valet, tractu temporis non convaleſcit.* And the Statute of 1 *Eliz.* hath at the time of the grant adjudged it void as to the ſucceſſor, which no ſucceeding accident can make good: No more than if a Biſhop make a leaſe for four lives, and one dieth in his life time, ſo that now there are but three lives, and afterwards he dieth, yet it ſhall not bind the ſucceſſor, although that all other circumſtances required by the Statute of 32 H. 8. be obſerved.

[62]

5. It was Reſolved, That the grant of any ancient office to one with the ancient fee by a Biſhop, ſhall not bind his ſucceſſor, if it be not confirmed by the Dean and Chapter. For ſuch grants are not, as appeareth before, reſtrained by the Statute of 1 *Eliz.* and therefore remain at the Common Law, and by conſequence ought to be confirmed by the Dean and Chapter.

Alſo no regard was had by the Court, That it did not appear that *John* the Biſhop was dead; for *nuper Epiſcopus* doth imply a tranſlation, or other removing, as well as death, but it is all one; for if he be tranſlated, depoſed, or otherwiſe removed, the grant is void againſt the ſucceſſor.

Laſtly, although it doth not appear, that there was any ſucceſſor at the time of the diſtreſs (for put caſe there was not any ſucceſſor then made) yet it is not material; for the grant did determine by the death or removing of the ſaid *John* the Biſhop. And afterwards this term, Judgment was given for the Plaintiffs *Simon Stanton* and *Henry Knap*, and againſt the ſaid *John Green* who claimed the ſaid office.

Note Reader, The ſubject of this Caſe is but ſmall, and the conſequence great: And where by force of an Exception in the Statute of 1 *Eliz.* any Archbiſhop or Biſhop might with the conſent of the Dean and Chapter convey any of their poſſeſſions to the King, his Heirs and Succeſſors, of any eſtate whatſoever; Our Sovereign Lord the King that now is, of his Piety and Devotion to Religion, and for the Honour of it, and that ſuch poſſeſſions which were given by his Noble Progenitors Kings of *England*, ſhould not be converted to private uſes, Hath at his Parliament, and by authority of the ſame, reſtrained them to make any Conveyance or Eſtate, either to himſelf, or to any of his heirs and ſucceſſors. And ſo you will underſtand what acts an Archbiſhop or Biſhop may do concerning their poſſeſſions without the aſſent of the Dean and Chapter; and what he may do with the aſſent of the Dean and Chapter; and what he may not do, although they be with the aſſent of the Dean and Chapters.

[b]

Trin.

Hill. 10 Jac. *In the Common Pleas.*

Whiſtlers' Caſe.

IN a *Quare Impedit* by *John Whiſtler* Gent. Plaintiff, and *John* Biſhop of *Oxford*, and *Iſaac Singleton* Clerk Defendant, for the Church of *Whitechurch* in the County of *Oxford:* The Caſe was ſuch; Queen *Elizabeth* was ſeiſed of the Mannor of *Whitechurch*, to which the Advowſon of the ſaid Church of *Whitechurch* was appendant in her Demeſn as of fee in the right of her Crown, and ſo ſeiſed 24 *Aprilis*, ninth of her Reign, by her Letters Patents demiſed the ſaid Mannor with the appurtenances to *William Smith*, except Advowſons of Churches, *&c.* for 21 years; and afterwards the Queen 22 *May*, 27 of her Reign, reciting the ſaid demiſe of the ſaid Mannor to *William Smith*, with the exception of the Advowſon, made another leaſe in reverſion to the ſaid *William Smith* of the ſaid Mannor with the appurtenances, except the Advowſon, and afterwards Queen *Eliz.* died; and the King that now is, in conſideration of ſervice, *ac ex certa ſcientia & mero motu*, granted to Sir *George Howme* Knight, *totum illud manerimm ſive dominium de Whitechurch in Com. noſtro Oxon. cum ſuis juribus, membris, & pertin. univerſit. Ac omnia & ſingula domos, & ædificia*, &c. *& hæreditamenta noſtra quæcunque prædicto manerio ſive dominio de Whitechurch ſive alicui inde parcell. quoquo modo ſpectan. ſive pertinen. cuidam Willielmo Smith per literas patentes dictæ nuper Reginæ Eliz. ſub magno ſigillo ſuo Angliæ pro termino 21 annorum, exceptis quæ in eiſdem literis patentibus excipiuntur, mentionat. fore dimiſſ. ac poſtea per alias patentes*; and mentioned the leaſe in reverſion, and in which is alſo the like clauſe, *Exceptis quæ in eiſdem literis patentibus excipiuntur, mentionat. fore dimiſſa, Ac ulterius de uberiori gratia noſtra ſpeciali, ac ex certa ſcientia & mero motu noſtris, damus & concedimus præfato Georgio Howme Militi hæredibus & aſſignatis ſuis imperpetuum omnia & ſingula meſuagia*, &c. *tenementa prædicto manerio ſive dominio de Whitechurch quoquo modo ſpectan. ſive pertin'*, &c. *Damus ulterius, & per præſentes pro nobis hæredibus & ſucceſſoribus noſtris, concedimus præfat. Georgio Howme Militi hæredibus & aſſignatis ſuis imperpetuum prædictum manerium ſive dominium de Whitechurch, ac cætera omnia & ſingula præmiſſa ſuperius per præſentes conceſſa cum eorum pertin. univerſis adeo plene & integre, & in tam amplis modo & forma prout ea omnia & ſingula præmiſſa aut aliqua inde parcella ad manus noſtras*, &c. *devenerunt, ac in manibus noſtris jam exiſtunt.* [63] [b]

And if the Advowſon appendant to the ſaid Mannor of *Whitechurch* ſhall paſs by theſe Letters Patents, or not, was the queſtion. And divers Objections were made at the Bar that the Advowſon ſhould not paſs: 1. Becauſe no expreſs mention was made of the Advowſon; and it is enacted by the Statute of *Prærogativa Regis*, *Cap*, 15. *Quando dominus Rex dat vel concedit alicui manerium vel terram cum pertin', niſi faciat in charta ſua vel ſcripto expreſſam mentionem de feodis militum, advocationibus eccleſiarum & dotibus, cum acciderint, ad prædict. manerium vel terram pertin', tunc his diebus Rex reſervat ſibi eadem feoda & advocat. cum dotibus, licet inter alias perſonas non fuerint obſervata.* And in this caſe the King made not expreſs mention of the Advowſon. The 2 Reaſon was, That when the King firſt granteth the Mannor of *Whitechurch, cum pertin'*, without making mention of the Advowſon, it is as much in Judgment of Law, as if the Advowſon had been excepted in expreſs words; and then when by the latter clauſe the King granteth *præd. manerium cum pertin. ac cætera omnia & ſingula præmiſſa ſuperius per præſentes conceſſa cum eorum pertin. univerſis, adeo plenè & integrè. &c.* this word (*prædict.*) hath reference to the Mannor mentioned before, which Mannor was granted without the Advowſon; and therefore this clauſe being reſtrained by this word (*prædict.*) and by theſe words (*& cætera omnia & ſingula præmiſſa ſuperius per præſentes conceſſa*) the Advowſon ſhall not paſs: And yet peradventure (as it was ſaid) if in the ſame clauſe the King had granted *totum manerium noſtrum de Whitechurch in Com. noſtro Oxon. adeo plenè & integrè, & in tam amplis modo & forma prout idem manerium ad manus noſtras devenit & modo in manibus noſtris exiſtit*, it might paſs. 3. It was objected, That the original grant is reſtrained by this word (*illud*) *manerium*, and by theſe ſubſequent words, *cuidam Willielmo Smith per literas patentes, exceptis quæ in eiſdem literis patentibus excipiuntur, mentionat. fore dimiſſa & conceſſa*; in which demiſe to *Smith* the Advowſon was expreſly excepted, and ſo upon the matter by this reference the Advowſon is excepted out of this grant. The 4. Objection was, That theſe words (*exceptis quæ in eiſdem literis patentibus excipiuntur*) ſhall be an exception out of the grant of the King that now is, and then againſt the expreſs exception, the general words afterwards ſhall not paſs it; for conſtruction ought to be made upon all the Letters Patents, that one part may ſtand with the other. [64]

To which it was anſwered and Reſolved by the Court, That when he Kings grant in general terms doth refer to a certainty, it contains as much certainty, as if the certainty had been expreſſed in the grant it ſelf, although that the certainty to which the reference is, be not of Record, but lieth in averment by matter in *pais* or in fact. And firſt was conſidered, what the Law was in this caſe before the Statute of *Prærogativa Regis*. And it was agreed, That before that Statute, If the King had granted a Mannor to which an Advowſon was appendant, without making mention of the Advowſon, or without ſaying *cum pertin'*, that the Advowſon ſhould paſs. And ſo is the Book adjudged in 43 E. 3. 22. That were the Earl Marſhal was ſeiſed of the Mannor of *A.* to which an Advowſon was appendant, and gave the ſaid Mannor to King *H.* 3. to him and his heirs, for which gift the King granted to him and his heirs 50 Marks *per annum*, till he was infeoffed of ſo much land, as fully and entirely as he had the Mannor of *A.* of his gift; and afterwards King *H.* 3.

gave the ſaid Mannor of *A.* to which the Advowſon was appendant, without ſaying *cum pertin'*, to the ſaid Earl Marſhal and his heirs for the ſame 50 Marks, and becauſe that the Mannor was more worth by 5 *l.* rendring 5 *l. per annum, &c.* And although the grant of King *H.* 3. ſpake nothing *de pertin'*, nor of his fees, nor of Advowſons, yet it was adjudged that the Advowſon ſhould paſs. And *Mowbray* Chief Juſtice rehearſed, although King *H.* 3. hath given the Mannor without ſaying *cum pertin'*, at which time the Advowſon paſſed by the Kings gift, as by the gift of another common perſon; and all times before the Statute of *Prærogat. Regis*, which Statute was in the time of the Grandfather of the King that now is: So that at all times before the Advowſon ſhall paſs by ſuch gift. For which cauſe Judgment was given, That by the ſaid grant of King *H.* 3. of the Mannor, the Advowſon ſhould paſs. And ſo there it is holden, That before the ſaid Statute, that by the Kings grant of a Mannor, the Tenure by Eſcuage ſhall paſs. And all this is proved by the Act it ſelf, which Act hath altered the Common Law; for the words of it are, *Tunc hiis diebus rex reſervat ſibi eadem feoda & advocation. Eccleſiæ, &c.* and the book ſaith ſo it is proved by the words
[b] *(hiis diebus)* began the Prerogative. And therewith agreeth 44 E. 3. 20. That by feoffment of the Mannor by the Common Law, without ſaying *cum pertin'*, the Advowſon ſhould paſs; and although the feoffment be by word, the Advowſon ſhall paſs. And therewith agreeth the book in 39 E. 3. 21. that before this Statute the Advowſon ſhall paſs. *Vide* 19 E. 2. Br. 844. 8 H. 7. 4. 18 E. 3. 15. And it is to be obſerved, That the Act of *Prærogativa Regis* doth not reſtrain but the ſaid three caſes, *ſc.* Advowſons, Knights ſervices, and the Endowments of women. For a Leet ſhall paſs without expreſs mention, or words equipollent, as it is holden in 18 *H.* 6. 12. ſo ſhall paſs a Foreſt appendant to an Honour, as it is agreed in 26 *Aſſ. p.* 60. the ſame Law of a Corrody appendant to the Patronage of a Priory, as appeareth in 26 *Aſſ. p.* 63. and ſo of the like. Alſo the words of this Act are, *Quando Dominus Rex dat vel concedit*, and therefore in caſe of Reſtitution, Advowſons, and Knights Services, ſhall paſs without expreſs mention of them, or words equivalent, as in Livery to heirs. 2. In reſtitution of the Temporalties to the ſucceſſor of a Biſhop, and the like. 41 E. 3. 5. 27 *Aſſ.* 48. *Plo. Com.* the Lord *Berkley*'s Caſe 251, 252. 20 *Eliz. Dyer* 306. But there *Thorp* Chief Juſtice ſaith in the ſame plea, That if a Mannor to which an Advowſon is appendant be in the Kings hands by eſcheat or by purchaſe, if the King at this day (after the ſaid Act of *Prærogativa Regis*) giveth the Mannor to a man as intirely as ſuch a one held the ſame before it came to the Kings hands by way of eſcheat; or as ſuch a one held it who enfeoffed us, that the Advowſon ſhall paſs without ſaying in the grant, *cum feodis & advocationibus*; and the cauſe is, becauſe the Law doth intend that in ſuch caſe the King is informed of his right: *quod curia conceſſit.* By which it is to be obſerved, 1. That although the reference in the Kings grant be to matter in *pais* or in fact, that if the truth be, that the Advowſon be appendant that it ſhall paſs, for in Judgment of Law it is equivalent to an expreſs mention of the Advowſon (as the Statute ſpeaketh) in the grant. 2. Although the King grant the Mannor onely as entirely, *&c.* yet the Advowſon ſhall paſs. And therewith agreethe *John Darcie*'s Caſe, That if a man hath a Mannor to which an Advowſon is appendant, and Franchiſe to have forfeitures and other franchiſes within the Mannor, and afterwards the Mannor cometh to the King by forfeiture of War, and afterwards the King giveth the Mannor to hold with the Franchiſes which were alwayes belonging to the ſaid Mannor as ſuch a one held, he ſhould have the Franchiſes. And there Sir *William Herle* ſaid, That it ſhall be a new grant, for the Franchiſes which lay in point of Charter were come to the Crown. In which firſt is to be obſerved, That
[65] if a man hath a Mannor, in which Mannor the owners thereof have had Franchiſes which lie in point of Charter, as forfeitures for Treaſon, and the like Royal Franchiſes; and afterwards the Mannor with the Franchiſes cometh to the Kings hands, and the King granteth the Mannor with the forfeitures of Treaſon and other Franchiſes which were appertaining to the ſaid Mannor as ſuch a one held, That all the ſaid Franchiſes ſhould paſs, and theſe words *(which were appertaining to the ſaid Manner)* ſhall be taken in this ſenſe, which were lawfully enjoyed within the ſaid Mannor, as entirely as ſuch a one had them. And yet according to the ſtrict propriety of the words, ſuch Franchiſes could not be appertaining to the Mannor. But ſuch conſtruction that ſhall make the true intention of the King expreſſed in his grant to take effect, is for the Kings honour, and ſtands with the Rule of Law. And therefore this word *(appertaining)* ſhall in ſuch caſe of the Kings grant be taken out of the proper ſignification. 2. It is to be marked, that in the ſame caſe ſuch Franchiſes which lay in point of Charter ſhall paſs as by a new grant, *à fortiori* Franchiſes appendant or pertaining to a Mannor, as Advowſons, Fairs, Markets, Warrens, *&c.* (which alwayes continue in being, and are never extinct in the Crown) ſhall paſs. It is ſaid in *Plo. Com.* 12. in *Fogaſſe*'s Caſe, If the King at this day grant over certain lands which have come to his hands before, and further grant to the grantee *tales libertates, privilegia, juriſdictiones, &c.* that he had who was laſt ſeiſed of the lands, where the King knoweth not the certainty of the liberties and priviledges, yet the grant is good enough, and the Patentee may enquire what liberties and priviledges the other had before; and foraſmuch as this incertainty may be reduced to a certainty by enquiry or circumſtance, the grant is good. *V.* the Caſe of the Abbot of *Mercella* in the 9 Part of my *Reports.* 18 *Eliz. Dyer* 350, 351.

As to the ſecond Objection, It was anſwered and Reſolved, That it is true, That if the ſaid clauſe of *adeo plenè & integrè* had been omitted, *&c.* that then the Advowſon had not paſſed by the firſt clauſe, but by the addition of the latter clauſe, all the parts of the Letters Patents taking effect at one time, the Advowſon ſhall paſs as appendant: and this word *(prædict.)* doth not reſtrain the paſſing of the Advowſon, but deſcribeth what Mannor it is, and then the adding of theſe words *(adeo plenè & integrè & in tam amplis modo & forma)* expreſs the Kings intent to paſs it as intirely as the Mannor came to his hands, or otherwiſe the ſaid words *adeo plenè, &c.)* ſhould not take their right and
[b] genuine effect. And it was never ſeen in any Letters Patents, that the ſaid words, *adeo plenè & inte-*

integrè, &c. came in the first clause of the grant, but is a new clause by it self; and then in the last clause, this word (*prædict.*) is alwayes added; and so in truth was the case in 18 *Eliz. Dyer* 350, 351. For it appeareth by the Letters Patents by Queen *Elizabeth* mentioned in the said Case, That the Rectory of *Westbodwin*, to which the Advowson of the Vicarage was appendant, came to the King by the attainder of E. for Felony, and was concealed, the Queen *Elizabeth* granted *totam illam Rectoriam de W. in Com. Wilts. cum suis juribus, membris & pertin. universis, nec non omnia & singula messuagia*, &c. *& hæreditamenta parcell. spectan. sive pertin. dictæ Rectoriæ: Et ulterius, &c. Concessimus præd. Rectoriam cum pertin. cæteraque præmissa cum pertin. adeo plenè & integrè & in tam amplis modo & forma, quantitate & qualitate prout*, &c. the Felon had it and as it came to her hands. And it was adjudged that the Advowson did pass without express or special mention. Also the words were *ex certa scientia & mero motu*, and so the Queen was not deceived. Which being a Judgment in the point consonant to the Resolution in old time, and agreeing with common experience and opinions of Learned men, the same was not worth any question to be made of it. And thereupon it was concluded, That if the King hath the Mannor of *D.* in the County of *Northumberland*, and some of the rents and services extend into *Cumberland*, and the King granteth the Mannor of *D.* in the County of *Northumberland, & omnia & singula messuagia*, &c, *redditus, servitia, & hæreditamenta in dicto Comitatu Northumberland seu alibi parcell. prædicti manerii, &c.* That the rents and services in the County of *Cumberland* shall pass; for (*prædict.*) is but a description of the Mannor, and these words (*aut alibi*) ought to have some effect. And therefore in as much that in such case all parts of the Charter take effect at one time, these words (*aut alibi*) shall be in Judgment of Law annexed to the first clause, and shall be of such effect as if the King had granted the Mannor of *D.* and all rents and services, parcel of the said Mannor in the County of *N.* or elsewhere; and that stands with the Rule of good construction, *sc.* to make all the words of the Letters Patents, according to the true meaning of the King expressed in them to take effect.

As to the third Objection, Although that the first clause of the grant doth refer to the demise in which the Advowson is excepted; yet by the middle clause all tenements, *&c.* appertaining to the Mannor are granted; and the last clause granteth the Mannor with the appurtenances, &c. *adeo plenè & integrè*, so that the answer to the second Objection, answereth this also. [66]

As to the fourth Objection, it was Resolved without any difficulty, that the Exception shall be extended onely to leases recited, and not to be any exception out of the Letters Patents of the fee simple. And accordingly Judgment was given that the Advowson should pass.

Trin. 11 Jacobi.

The Case of the Wardens of the Church of St. *Saviours* in *Southwark*.

IN an Information of Intrusion preferred in the Court of Exchequer by the Kings Attorney-General, which is entred *Hill.* 5 *Jac. Rot.* 121. against *Thomas Harvy, John Marshal, Abraham Green*, and others, for intruding into the Rectory of the Parish Church of St. *Saviour* in the County of *Surrey*, 9 *Octob.* 3 *Jac. &c.* Upon Not guilty pleaded, the Jury gave a special Verdict to this effect: That Queen *Elizabeth* was seised of the said Rectory in her demesn as of fee in the right of her Crown, and by her Letters Patents dated 22 *Feb.* 27 of her Reign, granted to the Wardens of the Parish Church of St. *Saviour* of *Southwark* (who by such Name were Incorporated by Act of Parliament, *Anno* 32 *H.* 8. and so found) the said Rectory from the Feast of St. *Michael* then last past for 21 years, by force whereof they entred, and were thereof possessed; and afterwards the said Queen by her Letters Patents bearing date the 28 of *Novemb.* in the 33 year of her Reign, reciting the said lease, *per prædictas literas patentes port. dat.* 22 *Feb. anno nuper Reg.* 27. *confect': quas quidem literas patentes, & totum statum, titulum, interesse, terminum annorum adhuc futur. de & in præmissis, dilecti subdit. nostri Thomas Norton*, &c. *gardiani dictæ Ecclesiæ parochialis modo habentes, & ad præsens possidentes nobis sursum reddiderunt & restituerunt cancellandas, quam quidem sursum redditionem acceptamus per præsentes; sciatis igitur quod ad humilem petitionem gardianorum & parochianorum dictæ Ecclesiæ sancti Salvatoris de Southwark, tam in consideratione sursum redditionis prædict. quam in consideratione quod prædict. nuper gardiani Ecclesiæ parochial, prædict. post datum dictarum nostrarum literarum patentium superius mentionat', unam sufficientem domum aptam & convenientem pro Schola Grammaticali ibidem tenend. infra parochiam sancti Salvatoris prædict. pro eruditione puerorum ejusdem parochiæ sumptibus eorum & expensis erexerunt & ædificaverunt, necnon pro fine* 20 *l. legalis monetæ Angliæ ad receptum Scaccarii nostri, ad usum nostrum per præfatos modo gardianos solut'*, demise the said Rectory to the said *Thomas Norton, &c.* now Wardens of the said Church, from the Feast of the Annunciation of our Lady last past for the term of 50 years; and further found, that the said Wardens at the time of the making of the said lease for 50 years, surrendred and yielded up the said Letters Patents of 27 *Eliz.* to be cancelled, and then paid to the Officers of the Court of Chancery the Fees for the cancelling of them, and a vacat of the enrolment of them; and that they then were possessed of the residue of the said term of 21 years, [b] [67]

gave the ſaid Mannor of *A.* to which the Advowſon was appendant, without ſaying *cum pertin'*, to the ſaid Earl Marſhal and his heirs for the ſame 50 Marks, and becauſe that the Mannor was more worth by 5 *l.* rendring 5 *l. per annum, &c.* And although the grant of King *H.* 3. ſpake nothing *de pertin'*, nor of his fees, nor of Advowſons, yet it was adjudged that the Advowſon ſhould paſs. And *Mowbray* Chief Juſtice rehearſed, although King *H.* 3. hath given the Mannor without ſaying *cum pertin'*, at which time the Advowſon paſſed by the Kings gift, as by the gift of another common perſon; and all times before the Statute of *Prærogat. Regis*, which Statute was in the time of the Grandfather of the King that now is: So that at all times before the Advowſon ſhall paſs by ſuch gift. For which cauſe Judgment was given, That by the ſaid grant of King *H.* 3. of the Mannor, the Advowſon ſhould paſs. And ſo there it is holden, That before the ſaid Statute, that by the Kings grant of a Mannor, the Tenure by Eſcuage ſhall paſs. And all this is proved by the Act it ſelf, which Act hath altered the Common Law; for the words of it are, *Tunc hiis diebus rex reſervat ſibi eadem feoda & advocation. Eccleſiæ, &c.* and the book ſaith ſo it is proved by the words [b] (*hiis diebus*) began the Prerogative. And therewith agreeth 44 *E.* 3. 20. That by feoffment of the Mannor by the Common Law, without ſaying *cum pertin'*, the Advowſon ſhould paſs; and although the feoffment be by word, the Advowſon ſhall paſs. And therewith agreeth the book in 39 *E.* 3. 21. that before this Statute the Advowſon ſhall paſs. *Vide* 19 *E.* 2. Br. 844. 8 *H.* 7. 4. 18 *E.* 3. 15. And it is to be obſerved, That the Act of *Prærogativa Regis* doth not reſtrain but the ſaid three caſes, *ſc.* Advowſons, Knights ſervices, and the Endowments of women. For a Leet ſhall paſs without expreſs mention, or words equipollent, as it is holden in 18 *H.* 6. 12. ſo ſhall paſs a Foreſt appendant to an Honour, as it is agreed in 26 *Aſſ. p.* 60. the ſame Law of a Corrody appendant to the Patronage of a Priory, as appeareth in 26 *Aſſ. p.* 63. and ſo of the like. Alſo the words of this Act are, *Quando Dominus Rex dat vel concedit*, and therefore in caſe of Reſtitution, Advowſons, and Knights Services, ſhall paſs without expreſs mention of them, or words equivalent, as in Livery to heirs. 2. In reſtitution of the Temporalties to the ſucceſſor of a Biſhop, and the like. 41 *E.* 3. 5. 27 *Aſſ.* 48. *Plo. Com.* the Lord *Berkley's* Caſe 251, 252. 20 *Eliz. Dyer* 306. But there *Thorp* Chief Juſtice ſaith in the ſame plea, That if a Mannor to which an Advowſon is appendant be in the Kings hands by eſcheat or by purchaſe, if the King at this day (after the ſaid Act of *Prærogativa Regis*) giveth the Mannor to a man as intirely as ſuch a one held the ſame before it came to the Kings hands by way of eſcheat; or as ſuch a one held it who enfeoffed us, that the Advowſon ſhall paſs without ſaying in the grant, *cum feodis & advocationibus*; and the cauſe is, becauſe the Law doth intend that in ſuch caſe the King is informed of his right: *quod curia conceſſit.* By which it is to be obſerved, 1. That although the reference in the Kings grant be to matter in *pais* or in fact, that if the truth be, that the Advowſon be appendant that it ſhall paſs, for in Judgment of Law it is equivalent to an expreſs mention of the Advowſon (as the Statute ſpeaketh) in the grant. 2. Although the King grant the Mannor onely as entirely, *&c.* yet the Advowſon ſhall paſs. And therewith agreethe *John Darcie's* Caſe, That if a man hath a Mannor to which an Advowſon is appendant, and Franchiſe to have forfeitures and other franchiſes within the Mannor, and afterwards the Mannor cometh to the King by forfeiture of War, and afterwards the King giveth the Mannor to hold with the Franchiſes which were alwayes belonging to the ſaid Mannor as ſuch a one held, he ſhould have the Franchiſes. And there Sir *William Herle* ſaid, That it ſhall be a new grant, for the Franchiſes which lay in point of Charter were come to the Crown. In which firſt is to be obſerved, That [65] if a man hath a Mannor, in which Mannor the owners thereof have had Franchiſes which lie in point of Charter, as forfeitures for Treaſon, and the like Royal Franchiſes; and afterwards the Mannor with the Franchiſes cometh to the Kings hands, and the King granteth the Mannor with the forfeitures of Treaſon and other Franchiſes which were appertaining to the ſaid Mannor as ſuch a one held, That all the ſaid Franchiſes ſhould paſs, and theſe words (*which were appertaining to the ſaid Mannor*) ſhall be taken in this ſenſe, which were lawfully enjoyed within the ſaid Mannor, as entirely as ſuch a one had them. And yet according to the ſtrict propriety of the words, ſuch Franchiſes could not be appertaining to the Mannor. But ſuch conſtruction that ſhall make the true intention of the King expreſſed in his grant to take effect, is for the Kings honour, and ſtands with the Rule of Law. And therefore this word (*appertaining*) ſhall in ſuch caſe of the Kings grant be taken out of the proper ſignification. 2. It is to be marked, that in the ſame caſe ſuch Franchiſes which lay in point of Charter ſhall paſs as by a new grant, *à fortiori* Franchiſes appendant or pertaining to a Mannor, as Advowſons, Fairs, Markets, Warrens, *&c.* (which alwayes continue in being, and are never extinct in the Crown) ſhall paſs. It is ſaid in *Plo. Com.* 12. in *Fogaſſe's* Caſe, If the King at this day grant over certain lands which have come to his hands before, and further grant to the grantee *tales libertates, privilegia, juriſdictiones, &c.* that he had who was laſt ſeiſed of the lands, where the King knoweth not the certainty of the liberties and priviledges, yet the grant is good enough, and the Patentee may enquire what liberties and priviledges the other had before; and foraſmuch as this incertainty may be reduced to a certainty by enquiry or circumſtance, the grant is good. *V.* the Caſe of the Abbot of *Mercella* in the 9 Part of my *Reports.* 18 *Eliz. Dyer* 350, 351.

As to the ſecond Objection, It was anſwered and Reſolved, That it is true, That if the ſaid clauſe of *adeo plenè & integrè* had been omitted, *&c.* that then the Advowſon had not paſſed by the firſt clauſe, but by the addition of the latter clauſe, all the parts of the Letters Patents taking effect at one time, the Advowſon ſhall paſs as appendant: and this word (*prædict.*) doth not reſtrain the paſſing of the Advowſon, but deſcribeth what Mannor it is, and then the adding of theſe words (*adeo plenè & integrè & in tam amplis modo & forma*) expreſs the Kings intent to paſs it as intirely as the Mannor came to his hands, or otherwiſe the ſaid words *adeo plenè, &c.*) ſhould not take their right and [b] genuine effect. And it was never ſeen in any Letters Patents, that the ſaid words, *adeo plenè & inte-*

integrè, &c. came in the first clause of the grant, but is a new clause by it self; and then in the last clause, this word (*prædict.*) is alwayes added, and so in truth was the case in 18 *Eliz. Dyer* 350, 351. For it appeareth by the Letters Patents by Queen *Elizabeth* mentioned in the said Case, That the Rectory of *Westbodwin*, to which the Advowson of the Vicarage was appendant, came to the King by the attainder of E. for Felony, and was concealed, the Queen *Elizabeth* granted *totam illam Rectoriam de W. in Com. Wilts. cum suis juribus, membris & pertin. universis, nec non omnia & singula messuagia*, &c. *& hæreditamenta parcell. spectan. sive pertin. dictæ Rectoriæ: Et ulterius, &c. Concessimus præd. Rectoriam cum pertin. cæteraque præmissa cum pertin. adeo plenè & integrè & in tam amplis modo & forma, quantitate & qualitate prout*, &c. the Felon had it and as it came to her hands. And it was adjudged that the Advowson did pass without express or special mention. Also the words were *ex certa scientia & mero motu*, and so the Queen was not deceived. Which being a Judgment in the point consonant to the Resolution in old time, and agreeing with common experience and opinions of Learned men, the same was not worth any question to be made of it. And thereupon it was concluded, That if the King hath the Mannor of *D.* in the County of *Northumberland*, and some of the rents and services extend into *Cumberland*, and the King granteth the Mannor of *D.* in the County of *Northumberland*, *& omnia & singula messuagia*, &c. *redditus, servitia, & hæreditamenta in dicto Comitatu Northumberland seu alibi parcell. prædicti manerii*, &c. That the rents and services in the County of *Cumberland* shall pass; for (*predict.*) is but a description of the Mannor, and these words (*aut alibi*) ought to have some effect. And therefore in as much that in such case all parts of the Charter take effect at one time, these words (*aut alibi*) shall be in Judgment of Law annexed to the first clause, and shall be of such effect as if the King had granted the Mannor of *D.* and all rents and services, parcel of the said Mannor in the County of *N.* or elsewhere; and that stands with the Rule of good construction, *sc.* to make all the words of the Letters Patents, according to the true meaning of the King expressed in them to take effect.

As to the third Objection, Although that the first clause of the grant doth refer to the demise in which the Advowson is excepted; yet by the middle clause all tenements, &c. appertaining to the Mannor are granted; and the last clause granteth the Mannor with the appurtenances, &c. *adeo plenè & integrè*, so that the answer to the second Objection, answereth this also. [66]

As to the fourth Objection, it was Resolved without any difficulty, that the Exception shall be extended onely to leases recited, and not to be any exception out of the Letters Patents of the fee simple. And accordingly Judgment was given that the Advowson should pass.

Trin. 11 Jacobi.

The Case of the Wardens of the Church of St. *Saviours* in *Southwark*.

IN an Information of Intrusion preferred in the Court of Exchequer by the Kings Attorney-General, which is entred *Hill.* 5 *Jac. Rot.* 121. against *Thomas Harvy, John Marshal, Abraham Green*, and others, for intruding into the Rectory of the Parish Church of St. *Saviour* in the County of *Surrey*, 9 *Octob.* 3 *Jac. &c.* Upon Not guilty pleaded, the Jury gave a special Verdict to this effect: That Queen *Elizabeth* was seised of the said Rectory in her demesn as of fee in the right of her Crown, and by her Letters Patents dated 22 *Feb.* 27 of her Reign, granted to the Wardens of the Parish Church of St. *Saviour* of *Southwark* (who by such Name were Incorporated by Act of Parliament, *Anno* 32 *H.* 8. and so found) the said Rectory from the Feast of St. *Michael* then last past for 21 years, by force whereof they entred, and were thereof possessed; and afterwards the said Queen by her Letters Patents bearing date the 28 of *Novemb.* in the 33 year of her Reign, reciting the said lease, *per prædictas literas patentes port. dat.* 22 *Feb. anno nuper Reg.* 27. *confect': quas quidem literas patentes, & totum statum, titulum, interesse, terminum annorum adhuc futur. de & in præmissis, dilecti subdit. nostri Thomas Norton*, &c. *gardiani dictæ Ecclesiæ parochialis modo habentes, & ad præsens possidentes nobis sursum reddiderunt & restituerunt cancellandas, quam quidem sursum redditionem acceptamus per præsentes; sciatis igitur quod ad humilem petitionem gardianorum & parochianorum dictæ Ecclesiæ sancti. Salvatoris de Southwark, tam in consideratione sursum redditionis prædict. quam in consideratione quod prædict. nuper gardiani Ecclesiæ parochial. prædict. post datum dictarum nostrarum literarum patentium superius mentionat', unam sufficientem domum aptam & convenientem pro Schola Grammaticali ibidem tenend. infra parochiam sancti Salvatoris prædict. pro eruditione puerorum ejusdem parochiæ sumptibus eorum & expensis erexerunt & ædificaverunt, necnon pro fine 20 l. legalis monetæ Angliæ ad receptum Scaccarii nostri, ad usum nostrum per præfatos modo gardianos solut'*, demise the said Rectory to the said *Thomas Norton, &c.* now Wardens of the said Church, from the Feast of the Annunciation of our Lady last past for the term of 50 years; and farther found, that the said Wardens at the time of the making of the said lease for 50 years, surrendred and yielded up the said Letters Patents of 27 *Eliz.* to be cancelled, and then paid to the Officers of the Court of Chancery the Fees for the cancelling of them, and a vacat of the enrolment of them; and that they then were possessed of the residue of the said term of 21 years, [b] [67]

but no Vacat was made of the enrolment of the said Letters Patents; and that the said Defendants and others being Wardens, have entred into the said Rectory by force of the said lease *prædt' tempore quo*; And if the entry of the Defendants and Guardians was lawful or not, was the question.

And this Case was often argued at the Bar in sundry several Terms, and now this Term it was argued by Sir *Ed. Bromley*, Sir *James Altham*, and Sir *George Snigge*, Barons of the Exchequer, and Sir *Laurence Tanfield* Chief Baron: And in this Case three Points were Resolved.

1. That there needeth not any actual surrender in this case, because that these words, *modo habentes & ad præsens possidentes, &c.* prove, That at the time of the making of the said Letters Patents, the Church-wardens of the said Parish had the said term of years in them; and therefore it expresly appeareth, that the King's intent was not that they should make any surrender before the Patent, but that by accepting of the Letters Patents, they having the term then in them, their estate for years should be surrendred. And where the words are *sursum reddiderunt, & restituerunt, &c.* in the Preterperfect tense, it is observed, That the words are, *modo habentes & ad præsens possidentes sursum reddiderunt & restituerunt, &c.* which is true in construction of Law: for in Judgment of Law the surrender doth precede the new lease; and in many cases the Preterperfect tense is put for
[b] the Present tense, as *Dedimus & Concessimus*, for *Damus & Concedimus*, &c. To which surrender in Law the King expresly agreeth by these words, *quam quidem sursum redditionem acceptamus*; and the King is not deceived thereby, nor prejudiced in estate, interest, value, or remedy. And although the lessees were a Corporation aggregate of many, and could not make an express surrender without Deed in Writing under their Seal; yet they might by an act in Law surrender their term without writing, for *fortior & potentior est dispositio legis quam hominis*, as in 37 *H.* 6. 16. If a man hath *interesse termini pro termino annorum* to begin at Michaelmas, he cannot expresly surrender this interest. But if he taketh a new lease for years, this acceptance is a surrender in Law of the first lease. So if a Prior with the consent of his Covent maketh a lease for years rendring rent; If the Prior by deed expresly releaseth the rent and dieth, the successor shall recover the arrerages: but if the Prior had ousted the lessee and died, this discharge in Law should discharge the rent which incurred during the oust against the successor, as it appeareth in 34 *H.* 6. 21.

And this construction and no other stands with the meaning of the Letters Patents. But if two constructions may be made of the Kings grant, then the Rule is, When it may receive two constructions, and by force of one construction the grant according to the Rule of Law may be adjudged good, and by another it shall be taken to be void: then for the Kings honour, and for the benefit of the Subject, such construction shall be made, that the Kings grant do take effect. And therewith agreeth Sis *John Molins* Case in the eighth Part of my Reports.

2. It was Resolved, That the delivery made by the Wardens of the said Letters Patents in Chancery to be cancelled, &c. (which was part of the consideration) by their hands without writing, was sufficient, and as much as they ought to do; and it belongeth to the Lord Chancellor or his Officers to have cancelled them, and every one ought to do what belongeth to him to do.

3. It was Resolved, That the finding of the payment of 20 *l.* needed not be found, which was one of the considerations of the lease; for the same is but a sum of mony in the personalty, and affirmed by the King to be paid and satisfied in time before the Patent, and so personal consideration executed; and therewith expresly agreeth 37 *H.* 8. *Br. Patents* 4.

[68] Note, Reader, I have seen divers Letters Patents made upon like consideration, and having such words, *modo habens & possidens*, and in none of them any actual surrender made. See *Barwicks* Case in the fifth Part of my Reports: and see *Altonwoods* Case in the first Part of my Reports; betwixt which Case and the Case at Bar a difference appeareth.

Mich. 10 Jac. *In the Common Pleas.*

The Case of the Marshalsea.

[b] *Richard Hall* brought an action of Trespass of Assault, Battery, Wounding and False Imprisonment against *William Stanly*, *William Richardson*, and *Roger Cante*, That they 1 *Jan.* 7 *Jac. Regis*, did assault, hurt, wound and imprison, and detained him in prison for the space of three moneths, *&c.* The Defendants as to all the Trespass, but the Assault and Imprisonment, and keeping of him in prison, pleaded Not guilty. And as to the Assault and Imprisonment, *&c.* the said *William Stanley* and *William Richardson* said, That the Court of our Lord the King, called The Court of Marshalsea of the Kings House, is an ancient Court of the King and of his Progenitors Kings of *England*; and that the said Court is holden, and time out of mind was holden, and used to be holden within the verge, *&c.* before the Steward of the Court of Marshalsea, and the Marshal of the Kings house for the time being; and that the same Court time out of mind had Jurisdiction to hold Pleas of Trespass, and Trespass upon the Case done within the said house, and the verge of the said house; and for all the said time within the said Court there were *tam quidem Marisc*all' *Mariscballcie hospitii prædt' quam quidam Officiarius*, called *le Baston*, within the verge of the said house. Which said Steward of the Marshalsea of the Kings house, and the said Officer *de la Baston* for the time being, are, and for al the time aforesaid were Officers and Ministers of the said Court; and that

that all Writs and Precepts are directed, and for all that time were used to be directed to the said Marshal of the Marshalsea; and that the said Marshal of the Marshalsea by himself, and the said Officer *de la Baston*, by his command by word have, and for all the time aforesaid had and used [69] to have the execution and return of all and singular Precepts and Warrants whatsoever issuing out of the said Court directed to the Marshal of the said Marshalsea. And the said *William*, *William* and *Roger* further said, That in the said Court there is, and time out of mind hath been a Custom, That if any person be Defendant in any plea of Trespass depending in the said Court, and was to be bailed, they did prescribe to bail the Defendant. And that the said *William Richardson* before the Trespass, and yet is Marshal of the Marshalsea of the Kings Household; and the said *William Stanley* the Baston. And that the said *Roger Cante* before the Trespass, *sc.* 21 *Jan.* 5 *Jac. Reg.* in the said Court of Marshalsea of the Household, before *Tho. Warre* Esq; the Steward of the said Court, and *Thomas Vavasour* then Marshal of the Household at *Southwark* within the County of *Surrey*, within the verge, *&c.* did there exhibite a Bill against one *Thomas Ownstead* then in the custody of the Marshal of the Marshalsea of the said Household, of a Plea of Trespass upon the Case; and declared, That the said *Thomas* was indebted to the said *Roger* in 80*l.* for divers sums of moneys by the said *Thomas* due to the said *Roger*; and so being indebted the said *Thomas* 1 *Jan.* 5 *Jac. Reg.* at *Islington* within the verge, did assume to pay to the said *Roger* the said 80*l.* upon request, which he hath not paid: Whereupon the said *Thomas* was bailed, and the said *Richard Hall* and one *Richard Petty* became his Bail. To which Declaration the said *Thomas Ownstead* pleaded, That he made no such promise, *&c.* which Issue was tried for the Plaintiff, and Damages and Costs assessed: whereupon the Plaintiff in the same Court had Judgment; and the Plaintiff upon that Judgment did sue forth a Warrant in the nature of a *Capias* against the said *Tho. Ownstead*, directed to the Marshal of the Marshalsea of the Household, who returned *Non est inventus:* whereupon the Plaintiff sued forth a Precept in the nature of a *Capias*, to arrest the body of the said *Tho. Ownstead*, or of the said *Richard Hall* and *Richard Petty*, according to the Custom of the said Court *ad satisfaciend'*, directed to the Marshal of the Marshalsea of the said Household: By force whereof the said Marshal of the Marshalsea by word of mouth commanded the said *William Stanley* to execute the said Writ. By force whereof he did Arrest within the verge, *&c.* the body of the said *Rich. Hall*, and delivered him to the said *William Richardson* Marshal, *&c.* in execution, who detained him in the prison of the Marshalsea at *Southwark* within the verge in Execution. The Plaintiff replied and said, That neither the said *Roger Cante* Plaintiff in the said Plea, nor the said *Thomas Ownstead* Defendant in the said Plea, at the time of the exhibiting of the said Bill, was Servant or Servants of our Lord the King, or of his Household. Upon which the Defendant did demurr in Law. And this [b] Case was often argued at the Bar, and two points were moved.

1. If an Action upon the Case upon Assumpsit for payment of a debt being made within the verge, be within the Jurisdiction of the Court of Marshalsea.

2. Admitting that it be not; Then if the Defendants having the Courts Warrant, shall be punished for a false imprisonment, or not. And much was said by them who were of Counsel with the Court of Marshalsea; for the Antiquity, Honor and Jurisdiction of the Court of Marshalsea: For the Antiquity, that it is as ancient as any of the Kings Courts, as it appeareth in 4 *H.* 6. 8. And diversity of Courts tit. Marshalsea. For the Honor, that *Fleta Lib.* 2. *Cap.* 2. next after the High Court of Parliament, addeth, *Habet & Curiam suam coram Seneschallo suo in aula sua, &c.* And *Britton Cap.* 1. which is in his Book in the Person of the King, beginneth with the Court of Marshalsea before any other, in these words; That the Marshal of Our Household hold our Place within the verge, *&c.* And We Will, That the Earl of *Norfolk* by himself or another Knight, be attendant upon Us and Our Steward, to do Our Commands, and the Attachments and Executions of Our Judgments and of Our Steward through the verge of our Household. In which also observe for the Honor of the Court, That the Judges hold the Kings Place, and that a man of such Dignity as the Earl of *Norfolk*, is attendant to the said Court. And they further said, That this Court was of so high Jurisdiction, that before the Statute of 5 *E.* 3. *cap.* 2. & 10 *E.* 3. *cap.* 2. That no Writ of Error lay of any Judgment there given, but in Parliament: and by the same Statutes their Errors shall be examined and redressed in the Kings Bench. And as it appeareth by *Fleta*, That Court of old time for the greater Honor thereof, was kept *in Aula Regis*, within the Hall of the Kings Honourable Household.

And as to the Jurisdiction, they said, That before the Statute of *Articuli super Chartas*, *cap.* 3. That the Court of Marshalsea had Jurisdiction within the verge of Pleas Crown or Criminal Causes, and of all Common Pleas, Real, Personal and Mixt. And that before the said Statute, the Steward and Marshal of the Kings Household used to hold all the Pleas beforesaid within the verge, although that none of the parties were of the Kings Household. And now the said Act hath restrained them to three actions onely, *sc.* Contracts, Covenants and Trespasses; and that in three distinct manners. 1. In Contracts and Covenants, when both are of the Household. 2. In Trespass, when one or other party is of the Household. 3. Of other Trespasses done within the verge, when [70] none of the parties are of the Household. And that stands with the words of the Act, *sc.* but onely of Trespass of the Household, and of other Trespasses done within the verge. And the Contracts and Covenants which any of the Kings Household hath made to another of the same Household; so that by expres words they have power not onely of Trespass of the Household, but also of other Trespasses within the verge. And that the later words, (Which any of the Household, *&c.* have done to another of the same Household) shall have relation onely to Contracts and Covenants, and not to the clause concerning Trespasses: for then these words (And of other Trespass done within the verge) are void: For it speaketh first of Trespass of the Household, and then in the

latter clause shall have relation to the clause of Trespass, the same clause (And of other Trespasses done within the verge) shall be void, *& glossa viperina est quæ corrodit vicera textus.* And they strongly relied upon an Act of Parliament made within two years after the said Act of 28 E. 1. *sc. anno* 30 E. 1. not printed, but remaining in the Treasury, which is a good exposition of the said former Act. By which it is enacted, That where before the Steward and Marshal, the Court being many times near the City of *London*, some Enquests are taken of Trespass, and other things done within the said City, betwixt some of the same City onely, and betwixt them and Forreigners jointly, or betwixt Forreigners; Of which Trespasses and other things, the conusans, by reason of the verge, doth appertain to the Steward and Marshal, that all such Enquests shall be taken in *London*, and not elsewhere. Upon which it was inferred, That of all Trespasses within the verge betwixt what persons soever, the conusans doth appertain to the Steward and Marshal of the Household, which is an Exposition by the High Court of Parliament, *& contemporanea expositio est fortissima in lege:* So that as well before the Statute of 28 E. 1. as by the words of the Statute, and by the Act of 30 E. 1. the Steward and Marshal of the Household have Jurisdiction to determine all pleas of Trespass betwixt any persons whatsoever. And they cited also the Statutes of 5 E. 3. *cap.* 2. and 10 E. 3. *cap.* 3. by which it appeareth, That the Court hath not Jurisdiction onely of Trespasses of the Houshold, but also of other Trespasses. And they held that this word (Trespass) shall be extended beneficially for the Jurisdiction of the said Court, because their old Jurisdiction was so much restrained by the said Act. And therefore they conceived, That all actions, the entry whereof is *in placito transgressionis, &c.* shall be within this word (Trespass.) And there-
[b] fore pleas of *Ejectione firmæ, Trespass quare clausum fregit*, of goods imported, Assault, Battery, Wounding, Trespasses upon the Case, upon Trover and Assumpsit, and other Trespasses upon the Case, shall be taken within this word (Trespass) and the Jurisdiction thereof doth appertain to the Steward and Marshal of the Kings Houshold. And they concluded, That infinite Presidents might be shewed at all times after the making of the said Act of 28 E. 1. That they have holden pleas of Trespass, as well upon the Case as other within the verge, although that none of the parties were of the Kings Houshold, *& optimus legum interpres consuetudo.*

And as to the other Point, admitting that the Court hath not Jurisdiction of the cause, yet the proceeding in it (being a Court of Record) is not void, but voidable by Writ of Error. Also the Marshal of the Marshalsea of the Houshold, and the Officer of the Baston, are Officers and Ministers of the Court, and and it shall be against reason to punish them for the executing of the Precept and Warrant of the Court, when if they had refused, the Court would have punished them for their disobedience. And therefore the Rule is, *Quicunq; justu judicis aliquid fecerit, non videtur dolo malo fecisse, quia parere necesse est.* And in 26 E. 3. 70. there it is taken for a Maxim, That the thing which an Officer doth by Warrant or Command of a Court, cannot be against the peace. And *Doctor and Student* 150. the Kings Officers are bounden to execute the Kings Writs at their perils. And they cited and strongly urged the Book in 7 E. 3. 23 & 24. where *Alice* brought an Action of Trespass against one *William*, of false Imprisonment: The Defendant said, That before the Imprisonment it was commanded in the Marshalsea, That if no feme sued the Houshold of our Lord the King, she should be taken and imprisoned: and this *Alice* sued the Houshold of the King; and that *John Claydon* then Marshal commanded the said *William* the Goaler to Arrest her, for which he by his commandment did Arrest her, and for such cause, and we do not conceive that she can assign any wrong done by us. And there the Rule of the Book is, That *William* the Defendant did no wrong, whether the cause were allowable or not; for it behoveth that he be obedient to his Master, but alwayes the Goaler ought to receive whosoever is sent to him by his Master, whether the cause were allowable or not. And there issue was taken, whether the Defendant had the Plaintiff of the delivery of the Marshal. So in the Case at Bar, the Officers of the Court are not to dispute their Authority, but ought to be obedient, and execute the Warrants and Commands of the Judges of the
[71] Court. And upon this ground are the Books in 8 E. 3. 38. 17 E. 3. 66. 19 E. 3. *Quare non admisit* 7. *Plo. Com. Morgan's* Case 12, 13. 7 H. 4. 27. 11 H. 4. 35. 9 H. 6. 20. 2 R. 3. 10. 21 H. 7. 22. 14 H. 8. 16. *Vid. temps* E. 1. *Assise* 402. 32 E. 1. *ibidem* 378. 17 E. 2. *Ass.* 373. 19 E. 2. *Scire facias* 12. 31 *Ass.* 19. 10 E. 3. 47. 14 H. 4. 24. 21 E. 4. 66. 21 H. 6. 36. 21 H. 6. *Trespass* 50.

But upon solemn Argument at the Bar, it was Resolved, That Judgment should be given against the Defendants.

And as to the first point, it was devided into five parts. 1. What Jurisdiction the Court of Marshalsea had at the Common Law before the Act of *Articuli super Chartas, anno* 28 E. 1. and therein the extent of their Jurisdiction was considered; *sc.* 1. In what actions the Court had Jurisdiction. 2. To what place their Jurisdiction is circumscribed, and to what persons their Jurisdiction did extend.

2. The Reasons wherefore the Common Law gave them as Judges of the Court of Marshalsea, such particular and limited Jurisdiction.

3. Consideration was had of the Act of *Articuli super Chartas*; and therein three points were discussed: 1. Wherefore this Act was called *Articuli super Chartas.* 2. What manner of Act it was, whether Introductory of a new Law, or Declaratory of an old. 3. The several parts of the Act were considered.

4. The Authorities of Law in all successions of ages after the said Act.

5. The nature of this action upon the case.

As to the first, it is to know, That the Steward and Marshal of the Kings Household, had before the said Act two distinct Authorities; one, they had such general Authority in effect as Justices in *Eyre* had, for they were the Vicegerents in part of the Chief Justice of *England* within the verge:

verge: Also the Steward and Marshal had another Authority, *sc.* to hold the Court of Marshalsea, the Title of which was, *Placita Coronæ Aulæ hospitii Domini Regis coram Seneschallo & Mariscallo.* By force of their first Authority, they might hold all manner of Pleas of the Crown, and of Common Pleas, as well real and mixt, as personal. And the same appeareth by divers ancient Precepts of Summons which they used to direct to Sheriffs, *&c.* to cause to come before them all Pleas, *&c.* the form of which was such; *Robertus filius Johannis miles, Seneschallus hospitii domini Regis Vic. S. salutem: Mandamus quod venire fac. coram nobis tali die ubicunque; dominus Rex tunc fuerit in ballivâ tuâ omnes Assisas novæ disseisinæ, mortis antecessoris, ultimæ præsentat', magnas Assisas, & omnes juratas, inquisitiones & attinctas, & omnia placit. de dote. Unde mulieres nihil habent & quæ summ. sunt coram Justic. Regis ad primas Assisas cum in partes illas venerint, immo & omnes Assisas illas & placita illa, juratas, inquisitiones & attinctas illas quæ coram Justic. Regis ad Assisas capiendas in ballivâ vestrâ assignatis fuerint attamiatæ & non finitæ. Et partibus diem illum præfigatis quod tunc sint ibi Assisas illas, & placita illa, juratas & inquisitiones & attinctas illas in eodem statu quo remanserunt coram præfat. Justic. prosecut. si voluerint. Venire etiam fac. coram nobis dictis die & loco, omnes prisones & manucaptos de ballivâ vestrâ, & omnia attachiamenta quæ pertinent ad goalam deliberandum. Fac. etiam proclamari & sciri per totam ballivam vestram quod omnes liberi & quatuor homines & præpositus de villatis quar. interfuerit quod tunc sint ad deliberationem prædictam. Et habeat. ibi Recognitores, nomina Pleg', Summ. & hoc breve.* [b]

And that they have such general Authority, appeareth in *Fleta*, who wrote before the said Act of 28 E. 1. *Lib. 2. Cap. 2. Habet & Rex Curiam suam coram Seneschallo suo in Aula sua, qui jam tenet locum Capitalis Justiciarii Regis (de quo fit mentio in communi brevi de Hom. repl.) qui proprias causas Regis terminari consuevit, & falsum judicium ad veritatem revocare, & conquerentibus absque brevi justitiam exhibere; cujus vices gerit in parte idem Seneschallus hospitii Regis, cujus interest de omnibus actionibus contra pacem infra metas hospitii, &c. recenter illatis & sine brevi, &c. additis quæremoniis injuriarum in aula regis audire & terminare assumpt. sibi camerar. hostiar', vel Mariscallo aulæ, militibus, vel aliquibus eorum, si omnes interesse non possunt. Et cap. 3. Habet Seneschallus ex virtute officii sui prædictam potestatem procedendi ad utlagationes & bella injungendi, & omnia & singula faciend. quæ ad Justiciarios itinerantes, prout superius dictum est, pertinent faciend', hoc tantum excepto quod de libero tenemento intromittere non debet sine brevi.* And there it appeareth, That the Steward, *&c.* held this Court in *Aula Regis*; and what authority Justices in *Eyre* had to hold Pleas of the Crown, and all common Pleas real, mixt and personal, you may see in the *Miror of Justices, Cap. 2. Sect. 3.* where it is said, The Kings do right unto all by their Justices Commissaries errants assigned to all pleas. *Vide* the Statute of *West. 2. cap. 11. Bracton lib. 3. cap. 7. fo. 105, &c. & 11. Britton cap. 1. 6 E. 2. Assise 496. 4 E. 3. 41, 42. 6 E. 3. 55. 27 Ass. p. 1. 15 H. 7. 5. b.* And it is to be observed, That he who is prisoner to the Kings Bench, is *in custodia Marescballi Marescbalcie domini Regis*; and he who is prisoner to the Marshalsea, is *in custodia Marescballi Marescbalciæ hospitii domini Regis.* And thereby also it appeareth, That the Steward, *&c. vices gerebat capitalis Justiciarii.* And therewith agreeth *Britton cap. 1.* who wrote in 5 E. 1. which is before the Statute of *Articuli super Chartas*; and that the Marshal of our Household hold our pleas within the verge of our Household, and that his Office extendeth it self to hear and determine the Presentments and Charters of our Crown when we shall see it good. And note, That these Charters were those which Justices in *Eyre* charged the Jury to enquire of, as it appeareth in *Bracton, Lib. 3. Tract. 2. Cap. 1. fol. 116.* And therewith agreeth the *Mirror of Justices*, which Book was also written before the said Act of 28 E. 1. To the Offices of the Chief Justices belong *les torciousnes des Judgments & Errors, &c.* and so belongeth it to their Office to hear and determine all plaints made of personal wrongs within twelve miles of the Kings Tonnel, and of Goal-delivery of prisoners deliverable, and to determine as much as is to be determined by Justices Itinerants. And also *Bracton* saith (who wrote also before the said Act) *Lib. de Actionibus, Cap. 7. fol. 105. Habet Rex plures Curias in quibus diversæ actiones terminantur, & illarum curam habet unam propriam sicut aulam Regiam, & Justiciar. Capitales qui proprias causas Regis terminant, & aliorum omnium, per querelam, vel per privilegium, vel per libertatem.* [72]

As to the other Authority, the Steward and Marshal are Judges of the Marshalsea of the Kings Household, and this Court at the Common Law hath a particular and limited Jurisdiction.

1. In respect of the causes; for they as Judges of this Court had not Jurisdiction but of Pleas of the Crown, and of three particular common Pleas, *sc.* Pleas of Debt, Covenant and Trespas, *vi & armis*, as of Battery, goods imported, but not of Trespas *Quare clausum fregit, Ejectione firmæ*, Action upon the Case, *Detinue*, nor any other personal action, nor of any real or mixt action.

2. In respect of the persons; for in Debt and Covenant both the parties ought to be of the Household. And the same also appeareth by *Fleta lib. 2. cap. 3. Si autem de aliquo familiari Regis* (that is, any of the Kings Household) *fiat queremonia, primo Summoneatur, 2. Attachietur. 3. Capiatur, &c.* By which it appeareth, That the Trespas ought to be *vi & armis*, and not upon the Case, otherwise a *Capias* lay not at the Common Law; and also that it sufficed if one of the parties were of the Kings Household. But forasmuch as the Steward and Marshal had at the Common Law these Authorities, the one general, and the other particular, and both Courts then holden in *aula Regis*; and that they had the general Authority but at will, and had a fixed estate for their lives in the other, they drew to their Court of the Marshalsea by colour of the general Authority many causes which by the Law appertained not to the Jurisdiction of the said Court. [b]

3. In respect of the place to which their Jurisdiction was circumscribed. And that appeareth by *Fleta lib. 2. cap. 2. Infra metas hospitii continentes 12. leucas in circuitu*, and the *Mirror of Justices* before. And that was the Law before the Statute of 13 R. 2. *cap. 3.* but the same limiteth the 12 miles

to be accounted about the Tonnel of our Sovereign Lord the King. And the Lord and Marſhal being ſo reſtrained, they invented divers means and devices to enlarge their Juriſdiction, and to encroach upon the Common Law; and therefore if in the obligation or Covenant, *&c.* mention was made of diſtreſs of the Steward or Marſhal of the Kings Houſhold, or one of them, they uſed to hold plea thereof, although the Obligation or Covenant were made out of the verge. And alſo they uſed to hold conuſans of Debts and other things, where the parties were not of the Kings Houſhold. And the ſame appeareth alſo by *Fleta lib. 2. cap. 3. Tunc demum de obligationibus & contractibus, in quibus debitores ad diſtrictionem Seneſchalli & Mareſchalli domini Regis ſponte ſe obligaverint. Et paulo poſt. Et nota quod in obligatione omni in qua fit mentio de diſtrictione Seneſchalli & Mareſchalli hoſpitii Regis vel eorum alterius tantum, audit. ſunt parties, & loquela terminata ſine brevi ubicunque ſe contraxerint infra virgatam vel extra coram ſen. niſi loquela liber. tnagat ten. ejus vel pertinent'. Nec obſtabit petenti ex. de contractu facto extra virgatam, ut inter placita Petri de Chamnet, anno regis regni Ed. 18. inter Henr. de Wotton petentem, & Ranulfum Foleſchanks obligat. præfat. H. in neceſſariis pro victu & veſtitis & hujuſmodi ad valenc. 20 li. per ann. ſuo perpetuo inveniend. pro quad. terra in D. & quadam halliva in S. & unde idem R. obligavit ſe in Lond. diſtrictioni Sen. & Mar. Regis anno 15. Regis tunc exiſtente in Vaſcon'. Cui execution. de novo infra virgatam non allocata, petiit judicium ſi de libero ten. vel ejus pertin. debuit ſine brevi Regis reſpondere, cum idem H. petiit certum redditum ad terminum vitæ ſuæ: Et quia voluit ſic obligari, nec volenti & ſcienti fit injuria, conſiderat. fuit per pl'es. Juſtic. qui aderant, ex quo neceſſaria illa proveniebant tanquam de Camera & non de loco certo de quo potuit viſus fieri, quod executio prædicta locum non haberet, & quod aliud diceret & reſponderet, vel pro indefenſo & convicto haberetur.* Another invention to encreaſe their Juriſdiction, was, That although that none of the parties were of the Houſhold, yet they would name themſelves in the plea and count of the Kings Houſe, and ſo as they conveived, to ſtop the party to
[74] contradict it. But to conclude this point, it appeareth to you, good Reader, needfull to know what the Law was before the Statute of 28 E. 1. the Authority of the ſaid ancient Books of *Bracton, Britton*, and the *Mirror of the Juſtices*, are very neceſſary; and although perhaps one may know the Law upon the old Statutes, yet they ſhall never know the true reaſon of the Interpretation of them, if they know not what the Law was before the making of them: and there it is true, *Quod multa ignoramus quæ nobis non lateret ſi veterum lectio fuit nobis familiaris.*

As to the ſecond Point, the ancient ſtyle of the Court of the Marſhalſea was, *Placita Coronæ aulæ hoſpitii Domini Regis tenta coram, &c.* by which words *aulæ hoſpitii*, is proved, that at leaſt one of the parties ought to be of the Kings Houſhold: For how can the words be *aulæ hoſpitii domini Regis*, when none of the parties is of the Kings Houſhold? And it was obſerved, That thoſe of the Kings Houſhold are *Aulici*, and that is the reaſon that in Suits there before the Steward and Marſhal, it need not be alledged that the Plaintiff or Defendant was of the Kings Houſhold, for the ſtyle of the Court, as appeareth by many Authorities, doth imply it. The ſecond reaſon is becauſe the proceedings in the ſame Court is by Bill in reſpect of the priviledges of the parties, and not by original; and the Court of Kings Bench cannot hold any Common plea by Bill without priveledge of the Court. The third reaſon, That the ſervice and attendance of the Kings ſervants was ſo requiſite and neceſſary to the King, that the pleas in the ſaid Court ſhould be alwayes rather diſcontinued by his remove out of the verge, then he ſhall loſe the attendance of his ſervants: and if they may hold pleas betwixt forraigners, what reaſon is there that the pleas ſhould be diſcontinued by the Kings remove? And why ſhall the Judges of the Kings Houſhold decide the cauſes, when none of the parties is of the Houſhold? *Juriſdictio eſt poteſtas de publico introducta cum neceſſitate juriſdicendi.* And the ſame well agreeth when the parties are of the Houſhold for the neceſſity of the Kings ſervice, but not when none of the parties are of the Houſhold. In *Mich.* 42 & 43 *Eliz.* in the Kings Bench, *Hall* brought a Writ of Error againſt *Jones* of a Judgment given in the Court of Pipowders of the Market in the City of *Glouceſter*, for *Jones* Regiſter of the Biſhop of *Glouceſter*, becauſe that *Hall* had publiſhed ſlanderous words of him, *ſc.* That Mr. *Jones* and his Clerks have by colour of his Office extorted and gotten 300 *l. per ann.* by unlawfull means for many years together, above their ordinary fees, for proving of Teſtaments, and granting of Adminiſtrations. And the Judgment was reverſed for two Errors: 1. Becauſe the ſaid words did not concern any thing touching the Market, and therefore the Court had not juriſdiction of it: But if one ſlander any
[b] one who cometh into the Market, in any thing which concerneth his Trade, an action lieth by him. 2. It appeareth in the Declaration, That the words were ſpoken before the Market, and not within the Market: For as the Court hath not juriſdiction but for things concerning the Market; ſo it hath not Juriſdiction for matters concerning the Market, if they be not done in the Market. *Vide 2 & 3 Phil. & Mar. Dyer* 132. *Vid. Bracton* 334. 13 E. 4. 8. 7 H. 6. 19. 13 H. 7. 19. the Statute of 27 H. 6. *cap.* 5. 17 E. 4. *cap.* 2. and 1 R. 3. 6. by like reaſon, it ſhall be againſt reaſon that pleas ſhall be *coram Seneſchallo & Mariſchallo hoſpitii domini regis*, of a thing which doth not concern any of the Houſhold. The fourth Reaſon, *ex congruo*, it ſhall not be comely that any Carman or other Mechanical perſon ſhall ſue another in the ſame Court, and draw them in *aulam Regis*, where the Court was originally holden, for they have not *veſtimenta aulica*; and therefore it is recorded by St. *Luke* the Evangeliſt, *cap. 7. ver. 27. Dixit ad turbam, quid exiſtiis videre hominem mollibus veſtimentis indutum? Ecce qui in veſte ſpecioſa ſunt & in deliciis agunt, in domibus regum ſunt.* And the Common Law doth regard conveniency, and doth not allow any thing which is undecent, nor that which is againſt good manners. 5. At the ſame Parliament, *ſc. anno* 28 E. 1. *cap.* 5. it was Enacted, The Chancellor and Juſtices of his Bench ſhall follow him, ſo that he may have at all times near him ſome that be learned in the Law, which be able duly to order all ſuch matters as ſhall come to the Court at all times when need ſhall require. And it appeareth by divers Records ſubſequent,

That

That the Chancellor and the Judges had their purveyors, &c. and that accordingly Purveyance was made for them; as it appeareth in *Rot. Pat.* 10 E. 2. *parte* 2. *Membr.* 20. & 2 E. 3. *parte* 1. *Membr.* 33. till 4 E. 3. at which time the Court of Kings Bench became Resident, and all the Pleas there being *coram Rege.* And by the Act of 4 E. 3. it was prohibited, That no Purveyance should be taken great or small, but onely that the Purveyors of the King, Queen, and their Children, take not corn, &c. But by the said Act of 28 E. 1. the general Authority of the Steward did vanish, inasmuch as having regard to the same, they were but the Vicegerents of the Cheif Justice, when he himself was present, *in præsentia majoris cessat potestas minoris*, and yet under colour of their former general Authority, they encroached much upon the Common Law. And it was observed, That after the making of this Act, that the Court of Marshalsea of the Kings house hath not holden any Pleas of the Crown, because the Justices of the Kings Bench were to follow the King; and therefore they have used to hear and determine Pleas of the Crown within the verge by force of a Commission of *Oyer* and *Terminer*, in the Vacation time, for in the Term time when the Kings Bench doth sit, all Commissions cease. *Vide Katherine Wrote's* Case in the fourth Part of my *Reports.* 6. The reason why this Court was limited to these three Actions, was, because that one [74] of the Houshold who liveth of his Salary or Pension, oftentimes hath occasions to borrow moneys, and to make Covenants with others of the same Houshold, for apparell and other necessaries; and for Trespass *vi & armis*, as Battery, carrying away of goods, &c. they have Jurisdiction for the preservation of the peace, as before is said, 7. The reason wherefore the bounds of the Marshalsea are called the verge, and that his Jurisdiction is confined within the verge; is, because the Marshal *portat virgam (quæ significat pacem) coram Rege per spatium* 12 *leucarum*, &c. *& de virga prædict. dicitur virgata*, and beyond that the Steward and Marshal have not any Jurisdiction, as appeareth in *Fleta lib.* 2. *cap.* 4.

As to the third point, *sc.* The consideration touching the Act of *Articuli super Chartas*, It was Resolved, That *Articuli super Chartas*, is as much as to say, *Explanationes super Chartas*; and the *Chartas* here mentioned, are the Great Charter, and the Charter of the Forrest, and so it appeareth by the Preamble. Because that the points of the Great Charter of Liberties, and of the Forrest, &c. and in *Pierce de Saltmarsh's* Case, the Book saith, That *Herle* chief Justice in 6 E. 3. 33. made to be read the Explanations upon the Charters, *sc.* the 11 Chapter of *Champerty:* By which it appeareth, That *Articuli* in this Case doth signifie *Explanationes*; and some say, *quod dicuntur Articuli quia arctant ad obedientiam:* But then it will be asked in what part of the *Magna Charta* may any thing be found concerning the Court of Marshalsea? To that it was answered, That the 29 Chapter of *Magna Charta*, doth extend to the same; for there it is enacted, *Quod nullus liber capiatur, vel imprisonetur, aut disseisietur de liber. ten'to suo, vel de libertatibus, vel liber. consuetudinibus suis, aut utlagetur, aut exuletur, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus nisi per legale judic. parium suorum aut per legem terræ.* By which Act every arrest or imprisonment, and every oppression against Law is forbidden. Then, if any against the Law do usurp any Jurisdiction, and by colour thereof arrest and imprison a man; or in any manner by colour of an usurped Authority oppress any man (which is a manner of destruction) against Law, he may be punished by that Statute. And because the Steward and Marshal of the Court of Marshalsea had encroached to them Jurisdiction in divers causes which did not belong to them, and by colour thereof awarded Precepts sometimes to arrest the body of the Defendant, and sometimes by colour of Execution to sell the goods and chattels of the Defendant against Law, which is an oppression by colour of Justice, and a manner of destruction, for this cause this third Chapter was enacted for Explanation of the said Great Charter, as to the Jurisdiction of the said Court of Marshalsea. So that this Act of *Articuli super Chartas*, is not Introductory of a new Law, but an Explana- [b] tion of the Great Charter, which was declaratory of the old Law of *England.* But it appeareth also by this third Chapter, the parts whereof are now to be considered. This Chapter concerning the Court of Marshalsea is divided into two general parts. 1. Into the Preamble. 2. Into the Body of the Act. In the Preamble three things are propounded, to be remedied by the Body of the Act. 1. Of the estates of the Stewards and Marshals, that is, concerning their Jurisdiction by force of their offices in which they have estates, *sc.* for their lives within the Court of Marshalsea. 2. Of the pleas which they ought to hold, by which it appeareth that this Chapter was declaratory, for the intent of this Chapter was to reduce the Court of Marshalsea to its true and lawful Jurisdiction, the which this word (*ought*) doth import. And therefore this Act doth make demonstration what pleas they ought to hold, which well agreeth with the title *Articuli super Chartas*, and with the Book of 6 E. 3. the Explanations of the Charters, that is, of the Common Law. The 3. is, how they ought to hold their pleas. The Body of the Act doth pursue the parts of the Preamble; and first of all the purview thereof doth extend onely to the Court of Marshalsea of the Kings house. As to the pleas which they ought to hold, the body of the Act hath made declaration of three points: 1. Of the Causes. 2. Of the Persons. 3. Of the Place. For the causes, the purview of the Act is in the Negative, in part absolutely, and in part with an exclusion. It is ordained from henceforth, That they hold not plea of Freehold; and that is absolute: nor of Debt, nor of Covenant of the people; but the same is with exclusion, first to the causes, but onely of Trespass done within the Kings house, and of other Trespass done within the verge, and of Contracts and Covenants: So that these words (*but onely, &c.*) do reduce, as to the causes, the Jurisdiction of the Court to its original Institution, *sc.* to actions of Trespass, Debt and Covenant, and all other pleas are excluded. As to the persons, If this Act had not made any particular declaration, as appeareth before, they ought to have had the priviledge of the house, *sc.* in Trespass, where both, or at least one be of the House; and in case of Debt and Covenant, where both are

of the House, and of that also this Chapter hath made express declaration. And the Expolition in *Michelborn*'s Case in the sixth Part of my *Reports* was affirmed for Law. And see there an Act passed both Houses of Parliament, *anno* 1 *R.* 2. and see *inter petitiones Parliamenti*, *anno* 1 *E.* 3. *London* 10. That there the Steward and Marshal, after the said Act, did encroach to them to hold other pleas than of Trespass, Debt and Covenant. As to the place, the Statute hath restrained the same to the verge onely; and because that by colour of certain inventions of the Steward and Marshal to increase his Jurisdiction, as to Pleas, persons and precinct, this Statute hath enacted, That from henceforth the Steward hold not Plea of Debt or other thing, but between the people of
[75] the Household, so that the voluntary holding Plea of Debts before the Steward and Marshal by Forreigners, gave not to the Court any Jurisdiction, but the same was ousted by this Act as an unjust encroachment upon the Common Law. And also it is further enacted, That they shall hold no Plea by Obligation made at the distress of the Steward or of the Marshal; by colour of which, as it appeareth before, they encroached Jurisdiction not onely when the parties had not any priviledge, but also of causes which did not belong to their Jurisdiction, and those also made out of the verge, as appeareth by that which *Fleta* hath before reported, who hath well expressed the true cause and sense of the two last Branches, which of themselves were full of obscurity. As to the third part of the Preamble, *sc. How*, *&c.* the body of the Act hath three branches: 1. That they shall plead no Plea of Trespass, except the party were attached by them. 2. And they shall then plead speedily from day to day, so that they may be pleaded and determined before that the King depart out of the bounds of the same verge where the Trespass was done. 3. And if so it chance, that they cannot be determined within the Lines of the same verge, Then the same Pleas shall cease before the Steward, and the matters be determinable at the Common Law. And it was observed, That although the Steward and the Marshal are both Judges, yet in this last clause, as many in *Fleta*, the Steward was onely named, because he was the Lawyer, and therefore had the direction of the Court. And the conclusion of the body of the Act, as to three points, is, And if the Steward or the Marshal do any thing against this Ordinance, it shall be holden as void. And this Act was of so great profit and consequence, that by the Act of Parliament *anno* 18 *E.* 3. *cap.* 7. it is enacted and commanded to be put in execution.

And as to Authorities in Law, they are copious, and of four several natures. 1. The Year-books. 2. Books written of the Laws of *England*. 3. Judgments in Parliament: and all these are *Thesauri aperti*. 4. Judicial Records and Presidents: and these are *Thesauri absconditi*. And for direct Authority in the point in the Year-books, *vid.* 6 *R.* 2. Action upon the Statute *pl. ult.* 3 *H.* 6. *Estoppell* 18. Action upon the Statute, 13 *H.* 6. 30. 10 *H.* 6. 13. 14 *H.* 6. 6. *l.* 5 *E.* 4. 129. 19 *E.* 4. 8. *b.* 20 *E.* 4. 16. 22 *E.* 4. 16. 22 *E.* 4. 31. *Vid.* 48 *E.* 3. 17. *b.* and *Register Original* 111. the plaintiff shall never aver, *&c.* that the one or other party is of the Houshold for the cause aforesaid. *Register Original* 185. *inter brevia de Statuto*, *Rex Seneschallo & Mareschallo hospitii sui salutem* (and reciteth the said Chapter of the Statute) *& etiam ex gravi querela A. de B. accepimus, quod*
[b] *vos ad sectam R. ipsos ad respondendum coram vobis præfat. R. de quadam transgressione*, &c. *infra virgam nostram apud B. quanquam neuter eorum de eodem hospitio existat*, &c. *vobis mandamus quod si ita est, tunc placito illo coram vobis ulterius tenend. supersedeat. omnino ipsum B. contr. formam ordinationis præd. non molestant. in aliquo, seu gravant'.* Which Writ being formed upon the said Statute, and presently after the making of it, is a manifest proof, that the said Court of Marshalsea cannot hold plea in Trespass within the verge, if none of the parties be of the Kings house. And it is to be observed, That where any Statute doth forbid any thing, a man may have a *Supersedeas* in the nature of a *Prohibition* to any Judge who holdeth plea against any Statute; and this appeareth in many cases in the Register *inter brevia de Statuto*. And also it is to be observed, That when any Statute doth forbid any thing, *&c.* If any one impleadeth another, although it be in the course of a legal proceeding, yet the party grieved shall have his Action upon the Statute against the party who sueth against the Statute, although the words of the Statute do not give any action to the party, but the same is a consequent, and a thing implied in every thing forbidden by any Statute. And this appeareth by the said Book of 7 *H.* 6. 30, 31. where the party grieved hath an action upon this Statute; and 4 *E.* 4. 37. an action upon the Statute of 2 *H.* 5. *cap.* 7. for not delivering of the Libel. The Tales or *novæ Narrationes*, *fo.* 102. a Book cited and approved in 39 *H.* 6. The Diversity of Courts 102. *F. N. B.* 241. *b.* A man shall have averment in an an action brought against him in the Court of the Steward and Marshal, That he was not of the Kings Houshold at the time of the Trespass or Contract made; or that the Plaintiff was not of the Houshold, *vide Stanford lib. cap.* 5. And this point is Resolved by Parliament in 15 *H.* 6. *cap.* 1. where it is recited, That the Steward and Marshal of the Kings house and their Deputies, have holden pleas of Debt, Detinue, and other personal pleas betwixt people which were not of the same house, making mention in their Records, that the Plaintiffs and Defendants were of the same house, and do not allow to the parties Defendants their challenges and exceptions by them alledged, that themselves or the Plaintiff are not of the same house, against the Laws and Statutes in those cases made; provideth, That they shall not be estopped by such Record, *&c.* but that the Defendants have the averment to say, That they or the said Plaintiffs were not of the same houshold, at the time of such plea or suit commenced, the said Record or other matter within the same notwithstanding. By which Act the said invention to in-
[76] crease their jurisdiction was taken away, which was but a declaration of the Common Law, as appeareth by the said Book of 3 *H.* 6. *Estoppel* 18. and 10 *H.* 6. 13. See the said Acts of 30 *E.* 1. 1 *E.* 3. 1 *R.* 2. 5 *E.* 3. 10 *E.* 3. and 33 *H.* 6. *cap.* 12. And it was observed, that every Act made concerning the Marshalsea, doth either restrain or explain their Jurisdicton, and no Act doth add any thing to it.

As

As to judicial words, It appeareth in *Paſc.* 38 *E.* 3. in the Treaſury *coram Rege*, That judgment given in the Marſhalſea in an action of Detinue, was reverſed in the Kings Bench, becauſe they had no power to hold plea in ſuch action; and therefore in the Statute of 25 *H.* 6. in the Preamble, the action of Detinue is ill recited.

In the Book of Entries 278 & 128. *Conuſans* 7. and 32 *H.* 6. *Purchaſe*'s Caſe cited in *Michelborn*'s Caſe, which ſee there to be adjudged in the point.

As to the nature of the Action, It was Reſolved, That as well the Common Law, as the ſaid Act of 28 *E.* 1. did extend onely to Treſpaſs *ſimpliciter*, and not to Treſpaſs *ſecundum quid*, *ſc.* upon the Caſe; for theſe are not actions of Treſpaſs without addition, no more than they can hold plea in an action of Treſpaſs upon Trover, or Bailment and Converſion, or the like, but onely of Treſpaſs *ſimpliciter*, *vi & armis*; and alſo of ſuch Treſpaſs in which any Freehold cannot come in debate, as is aforeſaid; And according to this Reſolution it was adjudged in the Kings Bench, *Hill.* 5 *Jac. Reg. Rot.* 876. in *Jeremy Gray*'s Caſe, That Judgment given in the Court of Maſhalſea in an action upon the Caſe upon Trover and Converſion, was reverſed, becauſe the Statute doth not extend to Treſpaſs upon the Caſe; and therewith alſo agreeth *Michelborn*'s Caſe. But although that this action of Aſſumpſit upon general conſideration, *quod indebitatus exiſtit*, be againſt the Law, as appeareth in *Slade*'s Caſe in the fourth Part of my *Reports*, yet if they had Juriſdiction of the cauſe, their proceding therein was not void, but voidable by Writ of Error. But thereof ſhall be ſaid at large in the diſcuſſion of the ſecond point, which now followeth.

2. It was Reſolved, That the action well lieth againſt the Defendants: and difference was taken when a Court hath Juriſdiction of the cauſe, and proceedeth *inverſo ordine*, or erroneouſly, there the party who ſueth, or the Officer or Miniſter of the Court who executeth the Precept or Proces of the Court, no action lieth againſt them. But when the Court hath not Juriſdiction of the cauſe, there the whole proceeding is *coram non Judice*, and actions lie againſt them without any regard of the Precept or Proces. And therefore the ſaid Rule cited by the other ſide, *ſc. Qui juſſu judicis aliquod fecerit* (but when he hath not Juriſdiction, *non eſt judex*) *non videtur dolo malo feciſſe, quia parer. neceſſe eſt*, was well approved; but it is not of neceſſity to obey him who is not Judge of the cauſe, no more than it is a meer ſtranger. For the Rule is, *Judicium à non ſuo judice datum nullius eſt momenti.* And the ſame fully appeareth in our Books. And therefore in the Caſe betwixt *Bowſer* and *Collins* in 22 *E.* 4. 33. there *Piggot* ſaith, That if the Court hath not power and authority, then their proceeding is *coram non judice*: As if the Court of Common Pleas hold plea in an Appeal of Death, Robbery, or any other Appeal, and the Defendant is attainted, it is *coram non judice*, which all the Judges agreed. But if the Court of Common Pleas in a plea of Debt doth award a *Capias* againſt a Duke, Earl, *&c.* which by the Law doth not lie againſt them, and the ſame appeareth in the Writ it ſelf; yet if the Sheriff arreſt them by force of the *Capias*, although that the Writ be againſt Law, notwithſtanding, inaſmuch as the Court hath Juriſdiction of the cauſe, the Sheriff is excuſed. And therewith agreeth 38 *H.* 8. *Dyer* 60. *b.* The ſame Law, If a Juſtice of Peace maketh a Warrant to arreſt one for Felony who is not indicted, although that the Juſtice erre in the Warrant, yet he who maketh the arreſt by force of this Warrant, ſhall not be puniſhed by Writ for falſe Impriſonment, becauſe that he is Judge of the cauſe; and therewith agreeth 14 *H.* 8. 16. But if one be indicted before Juſtices of Peace and confeſſeth the Felony, and hath a Coroner, and becometh an Approver, and maketh an Appeal, ſuch Appeal before the King was adjudged void, as it appeareth in 9 *H.* 4. 1. and 2 *H.* 4. 19. See 44 *E.* 3. 44. and the reaſon of this Caſe (as ſome ſuppoſe) is, becauſe that the Commiſſion of Peace extendeth onely *ad inquirendum* (*ſc.* to inquire before them) *audiendum & terminandum*; and ſo the appeal of the Approver is out of their Commiſſion, becauſe that the Approver doth not make his appeal before the Juſtices, but before the Coroner, and the Coroner recordeth the ſame to the Court. But the reaſon which is given in 9 *E.* 4. 1. is, that the Juſtices of the Peace have not power to aſſign him a Coroner, no more than they can enquire of Treaſon, as it is there holden, becauſe it is not within the Commiſſion. So where the Sheriff who is preſcribed by the Law to hold his Torne within the month after *Michaelmas*, *&c.* holdeth his Torne after the month, and taketh an inditement of Robbery at the ſame Torne, and the Indictment is by *Certiorari* removed into the Kings Bench, by the advice of all the Juſtices the party ſo indicted was diſcharged, becauſe that the indictment was utterly void, and *coram non judice*, foraſmuch as at that time the Sheriff had not authority to hold the Court. And it was ſaid by the Juſtices, That if a man hath a Leet which hath been holden at a certain day, if he holdeth the ſame at another day, that ſuch Court holden is void, and without warrant; otherwiſe is it of a Court Baron. But if the Court of Common Pleas hold plea in Debt, Treſpaſs, *&c.* without an original, it is not void, for they are Judges of theſe pleas, and it cannot be ſaid that the proceeding is *coram non judice*. And therewith agreeth 19 *E.* 4. 8. And therewith, in the very point, agreeth the ſaid Book of 6 *R.* 2. That Judgment in the Marſhalſea, when none of the parties is of the Houſhold, is avoided by plea without a Writ of Error, which proveth that the ſame is void. *Vide* 20 *E.* 4. 16. 22 *E.* 4. 31. and 10 *H.* 6. 13. it is agreed in the point alſo, That in Treſpaſs before the Steward and Marſhal, if none of the parties be of the Houſhold, there it is *coram non judice*, becauſe they exceed their power. The ſame Law, if they hold plea out of the verge, as it is holden in *Plo. Com. Plat*'s Caſe 37, and the ſame agreeth with the Rule, *Extra territorium jus dicenti non paretur impune. Vide* 22 *Aſſ.* 64. *Plo. Com.* 394. *b.* 37 *Aſſ. p.* 17. 39 *E.* 3. 33, 34. 39 *Aſſ. p.* 6. 7 *H.* 4. 27. 11 *H.* 4. 36. 36 *H.* 6. 32. 22 *E.* 4. 32. 1 *R.* 3. 1. 2 *R.* 3. 2. 5 *H.* 7. 17. *b.* 9 *H.* 7. 12. 21 *E.* 3. *Barre* 271. 3 *Mar. Dyer* 135. And with this difference all the Books are well reconciled. And as to the ſaid Caſe of 7 *E.* 3. 23, 24. by the Common Law it belongeth to the Office of the Marſhal to keep the Court from Whores, as appeareth in *Fleta cap.* 5. *Mareſchalli intereſt virgatam à meretricibus omnibus protegere & defe-*

[b] [77]

deliberare, & habet Mareſchallus ex conſuetudine pro qualibet meretrice com. infra metas hoſpitii inventa 4 d. prim. die, quæ ſi iterum in balliva ſua inveniat', capiatur, & coram Seneſchall. inhibeant, ei hoſpitia regis, reginæ, & liberorum ſuorum, ne iterum ingrediatur, & nomina earum imbrevient', quæ ſi iterum inventæ fuerint hoſpit. ſecutrices tunc, aut remaneant in priſona in vinculis, aut ſponte præd. hoſpitia abjurent; quæ ſi autem tertio inventæ fuerint, conſiderabitur quod amputetur eis treſſoria & tondeantur, quæ quidem ſi quarto invenient', tunc amputentur eis ſuperlabia, ne de cætero concupiſcant. ad libidinem. The ſame being the Law, it appeareth, that the Report of the ſaid Book of 7 E. 3. is ſo obſcure and imperfect, that much of the ſubſtance of the matter ought to be ſupplied by intendment.

And the Chief Juſtice in the concluſion of his Argument did obſerve, That all the Caſes in which before there was diverſity of opinions betwixt this Court and the Court of Kings Bench, are now unanimouſly Reſolved. 1. That the general count in an action upon the Caſe *Quod cum indebitatus fuit* in ſuch ſum, *ſuper ſe aſſumpſit*, without ſhewing the cauſe of the Debt, is ſufficient. 2. That a particular count in ſuch caſe ſhewing the cauſe of the Debt, although it appeareth that the Plaintiff may have an action of Debt, well lieth, as it was Reſolved in *Slade's* Caſe. 3. That by Aſſumpſit of the Teſtator, *&c.* to pay a Debt or Duty, an action upon the Caſe lieth againſt Executors, *&c.* as it was adjudged in *Pinchon's* Caſe in the 9th Part of my *Reports*. 4. This caſe of Juriſdiction of the Marſhalſea is now adjudged by both Courts, *ſc.* in the Caſe of *Jeremy Gray* in the Kings Bench, and in the Caſe at Bar in this Court. Againſt which Judgments there is no opinion in any of our Books, but as before appeareth, many concurring in terms with them in all the points now reſolved. So that our Succeſſors, as I believe, may take up the ſaying of the Prince of Poets.

[b]

Haud unquam neq; concio nosneq; curia dictis
Audivit pugnare, animo ſed ſemper eodem,
Et ſentire eadem, atq; eadem decernere vellet.

Paſch. 11 Jacobi, *in the Common Pleas.*

10.

Leonard Lovies's Caſe.

[78] IN an *Ejectione firmæ* brought by *Robert Prowt* againſt *Roger Worthen*, upon demiſe made to the Plaintiff by *Leonard Lovies* Gent. 13 *Martii*, 7 *Jac. Regis*, of 8 acres of land in *Clannon* in the County of *Devon* for five years, from the laſt day of *June* then laſt paſt. The Defendant pleaded Not guilty: And thereupon the Jury gave a ſpecial Verdict to this effect; *Leonard Lovies* Eſq; was ſeiſed of the Manors of *Affaland* and *Heanton* in the Counties of *Devon* and *Cornwall*, and of the Manors of *Rillaton*, *Pengelly*, *Willeſworthy* and *Triveſquite* in the County of *Cornwall*, in his demeſn as of fee, and had iſſue *Thomas* his eldeſt Son, *William Lovies*, *Humfrey Lovies*, and *Richard Lovies*, which *William* afterwards had iſſue *Leonard* the leſſor of the Plaintiff) and the ſaid *Leonard* the Grandfather, 26 *Septemb. anno* 12 *Eliz.* by his Deed did enfeoff *Robert Prideaux* Eſq: *Humfrey Specot* Eſq; and others, and their heirs to the uſes and intents in certain Indentures tripartite of the ſame date expreſſed and declared: That is to ſay, Of the Manors of *Rillaton*, *Pengelly* and *Willeſworth*, and of the Manor of *Affaland* to the uſe of *Leonard Lovies* the Grandfather for his life without impeachment of Waſt; and afterwards to the uſe of ſuch fermors or tenants to whom he ſhould demiſe any part of the premiſes for or during life or lives, and for any term of years, as in any ſuch demiſe or demiſes ſhall be limited and appointed, *&c.* and afterwards to the uſe and [b] performance of the laſt Will and Teſtament of the ſaid *Leonard Lovies*, and to the uſe of ſuch perſon end perſons ſeveral to whom the ſaid *Leonard* the Grandfather by his laſt Will ſhould demiſe any eſtate or eſtates of and in the ſaid Manors laſt mentioned, or of any part of them, according to the true intent and meaning of his ſaid laſt Will; and after the performance of his laſt Will, to the uſe of the ſaid *William Lovies*, and to the heirs males of his body iſſuing; and for default of ſuch iſſue, to the uſe of *Humfrey Lovies* and the heirs males of his body lawfully begotten; and afterwards to the uſe of *Richard Lovies* and to the heirs males of his body lawfully begotten; and for default of ſuch iſſue, to the uſe of *Leonard* the Grandfather and the heirs males of his body upon the body of *Ibot* his wife begotten, and afterwads to the uſe of the heirs females of the body of the ſaid *Leonard* the Grandfather; and for default of ſuch iſſue, to the uſe of the ſaid *Leonard* the Grandfather, and his heirs for ever: And of the Manor of *Heanton*, to the uſe of the ſaid *Leonard* the Grandfather for his life without any impeachment of Waſt, and to the like uſes as aforeſaid, Saving that the ſaid *Humfrey* is preferred as to this Manor before *William*, and then to *William*, with ſuch remainders over as is aforeſaid: And of the ſaid Manor of *Triveſquite* to the like uſes as aforeſaid, Saving that *Richard Lovies* is preferred to this Manor in remainder to him and his heirs males of his body, before *William* and *Humfrey*, and afterwards to the ſame uſes as aforeſaid. In which Indentures there is a power of Revocation, *ſc.* That if the ſaid *Leonard* the Grandfather ſhall be minded or diſpoſed to alter, change, or make void the ſaid feoffment, *vel aliquem aſſum eorundem maneriorum ſeu aliquem ſtatum vel ſtatus qui accreſcerent (Angliè)* ſhould grow, or ſhould be executed by reaſon of any uſe or uſes in any of the ſaid Mannors, *&c.* Or if the ſaid *Leonard* the

the Grandfather ſhould be diſpoſed to have again the ſaid Mannors or any part of them; or to give or diſpoſe of the ſaid Mannors or any part of them, in any other manner than they before are limited; or to have again the ſaid Mannors or any part of them, to him and his heirs, as in his former eſtate, and thereupon *Leonard* the Grandfather by his Writing ſealed with his Seal and ſigned with his own Hand, ſhould notifie and ſignifie his will and pleaſure to the ſaid *Roger* and *Humfrey*, *&c.* That then after ſuch notice and ſignification in ſuch Writing as aforeſaid, ſuch and ſo many of the ſaid Mannors whereof he ſhould make ſuch notice or ſignification in ſuch Writing, ſhould be all revoked and utterly void, and ſhould be to the uſe of the ſaid *Leonard* and his heirs; and that [79] the ſaid feoffees then ſhould be ſeiſed to the uſe of the ſaid *Leonard* the Grandfather and his heirs for ever, Leaſes in form aforeſaid to be made, alwayes excepted and repriſed. And afterwards, *ſc.* 26 *Aprilis*, *anno* 14 *Eliz.* *Leonard Lovies* the Grandfather purchaſed to him and his heirs of *George Digby* Eſq; the ſaid 8 acres, in which, *&c.* and afterwards 16 *Martii*, 18 *Eliz.* by his Writing ſealed with his Seal, and ſubſcribed with his own Hand, reciting his ſaid power of Revocation ſignified by the ſaid Writing to the ſaid *Roger*, *Humfrey*, *&c.* did revoke and make void the ſaid feoffment concerning onely the ſaid Mannors of *Rillaton*, *Pengelly* and *Willeſworthy*, and of the ſaid Mannor of *Affaland* (the Barton onely there excepted.) And further declared and ſignified to them, That ſo much and no more of the ſaid Feoffment and Indentures which contained the ſaid premiſes (except before excepted) ſhould be utterly fruſtrate and void. And the ſaid *Leonard* the Grandfather ſo being ſeiſed of all the aforeſaid premiſes as the Law requireth, 20 *Martii*, 18 *Eliz.* made his laſt Will [a] in writing, and deviſed the ſaid acres in which, *&c.* amongſt other things, to *Thomas Lovies* his eldeſt Son, by theſe words following.

I deviſe to *Thomas Lovies* my eldeſt Son all my Mannors, *&c.* within the County of *Cornwall*, wherein, or which I the ſaid *Leonard Lovies* have or had any eſtate of Inheritance, the lands by me ſold onely excepted; and alſo all my Mannors, Lands, Tenements, Rents, Reverſions, Services and Hereditament with the appurtenances, within the County of *Devon*, wherein or in which I have or had, beſides the lands by me ſold, any manner of Inheritance: Except, and alwayes reſerved out of this preſent gift, grant, will and bequeſt, my Mannor of *Triveſquite* within the ſaid County of *Cornwall*, and all the Meſſuages, Lands and Tenements in *Triveſquite* aforeſaid, within the Pariſh of St. *Mabin* in the ſaid County of *Cornwall*, and alſo the Patronage of the Rectory and Parſonage of St. *Mabin* aforeſaid in the ſaid County of *Cornwall*; And alſo except, and alwayes reſerved out of this preſent gift, grant and bequeſt, as well the Barton onely of my Mannor of *Affaland* in the ſaid County of *Devon*, as all my Mannor of *Heanton*, alias *Highaunton*, with the Patronage of the Rectory and Parſonage of *Heanton*, alias *Highaunton* aforeſaid, in the ſaid County of *Devon*, and my tenement called *Tenaker* in the Pariſh of *Clawton* in the County of *Devon* aforeſaid, To have, hold, occupy and enjoy the premiſes with the appurtenances, except before excepted to my ſaid Son *Thomas*, [b] and to his heirs males of his body lawfully begotten, from and after my death for and during the term of 500 years then next enſuing, fully to be compleat and ended. Upon this condition, That my ſaid Son ſhall allow all ſuch eſtates, grants and conveyances thereof already made, or at any time to be made by me the ſaid *Leonard Lovies*, of and in the Mannors, Meſſuages, Lands and Tenements, and other the premiſes, to him by this my laſt Will given, granted and bequeathed, according to the true meaning, purport and effect of the ſaid leaſe and leaſes ſo made or to be made. Provided alwayes, That if my ſaid Son *Thomas*, or any the iſſue males of his body lawfully begotten, alien, give or grant the premiſes or any part thereof to them by theſe preſents given, granted and appointed, other then to leaſe, demiſe or grant the ſame or any part thereof, to any perſon or perſons for term of any number of years, as may and ſhall be determined upon the deaths of any three perſons to be named within the ſaid ſeveral leaſes, demiſes and grants, and whereupon the old and moſt accuſtomed rents and ſervices ſhall be yearly reſerved, to have continuance during the ſame ſeveral leaſes: That then all the premiſes for default of ſuch iſſue males of the body of the ſaid *Thomas* lawfully begotten, or to be begotten, or ſo much thereof as ſhall be aliened, given, granted or otherwiſe than [c] as aforeſaid, by the ſaid *Thomas*, or by the ſaid iſſue males, immediately upon every or any ſuch alienation, gift or grant ſo made or to be made of the premiſes, or any part thereof, contray to the true meaning of theſe preſents, ſhall remain and come to my Son *William Lovies*, and to the heirs males of his body lawfully begotten; and for default of ſch iſſue, or if the ſaid *William* or any of his iſſue males of his body lawfully begotten, make any manner of alienation, gift or grant, otherwiſe than my ſaid Son *Thomas*, or otherwiſe than they may lawfully do by vertue of the Statute made in the 32 year of the Reign of King *H.* 8. in that caſe provided, or any of his ſaid iſſue males may lawfully do by theſe preſents; Then all the ſaid premiſes, for default of ſuch iſſue, or ſo much thereof ſo aliened, given or granted by my ſaid Son *William*, or by any of the iſſue males of his body lawfully begotten, otherwiſe than as aforeſaid, ſhall remain and come to my Son *Humfrey Lovies*, and to the heirs males of his body lawfully begotten, *&c.*

And afterwards the ſaid *Leonard Lovies* the Grandfather died ſeiſed of the ſaid 8 acres of land, [80] in which, *&c.* and of other the premiſes, *prout lex poſtulat*, and that the ſaid 8 acres are holden in Socage, and that the ſaid tenements deviſed by the ſaid Will at the time of the death of the ſaid *Leonard* the Grandfather, were of the yearly value of 24 *l.* 14 *s.* 10 *d. per annum & non ultra*; and that the tenements whereof the ſaid feoffment was made, and not revoked at the time of the death of the ſaid *Leonard* the Grandfather, were of the yearly value of 55 *l.* 6 *s.* 1 *d.* And that the ſaid Mannor of *Triveſquite* onely is holden by Knights Service *in Capite*, and that the ſaid *Leonard* the Grandfather had not any other lands, and that *Thomas Lovies* after the death of the ſaid *Leonard* the Grandfather entred into the ſaid 8 acres, in which, *&c.* and died without heir male of his body, having iſſue *Julian* his daughter, who took to her husband *Robert Doily* Eſq; who entred into

the ſaid 8 acres, in which, &c. And that the ſaid *William Lovies* died, having iſſue the ſaid *Leonard Lovies* in the Writ and count mentioned, who entred into the ſaid 8 acres, in which, &c. upon the poſſeſſion of the ſaid *Robert* and *Julian*, and demiſed to the Plaintiff the ſaid 8 acres, in which, &c. as in the Declaration is alledged, who entred; upon whom the Defendant by the commandment of the ſaid *Robert Doily* and *Julian* his wife, did enter and eject him. And if the entry of the ſaid *Leonard Lovies* the leſſor was lawful or not, was the Queſtion, &c.

After that this Caſe (being of great difficulty and conſequence) had been often argued at the Bar; for it began 8 *Jac. Regis*, *Rot.* 4251. This Term it was argued by the Juſtices, and it was concluded, That Judgment ſhould be given againſt the Plaintiff, becauſe that the entry of the ſaid *Leonard Lovies* the leſſor was not lawful. And in this caſe divers points were moved and reſolved by the Court; ſome upon the Statutes of 32 & 34 *H.* 8. of Wills; and ſome at the Common Law.

Upon the ſaid Statutes. 1. If a man be ſeiſed of three acres of equal yearly value, one of them being holden of the King by Knights Service *in Capite*, and having iſſue two Sons, giveth the acre holden, and one of the other acres, to his younger Son in tail; by which he hath executed his power, that he cannot deviſe by his Will any part of the third acre; and afterwards he purchaſeth other three acres of equal value holden in Soccage: Now he having the reverſion in fee expectant upon the gift in tail (made to his younger Son) and the three acres newly purchaſed holden in Socage, can deviſe but two parts of the ſaid lands newly purchaſed, in reſpect of the ſaid reverſion.

[b] But two Objections were made againſt the ſame. 1. That the reverſion doth depend upon the eſtate which was given in tail, according to the power and authority given him by the Acts of 32 & 34 *H.* 8. to the younger Son, upon which Wardſhip or *Primer Seiſin* is ſued and given by the ſaid Acts to the King; That the ſaid reverſion depending upon the ſaid eſtate tail, ſhall not hinder the deviſe of the other lands holden in Soccage afterwards purchaſed, becauſe the King is once ſatisfied for the ſame. As if a man maketh a feoffment in fee of lands, whereof part is holden by Knights Service *in Capite*, to the uſe of his eldeſt Son and his heirs males of his body, and afterwards to the uſe of his younger Son in tail or in fee, and dieth; if the King be once ſatisfied of the Wardſhip or *Primer Seiſin* after the death of the father, and afterwards the eldeſt Son dieth without iſſue, he ſhall not have *Primer Seiſin* after the death of the elder, as it hath been often Reſolved, for the ſaid Statutes were ſatisfied with the firſt. See in the Caſe at Bar; The ſaid Statutes once wrought upon the gift in tail of the acre *in Capite*, and therefore the reverſion of the ſame acre ſhall not reſtrain the deviſe of lands holden in Socage newly purchaſed. 2. The ſaid reverſion is fruitleſs, and not of any yearly value, as long as the eſtate tail continueth, and therefore is not within the ſaid Acts, for the ſame do not extend to ſuch hereditaments which are not of any yearly value, as it is reſolved in *Butler* and *Baker's* Caſe, in the third part of my *Reports*.

But it was Reſolved, That the ſaid reverſion expectant upon the eſtate tail did reſtrain the deviſe of the whole Socage land newly purchaſed by the expreſs letter of the Act of 34 *H.* 8. And further be it declared and enacted, That all and ſingular perſon and perſons having ſole eſtate, &c. in fee ſimple, &c. of or in any Mannors, Lands, Tenements, &c. in poſſeſſion, reverſion or remainder, &c. holden of the King by Knights Service *in Capite*: So without queſtion the deviſor hath an eſtate in reverſion of lands ſo holden, and by conſequence he cannot deviſe but two parts of the lands newly purchaſed. And as to the Caſe which hath been put, that the younger brother in remainder, after that the King hath been once ſatisfied, ſhall not ſue Livery, It was agreed for good Law, becauſe in ſuch caſe the words and meaning of the Statute is ſatisfied, and the younger Son doth claim by purchaſe, and not as heir to the eldeſt Son, and therefore after his death he cannot be in Ward, or pay *Primer Seiſin*. And therewith agreeth 14 *Eliz. Dyer* 340. and *Matthew Mene's* Caſe in the 9 Part of my *Reports*. And *Coke* Chief Juſtice ſaid, That it was reſolved in the Kings Bench,

[81] *Hill.* 35 *Eliz.* in *Clement Howard's* Caſe, That if a man ſeiſed of lands in fee, part of which is holden of the King by Knights Service *in Capite*, conveyeth two parts of them to any of his Sons, or to the uſe of his wife for life or in tail, in ſuch caſe he may by his Will deviſe the reverſion of the two parts, although that the Statute be in the disjunctive, by act executed, or by his Will, yet the intent of the Act was, that he ſhould have power to diſpoſe two parts entirely as to all eſtates, and to leave onely the third part to diſcend. And the ſame appeareth by the words of the Statute of 34 *H.* 8. *ſc.* to give, diſpoſe, will or aſſign by his Will, or act executed, by himſelf ſolely, &c. or by all theſe wayes or any of them; which is as much as to ſay, either by Will, or by act executed, or by them both. And as to the ſaid words of the Statute (in poſſeſſion, reverſion or remainder) It was Reſolved, Where the ſaid *Leonard Lovies* had a remainder in tail expectant upon the eſtates in tail limited to his Sons, that ſuch remainder was not within the ſaid Act. And therefore if *A.* be ſeiſed of lands holden in Socage, and *B.* ſeiſed of lands in fee holden by Knights Service *in Capite*, maketh a leaſe for life, or a gift in tail to *C.* the remainder to *A.* in tail, or in fee; *A.* by his Will deviſeth all his land holden in Socage, and dieth, living the leſſee for life, or during the gift in tail, the deviſe is good for all the lands holden in Socage, for ſuch remainder is not within the intendment of the Statute, but onely ſuch remainder which may draw Wardſhip and Marriage by the Common Law. As if a man make a leaſe for life or for years, and afterwards granteth the reverſion for life or in tail, the remainder in fee, and afterwards the grantee for life dieth, or the donee in tail dieth without iſſue, ſuch a remiander which is now in point of reverſion, is within the Statute, for the ſame by the Common Law ſhall draw in ſuch caſe Marriage and Wardſhip, &c. And that it ought to be a remainder of ſuch nature, appeareth by the words of the Act it ſelf next following, Or if any Rents or Services incident to any reverſion or remainder; for no Rent or Service can be incident to any remainder but of ſuch nature.

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As to the second Objection, It was Resolved, That there was a difference betwixt hereditaments which of their nature are not of any annual value, as goods and chattels of Felons and Fugitives, Waif, Stray, and the like. (See for that in *Butler* and *Bakers* Case, and the notable opinion of *Priſot* Chief Justice in this Court, in 32 *H.* 6. upon the Statute of 1 *H.* 4.) and things which of their nature are of annual value, but in respect of a gift or lease *abſque aliquo inde reddendo*, they are not of any present value, as in the Case at Bar, although that the reversion in present is not of any annual value, yet the land it self is of annual value; and therefore such reversion is deviseable, as it was Resolved by *Popham* and *Anderſon* Chief Justices in the Court of Wards, *Trin.* 34 *Eliz.* in *Bedingfields* Case; where the Case was, That *Edmond Bedingfield* of *Oxborough* in the County of *Norfolk*, Esq; was seised of six Manors in the Counties of *Norfolk* and *Suffolk*, *s.* of one in his demesn as of fee, and of the others in tail, with the reversion expectant to him and his heirs, and had issue *Tho. Bedingfield*; divers of which Manors were holden of the Queen by Knights service *in Capite*, and every one of them of equal yearly value. The said *Edmund* by his last Will in writing devised all the said Manors to divers persons and their heirs, upon trust and confidence for payment of his Debts, and advancement of his Children, and died; and the estate in tail which descended to his issue, was more than the third part of the whole. Now the question was, If the devise should be void for a third part of the Manor in possession, and a third part of the reversions in fee; or if it should be good for the whole entire Manor in possession, and for the entire reversions. And these doubts arose upon two Branches of the Statute of 34 *H.* 8. the first is in these words, All and singular person and persons having a sole estate in fee simple in possession, reversion or remainder, holden of the King by Knights service in chief, shall have power, &c. to dispose two parts: by which clause it seemeth the devise should be void for the third part of the Manor in possession, for the devisor had sole estate of the reversion in fee holden by Knights service *in Capite*. The second clause was, And that the King shall have, &c. for his third part, &c. such Manors as shall descend as well in tail as fee simple; and that the Will of every such devisor of and for the two parts of the said Manors residue, shall stand good, albeit the Will be made of all his fee simple lands. By which Branch it seemeth clearly, That if the devisor had not any reversion in fee but only the said estate tail, that the devise should be good for all the Manor in possession, but the having of the reversion upon the consideration of the said former clause, made the question: and it was *quæſtio tortuoſa & difficultatis plena.* In which case was first Resolved by the two Chief Justices, That a reversion *in* fee expectant upon an estate in tail seck and fruitless, was within the said Act, for the cause and reason aforesaid. 2. It was Resolved, That the said devise should be good for two parts of the reversions, and for the whole Manor in possession, and that by the meaning of the makers of the Act upon both Branches, to the end the debts of the devisor should be paid, and his last Will performed, which was one of the principal motives of the making the said Act; and *ſic determinata fuit ſpinoſa illa quæſtio. Vide* 14 *Eliz. Dyer* 308. The Lord *Paget* being the Queens tenant by Knights service *in Capite*, levied a fine to the use of himself for life, and afterwards to the use of the right heirs of the Lord *Paget*, and died; the eldest son of full age sued Livery, and paid the value of the third part of the land in possession, and the moity of the reversion in fee, according to the usual rate: which proveth, That the Acts of 32 and 34 *H.* 8. being in the affirmative, and which give benefit to the King in respect of the possession, took not away such benefit which the Common Law gave to the King for the reversion of the same land. [b] [82]

It was also Resolved, That although hereditaments which of their nature are not of any annual value cannot be devised, yet if they be holden *in Capite*, they shall restrain the devise of Manors, Lands, *&c.* and shall make them void for a third part. For the hereditament holden by Knights service *in Capite*, needeth not to be deviseable. And the Chief Justice in his Argument for the more perspicuity, divided the said intricate and prolix Acts into several Branches: The first Branch out of the Act of 34 *H.* 8. which hath been mentioned before, All and singular person and persons having sole estate in fee simple, *&c.* of and in any Manors, *&c.* The second, Holden of the King by Knights service *in Capite*. The third is out of the Act of 32 *H.* 8. Saving, *&c.* to the King the custody, Wardship, or *Primer Seiſin*, the clear yearly value of the third part of the same Manors, Lands, *&c.* The fourth clause is out of the Statute of 34 *H.* 8. May give, dispose, will or assign two parts of the same Manors, *&c.* The fifth clause is out of the Act of 34 *H.* 8. That the King shall take for his third part, *&c.* such Manors, Lands, *&c.* as shall descend as well of the inheritance in fee tail as in fee simple. And out of these several Branches six times were observed; for *Judicis officium eſt, ut res, ita tempora rerum Quærere, quæſito tempore tutus eris.* And *omnia tempus habent, & habet ſua tempora tempus.* The first time is *tempus habendi*, every person having, *&c.* The second time is *tempus tenendi*, holden of the King, *&c.* The third time is *tempus diſponendi*, may give, dispose, *&c.* and it is to know, that By such disposition there is a vesting either in the Subject or the King; In the Subject, either by act executed by the Common Law in the life of the Kings tenant, or by last Will, which vesteth only by force of these Acts; in the King, only by the death of his tenant, for the Wardship or *Primer Seiſin* vesteth in him. The fourth time is *tempus appretiandi ſeu æſtimandi*, the clear yearly value, *&c.* The fifth time is *tempus providendi, plenam tertiam partem*, to descend in fee or in tail, a full third part, *&c.* to descend or come by descent, as well of estate of inheritance in fee tail as in fee simple. The sixth time is by construction of all the parts, *s. tempus continuandi, ſeu tempus continuum.* [b]

And it was holden, That the said three former times ought to concur, *s.* the time of *having*, the time of *holding*, and the time of *diſpoſing* ought to concur together. And therefore if a man be seised of an acre of land in fee, holden of the King by Knights service *in Capite*, and of other two acres in fee holden in Socage, and the tenant enfeoffeth his younger Son of the

acre

acre holden in chief, and of one of the other acres, To have and to hold to him and his heirs; and afterwards he purchaseth lands holden in Socage, that in this case he may devise all the lands newly purchased holden in Socage, and that for three Reasons. 1. Because he had not any lands holden by Knights service *in Capite* at the time of the devise, for the said Acts have made a marriage or conjunction of the lands which the Kings tenant had in Socage, with the lands which he holdeth of the King by Knights service *in Capite*; for the words of both the Acts are, Every person, &c. having Manors, Lands, &c. may give, dispose, &c. two parts of the same Manors, Lands, &c. And the Saving in the said Act of 32 *H.* 8. is Saving a third part, &c. of the same Manors, lands, &c. so that when the tenant hath conveyed the lands holden *in Capite* to his son, now when he maketh his Will of the lands newly purchased, he hath not any lands holden of the K. *in Capite* at the time of the devise, and the Statutes restrain only the lands in Socage, which he had at the time of the having of the lands holden *in Capite*. 2. The Acts give to him full power and authority to give, dispose, will or assign two parts for the advancement of his wife, preferment of his children, or payment of his debts: So that when the Statute hath given him power to convey two parts (whereof the land holden by Knights service *in Capite* is part) the intention of the makers of the Act never was to presume him who hath according to the Act conveyed the land, to have the same land for any intent or purpose. And as it is resolved in *Mights* Case in the 8th. Part of my Reports, *Trin.* 7 *Jac.* Land which is conveyed to one of the said three ends cannot be said covenous, because it is warranted by the Act.

[83] 3. It was observed, the great benefit which the King hath by these Statutes; for the K. tenant *in Capite* before these Statutes might have so conveyed the land to some of the said uses, that the King should never have Wardship nor *Primer Seisin*, as appeareth in Sir *George Cursons* Case in the sixth Part of my Reports. And therefore it shall not be reason to interpret the Statute in prejudice of the Subject against the express letter, *s.* by a Saving of a third part of the Kings lands which the Kings tenant then had, to extend it beyond the words to lands holden in Socage, which he purchased after he had conveyed over the lands holden *in Capite*. But the greater Question was, That if *Leonard Lovies* had conveyed (as was admitted) the land holden by Knights service *in Capite* to *William Lovies* his second Son in fee, &c. with power of Revocation; so that he had power upon the land, and might dispose of it, If that should restrain the power of *Leonard Lovies* to devise all the land in Socage newly purchased. But the Chief Justice held it all one for the reasons and causes aforesaid; and so much the rather, because the Statutes gave to him power to give, dispose, &c. two parts, &c. at his will and pleasure; so inasmuch as his will and pleasure appeareth to convey the land to *William*, as is aforesaid, with power of Revocation, he thereby pursueth the power which the Statutes give to him, which *Nichols* Justice granted. And as these Statutes have been put in ure according to the express purview, although that damage hath accrued to the Subject, as in *Vincents* Case briefly touched by the Lord *Dyer*, 22 *Eliz.* 367. It was resolved, That if the Kings tenant by Knights service *in Capite* convey the lands to the use of his wife and her heirs, or to the use of his youngest Son and his heirs, and dieth, his eldest Son within age, that although the eldest be disinherited, yet affliction is added to affliction, he shall be in ward to the King, although he hath nothing by descent, by the express purview of the Statute: So no interpretation shall be made for the benefit of the King against the express purview; and therewith agreeth *Wray* Chief Justice in *Butler* and *Bakers* Case. And therefore if a woman the Kings tenant *in Capite* hath issue a Bastard daughter, and conveyeth the lands to her Bastard daughter, and dieth, the King shall not have Wardship; for if it be within the Statute of 32 *H.* 8. it ought to be a child in Law and truth, and not in reputation, as

[b] it is resolved in *Thormtons* Case, 17 & 18 *Eliz. Dyer* 345. *Vide* 12 *Eliz. Dyer* 296, and yet a Chantry in reputation was adjudged within the Act of 1 *E.* 6. *cap.* 14. 22 *Eliz. Dyer* 368. in the Dean of *Pauls* Case. And the Chief Justice said, That it was Resolved in the Court of Wards, *Trin.* 25 *Eliz.* That where Sir *Nicholas Strange* Knight was the Kings tenant of the Manor of *Hunston*, and of divers other Manors, Lands and Tenements holden *in Capite*, in the County of *Norfolk*, and *Hamond Strange* his eldest Son and heir apparent purchased the said Manors, Lands and Tenements of him *bona fide* for money, and the said Sir *Nicholas* died, the said *Hamond* of full age, and this matter was found by office. And it was Resolved by *Wray* and *Anderson* Chief Justices, That he should not pay *Primer Seisin*, for the words of the Statute, are *give* (which implieth to be done *ex mera liberalitate & voluntate*: See *Bracton, lib.* 2, *cap.* 5, *fo.* 11.) And although the words are, *dispose and assign*, yet the conclusion is for the preferment of his children, for every preferment ought to be also *ex mera liberalitate & spontanea voluntate*, and accordingly it was Resolved (as then it was said) in *Porriges* Case in 12 *Eliz.* And *Randals* Case in 4 & 5 *Phil. & Mar.* 158. was cited by every one of the Justices in the argument of this Case. A man seised in fee of land of Socage tenure assureth the same to the use of his wife for Joynture in 32 *H* 8. and afterwards 2 *Ed.* 6. he purchaseth lands holden by Kings service *in Capite*, and of two parts thereof maketh his Will and dieth, his heir within age. If the Queen should have any of the Socage land to make a full third part of the whole, was the question: And Resolved she should not, for the words of the Act of 34 *H.* 8. of Explanation are, *and having no lands holden by Knights service*: which proveth, that the time of having, holding *in Capite* by Knights service, and of disposing, ought to concur. And a difference was taken and agreed between a disposition, by act executed in the life of the devisor, and by his last Will in writing. And therefore if a man seised of lands in fee holden in Socage of the yearly value of 20 l. *per annum*, and hath not any lands holden *in Capite* by Knights service, and maketh his Will in writing, and thereby deviseth the Socage land to another in fee, and afterwards he purchaseth lands holden by Knights service *in Capite*, of the yearly value of 20 s. and dieth, this devise shall not be good for all the Soccage land, for nothing is disposed or transferred over by the Will, till the death of the devisor. And there was an union of the land holden *in Capite*, and of

of the land in Socage tenure, ſo that the time of having, holding and diſpoſing, did concur. And therewith agreeth the opinion in *Butler* and *Baker*'s Caſe. So, and for the ſame reaſon it is there holden, That if a man be ſeiſed of lands holden by Knights Service *in Capite*, and of lands in Socage, and by his Will in writing deviſeth all the ſaid lands, and afterwards alieneth the lands holden *in Capite*, that this deviſe is good for the whole land in Socage; and many other Caſes of the like effect are put in *Butler* and *Baker*'s Caſe which you may ſee there. And where the Statute of 34 *H.* 8. ſaith, two parts as well of the ſaid Mannors, Lands, Tenements, Rents and Heraditaments, as of all and ſingular his other Rents and Heraditaments: Theſe laſt words (as of all and ſingular his other Rents) ought to be referred to the beginning of the ſentence, *ſc.* having a ſole eſtate, *&c.* of or in any Mannors, Lands, *&c.* holden *in Capite*. For if he hath not any land *in Capite*, he is not reſtrained to deviſe but two parts, for then he may deviſe the whole: but theſe words were needfull to be added, for the beginning of this Branch extendeth onely to enable the tenant to deviſe, *&c.* two parts of the lands holden *in Capite* onely; and therefore it was needfull to add, As alſo all and ſingular his other Rents and Heraditaments not holden *in Capite* by Knights Service: but all the words together prove (as hath been ſaid) that the time of *having*, *holding* and *diſpoſing* ought to concur. [84]

As to the fourth time, *ſc.* From what time the value of the lands whereof the King ſhall have the third ſhall be taken, It was Reſolved, That the value of the lands ſhall be taken as they are at the time of the death of the Kings tenant, for then by the Saving in caſe of act executed, the title of Wardſhip and *Primer Seiſin* veſteth in the King; and in caſe of Will it alſo taketh effect for two parts by the death of the tenant, and the third part doth deſcend to the heir, of which the King ſhall have the Wardſhip or *Primer Seiſin*. So that *tempus appreciandi* ought to concur with the time of the death; but the time of veſting in the Subject by act executed, and the time of value, do not meet together. And the reſolution of *Vigil Parker*'s Caſe in the eighth Part of my *Reports*, was cited, and agreed to be good Law: where the Caſe was, That *Vigil Parker* ſeiſed of the Mannor of *Fuſhill* in fee, holden of the King by Knights Service, as of his Dutchy of *Lancaſter*, *anno* 27 *Eliz.* made a feoffment of half of the Mannor to the uſe of himſelf for life, and afterwards to the uſe of *Mary*, whom he did intend to marry, for life, with divers remainders over; he married *Mary Coney*, and afterwards demiſed the other half to divers, for payment of his Debts and Legacies, and died: And it was Reſolved, That foraſmuch as the advancement of wife is as well within the Statute, as payment of his debts, and the Statute (as to values) principally taketh its effect by the death of the Kings tenant; for this cauſe, although the eſtate of the wife hath the precedency, it was reſolved, That the third part of the King ſhall be taken equally out of both parts, and not out of the half ſo deviſed onely and accordingly, as it appeareth there, it had been reſolved divers times before. [b]

As to the fifth time, *ſc.* To provide a third part to diſcend, It is to know, That if a man ſeiſed of certain lands, part of which is holden *in Capite* by Knights Service of the yearly value of 60 *l. per annum*, all which lands are conveyed to one of the ſaid three uſes, and afterwards he purchaſeth lands of the yearly value of 20 *l. per annum* or more, in tail or in fee, and leaveth the ſame to deſcend for the third part to the King, the ſame is good. For this time to provide a third part, needeth not to concur with the time of having, holding or diſpoſing by act executed; but it ſufficeth if this time concur with the time of the value, *ſc.* the time of the death of the Kings tenant: and this appeareth by the expreſs words of the Act of 34 *H.* 8. That the King ſhall take for his third part ſuch Mannors, Lands, *&c.* as ſhall deſcend in fee tail or fee ſimple, without any words of reference or reſtraint, or any union made of theſe lands, which deſcend with the land holden *in Capite* by Knights Service, as the other clauſes aforeſaid are.

As to the ſixth time, *ſc. tempus continuum*, to ſome purpoſe time ought to continue *uſque ad mortem*, and in ſome caſe *poſt mortem*; *uſque ad mortem*, the eſtate conveyed to any of the ſaid three purpoſes, ought to continue till the death of the Kings tenant, as is reſolved in *Bingham*'s Caſe, in the ſecond Part of my *Reports*: *poſt mortem*. 1. The tenure by Knights Service *in Capite* ought to continue after death, for if the tenure be but during the life of the tenant, ſo that it doth not continue after his death, the ſame ſhall not reſtrain the deviſe of the other lands, as it is holden in *Butler* and *Baker*'s Caſe. 2. The eſtate of the land holden ought to continue after the death of the tenant; and therefore if tenant in tail be to him and the heirs males of his body, the remainder to another in fee of land holden by Knights Service *in Capite*, and he is ſeiſed of other lands in Socage in fee, and by his Will in writing he deviſeth all his Socage lands, and dieth without iſſue male, in this caſe the deviſe is good for the whole Socage land, for the eſtate of the lands holden doth determine by his death, ſo that there was not any cauſe of Wardſhip by the Common Law. The ſame Law, If the eſtate of the land holden be defeated by Condition after the death of the tenant. *Vide* 13 *Eliz. Dyer.* 3. The privity of the heir of the tenant ought to continue after his death; and therefore if the King tenants *in Capite* conveyeth all his lands to any of the ſaid three uſes, and afterward is attainted of Treaſon, and afterwards he dieth his heir within age, in this caſe the King ſhall not have the Wardſhip, becauſe that he dieth without heir in reſpect of the corruption of bloud, as it was reſolved in Sir *Everard Digby*'s Caſe, *Mich.* 7 *Jac.* in the eighth part of my *Reports*. [85]

Queſtions at the Common Law. 1. If the uſes limited by the ſaid Tripartite Indentures to *William Lovies* in tail, with the remainder over, are in contingency or not? or if the uſes be preſently executed by the Statute of 27 *H.* 8. of Uſes, in *William Lovies* with the remainder over? And the Chief Juſtice held, That the uſes were in contingency, and not executed till the death of *Leonard Lovies* the Grandfather, for when he hath by the ſaid Indentures limited to himſelf an eſtate for life, and upon the matter power to make leaſes for life, lives or years, without any reſtraint of lives or years, then when the limitation is farther to the uſe of the performance of his Will and Teſtament, and

to the uſes of ſuch perſon and perſons ſeverally to whom he by his laſt Will ſhall deviſe any eſtate or eſtates. By theſe words without queſtion he may deviſe the lands to any perſonin tail or in fee, (for he hath power before to make leaſes for lives or years, without any limitation) and by conſequence the uſe limited to *William Lovies* in tail, with all the remainders over, are in contingency. For where it is doubtfull or incertain whether the uſe or eſtate limited *in futuro* ſhall ever veſt in eſtate or intereſt or not, there the uſe or eſtate is ſaid to be in contingency, becauſe upon a future contingent it may either veſt or never veſt, as the contingent ſhall happen. And therefore there is a difference betwixt ſuch a contingency as aforeſaid, and a limitation of eſtates by words of contingency, which extend upon the limitation of former eſtates, and which veſt in eſtate or intereſt preſently to take effect in poſſeſſion *in futuro*; as in 5 E. 3. 27. *William* leaſes to *John* for the life of *John*, rendring to *William* 40 *s.* rent during the life of *William*, and after the death of *William* to *John* and his heirs, this remainder to *John* cannot preſently veſt, becauſe peradventure it ſhall never veſt in eſtate or intereſt, and the contingent in this caſe is the time of the death of *William*, for if *William* dieth, *John* living, the remainder is good, but if *William* over-live *John* and dieth after him, [b] the remainder is void. *Vide Plo. Com.* in *Colthirſt's* Caſe. *Paſc. 36 Eliz. Rott.* 348. between *Alton* and *Hore* in the Kings Bench, the caſe was; That a fine was levied to the uſes of *A.* and the heirs males of his body, till he or the heirs males of his body hath done ſuch a thing, and after ſuch thing done unto the uſe of another in tail, and dieth without iſſue without any thing done, It was adjudged, That the remainder was in contingency, and never fell. If a man hath made ſeveral leaſes of two ſeveral acres of land for two ſeveral and diſtinct terms, as well in the commencement as in the end, and afterwards maketh a leaſe of both acres, to begin after the the determinations of the ſaid ſeveral terms for 40 years, it ſhall not expect to begin after the laſt leaſe, but ſhall veſt preſently in intereſt *reddendo ſingula ſingulis*, as it is adjudged in Juſtice *Windham's* Caſe in the fifth Part of my *Reports*, (and ſee 6 E. 3. 43. a good Caſe. See *Boraſton's* Caſe betwixt *Hinde* and *Ambrey* in the third Part of my *Reports*) for it veſts preſently in intereſt, to begin in poſſeſſion after the determination of a former term for years. But in the Caſe at Bar, nothing can veſt by the deviſe to *William Lovies*, nor the remainders over till the death of the deviſor, becauſe he hath power by his Will to deviſe to any perſon any eſtate, be it in fee ſimple if he will: *Ergo*, it cannot preſently veſt in *William Lovies*, and by conſequence in none of the remainders; upon which it followeth, that in the mean time the uſe of the fee veſts again in *Leonard* the Grandfather, (as it was adjudged in Sir *Ed. Clers* Caſe) and then he was ſeiſed of lands holden *in Capite* at the time of the purchaſe of the ſaid 8 acres in which, *&c.* And for this cauſe, he having diſpoſed two parts by act executed according to the Statute, cannot deviſe the ſaid 8 acres. For it appeareth by the Record, that he hath conveyed by feoffment lands and tenements of the yearly value of 55 *l.* 6 *s.* 8 *d.* and the land mentioned to be deviſed is but of the value of 24 *l.* 14 *s.* 10 *d. per annum*, and the feoffment cannot extend to the ſaid 8 acres, for they were purchaſed after; but being a laſt Will ſhall be direction to declare uſes upon the feoffment, and when the land ſhall paſs by the Will it ſelf, and when by the feoffment, See Sir *Ed. Clere's* Caſe. * But againſt this it was objected, That the fee which *Leonard* the Grandfather hath by operation of Law, is vaniſhed by his death, in as much as he made no diſpoſition of the land in fee ſimple by his Will, which was granted as had been reſolved before. But it was Anſwered and Reſolved, That the ſaid reverſion in fee expectant upon the eſtate tail, did not vaniſh, as [86] fully appeareth. Another Objection was made, That foraſmuch as the words of the Statutes of 32 & 34 *H.* 8. are, Lawfully execute in his life, *&c.* in this caſe foraſmuch as the ſaid uſes were in contingency, no execution of any eſtate was, but after the death of *Leonard* the Grandfather, and ſo out of the Statute. To which it was anſwered, That after the death of the ſaid *Leonard* the Grandfather, the ſaid eſtates were derived, and took their eſſence and effect by force of the feoffment made, and ſo upon the matter executed in his life. Alſo it was holden by the Chief Juſtice, That the remainder to *William Lovies* by the Will is contingent, foraſumch as no alienation is found to be made by *Thomas*; for in effect it is a deviſe to *Thomas* and his heirs males. Provided, that if he alien it, that then for want of iſſue male of his body, it ſhall remain to *William*, *&c.* So that there are two main impediments to the remainder, *ſc.* that there was not any alienation; and if there had been an alienation, then alſo it ſhould be repugnant, that after the alienation the land ſhould remain to *William*, and ſo *quacunque via data* the remainder as this caſe is doth not veſt in *William*. And the ſeveral pennings of the deviſe to *Thomas* with contingency to remain over to *William*, and of the deviſe to *William* and the remainder over were obſerved, which prove ſeveral intents in the Teſtator, as appeareth in *Edrich's* Caſe, in the fifth part of my *Reports*, upon the Statute of 32 *H.* 8. *Of Rents*. But this point was reſolved by the Court. Another point at the Common Law was alſo moved in this Caſe, *ſc.* Whether the ſaid revocation mentioned in the Record, were ſufficient or not. Touching which, there are three things to be conſidered.

1. His Power, reſerved to him by the Proviſo of Revocation.
2. If he hath purſued his power.

Firſt, the words of the Power divide themſelves into five Branches. 1. That if the ſaid *Leonard Lovies* ſhall be diſpoſed to alter, change, or to make void the aforeſaid feoffment, *&c.* 2. Or any uſe or uſes, *&c.* above limited. 3. Or any eſtate or eſtates which ſhall grow or be executed by reaſon of any uſe, *&c.* 4. Or if the ſaid *Leonard Lovies* the Grandfather ſhall be minded to have again all and ſingular the ſaid Mannors, *&c.* or any part of them. 5. Or to diſpoſe or give the ſaid Mannors or any part of them in any other manner, or to have again the ſame or any part of them to the ſaid *Leonard* and his heirs in his ancient eſtate, and thereupon ſhall ſignifie his will and pleaſure to the feoffees or any of them, *&c.* That then immediately, *&c.* the Mannors, *&c.* ſhall be to the uſe of *Leonard* the Grandfather and his heirs, in his ancient eſtate. Then the the Revocation ſtands upon

upon two parts: 1. He ſignifie that ſo much of the Indentures which concern certain Manners ſhall be void, which was objected cannot be, becauſe that the Indenture was made 26 *Sept.* 12. *Eliz.* and the feoffment was made 28 *Sept.* following, and therefore the Indenture precedent could not avoid the feoffment which paſſed by ſubſequent Livery. Alſo he declareth, That ſo much of the feoffment and Indentures, and no more, as concern only parcel of the premiſes, ſhall be void; and admitting that the feoffment and indenture may be avoided, and made void in all, yet it cannot be avoided in part, *s.* the Deed of Indenture as to one Mannor to be made void and to loſe its force, and as to another to ſtand with the Deed, and of ſuch effect, as it was objected, in the ſecond Branch, *s.* I will that ſo much and no more of the ſaid feoffment and Indentures, and every cláuſe and article therein contained, to be utterly fruſtrate and void, *&c.* 3. The nature of the things to be revoked was conſidered, That all the declarations and limitations of the uſes at the time of the Deed of Revocation, were only in contingency, and nothing in eſtate in poſſeſſion, reverſion, or remaider or intereſt, but only in poſſibility, which cannot be revoked, or changed, or altered; for revocation, alteration or change, doth preſuppoſe a former eſſence, as the Rule of the Logician is, *Omnis privatio præſupponit habitum.* And although that future powers and authorities annexed to eſtates, as a power to make leaſes, *&c.* given to him who hath an eſtate for life may with the eſtates be revoked, yet it was objected, That when all is in contingency or poſſibility it cannot be revoked; and the uſe which by operation of Law was veſted in *Leonard Lovies* the Grandfather, cannot be revoked, for the Proviſo of the ſaid Indentures extend only to uſes declared by the ſame Indentures, and not to an uſe created by the Law. But it was anſwered and reſolved by the Court, That the revocation was good: For uſes and powers in contingency and poſſibility, may by mutual aſſent of the parties be revoked and determined, for as they may be raiſed by Indenture, ſo by proviſo or limitation annexed to them in the ſame Indenture, they may be extinct or deſtroyed either before or after their eſſence. And it was Reſolved, that theſe words, The ſaid Indentures, and every clauſe and article therein contained, extend to all the uſes and limitation in contingency and poſſibility. And this Reſolution agreeth with common Experience, *s.* That eſtates limited to one, two, three Sons, *&c.* before that any of them be born, are by the like Proviſo's uſually and without queſtion daily revoked. And without queſtion the Indentures, as to the direction and declaration of uſes, may loſe their force in part, and ſtand good in part; and if the operation as to part be taken away by the Proviſo, then the feoffment for that part is to the uſe of the feoffor and his heirs; and by conſequence in the Caſe at Bar, *Leonard Lovies* had an uſe veſted in him by operation of Law upon the feoffment, untill other declaration was made by his Will. Now by the Revocation he hath an abſolute eſtate in fee ſimple, and in his ancient eſtate without any limitation. [b] [87]

Alſo the Chief Juſtice held, That the ſaid deviſe to *Thomas* was but for years, becauſe it is ſo deviſed in expreſs words: and againſt the expreſs words in this caſe, no inference or interpretation ſhall be made: for the words are, *Item*, I give, grant, will and bequeath, to my Son *Thomas* all my Mannors, *&c.* To have and to hold to my ſaid Son *Thomas*, and to the heirs males of his body lawfully begotten, from and after my death, for and during the term of 500 years then next enſuing fully to be compleat and ended, *&c.* and the remainders to *William Lovies* and others, to every of them and to their ſeveral heirs males of their bodies, without any reſtraint to any number of years. And note, the liberty given to *Thomas* is in theſe words, Otherwiſe than to leaſe, *&c.* the ſame for years determinable upon the death of any three perſons or leſs number of perſons: but in the liberty given to *William* and the other, the words, Otherwiſe than they may lawfully do by the Statute of 32 H. 8. Which Act he doth not mention in the deviſe to *Thomas*. So inſomuch as that *Thomas* hath not an eſtate but for 500 years, ſo long as he hath iſſue of his body he giveth him power but to demiſe for years, but to *William* who hath an eſtate in tail, he leaveth him power to leaſe the lands for three lives or 21 years, according to the Statute of 32 *H.* 8. which giveth power to tenant in tail, *&c.* and therewith agreeth Juſtice *Wineb.* But theſe words, During the term of 500 years, ſhall make a limitation to a term for years to determine it, for want of iſſue male. And that the ſame is but a term for years in Grants, the Books are expreſs in the point, 11 *Aſſ.* 21. 33 *Aſſ. p.* 17. 39 *E.* 3. 37. 19 *E.* 3 *Accompt* 56 9 *H.* 6. 58. 22 *H.* 6. 33. 34 *H.* 6. 27. *Litt.* 168. 10 *Eliz. Dyer* 276. *Vide* 21 *H.* 8. *br. Eſtates*, the like. But as to that point which hath been controverted betwixt this Court and the Court of Kings Bench, in a former action brought upon this deviſe, no Reſolution as to that point was now given by the Court. Note, Reader, if a term be deviſed to one and the heirs males of his body, his heir ſhall not have it but his Executors, for a term is but a Chattel which cannot be entailed, and ſuch deviſee may well alien the term to whom he pleaſeth. And ſo it was adjudged *Trin.* 25 *Eliz.* in the Kings Bench in *Peacocks* Caſe; and *anno* 21 *Eliz.* ſo Reſolved by *Anderſon* and *Walmeſley*, being a Caſe referred to them out of the Chancery, between *Higgins* and *Mills*. [b]

Hill. 8 Jacobi.

Doctor *Leyfield*'s Caſe.

[88] JOhn *Leyfield* Doctor in Divinity brought an action of Treſpaſs in the Kings Bench, *Hill.* 8. *Jac. Rot.* 1282. againſt *Henry Hillary*, of taking and carrying away his Corn and Hay at *Old Cleve* in the County of *Somerſet*. The Defendant pleaded in barr, That Queen *Elizabeth* was ſeiſed of the Rectory of *Old Cleve* in the ſame County in her demeſn as of fee in the Right of her Crown of *England*; and by her Letters Patents 20 *Junii*, 35 *Eliz.* (without ſaying he ſhewed forth) demiſed the ſaid Rectory to *Conand Prowſe* for his life, who 26 *Jan.* 3 *Jac.* demiſed the ſaid Rectory to *George Pincomb* for eight years, if the ſaid *Conand* ſhould ſo long live, and the Defendant as ſervant to the ſaid *George* took the Corn and Hay as Tithes ſevered from the nine parts, and averred the life of the ſaid *Conand:* Upon which the Plaintiff did demur in Law, becauſe that the Defendants plea did amount unto the General Iſſue. And it was adjudged in the Kings Bench, That the barr was inſufficient, becauſe the Defendant in his plea did not ſhew to the Court the Letters Patents of Queen *Eliz.* made to *Conand Prowſe*, which the Court took to be matter of ſubſtance, and which the Defendant ought to have ſhewed forth, although he in whoſe right he juſtified had but part of the eſtate. Whereupon a Writ of Error was brought in the Exchequer Chamber, and there two Errors were moved; one, which was aſſigned by the Defendant for his cauſe of demurrer, 1. That the ſaid plea did amount to the General Iſſue, becauſe the Defendant gave not to the Plaintiff any co-
[b] lour, in which caſe no Judgment ought to have been againſt the Defendant, but the Court ought to have ruled him to anſwer over; the ſecond, That for want of ſhewing the Letters Patents, the Court ought not to have given Judgment againſt the Defendant, for two cauſes. 1. Becauſe that by Law the Letters Patents needed not to be ſhewed forth. 2. If they ought to have been ſhewed, yet the ſame is but matter of form, and not of ſubſtance; and therefore by the Statute of 27 *Eliz. cap.* 5. becauſe that he ſhewed not the ſame for ſome cauſe of his demurrer, he ſhall not take advantage of it.

As to the firſt, it was objected, That the ſaid plea in barr doth amount to the General Iſſue, becauſe the Defendant hath not given any colour to the Plantiff, nor any poſſeſſion upon which he may ground his Action. And thereupon they cited 21 E. 4. 65. In Treſpaſs for taking and carrying away of certain Cart-loads of Beans at *Bodmon*, againſt the Prior of *Bodmon*; the Defendant ſaid, That the Corn was growing in a certain place in *B.* in the Pariſh of *Bodmon*, whereof he was Parſon inparſonee, and (being driven by the Court to ſhew how he came to the ſame Parſonage) ſaid, That he had the Impropriation by title of Preſcription; and how that the Corn was ſevered from the nine parts, and that he took them as his own goods (and gave colour) that he delivered them to one T. who delivered them to the Plaintiff to keep, and that the Defendant took them. And in 21 *H.* 6. 30. *Robert*, Parſon of the Church of *Clifford*, brought an action of Treſpaſs againſt divers, and declared of his taking and carrying away of his goods, 1. Wheat, Barley, *&c.* three Coverlets, and three Blankets. As to the Corn of Wheat and Barley, *&c.* the Defendant ſaid, That before the Treſpaſs one *A.* was Parſon of the ſaid Church, and the Pariſhioners had ſowed their lands with Wheat and Barley the firſt day of *May*, and afterwards the ſame day the ſaid *A.* made the Defendants his Executors, and died; and gave colour to the Plaintiff, That he was inſtituted and inducted Parſon of the ſaid Church, and afterwards the Pariſhioners ſevered the Corn from the nine parts, and the Plaintiff as Parſon took the Corn, and the Defendants as Executors took it out of his poſſeſſion. And 19 *H.* 6. 20. In treſpaſs againſt *B.* Prior of *L.* for breaking of his Cloſe, and taking away his Graſs being in Cocks. The Defendant as to the breaking of the Cloſe pretended his Freehold; and as to the Cocks, he ſaid, That he himſelf is Parſon inparſonee, and that the place where is ſo much land of ſuch a Town within the ſame Pariſh, (and he was driven by the Court to give a name to the Cloſe) and that the Cocks were there growing, and ſevered from the nine parts; and you claiming to be Parſon of the ſame Church by the Kings preſentment by his Letters Patents, whereas you were not inſtituted nor inducted, took the ſame Cocks, and we took them
[89] back again. And there *Forteſcue* and *Newton* conceived that the colour was not good. And in 2 *H.* 4 5. The Vicar of *Saltaſh* brought an Action of Treſpaſs for carrying away his goods in *S.* The Defendant alledged, That the Dean of *Windſor* was Parſon of *S.* and that he as ſervant took the goods as his Maſters goods, and the Plaintiff would have taken them from him, and he would not ſuffer him. And by the Rule of the Court it was holden no plea, becauſe that the Defendant doth not acknowledge any poſſeſſion in the Plaintiff, nor property at any time in him of the ſaid goods. 34 *H.* 6. 10. *b.* The Abbot of St. *Mary* of *York* brought an action of Treſpaſs againſt *John* Parſon of the Church of *P.* for taking of 30 *l.* at *D.* in the County of *York*. The Defendant ſaid, That there is a Chappel of our Lady in the City of *York*, in the Defendants Pariſh, in which Chappel there is an Image of our Lady, to which the People uſe to offer Gold and Silver; and that the 30 *l.* were Offerings there, and that he took them away, as it was lawfull for him to do; and gave colour to the Plaintiff, 1. That he did deliver the money to *B.* to keep for the Defendants uſe, who delivered the mony to the Plaintiff, and the Defendant took the ſame out of his poſſeſſion, *&c.* And in 39 *H.* 6. 1 & 2. In Treſpaſs, the Plaintiff declared of taking two Horſes. The Defendant ſaid, That the Lord *Latimer* is Lord of the Barony of *Godford*, which is an ancient Barony, and hath been time out of mind,

mind, *&c.* Within which he and his Anceſtors, and all thoſe whoſe eſtate he hath in the ſaid Barony, have had Waif and Stray time out of mind, *&c.* And further ſaid, That the Horſes were ſtollen, and brought within the Barony, where, *&c.* and there the Horſes waived, for which cauſe the Defendant as Servant to the ſaid Lord, and by his commandment ſeiſed them, *&c.* and the Plaintiff took them, and the Defendant took them again; and Exception was taken to this plea, becauſe the Defendant gave not to the Plaintiff any colour: for although they were waives out of his Franchiſe, and the Defendant ſeiſed them, the Plaintiff hath not colour to take them; for which the Defendant ſaid, That the Plaintiff ſuppoſing that the property was in him before the ſtealling took them. But by the whole Court, the Plea was nothing worth, without ſaying *in facto* that the property was in him; for which cauſe he pleaded accordingly. And many other Caſes were put to this purpoſe, which I purpoſely omit. *Vide* 22 E. 4. 24. Againſt which it was argued by the Counſel on the other ſide, That in this caſe there needeth not any colour to be given, for two cauſes. 1. Becauſe the Defendant doth juſtifie as Servant. 2. Becauſe the beginning of the barr is with the Queens Letters Patents.

As to the firſt, 18 E. 4. 3. was cited, where in an action of Treſpaſs for breaking of his Cloſe, and taking and carrying away 30 loads of Wheat; The Defendant pleaded, That one Sir *C.M.* was ſeiſed of a Carue of land, whereof the place where, *&c.* in his demeſn as of fee, and ſowed the ſame land with Wheat, and that the Defendant as his Servant, and by his commandment entred into the ſame land and cut the Wheat, and carried it away, as it was lawful for him to do. And it was moved, That the bar was not good becauſe he gave no colour. And it was holden by all the Juſtices, that he ſhould not in this caſe give colour to the Plaintiff, becauſe that in all caſes where a man juſtifieth as Servant to another, and by his commandment, he ſhall not give to the Plaintiff any colous. [b]

As to the ſecond, colour always ought to be given by him who is firſt in the conveyance, or elſe all that before it is waived; and therewith agreeth 10 *H.* 7. 14. 15 E. 4. 32. 18 E. 4. 10. & 22 E. 4. 25. And in this caſe Queen *Elizabeth* is the firſt in conveyance by the Letters Patents, and the Plaintiff cannot ſuppoſe that the defendant claimeth by former Letters Patents, for then it ſhould give to the Plaintiff a good title; as in 12 *H. 6. Colour* 54. In Treſpaſs for breaking his Cloſe, the Defendant ſaith, That one *H.* did enfeoff him, and the Plaintiff claiming by colour of a leaſe made to him for term of years before the feoffment, where nothing paſſed, entred, *&c.* And there *Fitzherbert* conceiveth that the plea is not good; for if ſuch a leaſe was, it paſſeth preſently, and when he pleadeth that the Plaintiff claiming by colour of a leaſe for years, where nothing paſſeth, the ſame is repugnant to it ſelf: for when he ſaith by colour of a leaſe, this word *Leaſe*, implieth a leaſe in Law, for otherwiſe it is no leaſe. As in Aſſiſe, it is no plea to ſay, that one *H.* did enfeoff him, and the Plaintiff claim by colour of a feoffment where nothing paſſed, entred, for the Law doth intend it is no feoffment without Livery; and therefore it is the uſe to plead, That the Plaintiff claiming by colour of a deed of feoffment where nothing paſſed, *&c.* for by the deed without Livery nothing in truth paſſeth. So if the Defendant ſhall ſay in caſe at Bar, That the Plaintiff claimeth in by colour of a former grant of the ſaid Queen by her Letters Patents, *&c.* the ſame implieth a lawfull grant, *&c.* But both theſe caſes were diſallowed by the Juſtices. For as to the firſt, It is true, when the Defendant in treſpaſs, *&c.* pleades, that the Freehold is in *John at Stiles*, and that he by his commandment entred; or that *J. S.* is ſeiſed of his demeſn as of fee, which is all one (as the Book is in 18 E. 4.) and that the Defendant as his Servant, and by his commandment entred, there he needeth not to give any colour, becauſe that notwithſtanding the fee or freehold be to one, yet the Plaintiff may have a leaſe for years; and therewith agreeth 22 *H.* 6. 50. But when ſpecial title is made, as in 2 *R.* 3. 8. *John Atwood* brought Treſpaſs of breaking of his Cloſe againſt *John Dingle* and *William Dingle*, the Defendants ſay, That one *Thomas Atwood* was ſeiſed thereof, and enfeoffed *I. B.* and *R. S.* who enfeoffed Sir *John Norbury* Knight, and the ſaid *John Dingle* in his own right, and the ſaid *William* as ſervant to him, *&c.* and gave colour to the Plaintiff by the ſaid *Thomas Atwood.* And 1 *H.* 7. 19. *Robert Redneſh* brought a Writ of *Forcible Entry* upon the Statute of 8 *H. 6.* againſt *I. B.* who pleaded, That *John Hoke* and *Henry Atwood* were ſeiſed, *&c.* and enfeoffed *Fines* and *Sackvile* in fee, and the Defendant as Servant, *&c.* and gave colour *prout oportet*, and traverſed the force; for when the Defendant maketh ſpecial title to him in whoſe right he juſtifieth as Servant, there it ſhall not be intended that the Plaintiff hath any intereſt in the land, and ſo is the difference. [90]

As to the 2 Reaſon, The Defendant ought to give colour by former Letters Patents, *ſ. colore quarundam literarum patentium fact' præd'* the Plaintiff *de tenementis prædictis ante, &c. pro termino, &c. ubi nihil tranſivit*, he ſhall not ſay that the Plaintiff claiming *colore conceſſionis ſive dimiſſionis, &c.* And that the colour ſhall be given in ſuch caſe, appeareth in 7 *H.* 7. 14. *a.* where in the ſame caſe, colour was given.

But it was Reſolved, That in the caſe at Bar colour ought not to be given to the Plaintiff. And the reaſon that colour ſhall be given in a Writ of *Entry ſur diſſeiſin*, a Writ of Entry in the nature of an Aſſiſe, Aſſiſe, Treſpaſs, *&c.* is, That the Law, (which preferreth and favoureth certainty as the mother of quiet and repoſe) to the intent that either the Court ſhall adjudge thereupon if the Plaintiff demur, or that a certain iſſue may be taken upon a point certain, requireth that the Defendant when he pleadeth ſuch ſpecial plea, that notwithſtanding that the Plaintiff may have right, the Defendant ſhall give colour to the Plaintiff, to the end that his plea do not amount to the General Iſſue, and ſo to leave all the matter at large to the Jury, which ſhall be full of multiplicity and prolixity of matter. And although that colour be not but a fiction, yet *lex fingit ubi ſubſiſtit æquitas*: See *Doctor and Student, cap.* 53. *fol.* 160. But when the ſpecial matter of the plea, notwithſtanding that the Plaintiff had right before, utterly barreth him of his right, in ſuch caſe

the Defendant needeth not to give any colour, because he barreth the Plaintiff of his right, if he had any; in which Case it should be in vain to give the Plaintiff colour, where it appeareth upon the matter of the plea that he had not right. For because that in real action, as Assise, Writ of Entry in the nature of Assise, *&c.* if a collateral Warranty be pleaded, and the Defendant doth rely upon it; or if an Estoppel be pleaded, or a fine with proclamations, *&c.* there needeth not
[b] any colour to be given, because that the plea is barred although he hath right; and therewith agreeth 35 *H.* 6. *Trespass* 160. So, and by the same reason, If the Defendant conveyeth to him title by Act of Parliament, as it is holden in 3 *E.* 4. 2. when one justifieth his Entry by a cause which bindeth one in his blood for ever, he shall not give any colour: and therewith agreeth 22 *E.* 4. 4. See 5 *H.* 7. 10. 3 *E.* 3. *tit. Assise.* But if a man pleadeth a descent in barr, yet the Defendant ought to give colour, for that bindeth the possession, and not the right, as it is agreed in 19 *H.* 6. 41. and 22 *H.* 6. If in Trespass for taking away of goods the Defendant justifieth, because that he hath Waif within his Mannor; and sheweth, that one stole the said goods *de quodam ignoto* and waived them within his Mannor, for which the Defendant seised them, it is good without any colour, and therewith agreeth 12 *E.* 4. 5. *b.* But it was there holden by all the Justices, That if the Defendant had said, that *A.* was possessed of the goods as of his proper goods, and that one *B.* had stoln the goods as above, that he ought to give colour to the Plaintiff, for then he proveth that no property was in the Plaintiff, so he had no colour of action; but there in the same case he sheweth that they were stoln *extra possessionem cujusdam ignoti*, so it is not denied but that the property was to the Plaintiff, and he is not bound to shew expresly in whom the property was. The same Law of a Sale in Market overt, If he had said, That such a one sold them, he needeth not to give colour; but if he saith, That such a one was possessed of his goods as of his proper goods, and sold them in Market overt, he ought to give colour. And all this appeareth in the said Book of 12 *E.* 4. But I conceive, that the said Case is not well reported, for the reason there given maketh against the opinion of the Justices; for their reason is, That the plea shall not be good without colour, when the property is alledged in a certain person, because it is proved, that no property was to the Plaintiff, and so had no colour of action: *Ergo*, it is a good cause that no colour shall be given, because it is an absolute barr of the property, and of all the Plaintiffs right, as it appeareth before. And so is the Book in 30 *H.* 6. 1. in the same case when the property is alledged in a person certain, and therewith agreeth 21 *E.* 4. 18. *b.* and 21 *E* 4. 65. *a.* And in 9 *E.* 4. 22. the Defendant when he justifieth for Wreck gave colour; and it is holden in 21 *E.* 4. 18. and 21 *E.* 4. 65. that in such case no colour shall be given, and the reason of all the Books agree with it. So when the matter of the plea doth barr the right
[91] of the Plaintiff, no colour shall be given. Also when the Defendant entitleth himself by the Plaintiff himself, no colour shall be given, 13 *H.* 7. 6 *H.* 7. 14. Also when a man pleads to the Writ, or to the action of the Writ, no colour shall be given, 21 *E.* 4. 4. And for the Case of Tithes, which is the Case at Bar, he who justifieth for them shall not give colour, for to whomsoever the property is, and whosoever severeth them from the nine parts, they belong to the Parson. And therewith agreeth 12 *E.* 4. 21 *E.* 4. 18. *b. & 65.*

And as to those Cases which have been put on the contrary party. 1. In the Case of 21 *E.* 4. 6. where colour was given in the case of Tithes, *Brian* Chief Justice there held, that it was not needfull to be given, for such plea was good without colour; and as to the case of 21 *H.* 6. 30. there colour was given, but not by the Rule of the Court, and the opinion of 19 *H.* 6. is not to the contrary, inasmuch as he taketh upon him to give colour if any was needfull, but such colour which he gave was not good. The case of 2 *H.* 4. is not of Tithes, but of other goods, and therefore is not to be resembled to this Case. In the Case of 34 *H.* 6. 10. there needeth not any colour to be given, but there *Moil* towards the end of the Case, saith, If any man taketh my goods or money, and offereth them to an Image, in that case I am barred against him as of goods sold and tolled in open Market, in which case no colour shall be given. And as to the Case of 39 *H.* 6. 1 & 2. the Case of Waif, when the Defendant alledgeth that the property was to the Plaintiff, *&c.* It was resolved that no colour shall be given. And it appeareth before by 21 *E.* 4. 5. and other Books, that no colour shall be given in case where the Defendant alledgeth that the goods and waif were the stoln goods *cujusdam hominis ignoti*; for in the end of the said Case of 39 *H.* 6. 2. the Reporter saith, *Quere*, If in this case colour ought to be given to the Plaintiff, because by this plea the property of the horses is not denied to be to the Plaintiff, before the stealing, and then it seemeth the plea is good without colour; and there the Reporter further saith, *Vide* such matter in a Replevin, *anno* 5 *E.* 3. And the Case which he meaneth is in *Hill.* 5 *E.* 3. 3. *William de Newport* of *London* brought a Replevin against Sir *Henry de Nevil* Knight, and declared of the taking of his goods to the value of *&c. v.* 10 Lasts of Herrings in the Town of *Walring*. The Defendant pleaded, That the Lasts of Herrings were cast by tempest of the Sea out of any ward upon his land in *Walring*, where the Plaintiff hath declared; and that the Defendant hath liberty of Wreck through the whole Town, as appendant to his Mannor of *Walring*, and so his own goods. Judgment if he shall be answered in this Writ? And in
[b] this case two points were Resolved. 1. That against this special matter the Plaintiff was not received to a simple averment, without answering to the cause. 2. Notwithstanding that the Defendant did not acknowledge that the property was at any time in the Plaintiff, yet the plea was good; for when goods are found in the Sea, then they are out of the custody and possession of every one, then the Lord upon whose lands they are cast, needeth not acknowledge whose goods they were; and the Plaintiff by the Rule of the Court was driven to answer: Wherefore he said, that the Defendant took the goods out of the possession of the Merchants and Mariners; and offered it in issue, and the Defendant was driven by the Court to joyn issue therein. In which case it is to be observed, That if the Defendant had generally claimed property, he shall not say that the property

was

was onely in him, but further, and not in the Plaintiff, or otherwiſe he doth not anſwer the declaration: But in the caſe at Bar, becauſe the matter of the plea doth barr the Plaintiff of his right, he ought not to deny the Plaintiffs property.

Note Reader, every colour ought to have four Qualities.

1. It ought to be a doubt to the Lay-people, 19 *H.* 6. 21. 11 *H.* 4. 3. 19 *E.* 4. 3. 23 *H.* 6. 54. 10 *H.* 6. 8. 36 *H.* 6. *Treſpaſs* 162. 36 *H.* 6. 7. 20 *H.* 6. 27. As where the Defendant ſaith, that the Plaintiff claiming by colour of a Deed of feoffment, *&c.* the ſame is good, for it is a doubt to Lay-people, If land ſhall paſs by Deed onely without Livery, or not.

2. That colour as a colour ought to have continuance, although that it want effect; as if the Defendant giveth colour by colour of a Deed of demiſe made to the Plaintiff for the life of *I. S.* who was dead before the Treſpaſs, it is not any colour, for it doth not continue, but the Defendant may gainſay the effect of it, that he claimeth by colour of a Deed of demiſe to him for life where nothing paſſeth; and ſo there is a difference betwixt the continuance of the colour, and the effect of it. 2 *E.* 4. 19. 19 *H.* 6. 21. 9 *H.* 4. 3. 8 *H.* 6. 9. 14. 38 *H.* 6. 67. 9 *E.* 4. 18. *Vide* 19 *E.* 4. 3. 7 *H.* 7. 13 *&* 14.

3. It ought to be ſuch a colour, that if there be defect ſhall maintain the nature of the action; as in an Aſſiſe, to give him colour of a freehold, and not as Gardian in Knights Service, 2 *Aſſ. p.* 6. 28 *Aſſ. p.* 28. 43 *E.* 3. *Aſſiſe* 53. 32 *H.* 6. 6. nor to his Anceſtor where the action is of his own poſſeſſion.

4. Colour ought to be given by the firſt conveyance as hath been ſaid, otherwiſe all the conveyance before is waived, 10 *H.* 7. 14. 15 *E.* 4. 32. 18 *E.* 4. 10. 22 *E.* 4. 25. *Long.* 5 *E.* 4. 134. 21 *H.* 6. 32.

As to the other Error which was aſſigned, theſe two points were argued, 1. If the Letters Patents ought to be ſhewed by the Defendant, who juſtifieth as Servant to him who hath but a parcel of the eſtate of him to whom the Letters Patents were granted. 2. Admitting that he ought to ſhew them, if the leaving out of this clauſe *(Cur. hic prolat.)* be matter of ſubſtance or matter of form; [92] for if it be but matter of form, then foraſmuch as the Plaintiff hath not ſhewed the ſame particularly and expreſly for his cauſe of demurrer, he ſhall not take advantage of the ſame by the ſaid Statute of 27 *Eliz. cap.* 5. And as to the firſt, *Auſtin*'s Caſe in 1 *&* 2 *Ph. & Mar. Dyer* 115. was cited, where in an Information of Intruſion in the Mannor of *Eaſtfarleigh* in *Kent*, the Defendant pleaded the Letters Patents of King *H.* 8. unto Sir *Tho. Wyat* in tail, and that Sir *Thomas* made a leaſe to him for thirty ſix years, without ſhewing forth to the Court the Letters Patents; and the Lord *Dyer* in the reporting of the ſaid Caſe, ſaith, Note this, And the ſame ſtands, as it was ſaid, upon great reaſon, for the leſſee having but parcel of the eſtate, the Letters Patents do not belong to him, but to his leſſor. And therewith agreeth 29 *Aſſ. p.* 2. *John Eatbred*'s Caſe, and the reaſon there given, is, Becauſe that the Patent doth not remain with him who hath but parcel of the eſtate. And in 28 *H.* 8. *Dyer* 29. In Treſpaſs the defendant ſaid, That the place where was 10 acres of land, whereof the King was ſeiſed in fee in the right of his Crown; and by his Letters Patents granted the land to the Lady *Carew* for term of life, who leaſed to the Defendant for years, and averred the life of the firſt leſſee, and ſo juſtified: And it was moved if the plea were good without ſhewing of the firſt Letters Patents; and it was holden by *Brown*, *Willowby* and *Baldwin*, That he ſhall not be driven to ſhew them, becauſe that the Letters Patents do not belong to him, no more than a Sub-Collector, Under-Sheriff, or Incumbent, becauſe they have not any means to make their grantors or maſters to ſhew them. And by them there is a difference, when the Patentee doth grant over his whole eſtate or intereſt, there the Patent belongeth to him, and therefore he ſhall ſhew it forth, but when he granteth but parcel, it is otherwiſe: and with the caſe of Incumbent agreeth 31 *E.* 3. *Monſtrans des faits* 177. *&* 31 *H.* 6. 14. and the caſe of Sub-Collector and Under-Sheriff, 22 *H.* 6. 42. *&* 31 *H.* 6. 14. 12 *E.* 3. *Monſtrans des faits* 65. A Sub taxer ſhall juſtifie the taking of goods without ſhewing the Commiſſion; but if a man will juſtifie the impriſonment of the body of a man by Warrant, he ought to ſhew the Warrant.

But it was Reſolved, That the leſſee for years in the Caſe at Bar ought ſhew the Letters Patents made to the leſſee for life: For it is a Maxim in the Law, That he who is party or privy in eſtate, or he who juſtifieth in the right of him who is party or privy plead a Deed, although he who is privy doth not claim but parcel of the original eſtate, yet he ought to ſhew the original Deed to the [b] Court. And the reaſon that Deeds being ſo pleaded ſhall be ſhewed to the Court, is, That to every Deed two things are requiſite and neceſſary; the one, that it be ſufficient in Law, and that is called the Legal Part, becauſe the Judgment of that doth belong to the Judges of the Law; the other concerns matter of fact, *ſc.* if it be ſealed and delivered as a Deed, and the Trial thereof belongeth to the Country. And therefore every Deed ought to prove it ſelf, and to be proved by others: Approve it ſelf upon its ſhewing forth to the Court in two manners. 1. As to the compoſure, the words to be ſufficient in Law, and the Court ſhall judge that. 2. That it be not raſed or ineterlined in material points or places, and that alſo in old time the Judges did judge upon their view, the Deed to be void, as it appeareth in 7 *E.* 3. 57. 25 *E.* 3. 41. 41 *E.* 3. 10, *&c.* but of late times the Judges have left the ſame to be tried by the Jury, if the raſing or interlining were before the delivery. 3. That it might appear to the Court and to the party, if it were upon condition, limitation, or power of revocation, *&c.* to the intent that if it be conditional, or if there be a limitation, or power of revocation in the Deed, If the Deed be ſingle, or if there wanteth a Counterpart of the Indenture, the other party might take advantage of the condition, limitation, or power of revocation. And therewith *Littleton* agreeth, *Conditions* 90 *&* 91. 40 *Aſſ.* 34. And theſe are the reaſons of Law, that Deeds pleaded in Courts, ſhall be ſhewed forth in Courts. And therefore it appeareth, that it is dangerous to ſuffer any who by the law in pleading ought to ſhew forth the Deed it ſelf to the Court upon the General Iſſue, to prove in Evidence to a Jury by Witneſſes

there

that there was ſuch a Deed, which they have heard, ſeen and read; or to prove it by a Copy: for the viciouſneſs, raiſings or interlinings, or other imperfections in theſe caſes, will not appear to the Court; or peradventure the Deed may be upon condition, limitation, or with power of revocation, and by this way Truth and Juſtice, and the true reaſon of the Common Law ſhould be overthrown. But yet in great and notorious extremities, as by caſualty of fire, that all his Evidences were burnt in his houſe, if the ſame ſhall appear to the Judges, they may in favour of him who hath ſo great loſs by fire, ſuffer him upon the General Iſſue to prove the Deed in Evidence to the Jury by Witneſſes, that affliction be not added to affliction. And if the Jury find it, although it be not ſhewed forth in Evidence, it ſhall be good enough, as it appeareth in 28 *Aſſ. p.* 3. And in 12 *Aſſ. p.* 16. the Judges would not ſuffer a Deed to be given in Evidence, which was not ſhewed forth to the Jury. *Vide* 26 *Aſſ. p.* 2. the like. But the Copy of a Record may be ſhewed forth in Evidence to the Jury, for Records are of ſo high a nature, and ſuch credit in Law, that they cannot be proved by other means than themſelves, and no raſure or interlinings ſhall be intended in them.
[93] And therefore a Copy of a Record being teſtified to be true, is ſuffered to be given in Evidence; but the ſure way is, to exemplifie the ſame under the great Seal, or at the leaſt under the Seal of the Court. And in the ſaid caſualty by fire, there ought to be great care and diſcretion in the Judges, for notwithſtanding any ſuch caſualty by fire, he in pleading ought to ſhew forth the Deed to the Court, otherwiſe his plea ſhall be inſufficient, and Judgment ſhall be given againſt him; for the Law will rather ſuffer a miſchief to a private man in a private caſe, then an inconvenience, which by the breaking of the Rule of Law, ſhould be brought in. Alſo the Deed ought not onely, as hath been ſaid, approve it ſelf, but it ought to be proved by other, *ſc.* by Witneſſes, that the ſame was ſealed and delivered; for otherwiſe although the fabrick and compoſition of the Deed be legal, yet without the other it is not of any effect. And all this which hath been ſaid of Deeds, as to the legal part, may be alſo affirmed of Letters Patents from the King. And the ſaid Maxim aforeſaid is proved by many Authorities in Law: And therefore in 3 *H.* 6. 20, 21, 22. in *William Pole*'s Aſſiſe the caſe was ſuch; Sir *John Clinton* Knight by his Deed indented did enfeoff *William Daventure* and his heirs, yeilding to the ſaid Sir *John* and his heirs the yearly rent of five Marks, with clauſe of diſtreſs; which rent after the death of the ſaid Sir *John*, deſcended to Sir *William Elington* Knight, as to his Couſin and heir, which Sir *William* by his Deed ſhewed forth, granted to the ſaid Sir *William Pole* now Plaintiff, (who was a Lawyer) *pro conſilio impenſo & impendendo*, 26 *s.* 8 *d.* parcel of the ſaid rent. To have and perceive to him for his life, and that he was thereof ſeiſed and diſſeiſed. And there *Weſtbury* and others take a difference, when the firſt grantee granteth over as great an eſtate as he had, and where he granteth a leſs eſtate; for when he granteth as great an eſtate as he hath, the whole eſtate of the rent doth remain in the perſon of the ſecond grantee, in which caſe the firſt Deed of right belongeth to the ſecond grantee; and therefore in an Aſſiſe brought by him of this rent, he ought to ſhew forth the firſt Deed: but where he granteth a leſs eſtate then he hath, *ſc.* where he that hath a fee ſimple granteth for life, or maketh a gift in tail, the ſecond grantee ſhall not be driven to ſhew forth the Deed made to his grantor, becauſe that the fee doth remain in the leſſor or donor to whom the Deed belongeth, and to no other, and therefore he ſhall not be driven to ſhew the firſt Deed. But the Opinion of the Court was againſt the Plaintiff, and the reaſon was, becauſe he is privy in the eſtate of the rent, and claimeth by the firſt grantee. *Vide Litt. Lib.* 3. *cap. Releaſes* 106. Note, every Releaſe made to him who hath a Reverſion or remainder in fait, ſhall ſerve and aid him who hath the Freehold, as well as he to whom the releaſe is made, if the tenant for life
[b] hath the Releaſe in hand to plead; and the reaſon thereof is, becauſe there is privity in eſtate betwixt him in the reverſion or remainder, and the tenant for life, and yet the Deed doth not belong to him, but to him in the reverſion or remainder. In the ſame manner *Littleton* ſaith, Where a Releaſe is made to tenant for life, or to tenant in tail, the ſame ſhall enure to him in the reverſion or remainder, as well as to the tenant of the freehold, and they ſhall have as great advantage of it, if they can ſhew it; but in reſpect of the privity of eſtate, if they cannot ſhew it, they ſhall not take advantage of it. And therewith agreeth 35 *H.* 6. *Monſtrans des faits* 118. where *Priſot* Chief Juſtice of the Common Pleas holdeth, That in many caſes a man ſhall not plead a Releaſe or Deed which belongeth not to him, nor can he have an action to recover, without ſhewing of it. As if the diſſeiſor maketh a leaſe for life, who is impleaded in a *Præcipe*, and maketh default after default, and the diſſeiſor is received, he ſhall not plead a Releaſe made by the diſſeiſee to the tenant for life, without ſhewing it. So the Lord by Eſcheat ſhall not plead a Releaſe made to the diſſeiſor by the diſſeiſee without ſhewing of the Deed, and yet it doth belong to him, nor hath he any remedy for to come by it. And it was ſaid, That theſe Caſes were ſtronger Caſes than the Caſe at Bar; for when the ſaid *Conand* made a leaſe to the ſaid *George* for years, the leſſee might bind the ſaid *Conand* by Covenant, or otherwiſe, to ſhew the Letters Patents to the Court, when need ſhould be; but ſo cannot the Tenant for life, or he in the remainder or reverſion, for there no contract is made betwixt him who pleadeth the Deed, and him to whom the Deed is made.

It is further ſaid in 35 *H.* 6. that it agreed, That Gardian in Knights ſervice ſhall not plead a Releaſe made to his tenant, without ſhewing of it, and that is adjudged as it is there ſaid; and tenant in Dower ſhall plead a Releaſe made to her husband without ſhewing of it. And in 14 *H.* 8. 4. it is agreed by all, That he who is privy in eſtate, as feoffee, leſſee for years, *&c.* and he who juſtifieth as Servant to him who is privy, ought to ſhew the Deed in Court which they plead, *&c.* And in Debt againſt the heir he ſhall not plead a Releaſe made to the Executor without ſhewing it, for that is privity betwixt them; and therewith agreeth 13 E. 2. *Monſtrans des faits* 42. And there is another Maxime in Law, That where a man is a ſtranger to a Deed and doth not claim the thing compriſed in the grant, nor nothing out of it, nor doth any in the right of the grantee as Baily

or

or Servant, there he ſhall plead the Patent or Deed without ſhewing it. If the tenant pleadeth a grant of the Lord with Attornment, he ſhall not ſhew it, and ſo of the like; but when he who claimeth the things, or any right or intereſt out of them, or juſtifieth in the right of the grantee, there he ought to ſhew the firſt grant, as the ſecond grantee of the rent-charge ſhall ſhew the firſt grant, and ſo ſhall his Baily; and the grantee of the rent-charge ſhall not plead the Releaſe of the diſſeiſee to the diſſeiſor without ſhewing of it; for although he doth not claim the land of which the leaſe is made, yet he who hath a rent of land, hath right in the land which by releaſe of all his right ſhall be extinct, and there he ought to ſhew the Deed in ſuch caſe; and therewith agreeth 20 *H.* 7. 6 & 8. and 14 *H.* 8. 5. The diſſeiſee ſhall not plead a Releaſe to the diſſeiſor, nor of the right in the land, nor of rent going out of land, without ſhewing of it; for where one claimeth the thing to whom a Releaſe is made, or a right or intereſt out of it, the Law maketh privity in reſpect of his eſtate or right in the land, to ſuch intent that he ſhall not have avail of the Deed without ſhewing of it. Which Caſes are ſtronger Caſes than the Caſe at Bar; for in the Caſe at Bar, he claimeth eſtate and intereſt in the land it ſelf which is demiſed by the Letters Patents, and therefore he ought to ſhew them. [94]

As to the Caſes which have been urged to the contrary, and firſt to *Auſtin's* Caſe, there is not any Authority in the Book, that the ſame was allowed or diſallowed by the Court; and the ſaid Caſe of *Eatbred* in 29 *Aſſ. p.* 2. There the Prior alien made a leaſe for life, which he made as Prior out of the inheritance of the houſe, and not by force of the Letters Patents, by which but a chattel paſſeth. And in the Caſe of 28 *H.* 8. there *Fitzherbert*, *Mountague*, and *Knightley* held, That the Letters Patents ought to be ſhewed in ſuch caſe, *& ſic gens contra gentem.*

As to the ſecond Point, it was objected, That it was but matter of form, and the ſubſtance is the grant of Queen *Eliz.* by her Letters Patents, which is confeſſed by the Plaintiff by his demurrer. And the Book in 6 *E.* 4. 2. was objected, where *Choke* holdeth, that if one be bounden upon condition to perform the Covenants in certain Indentures; and he pleadeth performance without ſhewing them in Court, and the Plaintiff replieth, and ſheweth a breach, he maketh the barre good; for he ſaith, That of ſuch things which are not material, the replication ſhall make the barre good; by which it was inferred, that the ſhewing of the Indentures was a thing of form, and not of matter. And a Judgment was cited *Mich.* 29 & 30 *Eliz.* in this Court in the Mayor and Commonalty of *Launceſton's* Caſe in Treſpaſs in *Cornwall*, the Letters Patents of Queen *Elizabeth* were pleaded, *ſc.* that Queen *Elizabeth* by her Letters Patents *conceſſit*, *&c.* without ſaying (*Cur' prolat.*) upon which the other party did demurr generally, and the plea adjudged good. But it was reſolved, that the ſame was matter of ſubſtance, as appeareth by the cauſes for which Deeds ſhall be ſhewed forth. And as to the ſaid Caſe of the Mayor and Commonalty of *Launceſton*, it was true, that ſuch Judgment was given upon arguments of other points. But in a Writ of Error *Mich.* 30 & 31 *Eliz.* upon the Statute of 27 *Eliz.* Error was aſſigned, That the Letters Patents were not ſhewed forth; and it was reſolved, That for this cauſe the plea was inſufficient in ſubſtance. And for this cauſe it was Reſolved by all the Juſtices of the Common Pleas, and the Barons of the Exchequer, that the Judgment ſhould be reverſed. And of ſuch opinion in the Caſe at Bar, were all the Judges of the Common Pleas and Barons of the Exchequer, and ſo the Judgment given by the Judges of the Kings Bench in the Caſe at Bar was affirmed. [b]

Obſerve good Reader, That this Caſe is adjudged by all the Judges of *England*, and Barons of the Exchequer.

Note Reader, as to the ſaid three Caſes put in 35 *H.* 6. *ſc.* of the Gardian, and Tenant in Dower, and of Tenant by the Courteſie, they are good Law: For as to the ſaid two Caſes of Gardian and Tenant in Dower, there is a difference where a particular eſtate or intereſt is gained by the Law, and where by the act of the party. And in the Caſe at Bar, the intereſt is gained by the act of the party, who might provide for himſelf; but when the Law doth create the eſtate, and the Deed doth not belong to him, nor ever was in his power, then he ſhall not ſhew it, as in the ſaid caſe of Gardien by Knights Service; and therewith agreeth 20 *E.* 3. *Darr. Preſentment* 13. 33 *E.* 3. *Gard.* 162. And therefore the Gardien in Knights Service in a Writ of Dower brought againſt him, ſhall not plead detainment of Charters, becauſe they do not belong to him, but to the heir, as it is holden in 10 *E.* 3. 49, *&c.* The ſame Law of Tenant in Dower, as it is holden in 5 *E.* 3. *Hors de ſon fee* 2. 3 *H.* 6. 31. 7 *H.* 6. 1. 7 *H.* 5. 5. *Vide* 11 *H.* 4. 83. 15 *H.* 8. And ſo of Tenant by Statute Merchant, Staple, *Elegit*, *&c.* for they came to the poſſeſſion by execution of Law, and againſt the terre Tenant who hath the Deed; for, *Judicium redditur in invitum:* and therewith agreeth 24 *H.* 7. 6. But the Tenant by the Courteſie ought to ſhew the Releaſe made to his wife, for although that his eſtate be created by the Law, yet the Deed doth belong to him, and he had it in his power, becauſe the Deed was made to his wife, and he might detain the ſame during his life. *Vide* 14 *H.* 8. [95]

Note Reader, when a plea doth amount to the General Iſſue, and the Plaintiff doth demur upon it, if the Defendant will not plead the General Iſſue, but joyn in Demurrer, the Court ſhall adjudge againſt him at the Common Law upon the general Demurrer. And after the ſaid Act of 27 *Eliz.* upon ſuch ſpecial cauſe ſhewed as was in the Caſe at Bar. And by theſe Reaſons and Differences you will the better underſtand your Books; and the Books which *prima facie* to ſome ſeem to diſagree, are well reconciled.

Mich. 10 Jacobi.

Edward Seymor's Caſe.

[b] BEtween *William Heywood* Gent. Plaintiff in an *Ejectione firmæ* in the Kings Bench, and *Samuel Smith* Defendant, upon a demiſe made by *Edward Seymor* Eſquire, 9 *Martii*, 4 *Jac. Reg.* of a houſe within the Pariſh of St. *Anne* within the Precinct of *Black-friers*, within the Ward of *Farringdon* within, *London*, for three years, *&c.* and that the Defendant had ejected him, *&c.* The Defendant pleaded Not guilty; and upon this iſſue a ſpecial Verdict was given to this effect: *Sir Tho. Cheiney* Knight was ſeiſed of the ſaid Meſſuage in fee, and 6 *Decembr.* 1 *Eliz.* by his Will in Wring demiſed the ſaid Meſſuage to *Henry Cheiney* his Son, (afterwards Lord *Cheiney*) and to the heirs of his body, the remainder to *John Cheiney*, and to the heirs males of his body, the remainder to the next heirs males of the ſaid *Thomas Cheiney*, and to the heirs males of their bodies, the remainder to the next heirs of the ſaid Sir *Thomas Cheiney*; and afterwards the ſaid Sir *Thomas Cheiney* died ſeiſed: after whoſe death the ſaid *Henry Cheiney* died, his Son entred into the ſaid Meſſuage, and was thereof ſeiſed in tail, with the remainders over in tail, the reverſion in fee to him and his heirs. And 18 *Decemb.* 22 *Eliz.* by Indenture enrolled in the Chancery within ſix months, for a certain ſum of money bargained and ſold the ſaid Meſſuage to *William Higham* Gent. and his heirs, by force whereof he entred and was ſeiſed accordingly. And afterwards the ſaid *Henry Cheiney*, *ſc. Octob. Mich.* 32 *Eliz.* levied a fine with proclamations of the ſaid Meſſuage to the ſaid *William Higham* and his heirs, with general Warranty to him and his heirs againſt all men. *William Higham* 19 *Decemb.* 23 *Eliz.* did enfeoff of the ſaid Meſſuage *Edw. Stanhope* Eſq; in fee, who 30 *Jan.* 26 *Eliz.* [96] enfeoffed the Lord *Seymor* in fee, who *ult. Octob.* 26 *Eliz.* of the ſaid Meſſuage did enfeoff *Edward* Lord *Seymor* in fee; And that the ſaid *John Cheiney* in remainder had iſſue *Thomas Cheiney*, and died; and afterwards the ſaid *Henry* then Lord *Seymor* died, *anno* 29 *Eliz.* without iſſue; and that the ſaid *Thomas Cheiney* was Couſin and heir to the ſaid *Henry* Lord *Cheiney*, and the ſaid *Thomas Cheiney*, 16 *Novemb.* 31 *Eliz.* entred into the ſaid Meſſuage, claiming the ſaid Meſſuage by force of the ſaid remainder in the ſaid Will; and that the ſaid *Edward* Lord *Seymor* died, having iſſue the ſaid *Edward* the leſſor of the Plaintiff his Son and heir, who entred into the ſaid Meſſuage, and made the leaſe to the Plaintiff, as it is alledged in the Declaration; and that the Defendant as Servant of the ſaid *Thomas Cheiney*, and by his commandment did eject him: And if upon the whole matter the ſaid Defendant lawfully entred or not, the Jury pray the advice of the Court. And this Caſe was argued at the Bar and at the Bench in the Kings Bench, and therein divers Points were Reſolved by the whole Court.

1. That by the Deed indented of bargain and ſale inrolled, the bargainee had an eſtate diſcendible to his heirs, determinable upon the death of Tenant in tail, and alſo he had the reverſion in fee expectant upon the eſtate in remainder in tail, and that the wife of the bargainee ſhould be endowed. And therewith agreeth 24 E. 3. 22. in *Caly's* Caſe; but ſuch Dower ſhall be determinable by the death of Tenant in tail;

2. It was Reſolved, That a fine levied to the bargainee doth not make a diſcontinuance of the remainder to *John Cheiney*, becauſe it doth not touch or diſplace the remainder, and no eſtate of freehold paſſeth by the fine, but the fine with proclamations doth corroborate the eſtate of the bargainee; and by the Statutes of 4 *H.* 7 *cap.* 24. and 32 *H.* 8. *cap.* 36. maketh his eſtate more perdurable; for where it was (having regard to the eſtate tail) determinable upon the death of tenant in tail, now it is not determinable till the death of tenant in tail without iſſue, but if the fine had been levied before the bargain and ſale enrolled, it had been a diſcontinuance; but in the Caſe at Bar the fine doth operate upon the eſtate precedent which paſſeth by the bargain and ſale, and is guided by the precedent eſtate, and no concluſion, for he may confeſs and avoid, as in 6 *R.* 2. *Eſtoppel* 111.

[b] 3. It was objected, That where by the feoffment of the bargainee the remainder of *John Cheiney* was diſplaced and put to a right, ſo as the Warranty in the fine doth deſcend upon *John Cheiney*, who hath but a right, and therefore ſhall barr him: It was reſolved by the whole Court, That this Warranty ſhould not barr the remainder, for divers cauſes. 1. Becauſe every Warranty ought to be knit and annexed to an eſtate, for every Warranty hath his eſſence by dependency upon an eſtate; and in this Caſe at the time of the fine levied the Warranty was annexed to the fee ſimple determinable upon the death of tenant in tail without iſſue, and to the reverſion in fee, but did not extend to the eſtate of *John Cheiney* in the remainder, for the ſame was not then diſplaced or deveſted, but continued in him, for *John Cheiney* at the time of the fine levied, and after, was ſeiſed of his remainder. Then if the Warranty at the time of the mention of it be annexed to an eſtate, the Conuſee by his feoffment or act cannot extend it farther then it was at the time of the creation of; and therefore when the eſtate tail to which the Warranty is annexed is determined by the death of the tenant in tail without iſſue, the Warranty which hath its eſſence by dependency is alſo determined, for there is no eſtate which ſhould ſupport it. And therefore it was agreed, That if a man maketh a gift in tail, and warranteth the land to him and his heirs, and afterwards tenant in tail maketh a feoffment in fee, and dieth without iſſue, the feoffee ſhall not rebutt the donor in a Formedon in the reverter, becauſe that the eſtate to which the Warranty is annexed is determined: but it is holden in 7 E. 3. 34 & 35. That if a man maketh a gift in tail, and warranteth the land to him his heirs and aſ-

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ſigns, and afterwards tenant in tail maketh a feoffment in fee and dieth, he ſhall rebutt the donor by force of the ſaid Warranty in a Formedon in the reverter. And this Book is cited by *Wilby in* 46 E. 3. 3 & 4. which Book is good Law, if it be intended of a gift in tail made before the Statute of *Donis Conditionalibus*, for when the Warranty was annexed to an eſtate in fee ſimple, and the donor had but a poſſibility of reverter, which might be barred by a collateral Warranty. *Vide* 45 *Aſſ. pl.* 6. and *Plo. Com.* in the Lord *Barkleys* Caſe 234. But when a man maketh a gift in tail with Warranty after the Statute, this Warranty, in what manner ſoever it be made, cannot extend to barr the reverſion in fee, for the eſtate to which the warranty extendeth, is determined by the death of tenant in tail without iſſue, and as hath been ſaid, a feoffment or other act done by the donee ſubſequent, ſhall not extend the warranty further than the eſtate tail to which the warranty at the time of the creation of it was annexed. 2. It is a Maxim in Law, That no Warranty ſhall extend to barr any eſtate of freehold or inheritance which is *in eſſe* in poſſeſſion, reverſion or remainder [97] (and not diſplaced and put to a right) before or at the time of the warranty made, although that afterwards, and at the time of the deſcent of the warranty the eſtate of freehold or inheritance be diſplaced and diveſted. And therefore if there be father and ſon, and the ſon hath a rent ſervice, rent charge, or rent ſeck, or common of paſture iſſuing out of certain land, and the father releaſeth to the tenant of the land with warranty, and dieth, it ſhall not barr the ſon, for of the rent or common the ſon was actually ſeiſed at the time of the warranty made, and he who is in poſſeſſion needeth not to put in his claim, either to avoid the fine or collateral warranty. And in the ſame caſe, although the ſon after the warranty made be diſſeiſed of the rent or common, and afterwards the father dieth, it ſhall not barr him, becauſe that the warranty at the time of the creation of it, did not extend to any eſtate of freehold or inheritance *in eſſe* at the time of the creation of the ſame: but if the ſon be diſſeiſed of the rent or common, and affirm himſelf to be diſſeiſed by bringing of an Aſſiſe, and afterwards the father releaſeth with warranty and dieth, there the collateral warranty ſhall barr the ſon of his rent or common, becauſe he had put a bare right at the time of the warranty made. *Vide* 31 *Aſſ. p.* 13. 22 *Aſſ. p.* 38. 41 *Aſſ. p.* 6. 33 E. 3. *Garranty* 74. So if my collateral Anceſtor releaſeth to my tenant for life and dieth, it ſhall not bind me, becauſe that the reverſion doth continue in my perſon; But if my tenant for life be diſſeiſed, and my Anceſtor releaſeth to the diſſeiſor with warranty, and dieth, it ſhall bind me, becauſe as well the eſtate of the tenant for life, as my reverſion, was deveſted out of me at the time of warranty made, and with this agreeth 45 E. 3. 21. *b.* and 21 *H.* 7. 11.

4. It was clearly Reſolved, That a warranty cannot enlarge an eſtate, 22 *H.* 6. 15. 19 *H.* 6. 73. *b.* 20 *H.* 6. 73. 2 *H.* 4. 13. 43 E. 17. 43 *Aſſ. p.* 42. *Vide* 12 *Aſſ. p.* 17. 12 E. 3. *Tail* 3. 22 E. 4. 16. *b.* 44 E. 3. 10. 44 *Aſſ. Baſſingborns* Aſſiſe.

5. It was Reſolved, That the feoffment of the Conuſee was no diſcontinuance of the remainder of *John Cheiney*, ſo that his entry ſhould be taken away; for none can diſcontinue the remainder or reverſion. But he only to whom the land was entailed. And therefore if tenant in tail granteth *totum ſtatum ſuum* to one, and he maketh a feoffment in fee, it ſhall not take away the reentry of him in the remainder or reverſion.

6. It was Reſolved, That if the collateral warranty ſhould bind, that it might be well given in [*b*] Evidence to the Jury, although that ſome opinions are *obiter* to the contrary in 22 *Aſſ. p.* 37. and 7 *H.* 5. 6. *Vide* 34 E. 3. *tit. Droit.* For although a collateral warranty giveth not a right, yet in Law it barreth and bindeth a right, and therefore it may be given in Evidence; and ſo much the rather, becauſe that now in an *Ejectione firmæ*, and other perſonal actions, it may be pleaded by way of barr. 15 E. 4. *Entry* 42. 20 *H.* 7. 4. *a.* 1 *H.* 7. 12. 21 *H.* 7. 32. 2 E. 4. 4. 8 E. 4. 19. 21 E. 4. 82. 22 E. 4. 4. 3 *H.* 6. 27. & 36. 20 *H.* 6. 44. 35 *H.* 6. *Treſpaſs* 160. 27 *H.* 8. 22. And that a collateral warranty may be given in Evidence, and found by the Jury upon Not Guilty pleaded in an *Ejectione firmæ*, appeareth in the firſt Part of my Reports in *Chudleighs* Caſe. And according to thoſe Reſolutions in Trinity Term, 9 *Jac. Regis*, Judgment was given for the Defendant. Whereupon the Plaintiff brought a Writ of Error upon the new Statute in the Exchequer Chamber; where it was Reſolved in the ſame Term by all the Judges of *England*, and Barons of the Exchequer, That the Judgement given by the Juſtices in the Kings Bench ſhould be affirmed; and that the warranty did not bind the remainder of *John Cheiney*, for the Reaſons and Cauſes before recited.

Note Reader, every eſtate deſcendible to the heir, either is an eſtate of inheritance or eſtate of freehold. Eſtate of inheritance is either fee ſimple or fee tail; Eſtate of fee ſimple is either eſtate of inheritance abſolute and indeterminable, as where lands are given to a man and his heirs, he hath ſuch a pure and abſolute eſtate which can never determine; or a Fee ſimple determinable, and that is in two manners, *ſc.* either expreſly derived out of an abſolute and pure eſtate in Fee ſimple, or implicite, and derived out of an eſtate tail; out of an abſolute ſtate in Fee alſo in two manners. Firſt, upon condition, as upon morgage, and that is called a fee ſimple conditional. Secondly, by limitation, as if *A.* enſeoffeth *B.* of the Mannor of *D.* to have and to hold to him and his heirs, ſo long as *C.* hath heirs of his body, and that is called a fee ſimple limited and qualified; and in both theſe caſes, all the eſtate of their land is in the feoffee; and therefore upon none of them a remainder, or a reverſion cannot be expectant. Implicite and derived out of eſtate tail, as in the caſe at Bar; when tenant in tail doth bargain and ſell the ſaid meſſuage by deed indented and enrolled to *William* [98] *Higham* and his heirs, and afterwards levieth a fine to him and his heirs with proclamations, he hath an eſtate in fee ſimple as long as the tenant in tail hath heirs of his body derived out of the eſtate tail, and the ſame is a more inferior and ſubordinate eſtate in fee ſimple than the other two before: for upon it a remainder or reverſion may be expectant.

And yet in all theſe caſes, he who hath ſuch eſtate of inheritance may plead that he is ſeized

of the land in his demeſn as of fee without ſhewing the beginning of his eſtate, as well when he hath a fee ſimple derived out of an eſtate tail as a fee ſimple, conditional or limited. Eſtate of freehold deſcendible in like manner, either is expreſſed or implied; expreſſed, as if a man deviſeth land to one and his his heirs during the life of *I. S.* or tenant for life granteth his eſtate to one and his heirs; in theſe caſes the leſſee or grantee hath an eſtate of freehold deſcendible, but no eſtate of inheritance, for he ſhall be puniſhed for waſt, and he in the reverſion or remainder ſhall enter for forfeiture, and his heir ſhall not have his age; for he in a manner is but a ſpecial *occupant*; nor ſhall he be in reſpect thereof charged as heir in *Det.* Implicite as in the caſe at Bar. Tenant in tail bargaineth and ſelleth the land to *William Higham* and his heirs, he hath an eſtate deſcendible and determinable upon the death of the tenant in tail, and yet he hath a better eſtate then the other hath, for he ſhall not be puniſhed for waſt; or if he maketh a feoffment none ſhall enter for forfeiture, and his wife ſhall be endowed determinable upon the death of tenant in tail; And yet you Pleaders look well to it, that in ſuch caſe you do not begin your Plea, That the bargainee *fuit ſeiſitus in dominico ſuo ut de feodo.* But the ſure way is to plead the ſpecial matter, and to add the life of the tenant in tail.

And ſo you will the better underſtand your books. *s. Litt. 3. b. 7 Ed. 4. 12. 9 Edw. 4. 26. a. 15 Edw. 4. 8. 2 Hen. 4. 13. 21 Hen. 7. 4. 18 Edw. 3. 12. 13 Hen. 7. 10. 88 Hen. 8. 3. 11 Hen. 4. 42. 7 Hen. 4. 46. 8 Hen. 4. 15. 17 Edw. 3. 48. 19 Edw. 3. Account 56. 33 Aſſ. Pla. 17. 27 Aſſ. Pla. 31. 22 Hen. 6. 33. 39 Edw. 3. 25. 22 Edw. 3. 19. 27 Hen. 8. 29. 21 Hen. 8. titulo Eſtates* 28. 8 *Eliz. Dyer.* 253. 24 *Edw.* 3. 28. *b. 9 Edw. 4. 19. Plowdens Commentaries* in *Walſinghams* caſe 555.

[b] And I conceive in the caſe at Bar, the remainder of *John Cheiney* by the feoffment of the conuſee to *Edward Stanhope* and his heirs was not diſplaced, nor put to a right; for the conuſee had a fee ſimple determinable upon the death of *Henry* Lord *Cheiney* without iſſue of his body, and when he made a feoffment his determinable eſtate in fee ſimple in poſſeſſion, and his abſolute fee ſimple expectant upon the eſtate tail of *John Cheiny* in the remainder ſhould paſs, and ſhould not diveſt the remainder of *John Cheiny*: for the feoffment which in him is not tortious, cannot be tortious in another. But when tenant for liſe, or tenant in tail make feoffment, the feoffment in it ſelf is tortious; for tenant for life cannot give in fee, and therefore the feoffment it ſelf is tortious: and in caſe of an eſtate tail is tortious as to his iſſues. But when he who hath a fee ſimple, although that it be determinable, maketh a feoffment in fee: he who hath the fee ſimple, giveth a fee ſimple, and thereby he doth no wrong to his heirs, and by conſequence no wrong to him in the remainder. Alſo the eſtate tail by the ſaid fine is utterly barred, and a new eſtate in fee ſimple created.

Note alſo Reader, There are ſome titles to which a warranty ſhall not extend, as the title in caſe of diſcharge, condition upon mortgage, *&c.* conſent to raviſher, *&c.* for theſe no Action lieth, in which there may be voucher or rebutter. Neither ſhall a deſcent take away entry in ſuch caſes; and they continue in the ſame plight and poſſeſſion, as they were by their original creation; and they by no Act can be diſplaced or diveſted out of their original eſſence. *Vide 34 Edw. 3. Garantie* 72. A collateral warranty ſhall not bar a title of Dower, for the ſame continueth the being according to the original creation: and yet for the ſame an Action is given; and therefore there is a difference betwixt a collateral warranty, and a fine levied, and five years paſſed; for upon a fine and five years paſſed all the ſaid rights are bound; and the title of Dower alſo, if an Action be not brought within the time preſcribed by the Statute. *Vide Plo. Com.* 373.

[99]

Mich. 10 Jacobi *Regis.*

Beawfages Caſe.

IN this Term it was moved at the Bar, if the Sheriff who hath *Fieri facias* may take an Obligation of the Defendant to pay the money in Court at the return of the Writ. And the doubt which was conceived upon it, was upon the general words of the Act of 23 *Hen. 6. Cap.* 10. And if any of the ſaid Sheriffs, or other Officers, or Miniſters aforeſaid, take any obligation in other form, by colour of their offices, that it be void: And ſuch obligation to pay the money in Court, is in other form then the Statute preſcribeth.

[b]

But upon conſideration of all the parts of the ſaid Act, It was reſolved, That ſuch obligation was not made void by the ſaid Act. And therefore the coherence of the Proviſions of the ſaid Act is to be obſerved.

Firſt (as to this matter) it is enacted, That Sheriffs, *&c.* ſhall let out of priſon all perſons arreſted by them, or in their ward by force of any Writ, Bill, or Warrant, in any action perſonal, or for cauſe of Endictment of Treſpaſs, upon reaſonable ſurety of ſufficient perſons having ſufficient within the Counties where ſuch perſons are ſo let to bail, to keep their days, *&c.* except perſons in execution by *Capias utlagat', Excom' capiendum*, ſurety of peace by the command of any Juſtice, Vagrants.

The ſecond clauſe is, That no Sheriffs, *&c.* take, or cauſe to be taken or made any obligation by any aboveſaid, by colour of their office, if not only to themſelves, of any perſon nor by any perſon who is in their ward by courſe of Law, but upon the name of their office, upon condition

condition written, that the priſoners appear at the day contained in the ſaid Writs, Bills, or Warrants, and in ſuch places where the ſaid Bills, Writs, or Warrants require.

Then cometh the ſaid clauſe: And if any of the Sheriffs, *&c.* take any obligation in other form [100] by colour of their offices, that the ſame ſhall be void.

So that the firſt clauſe containeth the precept and commandment to Sheriffs, that they ſhall let priſoners to bail, who were arreſted in perſonal Actions; the which the Sheriff could not do before this Act, as it appeareth by 22 *Hen.* 6. 46. 19 *Hen.* 6. 43. 21 *Edw.* 4. 77. *Fitzherb. Natur. Brev. a.* & *b.*

The ſecond branch containeth the form of the obligation, by which he ſhall be let to bail.

The third, the penalty, if the Sheriff do not obſerve and perform the form preſcribed by the Statute; ſo that upon the coherence and dependency of the branches, the latter words, although they are general, ſhall extend only to the precedent branch, *ſc.* To obligations taken of thoſe who are in their ward.

And according to this reſolution it hath been adjudged in this Court. *Trin.* 34 *Eliz. Rott.* 1656. In debt by *Dawſon* Sheriff of *B.* againſt *Burman*, upon an obligation the Defendant pleaded the Statute of 23 *H.* 6. and ſhewed that one *K.* did recover debt and dammages againſt him, and brought a Writ of *Fieri fac'* againſt him directed to the Sheriff of *B.* and that he made the obligation to the Plaintiff for the Execution, and that the obligation was void by the ſaid Act; upon which the Plaintiff did demur; And it was reſolved, firſt, That the ſaid obligation was not within the ſaid Statute, becauſe the Statute extendeth only to ſuch obligations, which any in his ward maketh to him. Secondly, That the obligation was not void by the Common Law; whereupon the Plaintiff had Judgment. And the like Judgment was alſo given in this Court, *Mich.* 28. & 29. *Eliz. Rott.* 1502. Between *Burwey* and *Ket*, upon an obligation taken by the Sheriff *pro ſolutione pecuniæ debitæ Dominæ Reginæ*, upon an Extent out of the Exchequer.

Note Reader, that whereas it is ſaid in the laſt clauſe of the Act, That if any of the ſaid Sheriffs, or other Officers or Miniſters aboveſaid, take any obligation in any other form by colour of their offices, that it be void. It is to know, that there be two manner of forms, *ſc. Forma verbalis*, & *forma legalis*. *Forma verbalis* ſtands upon the letters and ſyllables of the Act; *Forma legalis* is *forma eſſentialis*, and ſtands upon the ſubſtance of the thing to be done, and upon the ſenſe of the Statute, *quia Notitia ramorum hujus Statuti non in ſermonum foliis ſed in rationis radice poſita eſt.* And according to this diſtinction hath this branch of this Act been expounded; And therefore in 37 *H.* 6. 1. If the Sheriff take a ſimple obligation of one in his ward, who was bailable, it is void; for that obligation [b] wanteth the eſſential form preſcribed by the Statute; for there wanteth the Condition, which is part of the ſubſtance; So there *Moile* ſaid, if the Sheriff had let one to bail, which is excepted in the Statute, and is not bailable, and had taken a ſimple Obligation, that it ſhould be void, *quod alii Juſticiarii conceſſerunt*; for by the exception it appeareth that it was not the intent of the Statute, that they ſhould be ſet to bail, and ſo the obligation is taken in another form then the Statute intended. And I conceive that as well in the ſame caſe of 37 *H.* 6. as in the caſe of *Dive* and *Manningham* in *Plo. Com.* 67. The obligation which hath condition to ſave the Sheriff harmleſs (when the Sheriff againſt Law let one to bail who is not bailable) is againſt Law, and void by the Common Law. And herewith agreeth *William Wiſebams* caſe 15 *Eliz. Dyer* 324. And in 7. *E.* 4. one was in the cuſtody of the Sheriff by force of a *Capias* directed unto him upon an Indictment of Treſpaſs and the party made an obligation to another (by the denomination of the Sheriff) upon ſuch condition as the Statute preſcribeth for the ſurety of the Sheriff; And there it is holden that the obligation is void, becauſe the Act preſcribeth the obligation to be made to the Sheriff himſelf, and the ſame is part of the eſſential form. So if the Sheriff addeth to the condition, that he ſhall be in ward without dammage to the King and the Plaintiff, *&c.* That the ſame ſhall make the whole condition void for the cauſe aforeſaid. So if the Sheriff or Goaler taketh an obligation of a Priſoner, with condition to be true Priſoner, or to pay for his meat and drink: So if the Sheriff addeth another thing to the matter preſcribed by the Statute, as to pay ſo much more for a horſe, *&c.* this Addition doth make the whole Obligation void, for the ſame is taken in other forms (touching the ſubſtance of the matter) then is preſcribed by the Statute. And with all this agreeth *Plo. Com.* in *Dive* and *Manninghams* caſe, 67, 68, 69. But in *Paſch.* 27 *Eliz.* In the Kings Bench, in an action of debt brought by Sir *William Drury*, late Sheriff of the County of *Suffolk*, upon an obligation of twenty pound againſt *A. B.* who demanded oyer of the bond, by which it appeareth that the Defendant was only bound in it, and of the condition, which was that one *More* whom the ſaid Sheriff had arreſted by force of a *Latitat* out of the Kings Bench, ſhould appear in perſon at the day contained in the Writ, *&c.* and pleaded the Statute of 23 *H.* 6. And that the obligation was taken in other form, then the ſaid Act preſcribed, *&c.* upon which the Plaintiff did demur in Law; And it was objected that there were three variances from the form preſcribed by the Statute, *ſc.* one in the Obligation, and two in the Condition; In the obligation, becauſe the Plaintiff took but one ſurety, and the Statute preſcribeth reaſonable ſurety of ſufficient perſons in the plural number, having ſufficient within the Counties where ſuch perſons are ſo let to bail, in which caſe there ought to be two ſureties at leaſt, and here is but one ſurety, and the plural number cannot be ſatisfied with the ſingular; and ſo againſt the words of the Act for the more; and the more able the ſureties are, they will the rather cauſe him who is ſo bailed to appear, and thereby Juſtice ſhall proceed with more expedition, and ſo not againſt the intention of the Statute. And with all this agreeth the opinion of *Montague*, Chief Judge of the Common Pleas in *Dive* and *Manninghams* Caſe.

Alſo in the Condition, firſt the words are, That the priſoner ſhall appear in perſon, where the words

of the Statute are, *ſhall appear* generally (without the words *in perſon*) 2 That he ſhall appear at the day, &c. *ad reſpondendum*; whereas theſe words, *ad reſpondendum*, are more than the Statute preſcribeth, and by conſequence the obligation void, as in the ſaid Caſes of 37 *H.* 6. 7 *E.* 4. and *Dive* and *Manninghams* Caſe.

But it was Reſolved by Sir *Chriſtopher Wray*, Sir *Thomas Gawdy*, and the whole Court of Kings Bench, That the ſaid Obligation was not made void by the ſaid Act. For as to the firſt, the words, *upon reaſonable ſurety of ſufficient perſons*, are added for the ſurety of the Sheriff; and therefore if he will take but one ſurety, it is at his peril, for he ſhall be amerced if the Defendant doth not appear, and therefore the Statute doth not make the Obligation void in ſuch caſe; for the branch which preſcribeth the form, requireth that the Obligation ſhall be made to the Sheriff himſelf, &c. by name of his Office, and that the priſoners appear, in which clauſe no mention is made of the ſureties; ſo that the intent of the Act was, That foraſmuch as the ſame was at the peril of the Sheriff to leave the ſame to his diſcretion to take one or more for his indempnity, and peradventure it ſhall be better for him ſometimes to take one who is ſufficient, then two others; and although that the ſurety or ſureties have not ſufficient as the Statute mentioneth, yet the Obligation was good enough, for theſe words of the Act as to this purpoſe and point, and more for counſel and direction of the Sheriff, than for precept or reſtraint of him, and that for the ſafety of the Sheriff: for if the Defendant cannot find two ſufficient ſureties, having ſufficient within the ſame County, the Sheriff is not bound to let him to bail. And this Reſolution agreeth with the old Rule, *ſc. Quilibet poteſt renunciare juri pro ſe introducti*. As to the ſaid two additions in the Bond, more than is in the Statute, It was Reſolved, It is true, there is a verbal difference from the form preſcribed by the Statute, but none in ſubſtance and effect; for he who is ſo bailed ought to appear in perſon, for ſo much is implied in this word of the Act (*ſhall appear.*) And therefore at the Common Law when any tenant or Defendant was commanded to appear in any Court, he ought before the Statute thereof made, in
[b] all caſes have appeared in proper perſon. And therewith agreeth *F. N. B.* 25. and the Books before cited, ſo for that cauſe the other addition is not material, for he who ought to appear, ought to appear *ad reſpondendum, & parum differunt quæ re concordant. Et eſt ipſorum legiſlatorum viva vox, rebus & non verbis legem imponimus. Vide* 21 *Eliz. Dyer* 364. there the condition was in the conjunctive, *appear and anſwer*, in the copulative, and yet the Obligation good. *Trinit.* 27 *Eliz.* in the Kings Bench between *Danby* and *Hethcote*, in a Writ of Error upon a Judgment given in the Marſhalſey, it was Reſolved, That if a Sheriff or Goaler for the eaſe and enlargement of any who is in his Ward, take a promiſe to ſave him harmleſs, that although the Statute doth not ſpeak but only
[ ] of an Obligation with Condition, yet the ſame is in equal miſchief. And *Wray* Chief Juſtice ſaid, That the Statute ſhould ſerve for little or no purpoſe, if promiſes ſhould be taken within the Statute. And the ſaid clauſe is general, *ſc.* If the Sheriff take any Obligation in other form, that the ſame ſhall be void, within the Equity of any Obligation, and Aſſumpſit is taken; for as it is ſaid in old Verſes,

Verba ligant homines, taurorum cornua fures,
Cornu bos capitur, voce ligatur homo.

Quando verba ſtatuti ſunt ſpecialia, ratio autem generalis, generaliter ſtatutum eſt intelligendum. And it appeareth by the Preamble, that the Statute was made to avoid Perjury, Extortion and Oppreſſion, three moſt horrible and odious ſins, and for the ſuppreſſing of them, and for the advancement of Truth and Juſtice, the words of the Act ſhall have a benign and favourable interpretation, *in rebus enim quæ ſunt favorabilia animæ, quamvis ſunt damnoſa rebus, fiat aliquando extentio ſtatuti.* And the Extortions and Oppreſſions which are done to priſoners are the moſt odious, for the ſame is *ſevire in dolentes, & addere afflictionem afflictis.* And it is true, that before this Statute, the Sheriffs, Goalers, &c. ſometimes for eaſe and enlargement, and ſometimes by oppreſſion and dures, would extort of the priſoners by colour of their Offices divers ſums of moneys and other vails, and ſo by ſuch pilling and polling they were enriched, and the priſoners impoveriſhed, and the proceedings of Juſtice delayed.

And it is well ſaid in *Dive* and *Manninghams* Caſe, 68. That Extortion is no other than Robbery, but is more odious than Robbery; for Robbery is apparent, and hath always the appearance of vice, but Extortion carrieth a viſage of truth, and is more hardly to be tried and diſcerned; and oftentimes accompanied with the damnable and damned ſin of Perjury, in the breaking of the Oath which the Officer taketh when he is admitted to his Office, and therefore it is more odious. *Ex-*
[102] *tortio eſt crimen, quando quis colore officii, extorquet quod non eſt debitum, vel quod eſt ſupra debitum, vel ante tempus quod eſt debitum*; and it is called *crimen expilationis*, and *crimen concuſſionis.*

Alſo it was ſaid, That the ſaid Aſſumpſit did not bind the priſoner at the Common Law, becauſe the Conſideration was againſt Law. *Vide* 19 *Eliz. Dyer, Onleys* Caſe.

Mich. 10 Jacobi.

Alfride Denbawd's Caſe.

ALfride *Denbawd* alias *Burnard*, brought a Writ of Error in the Exchequer Chamber againſt *Peter Woodley*, *Hill. 9 Jac. Reg. Rot.* 1151. in the Kings Bench. And the Caſe was; That *Peter Woodley* brought Treſpaſs againſt the ſaid *Alfride* and one *Thomas D. Quare clauſum fregit*, at *Aiſhbarton* in the County of *Devon*. The Defendant pleaded Not guilty; and at the Aſſiſes in the Country *Alfride* was found guilty, and the Plaintiff had judgment againſt the ſaid *Alfride*. Whereupon the ſaid *Alfride* brought a Writ of Error, and the Error which was aſſigned, was, Becauſe that one of the Jurors, of the principal Pannel appeared only at the Aſſiſes, upon which at the prayer of the Plaintiff a Pannel of *Tales de Circumſtantibus* was returned by the Sheriff in this form: The title was, *Nomina decem talium*, *&c.* and under it he returned eleven Jurors. And it was argued, That this judgment was erroneous for two cauſes. 1. Becauſe that but one of the principal Pannel appeared only, and two at leaſt ought to appear. 2. That inaſmuch as he entitleth the Pannel of *Tales*, *Nomina decem talium*, he cannot return eleven. [b]

As to the firſt, The awarding of the ſaid *Tales* ought to be warranted by the Statute of 35 *H8. cap. 6.* for at the Common Law the Juſtices of *Niſi prius* could not grant any *Tales*. And it was objected, That the awarding of the *Tales* in the Caſe at Bar, was not warranted by the ſaid Act; for the words of the Act are, And that the Juſtices ſhall and may proceed to the Trial of every ſuch iſſue, with thoſe perſons that were before impannelled and returned, and with thoſe newly added, *&c.* So that theſe words (*thoſe perſons*) being in the plural Number, cannot be ſatisfied with one ſingular perſon; as upon the Statute of *Weſt. 2. c. 11. Cum dom. &c. dederit eis Auditores compoti, &c.* if one Accompt before one Auditor, in debt for the arrearages upon ſuch Accompt, he ſhall wage his Law, as it is holden in 20 *H. 6* 41. and the reaſon there given is, becauſe that the Statute ſpeaketh of Accompt before Auditors. *Vide* 5 *H.* 4. *cap.* 8. 11 *H.* 4. 56. 8 *H.* 6. 15. 20 *H.* 6. 17. 14 *H.* 6. 24. 20 *H.* 6. 45. 22 *H.* 6. 35. *v.* 49. *E.* 3. 2. *&* 44. *E.* 3. 31. [103]

Note Reader, there is not any Act of Parliament which by expreſs words taketh away the wager of Law in an action of Debt upon arreages of Accompt, but at the Common Law the Defendant ſhall have his Law in an action of Debt upon arrerages of Accompt, whether the Accompt be before one Auditor, or many, as it appeareth in 38 *H.* 6. 6. but the reaſon why the Defendant ſhall not wage his Law when the Accompt is made before Auditors, is upon the Statute of *Weſt.* 2. *cap.* 11. for now this Statute hath made the Auditors Judges of Record, becauſe they have power thereby to commit the Defendant to priſon, which none can do if they be not Judges of Record; and with this reaſon, *ſc.* that they are Judges of Record agreeth 2 *H.* 6. 41. and ſo *H.* 6. 24, 25. and for this cauſe he was ouſted of Law by all the Juſtices in ſuch caſe. But if the Accompt be before one Auditor only, the ſame is out of the Statute, for he cannot commit the Defendant to priſon, and therefore it remaineth at Common Law. So the Lord who is found in ſurpluſage, the Statute is made againſt the Accomptant only, and the Lord cannot be committed to priſon, and therefore it alſo remaineth at the Common Law, as it is adjudged in 14 *H.* 6. 24. *Vide* 10 *H.* 6. 25. 38 *H.* 6. 6. 20 *H.* 6. 41. *b.* And it appeareth by the Judgment of the whole Parliament in 5 *H.* 4. *Caſe* 8. That in an action of Accompt before Auditors, that the Defendant ſhall not wage his Law, but there the remedy is given by examination, to diſcern if the matter lie in Accompt, and if not, there to allow the Defendant his Law; and therefore the Books in 43 *E.* 3. and 49 *E.* 3. are ill Reported.

And further, thoſe of Counſel with the Plaintiff in the Writ of Error, cited the Caſe of 22 *H.* 6. 46. where the Cuſtom of Forreign Attachment being alledged againſt perſons in the plural number, ſhall not be ſatisfied with one; and the Caſe of Rediſſeiſin, where the Statute of *Merton*, *Cap.* 3. ſaith, *Aſſumptis tecum Cuſtodibus placitorum Coronæ Domini Regis*; this plural Number ſhall not be ſatisfied with one: if there are more than one: and with that agree 27 *Aſſ. p.* 5. 50. *E.* 3. 17. 39 *H.* 6. 42. So in grants made by Corporations, the plural Number ſhall not be ſatisfied with one, as appeareth in the Caſe of the Cooks of *London* in *Plo. Com.* So in Writs, if the Writ be that the Defendant *falſo fabricavit diverſa facta*, he connot declare upon one only. 35 *H.* 6. 37. *b.* *Vide* 7. *E.* 4. 31. 20 *H.* 6. 45, *&c.* But it was Reſolved, That in caſe when but one of the principal Pannel appeareth, the Statute giveth authority to Juſtices of *Niſi Prius* to award *Tales de Circumſtantibus*: For it is Enacted by the ſaid Statute, For the more ſpeedy tryal of Iſſues to be tried by twelve men hereafter to be had, that in every Writ of *Habeas Corpora* or *Diſtringas* with a *Niſi Prius*, where a full Jury ſhall not appear before the Juſtices of *Niſi Prius*, or elſe after an appearance of a full Jury, by challenge of either of the parties the Jury is like to remain untaken for default of Jurors; That then the ſame Juſtices, upon requeſt made by the party, Plaintiff or Demandant, ſhall have authority by force of this Act to command the Sheriff, or other Miniſter or Miniſters to whom the making of the ſame Return ſhall appertain, to name and appoint, as often as need ſhall require, ſo many of ſuch able perſons of the ſaid County then preſent, *&c.* as ſhall make a full Jury. By which words without queſtion, although that one only appeareth, the Court may award *Tales* of eleven. Then cometh the clauſe which hath been mentioned before, which doth not reſtrain the generality of the firſt words. And the Caſes put before, which give authority in the nature of a Commiſſion, as in the Caſe of Auditors of the Accompt, Rediſſeiſin, *&c.* are not to be [b]

reſembled

reſembled to this Caſe upon the ſaid Act of 35 *H.* 8. which is made for more ſpeedy Trials, which always, and all other Statutes of like nature, ſhall be taken favourably in the furtherance and advancement of the expedition of Juſtice; and it is as great miſchief and delay of Juſtice when one onely, as when four or more appear. And for this cauſe, if the Body of the Act had been in the plural Number, yet it ſhould be conſtrued to extend to the Caſe, when one onely of the principal Pannel appeareth. And therewith agreeth the Opinion of the Court of Common Pleas in *Mich.* 7 & 8 *Eliz. Dyer* 245. in the ſame point, *ſc.* that the Juſtices of *Niſi Prius* have power to award *Tales* when one Juror onely appeareth; for there it is ſaid, So was the meaning of the makers of the Statute. And there *Brown* held, That if two of the principal Pannel appear, and at the prayer of the Plaintiff 12 *de Circumſtantibus* are returned, and then the two principal are drawn forth by challenge; then the Trial ſhall be all by the twelve *de Circumſtantibus*. But the Lord *Dyer* maketh a *Quere* of it. But at the Common Law, the Jurors of *Tales* paſſed in Trial without any Juror of the principal Pannel; and this Act hath been always expounded favourably. And therefore in *Mich.* 17 *Eliz.* No Hundredor appeared, and all Hundredors were returned upon the *Tales:*
[104] And 23 *Eliz. Dyer* 376. they have power to grant a *Tales de Circumſtantibus*, directed *Coronatoribus* for favour or affection of the Sheriff by the ſaid general words of the ſaid Act of 35 H. 8. *Mich.* 35 & 36 *Eliz. Julius Cæſar* Maſter of the Court of Requeſts in the Kings Bench, brought an Action for ſlanderous words againſt *Philip Corſini.* The Defendant pleaded not guilty, and ſaid, that he was an Alien born, *&c.* and prayed trial *per medietatem linguæ*, and it was granted; and at the *Niſi Prius* in *London* but ſix Engliſhmen and five Aliens appeared. And the Plaintiff prayed a *Tales de Circumſtantibus per medietatem linguæ*, and it was granted, ſo that there wanted one Alien; and the Record was, *Ideo alius alienigena de Circumſtantibus per vic. London. ad requiſitionem infranominati Julii Cæſaris per mandatum Juſtic. de de novo appoſit', cujus nomen panell. prædict. affilatur ſecundum formam ſtatuti in hujuſmodi caſu nuper editi & proviſi, Qui quidem jurator ſic de novo appoſitus viz. Chriſtianus Dethick aliegena exactius ſimiliter venit, ac in juratam illam ſimul cum aliis juratoribus, prædictis prius impanellatis & juratis juratus fuit.* And the Jury found for the Plaintiff, and aſſeſſed damages to 100 *l.* And it was moved in arreſt of Judgment, That no *Tales* is to be granted *de Circumſtantibus*, when the trial is *per medietatem linguæ* by the Juſtices of *Niſi prius*, by the ſaid Act of 35 *H.* 8. for three Reaſon.

1. The *Tales* ought to enſue the nature of the principal Pannel, and that alwayes is *ad requiſitionem defendentis*, and in this caſe the Plaintiff prayeth the *Tales*.

2. The words of the Act are in the plural Number, The Jury is like to remain untaken for default of Jurors: and here it was but for the default of one Juror.

3. The Act giveth not authority in this caſe to Juſtices to grant a *Tales*, for in the former part of the Act it is ſpoken of the freehold of the Jurors, and of iſſues to be returned upon the Jurors; and an Alien hath not any freehold, neither ſhall iſſues be returned upon him. Alſo the Statute ſaith, That if there be any default of Jurors others of the ſame County ſhall be returned, *&c.* and an Alien is not properly ſaid of any County. And notwithſtanding theſe, becauſe that the Statute was for the ſpeedy execution, and ſhall be expounded favourably to effect the intent and purpoſe of the makers of the Act, Judgment was given for the Plaintiff.

As to the firſt Objection which hath been made, it was Reſolved, That the title was the miſpriſion of the Sheriff; and it cannot be taken that the Juſtices ſhall grant *Tales* onely of ten, but of as many as in all ſhall make a Jury. And that appeareth, becauſe that eleven were returned, and eleven appeared, and eleven ſworn with him of the principal Pannel. And therefore it was Reſolved, That this miſpriſion of the Sheriff ſhould be amended, and *decem* put out of the title; and then the title ſhall be good and formal, *Nomina talium, &c.* or it may be *Nomina juratorum de novo appoſit. ſecundum formam ſtatuti.*

[b] Note Reader, at the Common Law in the granting of a *Tales*, five things are to be conſidered, 1. The time of granting, *&c.* of it. 2. The number of the *Tales*. 3. The order of them. 4 The manner of Trial, *ſc.* either by them with others, or by themſelves only, 5. The quality of them are to be conſidered.

As to the firſt, four things are to be conſidered. 1. That the time of granting of them is upon default of ſo many of thoſe of the principal Pannel, that there cannot be a full Jury. 2. That at the time of the granting of them, the principal Array ſtand, for *Tales* are words ſimilitudinary, and have reference to the reſemblance which at that time ought to be *in eſſe*; and therefore if the Array be quaſhed, or all the polls challenged and tried out, no *Tales* ſhall be awarded, for at that time *ne ſont quales*, but in ſuch caſe a new *Venire fac.* ſhall be awarded; but if at the time of the granting of the *Tales* the princial Pannel ſtand, and afterwards be quaſhed, as is aforeſaid, yet the *Tales* ſhall ſtand, for it ſufficeth if there were *quales* at the time of the granting of them; and that appeareth in 34 *H.* 6. *Eſtoppel* 30. 3. It is to be obſerved, That he who is meerly Defendant cannot pray a *Tales*, until the time the Plaintiff hath made default. 4. In ſome caſe a *Tales* ſhall be granted after a full Jury appeareth and is ſworn; as if a Jury be charged, and afterwards before the Verdict given in Court one of them dieth, a *Tales* ſhall be awarded, and no new *Venire facias*; and therewith agreeth 12 *H.* 4. 10. So if any of the Jurors impannelled die before that they appear, and the ſame appeareth by the return of the Sheriff, the Pannel ſhall abate, but if need be a *Tales* ſhall be awarded. *Vide* 21 *E.* 4. 11. And the time of challenge and trial of the *Tales* is after that the principal Pannel is tried; and if the principal Pannel be affirmed, the ſame triers ſhall try the *Tales*, but if it be quaſhed, then the two triers of the principal Pannel ſhall not try them. 9 *E.* 4. 14 *H.* 7. 1. & 33. *H.* 6. 21. *vide* 19 *H.* 6. 48.

As to the ſecond, *ſc.* the Number, three things are to be obſerved. 1. In all caſes the *Tales* ought

to be under the number of the principal in the *Venire fac'* (if it be not in case of an Appeal) as in *Attaint* under 24, and in other Actions where the *Venire fac'* is of 12 under 12. and the reason why more may be granted in an Appeal on the part of the Plaintiff is, Because the Defendant may challenge peremptorily, and if default be in the Plaintiff, then the Defendant may pray a *Tales*; and the reason is *in favorem vitæ*, and that he may dispatch and free himself of trouble and the question of his life, for fear that the Witnesses should die, *&c.* and therewith agreeth 14 *H.* 7. 16 *E.* 4. 6. 37 *H.* 6. 12. 18 *E.* 4. 5. *b.* and therefore I think that the Book in 48 *E.* 3. 1. is misprinted. *Vide* 49 *E.* 3. 1. & 48 *E.* 3. 28. The 2. that the number ought always to be certain, as 10, or 8, or 6, or 4, *&c. Vide Octo tales Br.* 11. But now upon the said Act of 35 *H.* 8. a *Tales de Circumstantibus* may be granted as well to an incertain, as of a certain number, and that by force of the words of the said Act, *sc. so many, &c. as shall make up a full Jury.* [105]

As to the third, *sc.* the Order, it is to know, that always in every new *Tales* the number shall be diminished, as if the first be 10, the second shall be 8, and so always less; and therewith agree 14 *H.* 7. 1. *tit. Tales, Br.* 15. *Vide* 47 *E.* 3. *p.* 10. But if the *Tales* be awarded, and afterwards is quashed by challenge, he may have anew of the same number as before; and therewith agreeth 20 *H.* 6. 40.

As to the fourth, *sc.* To the manner of Trial, *sc.* by them with others, it is common every day, and by them only, when after the granting of 10 *Tales*, and *octo Tales*, the principal Pannel is quashed, there the trial may be only of *Tales*, or if the *Tales* do not amount to a Jury, a *Tales* to supply the former *Tales* may be granted; and therewith agreeth 36 *H.* 6. *tit. Enquest* 30.

As to the fifth, *sc.* to the Quality of the *Tales*, they ought to be of the same quality as the principal are; and therefore if the first be *per medietatem linguæ*, of English and Aliens, the *Tales* ought to be so. So if the principal be out of a liberty, and all those things which are required by Law in the principals, are required in the *Tales*. *Vide* 4 *E.* 4. 11. 7 *H.* 6. 40. 30 *Ass. p.* 42. And afterwards by the Advice of all the Justices of the Common Pleas, and Barons of the Exchequer, the Judgment was affirmed; and so the principal Case at Bar is adjudged by all the Judges of *England* and all the Barons of the Exchequer.

Note Reader, in Assise, if so many of the Recognitors make default, that there be not 12, the Justices of Assise cannot award a *Tales de Circumstantibus*, for although that Justices of Assise are named in the said Act of 38 *H.* 8. as well as Justices of *Nisi Prius*, yet forasmuch as the said Act giveth not power to Justices of Assise or *Nisi Prius*, but where the Trial shall be by 12 men in every Writ of *Habeas Corpora*, or *Distringas* with *Nisi Prius*; and that cannot be in an Assise: for, *Assisæ capiantur in proprio Com'*, and never can be taken by *Nisi Prius in proprio Com'*, and no exposition can be made against express words; for that should be *Viperina expositio quæ corroderet ventrem textus*: And of such opinion was *Catelyn* Chief Justice in his time, and *Gerard* Attorney General, and after them *Wray* and *Anderson* Chief Justices, Justices of the Assise in *Norfolk* Circuit. [b]

Mich. 10. Jacobi.

Humfrey Lofield's Case.

THomas Young and *Dorothy* his wife, brought an Action of Debt against *Thomas Milton* and *Ann* his wife, Executrix of *Humfrey Lofield*, upon an Obligation of 100 *l.* made 20 *Decem.* 6 *Jac.* by the said *Humfrey Lofield* to the said *Dorothy dum sola fuit.* The Defendants demanded *Oyer* of the Bond and Condition, which was, That if the within *Humfrey Lofield*, his Executors, Administrators and Assigns, and every of them, shall well and truly observe, perform and keep all and singular the Covenants, Payments, Reservations, Grants, and Articles and Agreements contained in a Pair of Indentures bearing date the day of the date of the Obligation made between the said *Humfrey* and *Dorothy dum sola fuit*, which on his and their parts, *&c.* And pleaded, That by the said Indenture, which they shewed forth, that the said *Dorothy*, in consideration of the rent after by the same Indenture reserved, demised to the said *Humfrey Lofield* a Wine-cellar in *Gravesend*, To have and to hold to the said *Humfrey Lofield*, his executors and assigns, after the Feast of the birth of Christ then next following, *pro termino unius anni integri extunc prox' sequentis & si in fine dicti unius anni ambæ partes placerent, agrearent, & contentatæ forent, quod eadem præsens dimissio foret renovata, sive continuata pro aliquo longiori tempore, tunc habend' & tenend' dimissa præmissa dict' Humfrido Lofield executoribus & assignatis suis ab & post dictum festum Nativitatis Dom' tunc prox' sequen' datum Indentur' usque plenarium finem & terminum trium annorum extunc prox' sequent', reddendo inde annuatim durante dicto termino dictæ Dorotheæ, executoribus & assignatis suis* 40 *l. ad quatuor usual' dies festos, sive terminos, &c. sc.* the Annunciation, *&c.* with clause of distress if the rent were behind by the space of 10 days after any of the Feasts, &c. And pleaded, That he occupied the said Cellar for the space of the said first year, and at the end of the said year performed all the Covenants, Payments, Reservations, *&c.* in the said Indentures, *&c.* The Plaintiff replied, and for breach shewed, That the said *Humfrey Lofield* did not pay 10 *l.* due in the said first year at the Feast of the birth of Christ for one quarter. Upon which the Defendant did demurr in Law. And this plea began in the Common Pleas, *Trin.* 10. *Jac. Rot.* 3434. And it was argued by the Serjeants of Counsel with the Defendant, That the lessee should not pay any rent for the first year, and that for three causes. [106] [b]

1. Becauſe the reſervation, as it is made, doth depend upon a contingency, *ſc.* if at the end of the firſt year both parties agree that the leaſes ſhall be renewed and continued for any longer time, than to have and to hold the ſaid Cellar to the ſaid *Humfrey* from the Feaſt of the birth of Chriſt next enſuing the date of the Indenture for three years, *Reddendo inde annuatim durante dicto termino dictæ Dorotheæ, &c.* 40 *l. &c.* So that the *Reddendo* doth depend upon the ſaid contingent, which never took effect, for the leaſe was not continued beyond the firſt year.

2. The reſervation of the rent is *durante termino prædict'*, which being ſpoken in the ſingular Number, ſhall relate only to the term of three years laſt mentioned, and not to the term of one year, which was certain and compleat before the contingent.

3. Every reſervation and exception ſhall be taken *ſtrictè* againſt the leſſor, and beneficially for the leſſee, becauſe that every reſervation doth charge and encumber the land demiſed; and the words of reſervation are the words of the leſſor, and the reſervation is his act, and therefore ſhall not be extended beyond the words; and ſo it is holden in *Hill* and *Granges* Caſe in *Plo. Com.* 171. And to this purpoſe the common Caſes in 12 E. 3. *Aſſ.* 86. 17 E. 3. 52. & 17 *Aſſ. p.* 10. 10 E. 4. 18. 12 *H.* 8. 19. *a.* and divers others were cited.

And it was further ſaid, That if two tenants in common joyn in a grant of an Ox, or a pair of Spurs, or a Hawk, the grantee ſhall have two Oxen, *&c.* but if they make a gift in tail, or a leaſe for life or years, rendring an Ox, *&c.* to them and their heirs, they during their lives, nor their heirs after their deaths, ſhall have but one Ox, *&c.* And ſo if a man maketh a gift in tail of two
[107] acres, one at the Common Law, and the other in Borough-Engliſh, rendring an Ox to him and his heirs, and the donee having two ſons dieth, the eldeſt ſon inherit one acre, and the younger the other, in this caſe the donor or his heirs ſhall have but one Ox, becauſe the reſervation ſhall be taken ſtrictly againſt him and his heirs.

But it was Reſolved, That the ſaid reſervation ſhould extend to the firſt year; for the proper place of a reſervation is to come after the limitation of all the eſtates. And therefore if a man by deed indented demiſeth lands to *A. habendum* to him for life, the remainder to *B.* and to the heirs of his body, and for want of iſſue of his body, to remain to *D.* in tail, or for life, *Reddendo inde* to the leſſor and his heirs an annual rent, this reſervation ſhall extend to all the eſtates before. *Vide* 34 E. 3. *Avowry.* And although the future term be incertain, yet it is certain that the leſſee ſhall have the Cellar for one year, and the reſervation ſhall extend to it, for *durante termino prædᵗ*, although it be in the ſingular Number, yet it is named *collective*, and ſhall have relation to every term demiſed by the Indenture. And it is to be obſerved, That if the leſſee had held the Cellar beyond the firſt year, that the reſervation had extended without queſtion to the firſt year; and the conſideration of making of the leaſe, was only in conſideration of the rent reſerved in the ſaid Indentures. And in old time rent reſerved upon leaſes, *&c.* was called *vivus redditus*, becauſe that the leſſor lived by it. *Vide Plo. Com. Hill* and *Granges* Caſe 171. Such conſtruction ſhall be made in caſe of reſervation of rent, that the leſſor ſhall not loſe his rent at any day, *&c.* And *Hill.* 23 *Eliz. Rot.* 1410. in the Common Pleas, *Dioniſe Paſmer* brought a Replevin againſt *George Prowſe* for taking of his cattel at *Halberton*, in a place called *Terleigh Down* in the County of *Devon*; the Caſe, as appeareth by the Record, was ſuch: A leaſe was made of a houſe and lands for years, if the leſſee ſhould ſo long live; and afterwards the leſſor by his deed indented granted the meſſuage and land to another, To have and to hold the reverſion to the grantee for life, *cum per mortem, ſurſum redditionem, vel foriſfacturam* of the leſſee, *aut aliter acciderit, Reddendo inde annuatim*, to the grantor and his heirs, *cum reverſio prædicta acciderit 9 s. 4 d. per annum*; the leſſee died, the grantor of the reverſion diſtrained for the arrearages of rent, as well before the death of the leſſee as after; and in this Caſe four Points were Reſolved clearly by the whole Court.

[b] 1. That by the demiſe of the meſſuage and land for life, the reverſion thereof ſhould paſs; but by grant of the reverſion land in poſſeſſion ſhall not paſs.

2. By the grant of the meſſuage and land, *Habendum reverſionem, &c.* for life after the death of the leſſee, *&c.* That the *Habendum* is good; for in Judgment of Law, nothing but the reverſion is granted by the premiſes; and as in *Throckmortons* Caſe, *Plo. Com.* 147. when a reverſion is granted, *Habendum* the land, the *Habendum* is adjudged good: ſo when the land is granted *Habendum* the reverſion; and after the death of the leſſee, *&c.* is in conſtruction as much as to ſay, as to take effect in poſſeſſion after the death, *&c.* Alſo the *Habendum* had been good, although no mention had been made either of the land, or of the reverſion in the *Habendum*; for the principal office of the *Habendum* is to limit the eſtate in the land contained in the premiſes.

3. It was reſolved, That by the ſaid reſervation, the rent ſhall not begin before the reverſion fall into poſſeſſion; and theſe words, *cum reverſio prædicta acciderit*, ſhall be expounded according to the intent of the parties, which was not that the grantee for life ſhould pay the rent reſerved, before that he might take the profits to raiſe the rent out of them.

4. That the diſtreſs was well taken for the arrearages after the death of the leſſee, and for the arrearages incurred before. Not by the Lord *Dyer* in 23 *Eliz.* 376, 377. which proveth that reſerſervations ſhall be expounded according to the reaſonable intendment of the parties, to be collected by the words of their deed. And it is apparent, that the intent of the parties in the Caſe at Bar, was, That the leſſee ſhould pay rent for the time which by force of the ſaid leaſe he occupied the ſaid Cellar: But foraſmuch as the Obligation was forfeited, the Court moved the Plaintiff to take the arrerages, coſts and dammages, with which he was content, and ſo no Judgment was given.

Note Reader, as to the ſaid Caſe put at the Bar, of a gift in tail of one acre at Common Law, and of one acre in Borough-Engliſh, rendring an Ox, and afterwards the donee dieth, having iſſue two ſons, ſo that the one acre deſcendeth to the one, and the other to the other, that but one Ox ſhall be

be paid. For the better underſtanding of the Law, and of the reaſon thereof in this Caſe and other the like, It is to know, That there is a difference in Law, when by operation of the Law without the act of the party, there ſhall be a multiplying of an entire ſervice, and when not. And therefore there is a difference betwixt very Lord and very Tenant, and between Donor and Donee, or Leſſor and Leſſee: For in the caſe of very Lord and very Tenant, as well the annual as the caſual [108] entire ſervices in many caſes ſhall be multiplied, as it appeareth in *Bruertons* Caſe, in the ſixth Part of my Reports, and in the eighth Part of my Reports in *John Talbots* Caſe. But in the Caſe of Donor and Donee, or Leſſor and Leſſee, the entire rent ſhall not be by any diviſion either of the reverſion or of the poſſeſſion by act in Law multiplied. And therefore if in the ſaid caſe of one acre at Common Law, and the other in Borough Engliſh, the Donee dieth having iſſue two ſons, this ſeveral deſcent which is an act in Law ſhall not charge each of them with the entire ſervice, no more than if the donor in the ſame caſe dieth having iſſue two ſons, ſo that the reverſion deſcendeth ſeverally by act in Law; yet the donee nor their heirs ſhall not be charged but with one entire ſervice. So if a man be ſeiſed of two acres, one of the part of his father, and of the other of the part of his mother, and maketh a leaſe of both for life, reſerving yearly a Lamb to the leſſor and his heirs, and the leſſor dieth without iſſue of his body, the ſeveral heirs ſhall not have two lambs, but one lamb only. So if a man giveth lands to two men, and to the heirs of their two bodies begotten, yielding a Hawk, and they die, their ſeveral iſſues ſhall pay but one Hawk: And the reaſon of theſe and other like caſes, that the entire ſervices in theſe caſes ſhall not encreaſe, is, becauſe that the reſervation of the donor or the leſſor is his title only, and when he himſelf reſerveth but one, the Law, which is always grounded upon Right and Equity, will never encreaſe the ſame, or give to him more than himſelf hath reſerved. And the reaſon of this difference appeareth in *Woodlands* Caſe in *Plo. Com.* 94. For encroachment of the donor upon the donee, or of the leſſor upon the leſſee, ſhall not bind them in an Avowry, as it ſhall betwixt Lord and Tenant; and the reaſon is, becauſe that when the donor and leſſor, or the heir of any of them avoweth, he ought to ſhew the original reſervation, by which it will appear, how much the donor or leſſor hath reſerved. And with this agreeth the Judgment in Sir *William Foſters* Caſe in the eighth Part of my Reports, That the donor or leſſor need not in an Avowry alledge ſeiſin, nor encroachment upon them ſhall bind them, becauſe that the reſervation is their title. But if there be Lord and Tenant, and the Tenant maketh a gift in tail, or a leaſe for life, the remainder in fee, there encroachment by the Lord upon the donee or leſſee ſhall bind them, for the Lord need not to ſhew the commencement of the Seignory, but it ſhall not bind the iſſue in tail; and therewith agreeth 20 *E.* 3. *Avowry* 131. 5 *E.* 4. 2. *F.N.B.* 11 *a.* [*b*] The ſame Law is, when the Law doth create the tenure; as if Lord and tenant be by fealty, and the yearly rent of a Lamb, and the tenant maketh a gift in tail to two men, and to the heirs of their two bodies without any reſervation, then the donees ſhall hold of the donor by the like ſervices as he held over. *Litt.* 4. *b.* 33 *H.* 6. 7. *&c.* yet if the donees having iſſue die, their ſeveral iſſues ſhall pay but one Lamb, for the donor or his heirs in Avowry ought to ſhew the tenure betwixt the Lord and the tenant, and the gift in tail, ſo that it will appear to the Court, that but one lamb at the time of the gift was due; and the Law, to the prejudice of the heirs of the donees, ſhall not encreaſe it. But there is a difference betwixt thoſe which are entire ſervices; for ſome ſervices by the meer operation of the Law ſhall encreaſe. And therefore if a man ſeiſed of two acres, one at the Common Law, and the other by the cuſtom of Borough-Engliſh, and maketh a gift in tail of both; and the donee having iſſue two ſons dieth, both the ſons ſhall do fealty. The ſame Law of *Homage*, if it be reſerved by the party, or created by the Law. So if the donor dieth having iſſue two ſons, both the ſons ſhall have homage and fealty. So there is a difference betwixt entire ſervices of profit and of no truſt, and ſervices of truſt and no profit. The ſame Law is, if there be Lord and tenant by Knights ſervice, and the tenant giveth the tenancy to two men, and to their heirs of their bodies, and they die having iſſue, their iſſue ſhall hold ſeverally by Knights ſervice, for the ſame is for the defence of the Lord and of the Realm: And ſo another difference betwixt an entire ſervice for the profit of the Lord, and an entire ſervice for the publick defence of the Realm. See all theſe cited in *John Talbots* Caſe; and by theſe and other differences there put, all the Books proving them, are well without any contrariety or difficulty agreed and reconciled.

Mich. 10 Jacobi, *which began* Paſc. 10 Jac. Rot. 1639. *In the Common Pleas.*

Arthur Legat's Caſe, in the ſubverſion of Peſtilent Patents of thieviſh Concealers.

[109] ARthur *Legat* Gent. brought an *Ejectione firmæ* againſt *Edward Cockle*, upon a demiſe made of ſix acres of Wood in *Wimondham* in the County of *Norfolk* by *John Smith*, 19 *Octob.* 8 *Jac. Reg.* for three years, and that the Defendant did eject him, *&c.* The Defendant pleaded Not guilty, and a ſpecial Verdict was found to this effect. The King and Queen, *Philip* and *Mary*, were ſeiſed of the Mannor of *Wimondham* in the County of *Norfolk* in fee in the right of their Crown of *England* (whereof the ſix acres of Wood in which, *&c.* were parcel) and 9 *Julii*, 4 & 5 of the ſaid *Philip* and *Mary*, by their Letters Patents under the Great Seal of *England*, in conſideration of ſervice done by Sir *George Howard* Knight *ex certa ſcientia, mero motu, & gratia ſpeciali*, gave and granted to the ſaid Sir *George Howard* (*inter alia*) *omnes illas duas peciis terræ noſtræ vocat' Nettlehamſted & Wikemans*, containing by eſtimation 15 acres, *jac' & exiſten' in Wimondham in Com' Norf. modo vel nuper in tenura ſive occupatione Jo. Colman ac nuper Monaſt' de Wimondham*
[b] *quond' ſpect' & pertin' &c. quæ quidem omnia & ſingula præmiſſa cum pertinentiis à nobis ac à patre & fratre noſtris præfatæ Reginæ concelata & detent' fuer', ac redditus & reventiones inde nec alicujus inde parcellæ ante hæc reſponſa fuer', Habend' præd' Georgio Howard milit' hæred' & aſſignatis ſuis, &c.* And that the ſaid ſix acres of Wood whereof, *&c.* were parcel of the ſaid land called *Nettlehamſted* and *Wikemans*; and that the ſaid Mannor of *Wimondham* whereof, *&c.* at the time of the making of the ſaid Letters Patents *non concelat' nec detent' fuit, ſed fuit in onere & compoto*, and the rents and profits thereof (ſaving the lands called *Nettlehamſted* and *Wikemans*) were anſwered to the King before and at the time of the ſaid Letters Patents. And if the ſaid lands *Nettlehamſted* and *Wikemans*, being parcel of the ſaid Mannor, ſhould paſs or not, was the queſtion. And if the ſaid lands do not paſs by the ſaid Letters Patents, then they found for the Plaintiff, and if, *&c.* And in this caſe three queſtions were moved.

1. If the ſaid two parcels of the Mannor of *Nettlehamſted* and *Wikemans* ſhall be as this Caſe is in Law, ſaid to be concealed and detained from the Queen, when the Mannor whereof, *&c.* is in charge to the King and Queen, although in truth the ſaid parcel called *Nettlehamſted* and *Wikemans* were occupied by an intruder, who anſwered nothing for them.

The ſecond Queſtion was, That foraſmuch as the ſaid grant was of the ſaid two parcels by ſpecial names of *Nettlehamſted* and *Wikemans* in *Wimondham* in the County of *Norfolk*, and hath theſe certainties, *ſc. modo vel nuper in tenura ſive occupatione Johannis Colman, ac nuper Monaſterio de Wimondam quondam ſpectant', &c.* (all which were true) if the ſaid two parcels ſhould paſs, notwithſtanding that they ſhall not be ſaid in Law concealed or detained.

3. If the ſaid grant by Letters Patents *ex certa ſcientia, mero motu, & gratia ſpeciali*, ſhould make the grant good, notwithſtanding the falſity of the ſaid clauſe, *Quæ quidem, &c.*

And as to the firſt, it was Reſolved, That when the King and Queen were anſwered of the ancient Rent of the Mannor, although the Fermors, or Officers or Miniſters of the King ſuffer any to intrude into any parcel of the Mannor, yet it ſhall not be ſaid in Law concealed or detained; for the Mannor is in charge, and by conſequence in Law every part of it, *& turpis eſt pars quæ non convenit cum ſuo toto.*

As to the ſecond, it was objected, That there was multiplicity of certainty in the clauſe of the grant it ſelf. 1. In the thing granted, *ſc.* by certain names. 2. By certain content, *ſc.* fifteen acres. 3. In a certain Town. 4. In a certain County. 5. In the occupation of a certain perſon. 6. In title, *Nuper Monaſterio de Wimondham ſpectan'*; and all theſe are true: and therefore although
[110] in truth the ſaid lands called *Nettlehamſted* and *Wikemans* were not concealed, yet they ſhall paſs, for *utile per inutile non vitiatur*: And therefore they cited the Book in 22 E. 3. 9. where King E. 3. granted to *William* Earl of *Salisbury* the ſon *omnes advocationes Eccleſiarum quæ pertinent ad prioratum de Montague, &c. & quas nuper conceſſimus William* then Earl of *Salisbury patri præd' Willielm.* And in truth, the Advowſon of the Church of *W.* then in queſtion, was not granted to the fathes, and yet there the grant is holden good: And if it were in the caſe of a common perſon, the falſe *Quæ quidem* ſhould not avoid the grant.

But it was anſwered and reſolved by the whole Court, that the grant was void for four Reaſons. 1. Becauſe that the cauſe of *Quæ quidem, &c.* was in Judgment of Law the ſuggeſtion of the Patentee. 2. It was a clauſe of reſtraint, to reſtrain the grant to a thing onely concealed from the King and Queen, *&c.* and not in charge. 3. The King and Queen did not intend to diminiſh any part of their Revenue. 4. Foraſmuch as the words are in the conjunctive *concelata & detenta fuer', &c.* in which caſe if the land may be ſaid detained from the King or not.

As to the firſt, *ſc.* That the ſaid clauſe *Quæ quidem, &c.* ſhall be taken in Law as the ſuggeſtion of the party, in 19 E. 3. *Grant* 58. The King by his Letters Patents giveth Licence to appropriate the Advowſon of *D.* to the Prior of *C. quæ quidem advocatio non tenetur de nobis, &c.* and in truth the

the Advowſon was holden immediately of the King, and the Licenſe was holden void, for the book ſaith that the ſuggeſtion was falſe. And in 31 E. 4. 48. If the King grant the Mannor of *D. &c. quod quidem manerium ad manus noſtras devenit ratione eſcheat' &c.* and in truth the Mannor cometh not to the Kinſt by eſcheat, the grant is void; and the reaſon that *Huſſey* Chief Juſtice there giveth is, Becauſe the falſity cometh on the ſurmiſe of the party. And therewith agreeth 8 *H.* 7. 3. 37 *H.* 8. *Br. Patents*, and 9 *H.* 6. 28. And in 16 E. 4. 7. it is holden, That the Patentee ſhall not take advantage of any other title, than that which is expreſſed in the Letters Patents. And in the Act of Confirmation of Letters Patents, *an.* 18 *El. c.* 2. there is a Proviſo: provided always, That this Act, *&c.* ſhall not extend to any Letters Patents, which at any time ſince the beginning of her Majeſties Reign have been, or hereafter ſhall be granted by the Queens Highneſs to any perſon or perſons, of any Mannors, Lands, *&c.* by force of any information, ſuit or ſuggeſtion made or to be made to her Highneſs, that the ſame Mannors, Lands, *&c.* were concealed lands. And always after this Act, and after the like Act of Confirmations of Letters Patents, *anno* 43 *Eliz. Cap.* 19. the ſaid clauſes of *Quæ quidem, &c.* and ordinary proviſions concerning concealments, were conſtrued and taken in Law for informations, ſuggeſtions and ſuits of the Queens Patentees for concealed lands. [b]

As to the ſecond, The ſaid clauſe of *Quæ quidem, &c.* contains words of reſtraint inſerted for the Kings benefit, for it implieth a ſuggeſtion to the King (as hath been ſaid) and an anſwer made to it by the King, *ſc.* The ſuggeſtion of the Patentee to the King is, That he hath found lands which are concealed from him, of which he hath not any rent, profit, or other benefit anſwered; and therefore that it would pleaſe the King in reward of his ſervice, to grant theſe lands to him, which he by his induſtry hath found to belong to the King. To which the King anſwereth, I am content to grant to you the ſame lands, ſo as according to your ſuggeſtion they are concealed from us, and whereof we have not any rent or profit anſwered: Upon which the ſaid clauſe of *Quæ quidem, &c.* was added in the Patent, to reſtrain the Kings grant to lands only which were concealed from him, and to no other, whereof the King was anſwered any rent or profit. *Quæ reſtringendi cauſa additur in caſu domini regis, ſi falſum ſit vitiat cartam.* And therefore a notable cauſe was cited, which was adjudged *Mich.* 22, & 23. *Eliz.* in the Kings Bench, but the ſame is entred *Paſch.* 21 *Eliz. Rot.* 33. where the caſe was, that *Francis Vowe* brought an *Ejectione firmæ* againſt *Richard Smith*, upon a demiſe made by *Leonard Vowe* 3. *Octo.* 20 *Eliz.* of a meſſuage in *Hallangton* in the County of *Leiceſter*; the Defendant pleaded Not guilty; and at a *Niſi prius* before Sir *James Dyer* then Chief Juſtice of the Bench, a ſpecial Verdict was found to this effect. *William Dexter* was ſeiſed of the Mannor of *Hallangton* in the County of *Leiceſter* in fee, whereof the ſaid meſſuage, *&c.* were parcel, and in the time of *R.* 2. did thereof enfeoff *Henry* Earl of *Derby* and his heirs; and afterwards the ſaid Earl took upon him the Crown and Government of the ſaid Realm, by the name of *Henry* the fourth. And afterwards 2 *Aprilis ann' regni ſui* 7. *ad humilem petitionem & ſupplicationem quorundam Johannis Miton & Margaretæ uxoris ejus conſanguineæ & hæredis dicti Willielmi Dexter, videlicet, filiæ Willielmi, filii prædicti Willielmi Dexter, de gratia ſua ſpeciali per literas ſuas patentes ſigillo Ducatus ſui Lancaſtriæ confect' gerentes datum eiſdem die & ann', dedit & conceſſit præfat' Joh. Miton, & Margar' uxori ſuæ maner' præd' unde, &c. Habend' eis & hæred' de corpore ejuſdem Margaret' legitim' procreat', &c.* And the ſaid *John* and *Margaret* his wife had iſſue, and died; and afterwards one *Thomas Vowe*, Cozen and heir of the body *Anno* 1. *Mariæ* of the ſaid Tenements in which, *&c.* did enteoff the ſaid *Richard Smith* now Defendant, and of the reſidue of the ſaid Mannor enfeoff the ſaid *Leonard Vowe* the Plaintiffs leſſor: And the Jury found further in theſe words, *Idemque Leonardus Vowe frater prædicti. Tho. Vowe poſtea, ſc. primo die Julii anno regni dictæ dominæ reginæ nunc.* 17. *in vita dicti Th. Vowe ſenioris fratris ſui, dans eidem dn'æ reginæ intelligi & informari ſeipſum fore proprium exitum & hæredem de corpore præfat' Margaretæ Myton legitimè procreat', eidem dominæ reginæ humillimè ſupplicavit, ut eadem domina regina nunc per literas ſuas patentes ſub magno ſuo ſigillo Angliæ ſigilland' renovare & confirmare velit eidem Leonardo & hæred' ſuis de corpore ſuo legitimè procreat' prædict' cartam factam per præfatum quondam H.* 4. *gerent' datum, &c. Per quod domina regina nunc humili petitioni dict' Leonardi annuens, & informationi ſuæ fidem adhibens, primo die Julii anno* 17. *Volentes dictam intentionem prædicti regis H.* 4. *effectum capere & non evacuari, de gratia ſua ſpeciali & ex certa ſcientia & mero motu, certis cauſis & conſiderationibus ipſam dominam reginam ſpecialiter moventibus, per literas ſuas patentes geren' dat' eiſdem die & anno dedit & conceſſit prædicto Leonardo Vowe exiſten' (ut datum fuit eidem dominæ reginæ intelligi) proxim' hæredi & exitui de corpore prædictæ Margaretæ Myton legitimè procreat', manerium prædictum unde, &c. Habendum & tenendum prædicto Leonardo & hæredibus de corpore ſuo legitimè procreat', ubi revera prædictus Leonardus non fuit proximus hæres de corpore prædictæ Margaretæ Myton, ſed prædictus Thomas Vowe fuit in plena vita & frater ſenior ejuſdem Leonardi.* And afterwards *Thomas Vowe* died without iſſue; after whoſe death the ſaid *Leonard* then was in truth the next heir of the body of the ſaid *Margaret Myton.* The Queen reciting the ſaid miſpriſion, and all the ſaid ſpecial matter under her Privy Seal, bearing date *Julii* 9. *Anno regni ſui* 20. (to be a warrant to the great Seal) granted to the ſaid *Leonard Vowe* the ſaid Mannor whereof, *&c.* in tail; but before he had obtained it under the Great Seal, the ſaid Queen *Sept.* 2. *Anno regni ſui*, 20. *ſupradicto*, by Letters Patents under the Great Seal granted to the ſaid *John Farnham* Eſquire one of her Penſioners the ſaid meſſuage, *&c. In quo, &c. inter alia per nomen totius illius meſſuagii voc' Vowes, alias Mytons, alias Dexters, in Hallangſton in comitat' Leic', quæ quidem omnia & ſingula præmiſſa & quælibet inde parcella à nobis aut à patre, fratre vel ſorore noſtris huc uſque vel uſque* 8. *diem Octob. Anno regni nri* 17. *concelata, ſubſtracta, vel injuſtè detent' fuer', &c.* To have and to hold to the ſaid *John Farneham* and his heirs for ever. *Proviſo ſemper, quod ſi præmiſſa non ſunt aut fuer' à nobis aut à dictis patre, fratre, vel ſorore noſtris concelata, ſubtracta, vel injuſtè detent', & ſi remanſer' uſque tempus captionis primæ inquiſitionis vel informationis, &c. quod tunc hæ literæ patentes quoad, &c.* [b]

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vacuæ erunt. And the firſt certificat was *Octabis Trinit' Anno regni dicti dn'æ reginæ Eliz.* 20. And afterwards, *ſc.* The firſt day of *October* then next following, The ſaid *Leonard Vowe* obtained Letters Patents under the Great Seal, according to the ſaid Privy Seal. And the firſt day of *October* in the twentieth year aforeſaid, The ſaid *John Farneham* by deed indented and inrolled, bargained and ſold unto the ſaid *Richard Smith* now Defendant, the ſaid meſſuage *in quo, &c.* To have and to hold to him and his heirs, by force of which he entred, upon whom the ſaid *Leonard Vowe* did enter and made the Leaſe *prout, &c.* And if upon the whole matter aforeſaid, the ſaid Letters Patents made to the ſaid *John Farneham*, were ſufficient in Law to paſs the ſaid meſſuage; then they found for the Defendant; and if not, then for the Plaintiff, and aſſeſſed dammages and coſts. And in this caſe upon argument made at Bar and Bench, four points were reſolved.

1. That the ſaid Letters Patents of *Anno* 17 *Eliz.* were void in Law, becauſe they were in the nature of a reſtitution, and the ſuggeſtion of the ſaid *Leonard Vowe* recited in the ſaid Letters Patents, that he was next heir of the body of the ſaid *Margaret Myton* was falſe; and although it was but matter in fact, yet becauſe it was the principal motive of the ſaid grant in the nature of a Reſtitution, and the intention of the Queen expreſſed in the Letters Patents was that the intention of the grant of the ſaid. *Hen.* 4. ſhould take effect, which the Queen reciting the Letters Patents of King *Hen.* 4. and the imperfection of them declareth her intention in theſe words; *volentes dictam intentionem prædicti regis Henrici* 4. *effectum capere & non evacuari*, which could not be if the right heir of the body of the ſaid *Margaret Myton* be not reſtored; for this cauſe the ſaid grant of the Queen *Eliz.* of *Anno* 17. was void.

2. It was reſolved, That the ſaid clauſe of *Quæ quidem &c.* was in Judgment of Law the ſuggeſtion of the Patentee, and added to reſtrain the ſaid grant in ſuch manner, that if the ſaid clauſe of *quæ quidem, &c.* be falſe, although the ſaid meſſuage be granted by certain name, yet the grant is void.

3. It was reſolved, That when the Kings officers by force of any matter of record, may have ſo certain notice of the lands or tenements compriſed therein, that they may put them in charge to the King, although that the record it ſelf be not of any effect or validity in Law; yet in Judgment of Law, ſuch lands or tenements ſhall never be ſaid concealed, for the negligence or lacheſs of the Kings
[112] Officers or Miniſters ſhall not turn to the Kings prejudice in ſuch caſe. And therefore any grant or demiſe of any land in certain title under the Exchequer Seal, where it ought to be under the great Seal, or under the great Seal where it ought to be under the Dutchy ſeal, or under the ſeal of the Dutchy, or of the Court of Augmentations, where it ought to be under the Great ſeal: yet ſuch land againſt ſuch record cannot be ſaid to be concealed. And therefore although the ſaid grant of *Hen.* 4. under the Dutchy ſeal, where it ought to have been under the Great Seal, although that nothing paſſeth by it: yet by reaſon thereof the ſaid Mannor of *Hallington* can never after be ſaid to be concealed. So if King *Ed.* 3. by his Letters Patents under the Great Seal demiſeth the Mannor of *D.* for life, or for years, which leaſe was void by reaſon of the miſnoſmer of the leſſee, or any other ſuch imperfection, yet the ſaid Mannor never after can be ſaid to be concealed, And if any parcel of the poſſeſſions of the Crown be in charge in the Dutchy, or of the Dutchy in the Exchequer, theſe ſhall never be ſaid concealed. And it was ſaid that this word (Conceal) was a word of new invention, in times paſt not uſed or known to the ſages of the Law, but in one Writ which *Stamford Prerog. b.* ſpeaketh of, which Writ is called, *Writ de terris concelatis*, and lieth after a general livery ſued; but ſuch Writ is now alſo concealed, for it is not found in the Regiſter, either Original or Judicial.

4. That no Lands or Tenements whereof the King is ſeiſed, *&c.* although it be concealed from the King, cannot be ſaid in Law ſubſtracted or detained from the King; for the King cannot be diſſeiſed or deforced of any Land, *&c.* But if the Kings Tenant be diſſeiſed, and dieth without heir, then the right eſcheateth to the King, and there in truth the land is detained from the King; but ſuch right ſhall not paſs by the general grant of the King of Lands, *&c. Hill.* 38. *Eliz.* it was reſolved by *Popham* and *Anderſon* Chief Juſtices in the Caſe of one *Shane* ſent out of *Ireland*, That the clauſe of *quæ quidem*, in the like Letters Patents of concealment of lands in free land, did amount to a ſuggeſtion, and being falſe, made the grant of divers Rectories by certain name void, as here in the fourth point appeareth.

As to the third reaſon, to the end the final intention of the King by theſe Letters Patents was to reward the ſervice of the Patentee, and not to diminiſh any part of the Revenue of his Crown, but only to paſs that which was concealed from him. And the opinion of *June* in 9 *H.* 6. 28. was cited, If a man ſueth to the King by petition, to have a Mannor, and ſaith in his petition, that the Mannor is worth but 10 *l.* and hath a Patent of the ſame Mannor, and afterwards it is found upon Re-
[*b*] cord, that the Mannor is of the value of 40 *l. per annum*, the Patent ſhall be repealed, for the King intended to diminiſh his Revenue by 10 *l. per annum*, and upon the ſuggeſtion of the Patentee he was deceived in the value, and thereby he decreaſeth his revenue 40 *l. per annum. Vide* 16 *C.* 3. *Grants* 54.

As to the fourth Reaſon, The ſaid clauſe *Quæ quidem* hath a double conjunctive, *ſc. concelata & detenta*; and as it appeareth by the fourth point of *Vowes* Caſe, lands, *&c.* cannot be detained from the King. And ſo it was Reſolved in *Shanes* Caſe, *Hill.* 31 *Eliz.* where the Caſe was; Queen *Elizabeth* by her Letters Patents under the Great Seal of *Ireland*, *ex certa ſcientia, mero motu, & gratia ſpeciali*, granted unto *Edm. Barret*, the Rectory of *Sroze* in the County of *Longford* in *Ireland*, (*inter alia*) parcel of the poſſeſſions of the late Priory of *Loughſendy*, *Quæ omnia & ſingula præmiſſa à nobis & progenitoribus noſtris diu antehac concelata, ſubſtracta, & injuſte detenta fuerunt & adhuc ſunt*, To have and to hold to the ſaid *Edmond Barret* and his heirs. And it was reſolved, that this grant was void, becauſe that the ſaid Clauſe of *quæ quidem* was in the Judgment of Law the ſuggeſtion of the Patentee, and the ſaid Rectory could not be unjuſtly detained from the Queen; and the words are in Conjunctive, *Concelata, ſubſtracta, & injuſte detenta.* And ſo

Francis

Francis Shane who occupied the said Rectory did prevail against the said Patentee. And the second Conjunctive is, *Et redditus & reversiones inde, nec alicujus inde parcellæ antehac responsa fuer'*, so that both the Conjunctives ought to be true, otherwise the grant is void.

As to the third point in the principal Case it was resolved, where the said grant was to Sir *George Howard*, *ex certa scientia, mero motu, & gratia speciali: Ex certa scientia* importeth that the King hath knowledge of the thing he granteth. As it is said in 2 E. 3. 7. in *John de Bretaines* Case, but the same is intended of the truth, which is the proper object of knowledg, and not of falsity which is *non ens*, and of that the King cannot have knowledg, but in such case the King notwithstanding these words, is utterly deceived in his grant; and therefore they shall not give the Patentee any advantage.

Ex mero motu properly importeth the honour and bounty of the King, who rewardeth the Patentee for the merit of his service of his own meer motion, without any suit of the party. And it was said that these words were added after the Statute of 4 *H.* 4. *Cap.* 4. by which Act the King declareth, that he will abstain to grant any part of his Revenues, Lands, or Wardships, if not to those who have deserved, and those who sue for any such thing shall be punished, and should not have the thing for which the suit was made. After which Act to the end it might not appear that there was any suit, these words were added *sc. ex mero motu*. And the said Act is entituled in the Roll *Brangwyn*, which in the British tongue is a *White Cornelle*, in English a *White Crow*: and it was called Crow because he was oftentimes calling and requiring: and White because he hath *aulica & candida vestimenta*. [113]

Ex gratia sua speciali, in respect of grace and favour, which the King hath conceived to the Patentee.

And it was resolved there was a difference between Clauses of *quæ quidem*; For some are added only to make a more plain demonstration of the certainty of the thing granted, and some which concern the Kings Title, or the value of the land granted, or to make a restraint of the grant as hath been said before; And additions only to make more certainty shall not make void the Kings grant of a thing certain; as 10 *H.* 4. 2. in Sir *John Lestranges* Case it is holden, That if the King by Office found hath a Mannor in Ward, and granteth the said Mannor by a certain name in such a County *quod quidem manerium nuper seisitum fuit in manus nostras, &c.* and in truth this Mannor never was seised, it shall not avoid the grant, for it is not material whether the King had seised it or not; and it was added but to make more certainty to that which was certain enough before; and therefore it shall not avoid the grant although it be false. Otherwise it is of a general grant, as in the principal Case there it was. [a]

So in *Mich.* 22. & 23. A Case between the Earl of *Rutland* and *Thomas Markham* was by the commandment of Queen *Elizabeth*, referred to *Bromley* Lord Chancellor, *Gerard* Attorney, and *Popham* Sollicitor; and the Case was such: The Queen granted to *Thomas Markham Officium custodis parcorum sive boscorum de Billowe & Birkland in foresta de Sherewood in com' Nott', quod quidem officium Henric' nuper Comes Rutland' nuper habuit.* To have and to hold the said office to the said *Thomas Markham* for term of his life; and in truth the said *Henry* Earl of *Rutland* never had the said office; and yet it was resolved by them that the grant was good, because *quod demonstrandi causa additur rei satis demonstratæ frustra fit.* So if the King demiseth a Mannor by special name, *quod quidem manerium nuper fuit in tenura sive occupatione Johannis Stile:* and in truth he never had it, yet the grant is good, for in these Cases the King is not deceived in his title, nor in the value which he intendeth to grant, nor in the restraint which he for his profit intendeth to make. [b]

Also it was resolved, That there was a difference betwixt the Kings case, and the case of a common person; for a subject who may intend his private, shall not avoid his grant in these and the like cases, being made upon a false insinuation and suggestion; but the King who mindeth the condition of the publick, shall avoid his grant in these cases *jure regio*, as it is said 21 E. 3. 47. in the Earl of *Kents* case. And the same is an high and great Prerogative which the King hath, that when he maketh any grant upon such false suggestions as aforesaid, they are void in Law. So when upon false insinuations or pretences, he maketh any grant of any Monopoly, *&c.* which in truth is to the prejudice of the King and the Commonwealth, the King *jure regio* shall avoid such grants, and such Letters Patents by Judgment of Law shall be cancel'd. And it was said that Perpetuities, Monopolies, and Patents of Concealments were born under an unfortunate Constellation; for so soon as they have been brought in question, Judgment hath always been given against them, and none at any time for them; and each of them hath two inseparable qualities, *sc.* to be troublesom and fruitless.

As to the said case of 29 E. 3. 8. the case is there, That the King being founder of the Priory of *Mountague* (which was a Priory alien) the King for cause of war of *France* seised the said Priory, and by his Charter granted to *William Mountague* Earl of *Salisbury* the Father, the Advowson of the said Priory to him and his heirs, and also the keeping of the said Priory during the war, with all the appurtenances, and all the profits belonging to the same, as wholly as the same came to his hands. And after the said Earl died, *William* his son and heir then within age; to whom the King by another Charter granted *omnes advocationes Ecclesiarum quæ pertinent ad prioratum de Mountague, tenendum usq; ad legitimam ætatem præfati Willielmi, & quas nuper concessimus præfato Comiti Sarum Patri*; where it is taken, That the Advowsons appertaining to the said Priory shall not pass by the said general words. And there *Green* Chief Justice saith, Surely he conceived, That although the King had never granted the Advowsons to the Earl the Father, That by the second Charter they should pass to *William* the Son by those words; for in as much as he grants, *&c.* to hold till his full age, although that which he says after (the which he granted to his Father) be false, the grant is good. But *Norton* contrary; so that *Greens* reason was, because that the said words or restriction came after the *Habendum, sc.* after a full and absolute grant. Also if the said opinion of *Green* shall be Law, the said case is out of the reason and rule of the case at Bar, as it appeareth before. And Judgment was [114]

given

given for the Plaintiff, whereupon the Defendant brought a Writ of Error, and the Error aſſigned was in the point adjudged, which point was argued again at the Bar, and at the Bench; for *Mich* 11 *Jacobi* the Judgment was affirmed by the whole Court for the cauſes and reaſons reported before.

Note Reader, That *Hill.* 36 *Eliz.* an Information was exhibited in the Kings Bench againſt *Hugh Vaughan* for intruding into the gate of the late Priory of *Friers Preachers* in *Langley Regis*, in the County of *Hereford*, and upon not guilty pleaded the Jury gave a ſpecial Verdict to this effect. *Richard* Prior of the late Priory *Anno* 38. *Hen.* 8. with the conſent of the Covent by their Indenture enrolled did ſurrender and grant to *Hen.* 8. his Heirs and Succeſſors all their poſſeſſions, &c. by force whereof, and of the Act of 31 *Hen.* 8. The King was ſeiſed of the ſaid Scite, and 7. *Feb.* 31 *Hen.* 8. demiſed the ſame by the name of the Scite of the late Priory to the Suffragan of *Dover* for his life *abſque aliquo inde reddendo*, and afterwards the ſaid Suffragan died; and the Scite by mean conveiances deſcended to Queen *Elizabeth*. And afterwards 27. *Junii* 8 *Eliz.* a Commiſſion was directed under the Exchequer ſeal to *William Cook* Eſquire, and others giving them authority to ſurvey the ſaid Scite (*inter alia*) and to certifie to the Exchequer in what reparation it was, and what Lead, Stone and Iron was requiſite to repair it; which Commiſſioners 3. *Septembris* following by force of the ſaid Commiſſion, did certifie in writing under their Seals (*inter alia*) That there was an old Church appertaining to the ſaid late Priory, which was in great ruine and decay, and was covered with Lead, which lead was worth 33 *l.* 6 *s.* 8 *d.* And the Timber and Stones were little worth, &c. After which certificate the Lead, Timber and ſtones were ſold by the Treaſurer and Under-Treaſurer of the Exchequer *An.* 9 *Eliz.* to one *Webſter* for 33 *l.* 6 *s.* 8 *d.* who in the Court of Exchequer acknowledged the debt. And afterwards the Queen 9 *Aprilis Anno* 16. by her Letters Patents, *ex certa ſcientia, mero motu, & gratia noſtra ſpeciali*, granted the ſaid Scite of the late Priory *inter alia* to *Edward Grimſton* the Father, and *Edward* his ſon and their heirs under this *Proviſo*. *Proviſo ſemper quod ſi prædicta præmiſſa aut aliqua inde parcella, aut redditus aut proficua eorundem non ſunt nec fuerunt ante* 10 *diem Aprilis anno regni noſtri* 14. *à nobis nec à patre, fratre, nec ſorore noſtris concelat', ſubtracta, vel injuſtè detenta, & ſic concelat', ſubtract', vel injuſte detent' remanſerunt uſque prædictum* 10 *diem Aprilis anno* 14. *ſupradictо, quo die præd' Edwardus & Edwardus, &c. ſuis propriis ſumptibus & expenſis ad revelationem inde fieri procuraverant, quod tunc hæ literæ patentes quoad hujuſmodi parcellam ſic non concelatam, ſubtractam, vel injuſte detentam vacuæ erunt.* And further found that the Queen never took any profit of the ſaid Scite, but the ſaid Church as aforeſaid. And if, &c. And it was objected that the ſaid Scite ſhould paſs by the Letters Patents, becauſe that although it ſhall be admitted that the Scite it ſelf could not be ſaid to be concealed in that caſe, and although that the ſaid Scite could not be ſaid ſubſtracted and unjuſtly detained from the Queen, and the words are in the disjunctive, *aut redditus aut proficua eorundem*, &c. Yet foraſmuch as the rents and profits were ſubſtracted and unjuſtly detained from the Queen, and the words are in the disjunctive, *aut redditus aut proficua eorundem*, &c. For this cauſe the ſaid Letters Patents were ſufficient to paſs the ſaid Scite. Alſo it was objected, That the ſaid Commiſſion under the Exchequer Seal, is not any ſuch authentical Record in Judgment of Law, to prove that the ſaid Scite was not concealed. But it was reſolved by the whole Court, That upon the ſaid ſpecial matter found, the ſaid Scite ſhould not paſs by the ſaid Letters Patents. And in this caſe ſix points were reſolved.

[b]

1. That when there is any Record by which the certainty of the Kings Lands (which is not in charge) ſo particularly appeareth, That the Kings officers may put it in charge (without any reſpect to the time of the ſaid Record, ſo that it be after the Kings title accrued) ſuch land can never be ſaid to be concealed. As if a man ſeiſed of the Mannor of *D.* in fee by Deed enrolled, granted the ſaid Mannor to King *Hen.* 8. his Heirs and Succeſſors, and the King or any of his Succeſſors after the ſaid grant have never taken any rent or profit thereof, yet this Mannor ſhall never be ſaid to be concealed. So in the Caſe at Bar, when the King demiſeth the ſaid Scite of the late Priory to the Suffragan of *Dover* for life, although that nothing be reſerved; this Scite ſhall never after be ſaid to be concealed: and ſo of the like.

2. It was reſolved, That in the Kings Caſe, although that one wrongfully taketh rents and profits of the lands, yet the ſaid rents and profits cannot be ſaid to be witholden or unjuſtly detained, for the King may charge him who taketh the rents or profits of his lands as Bailiff, to render account; for in the Kings Caſe the Law in ſuch caſe maketh a privity, and therewith agreeth 33 *Hen.* 6. 2 & 3. And when the Land it ſelf is not concealed, the ſaid words, *aut redditus aut proficua eorundem, &c. concelata, ſubtracta, vel injuſte detenta*, &c. will not paſs it, for the Kings intent was to paſs nothing but that which was concealed from him; For otherwiſe by pretence of the Patentee, if the Kings Leſſee hath detained his rent reſerved upon his Leaſe, it ſhould paſs by the ſaid words, which was abſolutely denied by all the Juſtices, for no ſuch conſtrained conſtruction ſhall be made in the Kings grant, to paſs his inheritance againſt the Kings intention, and upon the ſuggeſtion of the Patentee himſelf.

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3. It was reſolved, as before in *Shaues* caſe, that in the ſame caſe land cannot be ſaid to be ſubſtracted or unjuſtly detained.

4. That the ſaid words *ante decimum diem Aprilis anno* 14. *Eliz.* ſhall be in conſtruction of Law taken for the whole time after the latter title of the Queen, untill that day, and not for a month, or a year, or two years, &c. upon which great uncertainty would follow; but all times after the Queens title until that day ſhall be taken, notwithſtanding the disjunctive words ſubſequent, *à nobis, aut à ſorore, fratre, vel patre noſtris.*

5. That the ſaid Commiſſion under the Exchequer Seal, and the return thereof was ſufficient to inſtruct the Kings officers to put the Scite in charge, and the ſame ſerveth for a ſufficient Record to that purpoſe; but an office found by force of a Commiſſion under the Exchequer Seal, was not ſufficient to entitle

entitle the King, in caſe of Attainder of Felony, Mortmain, *Ceſſavit*, or the like. So note the difference betwixt an Office of Inſtruction and Intitling.

Laſtly, It was reſolved, That foraſmuch as the Queen was anſwered ſome part of the profits of the Scite, no part thereof can be ſaid to be concealed.

Mich. 10 Jacobi *Regis.*

Robert Pilfold's Caſe.

Robert Pilfold brought an Action of Treſpaſs in the Kings Bench, *Trin.* 7. *Jac. Rot.* 795. againſt *Robert Dawkes quare clauſum & domum fregit*, at Saint *Olaves* in *Southwark*, in the County of *Surry*, with a *Continuando* for a long time, to the dammages of the Plaintiff 40 *l.* The Defendant pleaded not guilty, &c. which was tried by *Niſi prius* for the Plaintiff, and dammages aſſeſſed *occaſione tranſgreſſionis prædictæ* to 49 *l.* and for coſts of ſuit 20 *s.* upon which Verdict the Plaintiff at the day in bank, being the day of the return of the *Diſtringas* remitted 9 *l.* parcel of the 49 *l.* aſſeſſed for dammages, and prayed Judgment of 40 *l.* (to which dammage he had declared) with encreaſe of coſts, and had 9 *l.* of encreaſe added by the Court, which in all did amount to 50 *l.* and had his Judgment accordingly. And thereupon *Dawkes* the Defendant brought a Writ of *Error* in the Exchequer Chamber; And in this caſe it was aſſigned for *Error*, that the dammages and coſts together did amount to more than the dammages alledged in the Declaration: And it was ſtrongly argued that it was *Error*, for *miſa & cuſtagia* are included in this word Dammages; and therefore where the Statute of 8 *H.* 6. giveth double dammages in a Writ of Entry, in an Action upon the Statute, or in Aſſize, there the coſts alſo ſhall be treble, and yet the Statute giveth only treble dammages; but treble coſts are included within this word Dammages. And therewith agreeth 14 *Hen.* 6. 13. 19 *Hen.* 6. 32. 22 *Hen.* 6. 57. 12 *Ed.* 4. 1. *Fitz.* 248. And in 4 & 5 *Phil. & Mar. Dyer* 159. *b.* *Domingo Bilota* brought an [116] Action upon the Caſe againſt one *Pointel*, becauſe he ſued him before the Admiral for a thing done upon the land, in which caſe the Statute of 2 *Hen.* 4. *Cap.* 1. giveth to the Plaintiff double dammages, without ſpeaking of any coſts, and yet there he recovered as well double coſts as double dammages. And in 18 *Edw.* 4. 23. The Jurors may aſſeſs the dammages and coſts entirely if they will, for dammages do include the whole, 42 *Edw.* 3. 7. That the Plaintiff ſhall not recover more dammages than he himſelf hath declared of; and therewith agreeth 2 *H.* 7. 7. 9 *Eliz. Dyer.* And in 13 *Hen.* 7. 16. 17. In Treſpaſs the Plaintiff declareth to his dammages of twenty Marks, and the Jury gave twenty two Marks for coſts and dammages. *Brian*, this is good for twenty Marks, but they ſhall not give coſts beyond the ſumm of dammages alledged in the Declaration; *& alii concord*; and that was ſaid, was a caſe in the point, for which cauſe it was concluded, that the Judgment in this caſe was erroneous. [b]

But at length it was reſolved by all the Judges of the Common Pleas, and Barons of the Exchequer, that the Judgment ſhould be affirmed. And I have thought it neceſſary to report at length the reaſons and cauſes of the Judgment. And therefore,

Firſt, At the Common Law before the Statute of *Glouceſter* (which was made 6 E. 1. *Cap.* 1.) A man ſhould not recover dammages in any real Action, as in *Dower* before the Statute of *Merton*, *Cap.* 1. nor in *Aiel*, *Mordanceſter*, *&c.* before the ſaid Statute of *Glouceſter*; but in Actions mixt, as in Aſſize, Entry in the nature of Aſſize, *&c.* or in perſonal Action, as Treſpaſs *quare clauſum fregit*, of taking away of goods, *&c.*

Secondly, That in all caſes where a man ſhall recover dammages, he ſhall recover coſts, which is meant of all caſes, where he ſhould recover dammages; either before the ſaid Act of 6 E. 1. or by the ſaid Act.

Thirdly, In all caſes where a man either before, or by the ſame Statute ſhall not recover dammages, either ſingle, or double, or treble, *&c.* There the Plaintiff ſhall not recover coſts, for this Act is an Act of Creation, which createth and giveth recompence to the Plaintiff; where in the ſame caſe no recompence was given before.

Fourthly, But otherwiſe it is of an Act of Addition, *ſc.* which addeth greater recompence and ſatisfaction than was given before ſuch Act; but if the Act doth encreaſe the dammages, there the Plaintiff ſhall recover his dammages encreaſed by the Statute, and alſo coſts. And therefore in a *Quare impedit* dammages are given to the Plaintiff by the Statute of *Weſt.* 2. made in 13 E. 1. *cap.* 5. but no coſts ſhall be there recovered, becauſe the ſame is an act of Creation, which newly gave recompence to the Plaintiff, where none was recoverable before. And therewith agreeth 27 *H.* 6. 10. 2 *Hen.* 4. 17. 9 *Hen.* 6. 66. But in an Action upon the Statute of 2 *Hen.* 4. againſt him who ſueth in the Admiralty for a thing done upon the land, the ſame is an Act of Addition, for dammages and coſts were in ſuch caſe recoverable at the Common Law: See for that, 8 *Ed.* 4. 13, & 14. and the Statute encreaſeth the dammages to double, and yet he ſhall recover coſts alſo, for the Statute encreaſing the dammages, doth not take away the coſts. So afterwards at the ſame Parliament at *Glouceſter* *Anno* 6 *Ed.* 1. *cap.* 5. An action of Waſt is given, where there was but a prohibition againſt Tenant in Dower, *&c.* at the Common Law, and no dammages ſhall be recovered in it, but for Waſt done after the prohibition delivered. And againſt Tenant for life, or years, no prohibition lay; and therefore [b]

the Statute of *Ed.* 1. *c.* 5. which giveth treble dammages for waſt done before the Writ brought, and the place waſted, is a Law of Creation, and which giveth remedy where none was before, and therefore there no coſts ſhall be recovered. And therewith agreeth 2 *H.* 4. 17. 9 *Hen.* 6. 66. *b.* & 19 *H.* 6. 32. And therefore the Books in 5 *Hen.* 5. 13. & 5 *Edw.* 4. 7. are ill reported. But in a Raviſhment of Ward, which is a Law of Addition, *ſc.* which addeth the recovery of the Ward himſelf, or the value of him: Yet dammages and coſts ſhall be alſo recovered, becauſe an action lay at the Common Law for Raviſhment of a Ward, in which the Plaintiff ſhould recover his dammages and coſts. And therewith agreeth 27 *H.* 6. 10. So in an action for forcible entry into Lands upon the Statute of 8 *Hen.* 6. or in an Aſſiſe for a diſſeiſin done with force, there the Plaintiff ſhall recover treble dammages and coſts alſo, becauſe that at the Common Law the Plaintiff ſhould recover treble dammages and coſts alſo in both the caſes, for this Statute is but an act of Addition; and therewith agreeth 14 *Hen.* 6. 13. 19 *Hen.* 6. 32. 22 *Hen.* 6. 57. 12 *Edw.* 4. 1. *F. N. B.* 248. But in a *Decies tantum*, which is a Law of Creation, there the Plaintiff ſhall recover the penalty given by the Statute, and no more: for the ſame is a Law of Creation, 2 *Hen.* 4. 17. So upon the Statute of 5 *Edw.* 6. of Ingroſſers, the Plaintiff ſhall not recover coſts, but only the penalty given by the Statute, becauſe that the Plaintiff had not any remedy at the Common Law, 35 *Hen.* 8. *br. Dammages* 200.

Fifthly, It is to know, that this word (*Damna*) is taken in the Law in two ſeveral ſignifications, the one properly and generally, the other *relativè & ſtrictè*; properly, as in the Caſes which have been put upon the Statute of 2 *Hen.* 5. and 8 *Hen.* 6. where coſts are included within that word: for *damnum* in his proper and general ſignification *dicitur à demendo, cum diminutione res deterior fit*, and in this ſenſe coſts of ſuit are dammages to the Plaintiff: for by them *res ſua diminuitur*. But when the Plaintiff ſheweth the wrong done to him to the dammages of ſuch a ſum, the ſame is to be taken *relative* for the wrong which is paſt before the Writ brought, and are aſſeſſed *occaſione tranſgreſſionis prædictæ*, and cannot extend to coſts of ſuit, which are future, and of annother nature, *ſc.* to legal expences, and whereof no certainty then can be known. So theſe are two diſtinct things, *ſc. damna pro injuria illata*, and *expenſæ litis*; and therefore in the ſaid Acts of Parliament of 2 *H.* 4. and 8 *H.* 6. they are taken in their proper and general ſignification, and in favour of the Plaintiff who always when he recovereth he is favoured in Law. But in the caſe at Bar, it is taken in his relative ſignification, regarding the wrong which is paſt; and ſo they are expreſly aſſeſſed by the Jury, and that alſo in the Plaintiffs favour: And the difference was well obſerved betwixt perſonal actions, and real actions in which dammages are to be recovered. For in perſonal actions, they ſhall declare to dammages, becauſe they ſhall recover dammages only for the wrong done before the Writ brought; but in real actions the demandant ſhall never count to dammages, becauſe he is to recover dammages pendant the Writ: and therefore it is holden in 33 *H.* 6. 47. *a.* In a Writ of Entry Sur diſſeiſin, or in nature of an Aſſize, where the party ſhall recover dammages, and a Writ is awarded to enquire of the dammages, that the Plaintiff ſhall recover dammages from the time of the diſſeiſin until the time of the warding of the Writ of enquiry of dammages, and not after, notwithſtanding that the Writ of Enquiry was not ſerved after ſeven years paſt, and iſſue be joyned triable by Verdict, he ſhall recover dammages, but from the time of the diſſeiſin until the time of the Verdict: But in a *Præcipe quod reddat*, of a rent of the poſſeſſion of the demandant himſelf, he ſhall recover the arrearages behind, as well hanging the Writ as before: and therewith agreeth 7 *Edw.* 4. 51. *b.* 13 *Aſſi. p.* 2. 17 *Aſſi. p.* 10. 29 *Aſſi. p.* 59. 31 *Aſſi. p.* 33. 36 *Aſſi. p.* 2. 40 *Edw.* 3. 24. 7 *Hen.* 4. 16. 16 *Hen.* 7. 5. *a.* 6. *a.* And as in real actions the demandant ſhall not count to dammages, becauſe it is incertain to what the dammage ſhall amount, becauſe he ſhall recover thoſe hanging the Writ; ſo in the caſe of coſts they ſhall be recovered for the expences hanging the Writ, which being uncertain, cannot be comprehended in the count, becauſe the count doth entend to dammages paſt, and not to expences of ſuit. And coſts are not always included in this word Dammage; For if Treſpaſs be brought againſt two Defendants, and the one is found guilty by himſelf, and the other by himſelf, and dammages are ſeverally aſſeſſed, yet the coſts ſhall be joyntly taxed. And therewith agreeth 36 *Hen.* 6. 13. and 12 *Ed.* 4. 1. And the Books in 42 *Ed.* 3. and 2 *H.* 7. were agreed to be good Law, *ſc.* that the Plantiff ſhall never recover more dammages, than he hath declared of, *ſc.* dammages for the wrong done; but *Expenſa litis* may be added to it; and therefore 34 *Edw.* 3. *Dammages* 7. was denied to be Law, *ſc.* That in *Waſt* the Plaintiff declared to dammage of 10 *l.* and the Jury found dammages to 20 *l.* and the ſame was trebled; and the reaſon there given is, becauſe that the Statute of *Glouceſter* enacteth, that the Defendant make agreement of the treble of that the *Waſt* is taxed at; but the Statute is to be intended of dammages lawfully taxed. And ſo it was holden by the Lord *Dyer Trin.* 10. *Eliz.* in an action of Waſt brought by the Lord *Abergaveny*, that the Jury cannot value the waſt more than the Plaintiff hath declared of in his declaration. And therewith agreeth *Hill.* 3. *Ed.* 4. *Rot.* 137. And yet in ſome caſes the Plaintiff ſhall recover more dammages than he himſelf counted of.

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[b]

And as to the caſe of 13 *Hen.* 7. 16, & 17. which cauſe hath been cited out of *Brooks Abridgment*, the Book at large was confeſſed to be good Law, For the caſe, as it is there reported is ſuch; In an action of Treſpaſs brought by *Dorrel*, he declared to his dammages of 20 Marks, the Defendant pleaded not guilty: And they taxed the dammages and coſts of his ſuit joyntly to 22 Marks, which is the principal caſe word by word, which is clear that the Verdict cannot ſtand; for it doth not appear how much is for dammages, and how much for coſts; and then it may be they have given greater dammages then the Plaintiff hath declared of, ſo that the Verdict is incertain; and therefore *Brian* ſath well: that in ſuch caſe the Plaintiff can have Judgment but of 20 Marks.

Then all which followeth is but the Collection of the Reporter: ſo that according to his opinion, and of the other, the Jury cannot give coſts beyond the ſum of the dammages which the Plaintiff hath

hath counted of: which Collection is not warranted by the opinion of *Brian:* for in as much as the damages and costs were jointly taxed, the Plaintiff could not have Judgment but of 20. Marks for the incertainty, although that costs might be given beyond the damages in the Declaration. And therefore Abridgments are of good and necessary use to serve as Tables to find the Cases in the Books at large, or Records: and not to ground any opinion upon Abridgments. For example, the case in 45 *Edw.* 3. 19, 20. where the Case was, That Lands were given to *I. de C.* with *Johan* the sister of the donor, *Habendum eis & hæredibus suis imperpetuum.* And *Fitz.* in abridging of the Case, title *Tail* 14. saith, That the gift was adjudged fee simple, and not frankmarriage. And *Statham* in abridging the Case title *Tail*, saith, That it was an estate in frankmarriage. And *Brook* title *Frankmarriage* 1. saith, *Quære, quia non adjudicatur; ideo tutius est petere fontes quam sectari rivulos.* Note Reader, the principal case was adjudged by the Court of Kings Bench. And afterwards that Judgment was affirmed by all the Judges of the Common Pleas, and Barons of the Exchequer, and the Record was sent back into the Kings Bench according to the Statute. [118]

Mich. 10 Jacobi *Regis.*

Cheyney's Case.

THis Term Serjeant *Nichols* moved this Case: *Cheney* brought a Writ *de valore maritagii*, and issue was taken upon the tenure; and before the Justices of *Nisi Prius* in the County of *York* it was found for the Plaintiff, and the Jury did assess 40 *s.* Damages, and 10 *s.* Costs, and did not enquire of the value of the marriage, as they ought to have done; and he moved, that the Plaintiff might have a Writ to enquire of the value, and to supply the defect of the Verdict; and he cited two Presidents, one, *Pasc.* 3 *Jac. Rot.* 745. in a Ravishment of Ward brought by the Lord *Barkley* against *Hill*, the Defendant pleaded Not guilty, and the Jury found him guilty, and that the heir was within age, and married, *&c.* and assessed damages and costs, and found not the value of the marriage, and a Writ to enquire of the value issued forth. And the like Writ was awarded *Trin.* 38 *Eliz. Rot.* 1703. And in 4 & 5 *Mar. Dyer* 135. a *Quare Impedit* brought by *Poyner*, the Jury was not charged to enquire of four Points, *Sc. De plenitudine, Ex cujus Præsentatione, Si tempus semestre transierit*, and the value of the Church *per annum*; there the Plaintff may have a Writ to enquire of these points. *Vide* 8 *Eliz. Dyer* 241. 9 *Eliz. Dyer* 260. [b]

And the Case was oftentimes debated, and at last it was Resolved, That the Verdict was insufficient: For the Chief Justice said, That in a Writ *de Valore Maritagii*, three things are to be recovered, *s.* The value of the Marriage, Damages, and Costs, *quod fuit concessum per totam Curiam.* [119]

2. It was Resolved, That the issue be in this case of *Valore Maritagii* upon the tenure, yet as upon a consequent or dependant upon the issue, the Jury are, as parcel of their charge, if they finde for the plaintiff, to enquire of the value of the Marriage, Damages and Costs; and if the Jury do tax an excessive value, or excessive damages, an attaint lieth thereof. And thereof in Assise, if the issue be joyned upon a Release, and a mediate ouster confessed, there if the issue be found for the plaintiff, yet as parcel of their charge, the Recognitors of the Assise shall enquire of the seisin and disseisin, for that is the point of the Writ, and thereupon an Attaint lieth. And therewith agreeth 11 *H.* 4. 27. 34 *H.* 6. 32 *b.* 16 *Ass. p.* 1. 16 E. 3. *Attaint* 41. *Vide* 32 E. 3. *Cessavit* 25. 33 *H.* 6. 25. And in Trespass against two, one appeareth, and pleadeth Not guilty; in this case this first Enquest shall assesse the damages for the whole Trespass by both defendants; and afterwards the other appeareth, and pleadeth Not guilty, and is found guilty, the finding of the damages by the first Enquest to which he was not party, shall binde him; and therefore if they be outragious or excessive, the defendant in the last Enquest shall have an Attaint. And therewith agreeth 44 E. 3. 7. and *F. N. B.* 107. E. So in trespass *Quare clausum fregit*, if the issue be joyned upon a feoffment, and the Jury giveth outragious damages, an Attaint lieth for the enquiry of the damages, as a consequent upon the issue, and parcel of their charge. So in the Case at Bar, If the Jury had found outragious damages or value, an Attaint had lien.

3. It was Resolved, That the omission in the Verdict shall not be supplied by a Writ of *Enquiry of Damages*, for that shall prevent the plaintiff of his Attaint, which shall be mischievous, for then such omission might be of purpose to deprive the plaintiff of his Attaint. But the Rule is, That when the Court *ex officio* ought to enquire of any thing upon which no Attaint lieth, there the omission of it may be supplied by a Writ of *Enquiry of Damages* (as in the said case of *Quare Impedit*, to enquire of the four points, for of them no attaint lieth, as it is holden in 11 *H.* 4. 8. because as to them the Enquest is but of Office) but in all cases when any point is omitted whereof Attaint lieth, there it shall not be supplied by a Writ of *Enquiry of Damages*, upon which an Attaint lieth; And therefore the Presidents which have been cited, and all other which are against these Rules, passed *sub silentio*, without the advice of the Court, and against the Rule of Law. And therefore in *Detinue*, if the Jury finde Damages and Costs, and no value, as they ought, it shall not be supplied by a Writ of *Enquiry of Damages* for the reason aforesaid; And therefore by the Rule of the Court a new *Venire facias* was awarded. [b]

Mich. 10 Jacobi, *which began Trin.* 10 Jac. Rot. 2413. *In the Common Pleas.*

The Case of the Mayor and Burgesses of *Lyn-Regis*, concerning Misnaming of Corporations.

[123] THE Mayor and Burgesses of *Lyn Regis* in the County of *Norfolk*, brought an Action of Debt against *John Pain* Gent. Executor of *John Pain* Esq; upon an Obligation made by the Testator to the Plaintiffs, 27 *Jan.* 6 *Jac. Reg.* in 3000 *l.* The Defendant pleaded not the Testators deed; and the Jury gave a special Verdict: That King *H.* 8. 7 *Junii* in the 29th of his Reign, by his Letters Patents under the Great Seal, reciting, That the same King by his Letters Patents 27 *Junii*, *anno* 16. had granted to the Mayor and Burgesses and Inhabitants *burgi sui de Lyn Episcopi in comitatu suo Norfolc'. quod ipsi imperpetuum essent unum corpus corporatum, & una communitas perpetua in re & nomine, & quod habeant successionem perpetuam, ac nomen Majoris & Burgensium burgi prædicti Lyn Episcopi in comitatu Norfolc. haberent & gererent, & per idem nomen essent personæ habiles & capaces in lege, &c.* And by the same Letters Patents, reciting that what by Act of Parliament, 4 *Feb.* 27 *H.* 8. it was enacted, That the said King his heirs and successors Kings of *England*, should have the Mannors of *Lyn Episcopi*, and *Gaiwood*, *inter alia*, the said King by the said Letters Patents did declare, *Quod eadem villa de Lyn Episcopi de cætero vocaretur & nominaretur Lyn Regis, vulgariter nuncupat.* Kings Lyn, *& non per aliud nomen:* And granted to the said Mayor, Burgesses and Inhabitants *burgi sui prædicti quod ipsi imperpetuum nomen Majoris & Burgensium burgi sui de Lyn Regis vulgariter nuncupat.* Kings Lyn, *in Comitatu suo Norf. haberent & gererent, & per idem nomen vocarentur & nominarentur & non per aliud nomen, & quod per idem nomen essent personæ habiles, &c.* And the Jury further found, That 27 *Jan. anno* 6 *Jac. Regis*, the said *John Pain* the Testator *in vita sua prædictum scriptum obligatorium fecit, sigillavit, & ut factum suum deliberavit præfat. Majori & Burgensibus burgi domini Regis de Lyn Regis, vulgariter nuncupat.* Kings Lyn *in Comitatu suo Norf. per nomen Majoris & Burgensium de Lyn Regis in comitatu Norf. sed utrum super tota materia*, &c. *prædictum scriptum obligatorium in narratione specificat. sit factum prædicti Johannis Pain testatoris necne, iidem Juratores ignorant & inde petunt advisamentum Justiciarorum & Curiæ, &c.* And this Case was oftentimes argued at the Bar.

And it was Objected on the Defendants part, That the said Obligation did vary from the true and right name of the Corporation, and by consequence was not the Testators deed; and the material variances were, because they were incorporated by the Name of *Majoris & Burgensium burgi domini Regis de Lynn Regis, &c.* and the Obligation was made by them by the Name of *Majoris & Burgensium de Lynn Regis*, omitting after the word *Burgensium*, two words, *sc. Burgi Regis*, which are parcel of the Name of the Coporation. And it was observed by them, First, that the Name of the Corporation is like to the proper Name, or the Name of Baptism. 2. After that the King hath given to them their Name, then it is added, *Et quod per idem nomen vocarentur, &c.* 3. Negative words are added to the affirmative words, *sc. Et non per aliud nomen:* but the Obligation doth vary from the proper Name of the Incorporation, and is not made by the same Name, but by another Name, directly against the letter and intent of the Kings Charter. And it was strongly urged, That the place of the Incorporation is of the essence of the Corporation; for without a place, no [b] Corporation can be founded, and the place is the principal part by which the Corporation may be known and distinguished from others. And therefore it may be fitly resembled to the visage of a man, which is the principal part by which he is known and discerned. And therefore a Case was cited *Mich.* 29 & 30 *Eliz.* in the Exchequer Chamber, in which *Mariet* was Plaintiff against *Paschall* and others Defendants, of a demise made by *Thomas Fanshaw* Esq; the Queens Remembrancer of the Court of Exchequer, of certain lands in *Denge* in the County of *Essex*, *&c.* and upon Not guilty pleaded, the Jury gave a special Verdict to this effect: The Master and Chaplains of the *Savoy* were incorporated by the Name *Magistri & Capellanorum Hospitalis Henrici nuper Regis Angliæ septimi de Savoy*, by force of certain Letters Patents made to them 4 *H.* 8. And the Master and Chaplains of the said Hospital being seised in fee of the Mannor of *Denge* in the County of *Essex*, whereof the lands in which were parcel, *anno* 26 *E.* 6. by deed indented demised the said Mannor to *John Paschall* for 99 years, *per nomen Magistri Hospitalis Henrici Regis Angliæ septimi vocat.* the *Savoy*, *& Capellanorum ejusdem Hospitalis.* And if this lease were made according to the true Name of their Incorporation, was the Question. And it was adjudged in the Exchequer that the lease was void, because they had mistaken their Name of Incorporation in the most material part of it, *sc.* in the place; for the true Name is, *Hospitalis, &c. de Savoy*, and in the demise it is *Hospitalis, &c. vocat. de Savoy*; and the material variance in respect that *(de)* signifieth the place it self, and *vocat.* signifieth a Name which might be applied to another place; as *Prior & confratres Hospitalis Sancti Johannis de Jerusalem in Anglia*, and many other cases, as of Mount *Carmel*, *Bethlehem*, and others, which in truth are in the Land of *Canaan*, and yet are applied to certain places in *England:* all which you may see cited before in the Case of the Hospital of the Charter house, and therefore I omit them here. And it was said, That upon the said Judgment, a Writ of Error was brought

brought in the Exchequer Chamber, where the case was often argued again at the Bar, and yet the said Judgment was never reversed. So in the Case at Bar, forasmuch as this word (*Burgi*) is omitted, which is the place of the Incorporation, the same is such a material variance, that the obligation is void: And although it is said, *de Lynn Regis*; yet it is well proved that the same is a Town, but by that it doth not appear that it is a Burough, for every Burough is a Town, but every Town is not a Burough. And therefore *Litt. lib. 2. cap. 10. of Burgage* saith, It is to know, That the ancient Buroughs are the most ancient Towns that are within *England*: For those Towns which are now Cities, or Counties, in ancient times were Buroughs, and called Buroughs, and from [124] such ancient Towns called Buroughs come the Burgesses to the Parliament, when the King hath summoned his Parliament. *Item*, for the greater part such Buroughs have divers Customs and Usages which other Towns have not, *&c.* By which there appeareth a manifest difference in Judgment of Law betwixt a Burough and a Town. And the opinion of *Cavendish* Chief Justice in 40 *Ass. p.* 27. was cited, where he holdeth that all the ancient Buroughs are of Record in the Exchequer. And with *Littleton* agreeth, 41 *Edw.* 3. 32. *a.* 21 *Edw.* 4. 53, & 54. 21 *Hen.* 7. 5. by *Frowick*, &c.

Another variance was observed, That this word (*Regis*) was omitted, for the true name of the Corporation is *burgi sui de Lynn*, i. *Regis de Lynn*: and in the Obligation not only *Burgi* is left out, but *Regis* also; which (as it was urged) was also a material variance, for *Regis* ought to be twice added, *sc. Burgi Regis de Lynn Regis*: And therefore the Case of *Eaton* Colledge, *Trin.* 3. & 4. *Phil.* and *Mary*. *Dyer* 150. was cited. Where it appeareth that King *Hen.* 6. did incorporate the said Colledge *per nomen præpositi & sociorum Collegii beatæ Mariæ de Eaton juxta Windsor*, and in the time of E. 6. Sir *Tho. Smith* Knight, being Provost there, a lease was made *per nomen præpositi & sociorum Collegii regalis de Eaton juxta Windsor*, omitting *Collegium* in the first place, and yet in the second place *Collegii Regalis* was added. And by the opinion of all the Justices it was a void lease. And so it was adjudged *Mich.* 10 & 11 *Eliz.* So in the Case at Bar, the leaving out of the word *Regis* in the first place, although the same be observed in the second place, maketh a material variance. Many other Cases were put upon the general ground of misnaming of Corporations, which I purposely omit, because that these cases which are here mentioned, were the most material, and all the other shall be generally cited with reference to the Books at large in the the end of this case.

But the Court held the Obligation good, and that the Plaintiff ought to have Judgment for to recover. In which Case two points were resolved.

1. As to these words *per idem nomen, & non per aliud*: that this word (*Idem*) hath two significations, *sc. idem syllabis seu verbis*, and *idem re & sensu*, and it needeth not that the name of the Corporation be in grants or Conveyances, *idem syllabis seu verbis*, but it sufficeth if it be *idem re & sensu*. And according to these significations divers Cases have been resolved and adjudged. *Mich.* 10 & [b] 11. *Eliz. Dyer* 278. The Dean and Chapter of *Carlile* were incorporated *Anno* 33 *Hen.* 8. by the name of *Decanus & Capitul. Ecclesiæ Cathedralis Sanctæ & individuæ Trinitatis Carlienſis*, and they make a Lease by the name *Decanus Ecclesiæ Cathedralis Sanctæ Trinitatis in Carlile, & tot' Capitulum Ecclesiæ præd'*; which Lease is not made by the same name, which is *idem syllabis & verbis*: for first this word (*Individuæ*) is omitted. 2. In *Carlile*, where the name is *Carlienſis*, *sc.* of *Carlile*. 3. This word (*Totum*) is added. 4. The order of the words is not kept, for the true name of the Corporation is *Decanus & Capitul. Ecclesiæ Cathedralis Sanctæ & individuæ Trinitatis Carlienſis*, and the Lease is, *Decanus Ecclesiæ Cathedralis*, &c. *& totum capit. de Ecclesia præd'*. But notwithstanding these, It was resolved by *Dyer*, *Weston*, *Welsh*, *Southcot*, *Carew* and *Harpur*, that the Lease was good notwithstanding these variances, and the reason is there given, because that these variances are not in the substance of the name.

In *Mich.* 29 & 30 *Eliz.* Between *Hall* and *Wingat* in an *Ejectione firmæ* in the Kings Bench, The case was, That the Dean and Canons of *Windsor* were incorporated by Act of Parliament in 22 *Edw.* 4. by this name: *The Dean and Canons of the Kings free Chappel of Saint George the Martyr within his Castle of Windsor*. And in the time of the reign of King *Philip* and Queen *Mary*, they make a lease of certain Lands by this name, *The Dean and Canons of the King and Queens free Chappel of Saint George within the Castle of Windsor*: and in this case three variances were observed. 1. Where the name was by the Act of 22 *Edw.* 4. *The Dean and Canons of the Kings free Chappel*: the Lease was made by *the Dean and Canons of the King and Queens free Chappel*, &c. 2. Where the Corporation was, *Saint George the Martyr*, the Lease was, *of Saint George*, leaving out, *the Martyr*. The 3. was, *within his Castle*, *sc. within the Kings Castle of Windsor*. And it was adjudged that in this case any of them was a variance in substance, *sc. of the King and Queens Chappel*, for the true name of the Corporation by the Act of 22 *Edw.* 4. was *of the Kings free Chappel*: and although that at the time of the making of the Lease in truth the Chappel was the King and Queens free Chappel, yet the Corporation ought to be such as was given by the founder, and shall not be altered by the alteration of the name of the founder, or of the owner of the Castle. For if a Colledge be incorporated in the time of King E. 6. by the name of Master and Fellows of Kings Colledge, if they make a lease in the reign of Q. *Eliz.* they cannot make a lease by the name Master and Fellows of Queen Colledge: But for the other two variances the Court Resolved, that they were variances in syllables and words and not in substance, *& parum differunt quæ re concordant*, for St. *George*, includes the Martyr, as the [125] Trinity implyeth and includeth this adjective *individuæ*; and within *his Castle of Windsor*, and within *the Castle of Windsor*, is all one in substance and effect.

In which Case, the Chief Justice was of Counsel with *Wingat*, and in another also in which *Wingat* was Plaintiff, and Judgment was given for him in both cases, *Hill.* 3 *Eliz.* in the Kings Bench. Betwixt *Henry Fisher* in an *Ejectione firmæ*, and *William Bois* Defendant, of certain Lands in *Ellam* in *Kent* the Case was; By Act of Parliament *Anno* 1 *Ma.* A Colledge in *Oxford* was incorporated by

the name *Gardiani & Scholarium domus sive Collegii Scholarium de Merton in Universitate Oxoniæ*, and they make a Lease of the said Lands *per nomen custodis domus sive collegii de Merton in Oxonia & Scholar' ejusdem domus*. And in this case four variances were observed. 1. For this word, *Gardianus Custos*. 2. Where the true name of the Colledge was *per nomen domus sive collegii scholarium de Merton*; the Lease was *per nomen domus sive collegii de Merton*, omitting *Scholarium*. 3. For *in Universitate Oxoniæ*, the lease was *in Oxonia*. 4. *Scholars* were misplaced, for they came in the end, whereas in the Act they are named immediately after the *Gardian*. And it was adjudged, that for the second variance, it was a variance in substance; for the Act hath baptized the Colledge by the name of *Colledge of Scholers of Merton*; and they make a Lease by the name of the Colledge of *Merton* himself, who in truth was the founder: but for *Gardianus*, it is *Custos*, and for the University of *Oxford*, and *Oxford*, they are all one in effect and substance; and therefore no material variances. And for the misplacing of the said words, it is not material *dummodo proprius sensus remanet*. And the Chief Justice was of Counsel with the Colledge against the said Lease. So in the case at Bar, the said variance are only *in syllabis & verbis*, and not *in sensu & re ipsa*, and therefore are not material: for *per idem nomen*, shall be intended *idem sensu & re*, and not *per aliud*, that is, *aliud sensu & re*. And it is to know, that in the Case at Bar these words *Burgenses de Linne Regis*, imply that *Linne Regis* is *Burgus*; for *Burgus* and *Burgenses sunt conjugata*. And as *Littleton* above saith that from Boroughs come the Burgesses, &c. And *Linne Regis*, imply also, that the same is *Burgus suus*, that is *Regis*. And these words *vulgariter nuncupat' Kings Linne*, are included within these words, *Linne Regis*; so that the name in the Obligation by matter apparent therein doth carry a sufficient certainty of demonstration of the true name of the Incorporation.

[b] 5. *Edw.* 4. 20. The Abbot of *York* was incorporated by the name *Abbas Monasterii beatæ Mariæ Eborum*, and an Obligation was made to the Abbot by this name *Abbati Monasterii beatæ Mariæ extra muros civitatis Eborum*, and although that the Abby was *extra muros civitatis Ebor'*; yet because in truth it was within *York*, the Obligation was good. And therefore the Abbot there brought his Action of debt by his true name; and in his Declaration he said that the Obligation was made to the Plaintiff, by the name, &c. which implyeth an averment that the Abby was within *York*; and the Writ was ruled a good Writ by the opinion of the whole Court; and yet there was more variance *in syllabis & verbis*, then in the case at Bar, but because that in truth and substance, as it appeareth by the averment, all was one in effect, the Obligation made to them was good, and yet the name in the Obligation doth not import of it self the true name of the Corporation without averment. And therefore in pleading, or in a special case, in many cases, if by expres averment, or by the finding of the Jury it shall be made apparent to the Court, that the true name of the Incorporation, and the name in the Lease, grant, *&c.* are all one in effect, it will much enforce the matter, although that in words there are some substance of difference. And therefore it was well found in the special Verdict in the case at Bar, That the said *John Payn* the Testator, *prædictum scriptum obligatorium fecit, sigillavit, & ut factum suum deliberavit præfatis Majori & Burgensibus burgi domini Regis de Linne Regis vulgariter nuncupat' Kings Linne in commitatu suo Norf.* (which is the name of the Corporation without any manner of variance) *per nomen Majoris & Burgensium de Linne Regis in comitatu Norf.* which importeth all averments requisite by the Law in this case.

And it is well observed in Sir *Moile Finches* case in the sixth part of my Reports, that till this generation of late years it was never read in our Books, That any body politick or corporate did endeavour or attempt by any suit to avoid any of their leases, grants, conveyances, or other of their own deeds, nor of any other grants, *&c.* made to them by the misnaming of their true name of Incorporation. But after that a window was opened to give them light to avoid their own grants by the misnaming of themselves, what suits and troubles (to avoid grants, *&c.* as well made to them as by them) have followed thereupon every one knoweth. But there it was said, That for every curious or nice misnosmer God forbid, that their leases or grants, *&c.* shall be defeated, for there will be
[126] a found difference betwixt Writs and Grants, and in all cases it is true, *quod apices Juris non sunt Jura*: For if a Writ abateth, one may of common right have a new Writ, but one of common right cannot have a new Obligation, or a new Lease, or Grant, *&c.* And I well approve of the Book in 25 *Edw.* 3. 4. 8. Where the case was, That a *Præc' quod redd'* was brought against the Prior of *Worcester*, and demanded a Manor, and the Writ was *Præcipe Priori Wigorniæ, &c.* The Tenant said, that in *Worcester* there were two Priories, *s.* the Priory of Fryers Preachers, and the Priory of our Lady; and the Writ was abated: So I conceive it shall be reason *a multo fortiori* to drive him who would avoid a writing, demise, grant, *&c.* made by a Corporation, or to it, by reason of any verbal or literal misnosmer, to shew that there are two Corporations within the same City, Borough, or Town, *&c. s.* one by the true name, and another by such name as is contained in the Deed, *&c.* and so leave the Deed, *&c.* good for or to one of them. But when in truth there is but one Corporation, Leases, Grants, *&c.* made by them, or to them, ought not to be avoided by such nice and verbal variances, when in substance the true name of the Incorporation, either by matter expressed or necessarily implyed within the words themselves appeareth to the Court.

And as to the said case of the Hospital of the *Savoy*, It is true that Judgment was given in the Exchequer by Baron *Clark* and Baron *Gent'*. against the opinion of Sir *Roger Manwood* Chief Baron *totis viribus*. And after the Writ of *Error* brought, the case was argued at the Bar; and the said *Thomas Fanshaw* compounded with *Paschall* for his lease, and I was of Counsel with the said *Thomas Fanshaw*: And I conceive that there is little difference betwixt the Major and Commonalty of the City of *London*, and the Major and the Commonalty of the City called *London*, if it cannot be shewed that there are two distinct Corporations which have two distinct names. Also, there is a difference betwixt ancient Corporations, and Corporations made of late times; for ancient Corporations may by

by uſage have divers and ſeveral names, and Leaſes, Grants, &c. by any of them ſhall be good enough. And theſe, and divers other differences you ſhall find in your Books following, *ſc.* See the Caſe of the Dean and Chapter of *Norwich*, in the third Part of my Reports. 73. &c. *Plo. Com.* 537. 2 *Ma. Dyer* 97. & 98. 14 *Hen.* 8. 29. 26 *Hen* 8. 1. 11 *Hen.* 7. 27. 12 *Hen.* 7. 14. 23 *Hen.* 7. 14. 14 *Hen.* 7. 1. 16 *Hen.* 7. 1. 2 *Rich.* 3. 7. 4 *Edw.* 4. 8. 8 *Edw.* 4. 18. 9 *Edw.* 4. 19. 11 *Edw.* 4. 2. 15 *Edw.* 4. 1. 20 *Edw.* 4. 12. 21 *Edw.* 4. 10. 21 *Edw.* 4. 55, 56. 3 *Hen.* 6. 28. 7 *Hen.* 6. 13. 19 *Hen.* 6. 64. 26 *Hen.* 6. 27. 21 *Hen.* 6. 4. 26 *Hen.* 6. *Br.* 101. 35 *Hen.* 6. 5. 36 *Hen.* 6. *Br.* 485. 12 *Hen.* 4. 19. 29 *Aſſ. p.* 9. 44 *Edw.* 3. 16. 35. 38 *Edw.* 3. 16. 28. 33. 22 *Edw.* 3. 9. 8 *Edw.* 3. 5, 6. & 436. 8 *Aſſ. p.* 24. *Regiſter* 178. [b]

Mich. 11. Jacobi *Regis, which is entred Trin.* 10. Jacobi *Regis Rot.* 664. *in the Kings Bench.*

William Clun's Caſe.

WIlliam *Clun* Executor of *Ann Breather* was Plaintiff againſt *Henry Archer* Defendant, and demanded 9 *l.* debt. And declared that the ſaid *Ann Breather* 26 *Novemb.* 3 *Jacobi Regis* by Indenture of the ſame date did demiſe to the ſaid *Henry* two Mills, one Garden, and divers lands in *Coperſale* in *Eſſex* from the feaſt of Saint *Michael* the *Arch-Angel* then laſt paſt for 50 years, if the ſaid *Ann* ſhould ſo long live. *Reddendo & ſolvendo pro omnibus præd' præmiſſis præfat' Ann Breather executor' & aſſignatis ſuis annuatim pro quolibet anno durante continuatione dimiſſionis prædict' ad domum manſionalem Johannis Archer in Witham prædict' plenariam ſummam triginț' & ſex librarum bonæ & legalis monetæ Angliæ ad quatuor feſta ſive terminos in anno uſualia*, viz. *feſta nativitatis domini Jeſu Chriſti, Annunciationis beatæ Mariæ virginis, nativitatis ſancti Johannis Baptiſtæ, & ſancti Mich. Arch-Angeli, vel infra treſdecem ſeptimanas proxim' poſt quemlibet præd' dierum feſtival' per equas & equales portion'*. By force of which the ſaid *Henry Archer* entred into the ſaid tenements, and had and held them *uſque ad & poſt feſt' Annuntiationis beatæ Mariæ virginis, anno regni regis nunc* 9. *ſc. uſque* 2. *diem Aprilis anno* 9. *ſupradicto, quo quidem* 2. *die Aprilis præd' Anna apud Cooperſale prædict' obiit*, and for 9 *l.* for the quarter due at the feaſt of the Annuntiation *Anno* 9. *ſupradicto*, he brought that action, upon which declaration the Defendant did demur in Law; And this Caſe was often argued at Bar: At this Term it was argued by the Juſtices *Houghton*, *Dodderidge*, *Crook*, and the Chief Juſtice: And it was reſolved, that the action of Debt was not maintainable: and becauſe that *duo ſunt inſtrumenta ad omnes res confirmandas & impugnand'*, *ratio & authoritas*. Firſt I will Report the Reaſons of this Reſolution, and then divers Authorities in the point. And there were three reaſons ſhewed in this Reſolution. [127] [b]

1. Becauſe the disjunctive is added for the benefit of the leſſee, and it is more benefit to have the laſt day, in which caſe there are two days of payment, one voluntary, and that at the election and liberty of the leſſee to pay the ſame at the days of the ſaid Feaſts; the other day of payment is at the end of the thirteen weeks, and that is the extreme and legal time. And therefore foraſmuch as *Ann Breather* dieth before the extreme and legal time, the leſſee is diſcharged of the rent by the Act of God for the ſame quarter. See *Hill* and *Granges* caſe. *Plo. Com.* 172, 173. the moſt extreme time is the legal time. And it is to know, that in the caſe of payment of Rent going out of the land, there are four times of payment. The firſt time of payment voluntary and not ſatisfactory, and yet good to ſome ſpecial purpoſe.

The ſecond, voluntary, and in caſe ſatisfactory, and in caſe not.

The third, legal and ſatisfactory, abſolutely and not coercive.

The fourth, legal, ſatisfactory, and coercive.

As to the firſt, if the leſſee, donee, or tenant payeth his rent before the day, the ſame is voluntary and not ſatisfactory, for the cauſe rendred in the third Reaſon. But if it be paid in the name of ſeiſin of rent, although it doth not enure by way of ſatisfaction: yet it ſhall give a ſufficient ſeiſin to this purpoſe to have his Aſſiſe, or other remedy; for the law hath a delight in giving of remedy. And therewith agreeth *Lit. cap. Attornment* 127. *b. Vide* 45 *Edw.* 3. 44. *b.* 49 *E.* 3. 15. 15 *Edw.* 3. *Execution* 63. 37 *Hen.* 6. 33. 39 *Hen.* 6. 36. 5. *Edw.* 4. 2.

As to the ſecond, if the rent be payable at the feaſt of *Eaſter*, if the Tenant pay the rent in the morning, and the leſſor dieth at two before evening of the ſame day: this payment was voluntary, and yet it is a good ſatisfaction againſt the heir; but not againſt the King, 44 *Edw.* 3. 3.

As to the third, the legal time is a convenient time before the laſt inſtant of the day, which is the moſt extreme time, and is ſatisfactory and not coercive; for till the end of the day no remedy is given by the Law, 21 *Hen.* 6. 40.

As to the fourth, the ſame is when the rent is due and behind; and therefore it is well ſaid by the Poet, *Judicis officium eſt ut res, ita tempora rerum Quærere, quæſito tempore tutus eris.*

The ſecond reaſon was, when the Leſſee doth not make payment the firſt day according to his election, then the rent is abſolutly due at the ſecond day, and the ſecond day is as well parcel of the reſervation as the firſt day. And therefore after the non-payment at the firſt, it is now upon the matter [128]

as

as much in Law, as if it had been reſerved at the ſecond day only, for then his election is paſt, as in 17 *Eliz.* 344. If a man by deed granteth a Rent charge to one and his heirs, and doth not ſay, for him and his heirs, and dieth, now the time of election to make it an Annuity is paſt: and therefore if the grantee bringeth a Writ of Annuity againſt the heir, it ſhall not diſcharge the Land, becauſe that when no Election doth remain, it is as much in Law, as if Election had never been. And therefore upon the Books in 43 *Ed.* 3. *Bar.* 194. 44 *Ed.* 3. 32. 15 *Ed.* 3. *Execut.* 63. 5 *Ed.* 2. 2. This caſe was put, if one on the firſt of *October* maketh a leaſe for years, or for life, or a gift in tail, yeilding by the year a pair of guilt Spurs at the feaſt of *Eaſter*, or twenty ſhillings at the Feaſt of Saint *Michael* the Arch-Angel: In this caſe if the leſſee doth not pay the Spurs at the Feaſt of *Eaſter*, nothing is due till the Feaſt of Saint *Michael*.

The third reaſon was, becauſe that the rent reſerved is to be raiſed of the profits of the lands, and is not due until the profits are taken by the leſſee: for theſe words *Reddendo inde*, is as much as to ſay, that the leſſee ſhall pay ſo much of the iſſues and profits at ſuch days to the Leſſor, for *reddere inde nihil aliud eſt quam acceptum reſtituere, ſeu reddere eſt quaſi retro dare*, and *Redditus dicitur à reddendo, quia retro it, ſc.* to the leſſor, donor, *&c.* as *provent' à proveniendo*; and *obventus ab obveniendo*. And that is the reaſon that the rent ſo reſerved is not due before the day of payment incurred, becauſe it is to be rendred and reſtored of the iſſues and profits. And that is the cauſe, That if land be evicted, or if the leaſe determine before the legal time of payment, no rent ſhall be paid, for it ſhall never be apportioned in reſpect of part of the time, as it ſhall be upon eviction of part of the land. And therefore if tenant for life maketh a leaſe for years rendring rent at the Feaſt of *Eaſter*, and the leſſee occupieth the lands three quarters of the year, and in the laſt quarter before the Feaſt of *Eaſter*, the tenant for life dieth, here ſhall be no apportionment of the rent for three quarters of the year, becauſe that no rent was due until the Feaſt of *Eaſter*, and the Feaſt of *Eaſter* doth incur in the life of the leſſor, and no apportionment ſhall be in reſpect of time; but in the ſame caſe, if part of the land had been evicted before the Feaſt of *Eaſter*, and the Feaſt of *Eaſter* incurred in the life of the leſſor, there ſhall be an apportionment of the rent, but not in reſpect of the time which continueth, but in reſpect that parcel of the land leaſed is evicted.

[b] And this difference appeareth in our Books of 27 E. 3. 84. *b.* In Debt againſt Executors, declaring, That their Teſtator did grant him a Penſion of 20 *l.* to remain with him in the Kings Wars at the time that he ſhould be reaſonably warned, to take effect at four terms of the year equally; and ſheweth, That he went with him to *Calis* by the warning of their Teſtator, and was there armed; and demanded Judgment, and prayed his debt. To which the Defendant ſaid, That for the firſt quarter he was paid 5 *l.* and ſhewed forth an Accquittance, and before the ſecond quarter ended, the Teſtator died, and demanded Judgment of the action; and *Mowbrey* of Counſel with the Plaintiff moved, That foraſmuch as you do not deny the Penſion to be granted as one entire by the Law, upon condition which we have performed, *ſc.* that we have remained with him, We pray our debt. *Wilby* Chief Juſtice, by the Rule of the Court, doth award that the Plaintiff ſhall take nothing by his Writ, becauſe it ſhall not be apportioned in reſpect of part of the time, although that it fell by the Act of God. *Vide* 10 E. 4. 18. 20 H. 6. 6. 9 E. 4. 1. 30 H. 8. *br. Apportionment* 7. If I be bound to you by Obligation of 20 *l.* to be paid at four uſual Feaſts of the year by equal portions, the obligee ſhall not have an action of Debt before all the terms incurred; the ſame Law of a Contract: but if a rent be reſerved upon a leaſe for years at four uſual Feaſts of the year, the leſſor ſhall have an action of debt after the firſt day, and ſhall not ſtay till the whole be due, becauſe the ſame is accounted in Law as a reſervation of parcel of the iſſues and profit of the lands, which is no debt before the day, as in the ſaid caſe of Obligation or Contract. And that is the true difference betwixt the caſe of the Obligation, and a rent reſerved upon a leaſe for years, in *Litt.* 117. *b. Vide F. N. B.* 267. Note a difference betwixt a Recogniſance of a debt payable at ſeveral days, for the ſame is not like to an Obligation; but to a rent reſerved upon a leaſe for years. *Vide* 3 *Mar. Dyer* 103. another difference betwixt a Covenant or Promiſe, and Contract or Obligation. *Vide* 5 *Mar. Action ſur le Caſe br.* 108. 10 E. 2. *Execution* 137. and 16 E. 2. *ibid.* 138. *vide* 9 E. 3. 7.

For Authorities in the point, I have ſeen the Report of a Caſe *Mich.* 34 *H.* 8. in the time of *Baldwin* Chief Juſtice of the Common Pleas, that it was the opinion of all the Juſtices. And if a man ſeiſed of land in fee 1 *die Octob.* maketh a leaſe of the ſame land for ten years, from the Feaſt of St. *Michael* then laſt paſt, yeilding to him and his heirs a yearly rent of 20 *l.* at the feaſt of St. *Michael* the Archangel, or within one month after; That in this caſe if the leſſor dieth between the Feaſt of St. *Michael* and the end of the month, that the heir ſhall have the rent as incident to the reverſion, and not the Executors as rent behind, becauſe it was not due till the end of the month. The ſame [129] Law if the leſſor betwixt the two days hath granted the reverſion over, and the tenant attorneth, the grantee ſhall have the rent as incident to the reverſion. And *Mich.* 2 *&* 3 *Phil. & Mar. Prideaux* moved *Mountague* Chief Juſtice, and other Juſtices of the Common Pleas, That if a man maketh a leaſe for years, yeilding a yearly rent at the Feaſt of *Eaſter*, or one month after, with condition of re-entry, and the leſſee tendreth the rent at the laſt inſtant of *Eaſter* day; If the leſſor may enter upon demand made at the laſt inſtant of the month: And it ſeemeth not, becauſe that the leſſee hath liberty then to pay it. And the differenee was taken betwixt the disjunctive reſervation, and when the reſervation it at a certain Feaſt; and a Condition is added, That if it be behind by the ſpace of a moneth after the Feaſt, that then the leſſor ſhall re-enter, there the leſſee, for the ſalvation of his leaſe cannot tender it at the laſt inſtant of the Feaſt-day, becauſe he hath not ſuch liberty or election as in the other caſe. And it was ſaid by the new Serjeants, That in the time of the Lord *Baldwin* it was Reſolved by all the Juſtices, That in the ſaid caſe of a disjunctive reſervation, if the leſſor dieth betwixt the two days, the heir ſhall have the rent, and

not

not the Executors: which case the Chief Justice shewed in Court Reported by an ancient and learned Bencher of the Inner Temple, *Trin.* 31 *Eliz.* in the Kings Bench, *Rot.* 666. between *Smith* plaintiff, and *Bustard* defendant, where the Case was in effect, That *Smith* leased certain lands for years, yielding yearly a rent of 35 *l.* at the Feasts of St. *Michael*, and the Annunciation of our Lady, or within twelve dayes after every of the said Feasts payable at the Font-stone in the Temple Church, upon condition, that if the said rent of 35 *l.* or any part of it be behind, and not paid by the space of twelve dayes next after any of the said Feasts or dayes of payment thereof as is aboveſaid, that then the said lease shall be void; and it was adjudged, that the lessee in safeguard of his lease should have twelve dayes after the twelve dayes to pay the said rent, for when the rent is not paid at the first day, it is as much as if it had been reserved upon the twelfth day after: and where it is said, *per præd. spatium* 12 *dierum post, &c.* by good construction all the words ought to take effect, *sc. post aliquod præd. festorum seu dierum solutionis inde*; and *dies solutionis* is the twelfth day of the Feast, and therefore the lessee shall have twelve dayes after the twelfth day, which is *dies solutionis post festum, &c.* and that for the more avail of the lessee, for whose benefit further time was given; and these words, *præd. spatium* 12 *dierum*, may stand in good sense. *sc. per præd. spatium* 12 *dierum post præd.* 12 *dies*, for that is *præd. spatium*, although it had not the beginning as the other hath. And so the *Quære* in 3 & 4 *Phil. & Mar.* 142. well resolved and adjudged, *Trinit.* 39 *Eliz.* in the Common Pleas, between *Pilkington* and *Dalton:* the Case was; A Parson of a Rectory made a lease for years, rendring rent at the Feast of St. *Michael*, or within one month after; the lessor died ten dayes after the Feast of St. *Michael*, and was barred by Judgment of the Court, because the lessor died before that the rent was due. *Mich.* 40 *Eliz.* in the Kings Bench, the Case was, The Lady *Pawlet* late the wife of *Chedwick Pawlet*, seised of the Manor of *Wade* in the County of *Southampton* for her life, by deed indented leased the said Mannor to *William Pawlet* for 99 years, if the said Dame *Elizabeth* should so long live, yielding the yearly rent of 100 *l.* at the Feast of St. *Michael* the Archangel, and the Annunciation of our Lady, or within fourty dayes after every of the said Feasts; *William Pawlet* made *Dulcibel* his wife Executrix, and died; *Dulcibel* took husband *John Moor* Esq; the Lady *Elizabeth Pawlet* made *Ed. Walgrave* her Executor, and died the 13 day after the Feast of St. *Michael*; her Executor brought an Action of debt for the half year ended at the Feast of St. *Michael*, before the death of the Lady *Elizabeth*, and the whole Court was against the Plaintiff; but by entreaty of some of the Justices, *John Moor* gave to the Plaintiff 10 *l.* And in the Case at Bar Judgment was given, That the Plaintiff should take nothing by his Bill. [b]

Mich. 11 Jacobi, *Rot.* 1427. *In the Common Pleas.*

James Osborn's Case.

James Osborn Gent. brought an Action upon the Case against *Francis Middleton*, and declared, That where the plaintiff 14 *Feb.* 4 *Jac. Regis* had bought *diversa bona & catalla*, viz. *unum fulcrum lecti, Anglicè* a field Bedstead with a Testern and Curtains of Say, *unum Canopium, vocat.* a Canopy for a Bed of Dornix, *unum operimentum, vocat.* a Rug, &c. *ad valentiam*, 40 s. *pro undecim libris eidem Francisco super* 28. *die Jun. tunc prox. sequen. solvend'*, and declared upon *Assumpsit*, &c. (upon certain considerations mentioned in the Declaration) *ad deliberand. bona prædict.* &c. the which the defendant had not done, *&c.* the defendant pleaded *non assumpsit*; and the Jury found for the plaintiff, and assessed damages and costs, upon which the plaintiff had Judgment; and the Defendant brought a Writ of *Error*, and assigned *Error*, That damages were entirely given for divers things, and for some of them no damages ought to be given: For where it is said *unum fulcrum lecti, Anglice*, a field Bedstead, for that damages may be given; but for the addition subsequent, *sc. With a Testern and Curtains of Say*, no damages ought to have been given: for *fulcrum lecti* doth not include more then the Bedstead it self, for *fulcrum dicitur à fulciendo, quo lectus sustinetur*, and when damages are entirely given, and for part no damages ought to have been given, there the Jury did not do well in assessing damages; and therefore no Judgment ought to have been given in such case. And therewith agreeth 9 *Hen.* 7. in Rescous, and 28 *Hen.* 6. 10 *b.* and the Case in 22 *Eliz. Dyer* 370. was cited, where the case was, That *Clifford* brought a Writ of *Ejectione custodie terræ & hæredis, &c.* and declared accordingly, and the issue was taken upon the traverse of the tenure, which was tried by *Nisi prius* for the plaintiff, and damages generally assessed; and it was said in arrest of Judgment, that an Action did not lie *pro custodia hæredis*, but *pro custodia terræ* onely; and therefore in the Case *supra*, damages were entirely assessed for the ejectment of the land and heir, the plaintiff relinquished the damages, and prayed judgment of ejectment of the Land onely. All these Cases were agreed by the Court. [130] [b]

And further in proof thereof, two Judgments were cited, the first in *Mich.* 14, & 15 *Eliz.* in the Kings Bench in trespass by *Poley* against *Osborn* for breaking of his Close, and beating of his Servant and did not say *per quod servitium*, &c. *amisit*) the defendant pleaded not guilty, and the Jury found him guilty generally, and assessed damages also generally. And it was moved in arrest of Judgment, because that damages were entirely given, where by the Law no damages ought to

have been given to the plaintiff for the battery of his Servant, if he had not alleged that by reason thereof he loſt his ſervice: for otherwiſe the ſervant ſhould have the Action of Battery, and not the Maſter. To which it was anſwered by the plaintiffs Counſel, That it ſhall be intended that the Court, (which ought to direct the Jury in points of Law) had given direction to the Jury for how much according to Law they ſhould aſſeſs damages. And therefore it ſhall be intended in the Caſe at Bar, that the Jury have given damages onely for the breaking of the Cloſe, and not for the beating of the ſervant; for as much as for that (as the caſe was) no damages ought to have been aſſeſſed: and they likened the ſame to the Common Caſe, If a man bringeth an Action upon the Caſe againſt another for ſcandalous words (*exempli gratia*) for theſe, *Thou art an arrant Knave, a Coſoner, and a Traitour*, the defendant pleads not guilty, and the Jury find for the plaintiff, and aſſeſs damages generally, it is well done, for it ſhall be intended, that the Court did direct the Jury to give damages onely for the actionable words, *ſc. Thou art a Traitour*, and not for the other words for which no Action lieth.

But it was reſolved by the Court, That in the ſaid *Poley*'s caſe the Jury *in aſſidendo damna male ſe geſſerunt*, for when damages are entirely aſſeſſed, it ſhall be intended for that which the plaintiff complaineth. And therefore it ſhall be good policy in ſuch caſes to direct the Jury to give damages
[131] for the thing onely for which damages ought by Law be given. As if in the ſame caſe the Jury had given damages particularly for the breaking of the Cloſe, the ſame had been good. And as to the caſe of ſlanderous words, the Court agreed the ſame caſe to be good Law for two reaſons.

1. That the ſame is an Action upon the Caſe, and therefore he might well declare his caſe as the truth was.

2. Altogether is but one ſcandal, and although that no Action lieth for the ſaid words, *Thou art an arrant Knave, a Coſoner*, by themſelves; yet being ſpoken at the ſame time, and coupled with actionable words, they aggravate them: but if at one time the defendant call the plaintiff *Traitour*, and at another time he calls him *arrant Knave* and *Coſoner*, and the plaintiff bringeth his Action upon the Caſe, and alleged the ſaid ſeveral words to be ſpoken at ſeveral times, as ſeveral cauſes of Action; there if upon not guilty pleaded, the Jury aſſeſs damages entirely, Judgment ſhall be ſtayed for the whole; for he groundeth his Action upon two ſeveral ſcandals where one is not actionable.

Another caſe was adjudged in the Kings Bench, *Mich.* 30, & 31. *Eliz.* but the ſame was entred *Mich.* 28, & 29. *Eliz. Rot.* 476. the caſe was ſuch. *Moor* brought an Action upon the Caſe againſt *Bedel*, and declared; That where *Paſch.* 22 *Eliz.* *Bedel* had recoved by default in an Action of Waſt, and 45 *l.* damages, after which Judgment, *ſc. ultimo Novembris* 24 *Eliz.* they ſubmitted themſelves to the award of *Palmer* and *Povey* of all matters then in variance betwixt them, in conſideration that the plaintiff had aſſumed to perform the award on his part; the defendant made reciprocal promiſe to perform it on his part, and that he would not ſue out Execution upon the ſaid Judgment in the Action of Waſt. And afterwards 10 *Decemb.* 24. The ſaid Arbitrators made an award in writing to this effect. They award that *Moor* ſhall pay to *Bedel* 10 *l.* at certain dayes, and 15 *l.* at other certain dayes, and for the payment of the 15 *l.* one *William Salter* ſhall be ready to ſeal and deliver 15. Obligations, *&c.* And further they award, That where certain Copy-hold Land of the Mannor of *Langley* in the County of *Bucks*, of which the ſaid *Bedel* hath made a Leaſe for years by Indenture contrary to the Cuſtom, *&c.* That the ſaid *William Salter pro poſſe ſuo* ſhould do that no advantage ſhould be taken of the forfeiture; and in conſideration thereof, that *Bedel* ſhould diſcharge *Moor* of 20 *l.* of the ſaid 45 *l.* recovered in the Action of Waſt, and that upon the readineſs of *William Salter* to ſeal and deliver the ſaid 15. Obligations, *Bedel* by his Deed ſhould releaſe to *Moor* all Actions then depending, and all demands until the fifeteenth day of *June anno* 24. *ſuprad'*, [b] And ſhewed that the 10 *l.* was paid according to the award, and *ultimo Octob.* 24 *Eliz. Salter* did offer to be bound in the ſaid 15. Obligations, and did his endeavour *pro poſſe ſuo* that no advantage ſhould be taken of the forfeiture, *&c.* and aſſigned two breaches of the award, the one that the defendant had not made the releaſe upon requeſt had; The other, that he had ſued execution upon the ſaid Judgment by *Fieri facias*, and had levied 4 *l.* parcel.

The defendat pleaded *Non aſſumpſit*, and this iſſue was tried for the plaintiff, and 40 *l.* damages given. And in this caſe two points were reſolved which were onely moved in the Kings Bench. The one, that although the parties have been bound by Obligation to perform the award (as in this caſe by mutual promiſes) yet as to all that which was to be done by *William Salter*, being a ſtranger tothe ſubmiſſion the award was void; for they are not bound to perform any award, but that which is within the ſubmiſſion, and ſo was it adjudged *Paſch.* 24 *Eliz. Rot.* 2417. between *Eccleſfield* and *Maliard* in the Kings Bench, and therewith agreeth 17 *Edw.* 4. 5. *b.* by all the Juſtices: *Vide* 22 *Hen.* 6. the opinion to the contrary, but the Caſe is good Law, but ill reported; for in an Action of Debt upon an Obligation, The defendant pleads that the Obligation is endorſed upon ſuch condition, that if the defendant ſtand to the Arbitrement and award of *A.* and *B.* of all quarrels and debates betwixt the plaintiff and him, *&c.* that then the Obligation ſhall loſe its force; and ſaid that they awarded, that the defendant ſhould pay to one *Kendal* 20 *l.* which he hath paid him, Judgment, &c. *Aſhton* of Counſel with the plaintiff took exception to the plea, becauſe it appeareth that this Arbitrement is void, ſo the obligation remaineth in force: but that without queſtion is a *Non ſequitur*: for if no Arbitrement, or a void Arbitrement be made, which is all one in Law, the Obligation is not forfeited, nor the Obligee ſhall not loſe the benefit thereof; and therefore all which followeth there (as I conceive) is miſtaken by the Reporter, as an opinion not pertinent to the caſe in queſtion. *Vide* 28 *Henry* 6. 13. 8 *Edward* 4. 22. 19 *Edward* 4. 1. 21 *Edward* 4. 75.

2. Al-

2. Although that many things are awarded to be done in satisfaction of another (as that case was) and some are within the submission, and some out, and so void; and although that all were intended by the Arbitrators to be a plenary and entire recompence, for the things that the other should do in consideration thereof, notwithstanding if any thing given or done to the party, although it be of small value, be within the submission, the award is good, although it appear by the intent of the Arbitrators, that that which is within the submission, without the others was not a plenary satisfaction for the thing to be done by the other party; whereupon Judgment was given for [132] the plaintiff; and thereupon the said Executors of *Bedel* brought a Writ of *Error* upon the new Statute; and the said Exceptions moved in arrest of Judgment were moved again in the Kings Bench. And the Justices of the Common Pleas and Barons of the Exchequer did agree as to them with the Justices of the Kings Bench. And then another *Error* appearing in the Record was assigned, which was not moved in the Kings Bench and that was, That there were two breaches assigned by the plaintiff, one of refusal to make the said Release, and the other the suing of Execution; and as to the Release, the award was void, and by consequence damages being entirely given, the Judgment given for those damages was erroneous. And it appeareth that the said Release was out of the submission; for the submission was of all things in variance, *Ult. Novemb.* 24 *Eliz.* and the award was, that *Bedel* should release to *Moor* all demands untill the fifteenth day of *July*, *Anno* 24 *Eliz.* and the request to make the release was *Anno* 26 *Eliz.* and so one of the Breaches was out of the submission. Against which it was objected, that it is true, when two points are put in issue, and for the one no action lieth, and damages are entirely assessed, the same is erronious, because that both are directly within the charge of the Jury, as in the said case, of breaking of the close and battery of his servant. But in the said case between *Moor* and *Bedel*, the defendant in the action upon the case, pleads *Non assumpsit modo & forma*, which is onely their charge, and it shall be intended that the Court did direct the Jury as to damages for that breach onely which is within the award and the submission: and that case depended long in advisement. And after that the case had been often argued at the Bar before them, and upon conference amongst themselves, it was resolved by them all, That it shall be intended (if it be not specially found) that damages were given for both the breaches. And therewith agreeth *Clifford's* case aforesaid in 22 *Eliz. Dyer*, where the issue was joined upon the tenure, and damages generally assessed, extended as well to the custody of the body as of the land; and for as much as in the said case betwixt *Moor* and *Bedel*, one of the breaches was out of the submission, as it was resolved by all the Justices and Barons, the Judgment given in the Kings Bench was for that cause reversed.

But in the Case at Bar it was unanimously agreed that the Judgment was well given by the Judges of the Common Pleas, and that the same should be affirmed. And in this case these differences were agreed. 1. In the cases in which two things are directly put in issue, or obliquely enquired of by [b] the Jury; and the case at Bar, where there is but one thing onely, for *Fulcrum lecti* is onely the thing for which damages are given, and for the Testerne and Curtains no damages were assessed, for they are not alleged *positivè* but *expositivè*, sc. *unum fulcrum lecti Anglice*; and the exposition doth extend to more then *fulcrum lecti* doth signifie; and therefore all the residue is a meer nugation, and void, as a thing not alledged. And by the Statute of 36 *Ed.* 3. *cap.* 15. It is enacted, That all pleas which shall be pleaded, *&c.* be pleaded, shewed, defended, answered and debated in the English tongue: and that they shall be entred and enrolled in Latine; and that the Laws and Customs of the Realm, Terms and Proces be holden and kept as they are, and have been before these days. And it was resolved, That this Statute as to the first was introductive of a new Law, but as to the two other branches, they are declarative of the old; for of old time, and before the Conquest, the original Writs and all the Proces and proceedings upon them were entred in Latine, and infinite Records before this time are yet extant entred in Latine: and yet for the better illustration of the truth, an English Deed, French or Dutch, *&c.* may be entred in a plea, or special verdict. 41 *Edw.* 3. 16. *tit. Brief & abatement.* 49. (the book at large being all printed) In a *Præcipe quod reddat*, the Writ was, *Præcipe quod reddat filio & heire*, where it should be *hæredi* in Latine, and for this cause the Writ was abated. For as *Shard* Chief Justice saith in 29 *Edw.* 3. 31. Latine is a formal Language to put in Writs, *&c.* and English are the words of the people; and yet when English or French is parcel of a name, there it shall be suffered in a Writ. And therefore if the name of a Mannor be *A.* beside *K.* he may demand it in a *Præcipe* by that name in English, for peradventure notwithstanding the name, the said Mannor lieth in *K.* And therefore in a *Præcipe* if he shall sue in Latine *A. juxta K.* then without question if any part of the Mannor shall extend into *K.* the Writ shall abate. And therewith agreeth 44 *Edw.* 3. 12. & 29 *Edw.* 3. 31. So if the Surname be *Fitz John*, he may be so named in a Writ; for if he shall be named in a Writ *Præcipe Willielmo filio Johannis:* it shall be a good plea to say that his father had another Christian name, as *Richard*, &c. and so shall abate the Writ. And so it is holden in 29 *Edw.* 3. 30, 31. 40 *Edw.* 3. 22. 44 *Edw.* 3. 12, & 13. 11 *Ass. p.* 29. 11 *Edw.* 3. *Estoppel* 228. 10 *Edw.* 4. 12. So I have read that one *Henry* had to his surname *In the Hall*, and he brought a Writ by that name, which consisted of three English words, and yet well, [133] for his name is not *Henricus in aula*, *Vide* 29 *Edw.* 3. 2. *a.* So that *brevia tam originalia quam judicialia patiuntur Anglica nomina.*

2. It was resolved, That words which pass under the name of Latine are of four sorts. 1. Good Latine allowed by Grammarians. 2. Words significant, and known to the Sages of the Law, but not allowed by the Grammarians, not having any countenance of Latine. 3. In what cases *Mala Grammatica*, false Latine, or no Latine, and yet having countenance of Latine, shall abate or destroy, and where not. 4. Words insensible, and of no signification, and which have not any countenance of Latine, are utterly rejected; of the first sort were good and true Latine, and that without question

is within the Statute of 36 *Edw.* 3. Of the ſecond ſort, are *meſuagium*, *toftum*, *gardinum*, *bruera*, *jampna*, *maremium*, *&c.* Which and divers other of the ſame nature are allowable, not onely in pleading, but in original Writs alſo; for theſe words are known in the Law, and to the Judges thereof, and ſuch alſo are within the words of the ſaid Act of 36 *Edw.* 3. And ſo in other Sciences it is frequent, as the Profeſſors of the Civil Law uſe, *repriſalia*, *fuida*, *ſhopa*, *ſollaria*, and many other the like; and many times they uſe to explain them by *Anglicè*, &c. as *Sollaria*, *Anglicè* Ware-houſes; and the Phiſitians uſe this barbarous word *Brothium*, for broth, and other the like. The third ſort are falſe or incongruous Latine, the ſame ſhall abate an Original Writ, but ſhall not make any Judicial Writ, Count, pleading, or Judgment vitious (for falſe Latine ſhall be in ſuch caſes amended) *à multo fortiori* ſhall not avoid a grant, or other deed; And therefore neither falſe Latine nor falſe Engliſh ſhall make void a grant or other deed, when the meaning of the party appeareth, *Mic.* 3 and 4 *Eliz.* in the Common Pleas, *Rot.* 1350. The Obligation was in *Octogenta libris*, with condition for payment of 40 *l.* and although this word *octogenta* is no Latine, yet it was adjudged a good Obligation of *octoginta libris*.

Note *Octoginti* is 800 *Mich.* 44. & 45. *Eliz. Rot.* 1031. in the Common Pleas, the Obligation was in *ſeptengenta libris*, with condition for the payment of 350 *l.* And it was adjudged, That that word *ſeptengenta* ſhould be taken for *ſeptinginti*, that is, 700 *l.* So in 9 *Hen.* 6. 7. Obligation of *viginti libris* taken for *viginti libris*, and 9 *Hen.* 7. 6. and 2 *Hen.* 4. 8. *acc'* Accordingly *Mich.* 11. *Jacobi Regis* in the Common Pleas, a Bill was made in Engliſh, *ſc.* in *ſewtene pounds* which was falſe Engliſh, and yet it was adjudged a good Bill of ſeventeen pounds, for the intent of the parties appeareth. Alſo when there is no Latine word for divers things, as for a Stirrop, but a feigned word
[b] *Stapedia*; and ſo for Velvet there is no Latine word for it: and therefore in that caſe it may be ſaid in pleading two or three *virgatis velveti*. And in all ſuch caſes where it is no Latine, and yet it is ſignificant, and hath the continuance of Latine, it is wiſely done to make an illuſtration of ſuch words, to adde *Anglice*, as in the caſe before, *Anglice of Velvet*, and ſo of the like; as in the caſe at Bar, *operimentum*, *Anglice* a Rug, there being no Latine word for a Rug. And theſe are alſo within the ſaid Act of 39 E. 3. Of the fourth ſort are inſenſible words, *&c.* as in the caſe of Replevin *Paſch.* 36 *Eliz.* between *Thomas Gawyn* and Sir *Edmond Ludlow*, the Count was of divers goods and chattels, and amongſt them was *vitrium*, and upon iſſue joined the Jury aſſeſſed damages entirely for all. And it was reſolved, that if *vitrium* be a word inſenſible, and of no ſignification, then damages cannot be given for it, But for the reſidue onely: but the Court did ſtrongly incline, that it was but falſe Latine; for *vitrum* is Latine for Glaſs, and *vitrium* hath countenance of Latine, and doth ſufficiently aſſertain the Court that he intended it for Glaſs: And ſo *quacunque via data*, *Gawyn* had judgment to recover. And afterwards by all the Juſtices in the caſe at Bar the Judgment was affirmed.

Note Reader, *Multa renaſcentur quæ nunc cecidere, cadentque Quæ nunc ſunt in honore vocabula, &c.*

Paſch. 10 Jacobi *In the Common Pleas.*

Read and *Redman*'s Caſe.

[134] IN debt brought by two Executors, one was ſummoned and ſevered, and afterwards he who was ſevered died, and the defendant pleadeth the ſame in abatement of the Writ.

And it was reſolved, The Writ ſhall not abate againſt the Book briefly reported in 38 *Edw.* 3. 11. where the Reporter ſaith the contrary, *Ter. Trint.* 16 *Rot.* &c. and 20 *Edw.* 3. *Accom.* 78. The Executors of the Earl of *Salisbury* brought an Accompt, and one was ſevered and afterwards died, and the Writ by award was abated. But for the better underſtanding of the true reaſon of the Law in this caſe and the like, theſe differences are to be obſerved. The firſt is betwixt original real Writs, and Writs judicial. For if two Coparceners bring a real action, and the one is ſummoned and ſevered, and afterwards dieth having iſſue or no iſſue the Writ ſhall abate. So if two Joyntenants bring an Aſſize or other original real Action, and the one is ſummoned and ſevered, and he who is ſummoned and ſevered dieth, the Writ ſhall abate, although the thing in demand ſhall ſurvive; for a man in a real Action ſhall never recover upon a Writ either falſe in words, or unapt for his caſe; becauſe he may have another true and apt Writ: neither ſhall a man recover a moity, where he may have a Writ to recover the whole. And ſometimes by the ſubſequent Act of God the words of the Writ well brought became falſe or unapt for his caſe, and in ſuch caſe the Writ ſhall abate. And there-
[b] with agreeth 5 *Edw.* 3. 3. in a Writ of *Aiel. John de Hatton*'s Caſe, 38 *Edw.* 3. 35. *b.* 37 *Hen.* 6. 11. *b.* 19 *Rich.* 2 *Brief* 925. 38 *Edw.* 3. 34. But if two Coparceners bring a *Scire facias* upon a fine levied which is a Judicial Writ, *&c.* and the one Coparcener is ſummoned and ſevered, and dieth without iſſue, the Judicial Writ ſhall not abate. The ſame Law in caſe of two Joyntenants; but if the Coparcener who dieth hath iſſue, then the Writ ſhall abate, as it is adjudged in 42 *Edw.* 3. 2. & 8. *Vide* 32 *Edw.* 3. *Brief* 292. 12 *Edw.* 3. *ibidem* 258.

The ſecond difference is in real Writs Original, where he who is ſummoned and ſevered dieth, which is the Act of God by which the Writ is abated, or taking of Husband, or entry into the Land

Land by him who is ſummoned and ſevered, which ſhall not abate the Writ, for theſe are Acts of him who is ſummoned and ſevered, and the Writ by ſuch Acts (where there is not any ſummons and ſeverance) becometh onely abateable. And therewith agreeth 39 *Edw.* 3. 16.

The third difference is between real Actions concerning free-hold or inheritance as is aforeſaid, without having regard to ſurvivor, and Actions meer perſonal, or perſonal, and in ſome manner mixt with realty, in which Chattels or entire things are demanded: there if one Plaintiff be ſummoned and ſevered, his death (where the entire thing doth ſurvive to the other) ſhall not abate the Writ. As in a Writ of ward of the body. 37 *Hen.* 6. 11. 38 *Edw.* 3. 35, &c. *Vide* 50 *Edw.* 3. 7. 30 *Edw.* 3. 14. 38 *Edw.* 3. 36. 1 *Hen.* 5. 12. 9 *Hen.* 6. 56. 7 *Edw.* 3. 364. 17 *Edw.* 3. *Brief* 665. 38 *Edw.* 3. 48. *Vide* 17 *Edw.* 3. 11. *F. N. B.* 35. 3 *Hen.* 5. 4. *Quare impedit* 71. 10 *Eliz. Dyer* 279. And in ſuch caſe of *Quare impedit* in ſome caſe the death of one of the parties ſhall not abate the Writ without ſome ſeverance, *ſc.* or otherwiſe the Plaintiff who ſurviveth ſhould be without remedy, *&c.* as upon a plenarty and ſix months paſt, or that laps incur, which reaſon peradventure would reconcile all the Books aforeſaid, which *prima facie* ſeem to diſagree; and that is the reaſon given in ſome of the ſaid Books, in 38 *Edw.* 3. 36. 9 *Hen.* 6. 30, *&c.* That otherwiſe the wrong done to the Plaintiff ſhall be unpuniſhed, or otherwiſe the laps ſhould incur, *&c.* and peradventure ſuch wrong would trench to the diſinheritance of the ſurvivor for ever. As if two purchaſe an Advowſon in fee, and a ſtranger uſurpeth, and they bring a *Quare impedit*, and the ſix months paſs, and afterwards one of them dieth, if in this caſe the Writ ſhould abate by the Act of God, the ſurvivor ſhould be diſinherited of the Advowſon for ever. But when after the death of one of the Plaintiffs, the ſurvivor may have a new Writ without any prejudice to him, there you ſhall find [135] in ſome of the ſaid Books, that the Writ hath been abated. But without queſtion if one of the Plaintiffs in a *Quare impedit* be ſevered and dieth, the Writ ſhall not abate. In a Writ of *Detinue* of Charters brought by three Coparceners, *Vide* 19 *Edw.* 3. *Severance* 14. 20 *Hen.* 6. 45. 2 *Edw.* 3. *Severance* 19. In a Writ of Debt by Executors, which is the caſe now in queſtion, 5 *Edw.* 2. *Brief* 802. 16 *Edw.* 2. *Executors* 111. 3 *Hen.* 7. 1. For there the debt demanded is entire and doth ſurvive, but in theſe caſes if one Plaintiff dieth without ſeverance, the Writ ſhall abate. *Vide* 2 *Rich.* 3. 1. *Vide* 37 *Hen.* 6. 17.

In 42 *Edw.* 3. 32. Two brought a Writ of Warranty of Charters, *&c.* and the one dieth, the Writ ſhall abate, for that is an Original; but in a *quid Juris clamat* by two, and one of them dieth, the Writ ſhall not abate, for the ſame is a Judicial Writ, 48 *Edw.* 3. 12. And regularly in all Judicial Writs in perſonal Actions, the death of one of the Plaintiffs ſhall not abate the Writ. 41 *Edw.* 3. *Execution* 38. 11 *Rich.* 2. *Brief* 638. *Vide* 25 *Edw.* 3. 38. *b.* & 18 *Hen.* 6. 2. *Vide* 20 *Edw.* 3. *Severance* 17. That Summons and Severance lieth not in *quid juris clamat*, but the Nonſuit of the one is the Nonſuit of both, for the Tenant ſhall not be put to Atturn to one onely.

Another difference between Writs in which ſomething is to be recovered, and Writs in which nothing is to be recovered, but they are to diſcharge the Plaintiff onely of a Burthen. And therefore in a Writ of Error the death of one of the Plaintiffs ſhall abate the Writ. 3 *Hen.* 7. 1. 2 *Rich.* 3. 1. *a.* 19 *Aſſ. p.* 7. & 44 *Edw.* 3. *Brief* 584. But in *Audita querela* which is alſo Original, the death of one of the Plaintiffs, or one of the Defendants ſhall not abate the Writ. 2 *Rich.* 3. 1. 11 *Rich.* 2. *Brief* 638. becauſe he is to recover nothing, but onely to diſcharge himſelf of a burthen and charge. And for this cauſe the Nonſuit of the one is not the Nonſuit of the other in an *Audita querela*; but there ſhall be Summons and Severance. 15 *Edward* 5. *Severance* 23.

Note Reader, Summons and Severance is alwayes ſaid before appearance, and Nonſuit after appearance, where the Severance is without Proces, *&c.* 38 *Edw.* 3. 9. 26 *Aſſ. p.* 35.

Trin. 10 Jacobi *in the Common Pleas, which Plea began Hill.* 7. Jacobi *Regis Rot.* 1231.

Richard Smith's Caſe.

[b] *Richard Smith* Adminſtrator of *George Barkhouſe* was Plaintiff in a *Quare Impedit* againſt the Biſhop of *Peterborough*, *Thomas Abbot* and *Hugh Lloyd* Clerk; and the Writ and Count was, *de placit. quod permittat ipſum Rich. præſentare idoneam perſonam ad medietatem Eccleſiæ de Woodford in Com. Northampton, quæ vacat & ad ſuam ſpectat donationem.* And in this caſe after many Arguments at Bar, and now this Term at the Bench, divers points were reſolved.

1. That none ſhall have a *Quare impedit præſentare ad medietatem Eccleſiæ*, but when there are two ſeveral Patrons, and two ſeveral Incumbents of the Church within one and the ſame Town, ſo that the one Patron hath a diſtinct and ſeparate half of the tithes to him from the other, in the ſame Town; and ſo hath the other Patron and his Incumbent *mutatis mutandis*. And in this caſe the Advowſon and the Church are ſevered in right and in poſſeſſion. But when there is but one incumbent, although that the Advowſon be divided and ſevered into ſeveral hands, yet there ſhall never be *Quare impedit præſentare ad medietatem ſeu tertiam partem Eccleſiæ*, &c. And the reaſon of this difference is manifeſt. For every *Quare impedit* is in the poſſeſſion, and reſpecteth the Church which belongeth to the Incumbent: and therefore in the Writ of *quare impedit* it is *quod permittat ipſum præ-*

ſentare ad Eccleſiam de W. And thereby appeareth that the ſtate and quality of the Church doth direct the *quare impedit*; and therefore when the Church is not ſevered, but there is but one Incumbent, one Church, one Cure, it is not poſſible that in reſpect of the ſeveralty of the Advowſon, that *quare impedit* ſhould be brought *ad medietatem Eccleſiæ*; for there is not any moity in the Church, but
[136] the ſame is entire; but he who preſenteth hath a moity, *&c.* the Advowſon: And therefore when at the beginning of the Church, one Church of one town was divided and ſevered in two parts, and the Advowſon of the one part allotted to one, and of another part to another; and that there ſhould be two ſeveral Incumbents, one *de una medietate Eccleſiæ*, and the other *de alia medietate Eccleſiæ*, and one part of the Town goeth to one, and the other to another; There where one Patron preſenteth to the moiety of the Church, and is diſturbed, he may well have a *quare impedit quod permittat ipſum præſentare ad medietatem Eccleſiæ*; for in truth the Incumbent ſhall not have but the moiety of the Church, and not the whole Church, or the whole profits of the Church, nor the whole Cure of Souls. But the Writ of *Droit de advowſon* is brought to recover the Advowſon, and the Writ is *Præcipe quod reddat advocationem Eccleſiæ* and therefore the ſtate and quality of the Advowſon, and not of the Church ſhall direct the Writ; for the Incumbent of the Church ſhall not be removed by that Writ, for the Advowſon doth appertain to the Patron, and *Eccleſia* to the Incumbent; and therefore it was utterly denyed, That if a conſideration be made of three Advowſons, ſo that all make but one Incumbent in one Church, in that caſe although that the Advowſons are ſeveral to preſent by turns, yet the *quare impedit* ſhall be in ſuch caſe *præſentare ad Eccleſiam*, for now upon the matter there is but one Church and one Incumbent, *Vide F. N. B. 39. f. g.* 5 *Hen.* 7. 8. And it was Objected that admitting that in ſuch caſe as hath been put, *ſc.* where there are two ſeparate Incumbents, that the *quare impedit* ſhall be maintainable *de medietate Eccleſiæ*, yet ſuch ſpecial caſe ought to be ſet forth in the Count, or elſe it ſhall not be intended, and no ſuch ſpecial matter is alleged in the Count in the Caſe at at Bar. To which it was Anſwered and Reſolved, That the Count in the Caſe at Bar was ſufficient to aſcertain the Court, That there were two Patrons, and two Incumbents: For the Count was, That one *William Thorley fuit ſeiſitus de manerio de Thorleys in Com' præd'*, *ad quod advocatio medietatis Eccleſiæ præd'*, &c. *pertinuit & adhuc pretinet, in dominico ſuo ut de feodo*, &c. And alwayes one is ſaid to be ſeiſed *de advocatione medietatis*, when there are two ſeveral Patrons; and ſo *Priſot* holdeth in 33 *H.* 6. 11. *b.* in Sir *John Odingſel's* Caſe: and therefore in the Caſe at Bar, when the plaintiff declareth, That *William Thorley* was ſeiſed *de advocatione medietatis*, the ſame implieth two ſeveral Patrons and two Incumbents, for there the Advowſon and the Church are ſevered in right and in poſſeſſion. 14 *H.* 6. 15. *per Newton acc' Fitzh. Nat. Br.* 31 *b.*
[*b*] In 31 *E.* 1. *Droit* 68, 69. it appeareth, That a man ſhall have a Writ of Right *de medietate advocationis*, where the Advowſon is parted betwixt two Coparceners, and one is diſturbed by a ſtranger: But a Writ of Right *de advocatione medietatis Eccleſiæ* lieth wher two Patrons preſent two ſeveral Parſons to one Church, as there are in ſome Churches two Parſons, againſt the opinion of *Finchden* in 45 *E.* 3. *Fines* 41. *Vide* 45 *E.* 3. 12. 17 *E.* 3. 38. *Poining's* Caſe. *Vide* 17 *E.* 2. *Dower* 163. a Writ of Dower *de tertia parte advocationis*. *Vide F. N. B.* 33. when one Parſon ſueth in the Spiritual Court for Tythes amounting to the fourth part of the value of the Church, that Parſon who is ſo ſued may have a Prohibition called *Indicavit*, to the Eccleſiaſtical Judge and to the party, and then the Patron of the Parſon ſo prohibited may have a Writ of Right *de advocatione decimarum* 3. *partis Eccleſiæ de S. vel* 4. *partis*; but that Writ is given by the Statute of *Weſt.* 2. *Cap.* 5. towards the end. *Vide* 38 *E.* 3. 13. 31 *H.* 6. 14. and the Statute of *Articuli Cleri*, *Cap.* 2. and *Conjunctim Feoffati*, *F. N. B.* 36 *E. Doctor* and *Student*, *Cap.* 25. 108. 4 *E.* 3. 27, 29. 7 *E.* 3. 42. 8 *E.* 3. 49. 9 *E.* 3. 42. 2 *H.* 7. 12. 12 *E.* 4. 13. *Vide Regiſter* 29 *b. Præcipe quod reddat advocationem medietatis Eccleſiæ de S. vel* 3. *partis*, and *F. N. B.* 30 31 *E.* 3. *Droit* 68, 69. 22 *Aſſ. p.* 33. where there are three Parſons of one Church, and one in a *Quare Impedit* doth declare *præſentare ad medietatem*, where it ſhould be *ad tertiam partem*, and the Writ did abate, which proveth that in ſuch ſpecial caſe a *Quare Impedit* lieth *præſentare ad medietatem*, or *tertiam partem Eccleſiæ*; and therewith agreeth the Book of Entries 477. *tit. Quare Impedit. Mich.* 22 *H.* 6. *Rot.* 469. a Writ of *Quare Impedit* was *præſentare ad* 2. *partes Eccleſiæ. Vide* 6 *E.* 6. 78. *Dyer.* the Lord *Windſor's* Caſe.

And it was objected, There was not any Writ in the Regiſter of any *Quare impedit præſentare ad medietatem ſeu tertiam partem Eccleſiæ*, but onely *ad Eccleſiam.*

To which it was anſwered, and reſolved, That when the Regiſter giveth a Writ for the whole, it is a ſufficient warrant to bring it of any part, if the caſe will warrant it. And the latter part of the opinion of *Priſot* in 33 *H.* 6. 11. was denied, *ſc.* That when there are two Patrons and two Incumbents of the ſame Church, ſo that the Church it ſelf is divided into moyeties, that there a *Quare Impedit* will not lie to preſent to a moity, for Reaſon and many Authorities in Law are againſt it, as it appeareth before. But in ſuch caſe I conceive, That the Patron *de medietatis advocatione*, may have a *Quare impedit præſentare ad Eccleſiam*, for upon the matter as to him it is one Church. And ſo the Plaintiff may have, as I conceive, a Writ in the one form or in the other; and therewith agreeth *Windſor's* Caſe in the fifth part of my Reports, where the Count was *de advocatione* 3. *partis*, and yet the Writ was *ad Eccleſiam*, and not *ad tertiam partem.* And ſo you will the better underſtand the reaſon of your Books and thereby attain to the true ſenſe. and underſtanding and judgment of the Law. And afterwards Judgment was given, That the Writ was good, and the defendant
[137] ruled to anſwer, and ſo he did. *Vide Trinit.* 14 *Eliz. Rot.* 1060. *Paſch.* 37 *Eliz. Rot.* 1226. Sir *Thomas Stanhope's* Caſe. *Paſch.* 41 *Eliz. Rot.* 836. the Caſe of the Church of *Darfield*, where ſuch a Writ of *Quare Impedit* as this is in the principal caſe, *ſc. quod permittat præſentare idoneam perſonam ad medietatem Eccleſiæ de Darfield*, was upon demurrer and ſolemn argument adjudged maintainable.

Caſes

Caſes upon the Commiſſions of Sewers.

Paſch. 7 Jacobi *Regis.*

The Caſe of *Cheſter* Mill upon the River of *Dee.*

A Cawſey or Milſtank of ſtone in the River of *Dee* and City of *Cheſter* before the Reign of King *Edw.* 1. was made and erected, for the neceſſary maintainance of certain Mills, ſome of the Kings, others of the Subjects, which ſtood at the end of the Cawſey; and now of late a Decree was made by certain Comiſſioners of Sewers, for a breach to be made by ten Rods in length in the ſaid Cawſey, which Cawſey (as it was admitted by both ſides) was erected before the Reign of King *Edw.* 1. and ſo hath continued untill this day, without any exaltation or inhauncement. And if by any Decree of the Commiſſioners, by force of any Statute, any breach might be made of this Cawſey, was the queſtion, which was referred by Letters of the Lords of the Privy-Counſel to the two chief Juſtices, and the chief Baron; and upon hearing of Counſel Learned divers dayes, and upon conſideration had in the time of the laſt Vacation of all the Statutes concerning Sewers, and upon conference had amongſt themſelves, It was Reſolved as followeth. [b] [138]

1. Whereas it is Enacted by the Statute of *Magna Charta*, *Quod omnes Kidelli deponantur*, &c. *de cætero penitus per Thameſim & Medeweyam, & per totam Angliam niſi per coſteram Maris*, It was Reſolved, That this Statute doth extend onely to Kidels, that is, Penweares for taking of fiſh; but the firſt Statute which extendeth to the putting down or abating of any Mills, Mill-ſtanks and Cawſeys, was the Statute of 25 *Edw.* 3. *Cap.* 4. which Act appointeth ſuch onely to be put down or abated, which were levied or erected in the Reign of King *Edw.* 1. or after; but upon the Staeute made 1 *Hen.* 4. *Cap.* 12. upon complaint in Parliament of great damages which have happened by the outragious inhauncing of Mills, Mill-ſtanks, and other Impediments made and erected before the Reign of King *Edw.* 1. the ſaid ancient Mills and Mill-ſtanks were appointed by act then made to be ſurveyed, and ſuch as were found much inhaunced to be corrected and amended; Saving alwayes reaſonable ſubſtance of ſuch Mills, Mill-ſtanks, Weares, *&c.* ſo in old time made and levied. None of which acts extend to the caſe in queſtion; for this Cawſey was erected before the Reign of King *Edw.* 1. and was never exalted or inhaunced after the erection thereof. And the Statute of 12 *Edw.* 4. *Cap.* 7. confirmeth all the ſaid Acts, and by them the generality of the ſaid Act of *Magna Charta* is reſtrained, as by the ſaid Acts appeareth. And by the Statute of 25 *Hen.* 8. *Cap.* 5. none of the ſaid Acts (as to the point in queſtion) is repealed: For firſt, the ſame Act doth appoint the manner, form, tenor and effect of the Commiſſion of Sewers, by which power and authority is given to the Commiſſioners to ſurvey Walls, *&c.* Sewers, Cawſeys, Mills, *&c.* and them to correct, repair, amend, put down or reform, as cauſe ſhall require, according to their wiſdom and diſcretion; and therein as well to ordain and do, after the form, tenor and effect of all and ſingular the Statutes and Ordinances made before firſt day of *March*, *anno* 23 *Hen.* 8. as alſo to enquire by the Oaths of honeſt and lawful men, *&c.* through whoſe default the ſaid hurts and damages have happened, *&c.* By which it appeareth, That the diſcretion of the Commiſſioners was limited, *ſc.* to proceed according to the Statuters and Ordinances before made; and then all the ſaid ſubſequent clauſes, and alſo to reform, repair and amend the Walls, *&c.* by force of this word *(ſaid)* hath relation to the precedent purveiw of the Act: And further, to reform, amend, proſtrate and overthrow all ſuch Mills, *&c.* and other impediments and annoyances (aforeſaid) as ſhall be found by inquiſition, or by your ſurvey and diſcretion to be exceſſive and hurtfull: which word (aforeſaid) referreth this clauſe alſo to the precedent purveiw, *&c. ſc.* ſuch impediments and annoyances as are againſt the Statutes and Ordinances before made.

Alſo it is further Enacted by the ſaid Act, That all and every Statute, Act and Ordinance heretofore made concerning the premiſes, or any of them, not being contrary to this preſent Act, nor heretofore repealed, ſhall from henceforth ſtand and be good and effectual for ever. But the ſaid Acts of 25 *Edw.* 3. and 1 *Hen.* 4. are not contrary to any clauſe of this Act, nor were repealed before. And alwayes ſuch conſtruction ought to be made, that one part of the Act may agree with the other, and all to ſtand together. And if they had intended to have repealed the ſaid former Acts, they would not have repealed them by ſuch general and doubtful words, concerning Cawſeys, Mill-ſtank and Mills, when they concerned the Inheritances of many Subjects. And according to this Reſolution we certified the Lords of the Councel, That the ſaid Statutes of 25 *Edw.* 3. and 1 *Hen.* 4. remained in force; and that the Authority given by the Commiſſion of Sewers, doth not extend to Mills, Mill-ſtanks, Cawſeys, *&c.* erected before the Reign of King *Edw.* 1. if they be not exalted and inhaunced beyond their former altitude, and thereby made more prejudicial: In which caſe they are not to be thrown down or over-turned, but to be reformed by the abatement of the exceſs and inhauncement onely. [b]

Mich.

Mich. 7 Jacobi. *In the Common Pleas.*

Keighley's Case.

[139] THis Term, upon Evidence to a Jury in *Essex* in the Case of one *Keighley*, It was Resolved by the whole Court of Common Pleas, That if one who is bound by prescription to repair a Wall *contra fluxum Maris*, and he keepeth the Wall in good repair, and of such heigth, and so sufficient as it was accustomed; and by the sudden and unusual increase of water, salt or fresh, the Walls are broken, or the Water over-floweth the Walls; That in this case the Commissioners of Sewers ought to tax such persons who hold any Lands or Tenements, or Common of Pasture, or profit of Fishing, or hath or may have any loss, damage or disadvantage by any manner of means in the same places, according to the quantity of their Lands, *&c.* for no fault in this case was in him who ought to repair it. And the Statute of 23 *Hen.* 8. *Cap.* 4. first doth authorize the Commissioners to enquire by the Oaths of honest and lawfull men *&c.* through whose default the said hurts or damages have happened, *&c.* and who hath or holdeth any Lands or Tenements, *&c.* or hath or may have any hurt, loss, or dis dvantage, *&c.* and all those persons, and every of them to tax, *&c.* which ought thus to be intended, That when one by prescription or otherwise [b] ought to repair any Wall, Sewer, *&c.* that he ought to do it; but if he be not able to do it, and for inevitable necessity it ought to be repaired, in prevention of a great and publick hurt; or if no default be in him by reason of the extraordinary rage and violence of the water, That the Commissioners of Sewers in such cases have power by the said Act to charge all who have any loss, *&c.* according to the quantity of their Land, &c. But when one is bounden by prescription or otherwise to repair a Wall, &c. if any fault be in him, and the danger be not inevitable, but that he himself may well repair it, The Commissioners may by the true intent of the Act charge him onely to repair it; and if through his fault the danger become inevitable, or that he himself is not able to repair it, by which as it hath been said, all are charged, &c. Every one of them may have an Action upon the Case against him who is so bounden to repair the Wall, &c. and shall recover their damages according to their loss.

In 18 *Edw.* 3. 23. an Action upon the Case was brought against *B.* and counted that the said *B.* was seised of certain Lands in *K.* by reason whereof he and his Ancestors, and all the terre-tenants time out of mind, &c. have made and repaired, when need should be, so many Perches of the Wall of the Sea in *K.* &c. and for want of reparation, &c. the water entred and drowned the plaintiffs Land, &c. And the defendant traversed the Prescription upon which they were at issue, and it was found for the plaintiff, and that there was fault in the Wall for not repairing of it; for which the plaintiff recovered his damages, and a Writ was awarded to the Sheriff to distrain *B.* to repair the Wall there where there was need, and a fault.

Note Reader, this Judgment in an Action upon the Case, and the reason thereof, is *pro bono publico*: for, *Salus Populi est, Suprema Lex*; and therefore it is part of the Judgment in this Action upon the Case, That the defendant shall be distrained to repair the Wall.

And in the Case at Bar, the Law is grounded upon great Reason: For although that by the Law one be bound to keep and repair it, yet *impotentia excusat legem.* And that which cometh by the act of God, and is so inevitable, that by no providence or industry of him that is bound, it can be prevented, shall not charge him.

And therefore if Tenant for life or years do not repair a Sea-wall, so that by his fault the land is drowned, and becometh unprofitable, it is Waste; but if the land be drowned by the extraordinary rage and violence of the Sea without his fault, it is no Waste: no more than if a house be burned by Lightning, or overthrown by Wind and Tempest, without fault in the lessee, it is no [140] Waste. And many times Tides are occasioned by strong winds. And therewith, as to the Waste, agreeth the Opinion of the Court of Common Pleas, in *6 Eliz.* in Justice *Dalison's* Reports.

And the Court had consideration of another clause of the said Act of 23 *Hen.* 8. *Cap.* 5. And to make and ordain Statutes, Ordinances, *&c.* after the Laws and Customs of *Romney-Marsh* in the County of *Kent*, or otherwise, after your own wisdom and discretion.

And it was Resolved clearly, That the severall Commissioners shall follow the Laws and Customs of *Romney-Marsh*: But in case where any particular place within their Commission, had such Laws and Customs as *Romney-Marsh* had, there they may follow them; for *consuetudo loci est observanda.*

Lastly, it was Resolved, That these words in the Act, *&c. According to your wisdoms and discretions*, are to be intended and interpreted according to Law and Justice; and every Judge or Commissioner ought to have two Salts, *&c. Salem Sapientiæ, ne sit insipidus*, and *Salem Conscientiæ, ne sit Diabolus.* Also discretion, as it is well described, is *Scire per legem quid sit justum*: and therefore the Commissioners of Sewers ought to pursue as well their Commission, as the Oath expressed in the Act of 23 *Hen.* 8. which they take to execute their Commission of Sewers in the same manner as it is there prescribed. And therewith agreeth the description of Discretion in *Rook's* Case, in the fifth part of my Reports.

And

And it was well observed, That every Statute, Ordinance and Provision which is made by force of Commission of Sewers, ought to consist upon four Causes:

1. The Material cause, and that is Substance.
2. The Formal cause, and that is the Manner, with convenient Circumstance.
3. The Efficient cause, and that is their Authority according to their Commission.
4. The Final cause, and that is *pro bono publico, & nunquam pro privato.*

And whereas the Opinion of *Walmesley* Justice in *Wekes* Case was, if the owner of the land were by Prescription bound to repair the River bank, that yet upon such Commission awarded, ought not to charge him onely with the whole. Upon Conference with *Walmesley*, and *Flemming* Chief Justice, *Yelverton*, *Williams*, and other Justices, it was agreed by *Walmesley* himself, and all the other, That the said Resolution upon the difference aforesaid, was good in Law: and *Walmesley* explained his Opinion in *Rooks* Case, That the Commissioners ought not to charge him who is bound by Prescription onely; which he intended, where there is no fault in him: for the same agreeth with the said words of the Act of 23 *Hen.* 8. and there is no inevitable necessity for insufficiency or otherwise, but if he himself may do it, there he alone shall be charged to do it by force of the said Commission. And he said, That his Reason given in *Rooks* Case implieth as much. *sc.* for otherwise it may be that all the Countrey shall be drowned; which Reason imports his meaning, That all those who had Lands in danger should not be charged, but in case of insufficiency of him who is bound, or by other inevitable necessity. [b]

Mich. 7 Jacobi.

The Case of the Isle of *Ely*.

A Case was referred by the Lords of the Counsel to *Coke* Chief Justice, *Daniel* and *Foster* Justices of the Court of Common Pleas, Concerning a Decree made by the Commissioners of Sewers, for the making of a new River within the Isle of *Ely*; and in effect the case was such. The Commissioners of Sewers had decreed, That a new River should be cut out of the old River of *Ouse*, and through the main land within the same Isle, for seven miles, unto another part of the same River: And for the doing thereof, they had taxed several as well *Fen-Drayton*, *Samsey*, *Over-Wivelingham*, *Rampton*, *Cottenham*, and nine other Towns within the County of *Cambridge*, out of the Isle, as the Inhabitants of the said Isle, and the tax was general, *sc.* so much of one Town, and so much of another, and so of all of them. [141]

And in this Case two Questions were moved:

1. If the Commissioners of Sewers might by force of their Commission make a new River, or not.
2. If such general taxation upon the Town was lawful, or not.

And as to the first, it is to see, what might have been done by the Common Law, before any Statute made thereof. And it is to know, That by the Common Law, before the Statute of *Hen.* 6. *Cap.* 5. the King of Right ought to defend his Realm, as well against the Sea, as against the Enemies, that the same be not drowned or wasted: And also to provide, that his Subjects have their passage through the Realm by Bridges and High-wayes in safety. And therefore if the Sea-walls be broken, or the Sewers or Gutters are not scowred, that the fresh waters cannot have their direct course, the King ought to grant a Commission, to enquire, and to hear and determine these defaults. Which Commission appeareth in the Register, amongst the Commissions of *Oyer* and *Terminer*; in which it is said, *Nos eo quod ratione dignitatis nostræ Regiæ ad providendum salvationi Regni nostri circumquaque sumus stricti*, &c. And with that agreeth the Statute of 6 *Hen.* 6. *Cap.* 5. and the Statute of 23 *Hen.* 8. *Cap.* 5. [b]

And see a notable President, *Pasch.* 44 E. 3. *Middl. coram Rege*, *Præceptum est Vicecomiti quod distringat* A. B. *& alios quod ipsi defectus walliarum erga terras suas reparan', & si ipsi sufficientes non fuerunt, quod distrin' omnes tenentes terrarum*, &c. *qui defensionem, commodum, salvamen, vel damnum ratione reparationis, seu non reparationis walliæ præd' habent seu aliquo modo habere poterint, ita quod quilibit tenentium præd' juxta quantitatem tenuræ suæ ibid', contributionem præfat'* A. B. *& aliis ad wallias illas faciendas & reparandas faciant indilate*: Which Record was before any Act of Parliament that limited any form of Commission.

The second thing observable in the said Commission at the Common Law, is this clause, *Ad hujusmodi wallias, fossata, gutturas, sueras, pontes, calceta, & gurgites in locis necessariis reparand', & quotiescunq; & ubi necesse fuerit de novo facienda:* By which it appeareth, That by the Commission in the Register at the Common Law, that the ancient walls, gutters or Sewers might be repaired or new made; but no new walls, gutters or Sewers, by force of the said Commission might be made. Then it is to see, in what case the Statutes have made provision in these cases. And it is to know, That the Statute of 6 *Hen.* 6. *Cap.* 5. doth enlarge the said Commission which was at the Common Law; for where these words (*de novo facienda*) refer onely to old Walls, Gutters, Sewers, &c. the said Act hath these words, *Et eadem & alia quotiescunque & ubi necesse fuerit de novo facienda*; which words (*& alia*) being added to the former Commission, give to the Commissioners power to make new Walls, Gutters, Sewers, &c. but this Act did not

endure but for ten years; and by 18 *Hen. 6. Cap.* 10. the like Commiſſion was eſtabliſhed for ten years; and by 23 *Hen. 6. Cap. 9.* for fifteen years; and by 12 *Edw. 4. Cap. 6.* for fifteen years; and by 4 *Hen. 7.* for twenty five years; and *6 Hen. 8. Cap.* 10. for ten years, and until the next Parliament. And afterwards the Statute of 33 *Hen. 8. Cap.* 5. was made, which reciteth none of the former Acts as the other do, but enacteth, That there ſhall then after a Commiſſion of Sewers, according to the manner, tenor, form and effect hereafter enſuing, and rehearſeth the form of the Commiſſion *de verbo in verbum*: which Commiſſion omitteth the ſaid words (*& alia*) and follow-
[142] eth the Commiſſion in that point which was at the Common Law. The words of the Act of 23 *Hen.* 8. being, And alſo to reform, repair and amend the ſaid Walls, Ditches, Banks, Gutters, Sewers, &c. and the ſame (omitting theſe words, and other) as often, and where need ſhall be, to make new. And the former clauſe concerning execution of the former Statutes and Ordinances, is reſtrained with theſe words (*touching the premiſes*) which refer onely to repair the old Walls or Sewers, or to make them new. And alſo a ſubſequent clauſe, That all and every Statute, &c. heretofore made concerning the premiſes, (which reſtraineth that clauſe *ut ſupra*) not being contrary to this preſent Act, nor heretofore repealed, ſhall ſtand and be good and effectual for ever. So that it was Reſolved by the Juſtices, That by force of the ſaid Commiſſion founded upon the Act of 23 *Hen.* 8. the Commiſſioners could not make the ſaid new River out of the main Land, for four cauſes.

1. That this Act doth preſcribe the manner and form of the Commiſſion in expreſs words, which extend onely to reparation and new making of old Walls, Gutters, *&c.*

2. That theſe words (*& alia*) which were included in the Statute of *6 Hen. 6.* and all the ſaid Acts are left out of this Commiſſion.

3. All the former Acts were for a time, but this Act which eſtabliſheth this Commiſſion, is made perpetual by the Statute of 3 *Edw. 6. Cap.* 8. and therefore it ſhall be hard to enlarge it beyond the words, and to give power to Commiſſioners to try inventions at the charger of the Countrey, which ſhall never take good effect, but *via trita eſt tutiſſima.*

4. It appeareth by the Regiſter in the Writ of *Ad quod damnum* 252. and *F. N. B.* 225. That if an old Ditch or Trench coming from the Sea to a Town, by which Boats and Veſſels uſe to paſs to the ſaid Town; now if it be ſtopped by the outrage of the Sea, and a man would ſue to the King, to have leave to make a new trench, and to ſtop the old trench, he ought firſt to ſue *Ad quod damnum*, to know what damage it ſhall be to the King or others: By which, and by the Writ in the Regiſter *de antiqua trenchea obſtruenda & nova facienda ſeu habenda*, it appeareth, that no new trench or river which runneth to the Sea, can be made without the Writ of *Ad quod damnum*, and there-
[b] upon to obtain leave of the King to do it. For if any Commiſſioners might do it *ex officio*, great inconvenience would follow thereupon for private gain, as well as for publick damage or ſtopping of Havens, (which are the gates of the Kingdom) and other common Rivers, as particular nuſance and prejudice to private men, by drowning of their Lands and Inheritance. And therefore ſuch new Rivers cannot be made without the Kings Licence, grounded upon a Writ of *Ad quod damnum.* See the Writ of *Ad quod damnum* in ſuch caſe, becauſe it is excellent.

But it was reſolved, That new Inventions, as of an artificial Mill to caſt out the water, or of a great River out of the main Land, and other the like, are not warranted by the ſaid Commiſſion upon the ſaid Act of 23 *Hen.* 8. *quia nihil ſemel inventum eſt & perfectum.* So when an old Sewer is newly to be made or cleanſed, ſome ſmall alteration in reſpect of the natural change of the current, or otherwiſe for the publick good of ſuch place (and ſo in the like caſes) may be made. So when an old wall by the extream outrage of the water is broken, to preſerve the lands within the ſame Level from inundation; another wall, in caſe of inevitable neceſſity for the publick good of that part, may be made to defend the people and their Lands within the ſame Level. For this manner of defence by walling, is no new invention, but the old way and mean well approved of by experience, and upon the matter it is but a new making of the old wall in a place by inevitable neceſſity more fit than the other. But if by the timely reparation of the old wall, the extream danger may be avoided, no other ought to be made; for *ſi aſſuetis mederi poſſis nova non ſunt tentanda*: but when new inventions are propoſed, as is aforeſaid, if they are apparently profitable, no owner of the land there will deny to make contribution for his advantage; and then the ſame ought to be made by a voluntary conſent, and not by conſtraint by force of the ſaid Commiſſion of Sewers upon the ſaid Act of 23 *H.* 8. But ſometimes when a publick good is pretended, a private benefit is intended. And if any ſuch new invention be in truth (*quod raro aut nunquam fit*) good for the Common-wealth, and yet no conſent can be obtained for the making of it, then there is no remedy but to complain in Parliament, and there to provide relief, as Sir *John Popham* late Chief Juſtice of *England* did, who exhibited a Bill in Parliament *anno* 3 *Jac.* for making of a new River in the ſaid Iſlle, which he himſelf upon his great charge begun, knowing that without an Act of Parliament, none could be forced by force of the Commiſſion of Sewers, to contribute to ſuch a new attempt. But the Bill was utterly rejected.

Alſo it was Reſolved, that none can be taxed towards the reparation, but thoſe who have prejudice, damage or diſadvantage by the ſaid nuſances or defaults, and who may have benefit and profit by the reformation or removing of them. Alſo the Tax, Aſſeſment and charge ought to have
[143] theſe qualities. 1. It ought to be according to the quantity of their lands, tenements and rents, and by number of acres and perches. 2. According to the rate of every perſons portion, tenure or profit, or of quantity of Common of paſture, or of fiſhing, or other Comodity. And therefore it was clearly Reſolved by them, That the tax generally of a ſeveral ſum in groſs upon a Town is not

not warranted by their Commiſſion, but it ought to have been particular, according to the expreſs words, upon every owner or poſſeſſor of lands, tenements, rents, &c. obſerving the qualities aforeſaid.

And it is to be obſerved, That there are three manner of Statutes which concern Sewers: The firſt conſiſting *in defendendo & reparando wallias, ſeweras, &c.* The 2. *in deſtruendo & amovendo nocumenta, &c.* The 3. which concerneth both the points, *tam in deſtruendo & amovendo quam in defendendo.* Of the firſt ſort are *Magna Charta, cap.* 15, *&* 16. 6 *H.* 6. *cap.* 5. 18 *H.* 6. *cap.* 10. 23 *H.* 6. *cap.* 9. 12. E. 4. *cap.* 6. 4 *H.* 7. *cap.* 8. 6. *H.* 8. *c.* 10. Of the ſecond ſort, are *Magna Charta Cap.* 23. 25 E. 3. *cap.* 4. 45 *E.* 3. *cap.* 4. 1 *H.* 4. *cap.* 12. 9 *H.* 6. *cap.* 9. 12 E. 4. *cap.* 7. Of the third ſort of Statutes, which concern both the former ſorts, are 23 *H.* 8. *cap.* 5. 25 *H.* 8. *cap.* 10. 3 E. 6. *cap.* 8. and 13 *Eliz. cap.* 9.

Mich. 10 Jacobi. *In the Court of Wards.*

Scropes's Caſe.

THe Caſe between *Thomas Bridges* and *Anne* his wife plaintiffs, and *Elizabeth Scrope* and other defendants, was ſuch: *Nicholas Scrope* was ſeiſed in fee of the Mannors of *Harleſton* and *Mount*; and having iſſue the ſaid *Anne* one of the plaintiffs by *Winifrid* his wife, by Indenture dated 26 *Junii*, 23 *Eliz.* for the preferment of *Winifrid* his wife and *Anne* their daughter, did covenant with others to ſtand ſeiſed of the ſaid Mannors to the uſe of the ſaid *Nicholas Winifrid*, and *Anne* for their lives, and afterwards to the ſaid *Anne*, and the heirs of her body, with divers remainders over; with a Proviſo, That if the ſaid *Nicholas* during his life, and after his debts paid, mentioned in a Schedule annexed to the Indenture, ſhall be diſpoſed either to determine, diſannul, change, alter, enlarge, diminiſh or make void the uſes or eſtates, or any of them, of the premiſes, or any part thereof; That then it ſhall be lawful to and for the ſaid *Nicholas*, at all times at his pleaſure, by his writing indented under his Hand and Seal, ſubſcribed in the preſence of three Witneſſes, to determine, diſannul, *&c.* And alſo by the ſame writing at his will and pleaſure, or any other writing whatſoever, ſigned and ſubſcribed as aforeſaid, to limit declare and appoint the uſes of the ſame to the perſons aboveſaid, or to any other perſons, &c. *Winifrid* died, the ſaid *Nicholas* married *Eliz. Morrice*; and by Indenture *ult. Novemb.* 33 *Eliz.* ſubſcribed in the preſence of three Witneſſes, in conſideration of a Joynture to be made to the ſaid *Eliz.* did covenant with *Wykes* and *Warnford*, to ſtand ſeiſed of the ſaid Mannor of *Harleſton* to the uſe of the ſaid *Nicholas* and *Eliz.* for their lives, and afterwards to the uſe of the right heirs of the ſaid *Nicholas*, &c. and other Conveyances of the fee ſimple were afterwards made. And it was Reſolved by the two chief Juſtices, and the chief Baron, That although in this caſe there is not any expreſs ſignification of his purpoſe or determination to determine, diſannul, &c. Yet foraſmuch as by the ſaid Indenture of 33 *Eliz.* he covenanteth to ſtand ſeiſed to the uſe of himſelf, and the ſaid *Elizabeth* then his wife, and afterwards to his right heirs, the ſame ſhall innure to two intents. 1. To declare his purpoſe and determination to determine and diſannul, *&c.* and therefore *ipſo facto* the former uſes ceaſe. And 2. the Covenant in the ſame Indenture doth inure to raiſe a new uſe to the ſaid *Nicholas* and *Elizabeth* his wife, and to the heirs of the ſaid *Nicholas*. And ſo it was Reſolved in a Caſe in the Kings Bench, between *Frampton* and *Framton*, *Trin.* 2. *Jac. Regis*, *quia non refert an quis intentionem ſuam declaret verbis, an rebus ipſis, vel factis*; and when he limiteth new and other uſes, he thereby doth ſignifie his purpoſe to determine and alter the uſes before. But it was Reſolved, That all incident circumſtances preſcribed by the Proviſo, *ſc.* as to Subſcription, Witneſſes, and other circumſtances, ought to be obſerved in the ſecond Indenture. [b] [144]

FINIS.

THE REPORTS OF Sir Edward Coke Kt, &c.

PART XI.

Anno 32 Eliz.

The Case of the Lord *Lord De La Ware.*

AT the Parliament holden 39 *Eliz.* the Case was such: *Thomas la Ware*, Knight, Lord *la Ware*, Son and Heir of *William*, Son and Heir of *George*, Brother and Heir of *Thomas* Lord *la Ware*, exhibited his Petition to the Queen to this effect, That whereas the said *Thomas* his Great Grand-father was called to Parliament by Writ of Summons, *An.* 3 *H.* 8. and afterwards the said *Thomas* the Besayel died; after whose death *Thomas* his son was called to divers Parliaments by Writs of Summons, and afterwards by Act of Parliament, *An.* 3 *Ed.* 6. for divers causes mentioned in the said Act, it was enacted, That the said *William*, during his life, should be disabled to claim or enjoy any dignity or Lordship in any Right, Estate, *&c.* by Discent, Remainder, or otherwise, and afterwards the said *Thomas*, son of *Thomas*, died; after whose death, the said *William* being so disabled, was not called to any Parliament by Writ of Summons, till Queen *Elizabeth* called him to Parliament by Writ of Summons, and sat as puisne Lord of the Parliament, and afterwards he died. And now the said *Thomas* his son being called, this Parliament by Writ of Summons sued to the Queen, that he might have the place in Parliament of his Great Grand-father, *viz.* between the Lord *Berkley* and the Lord *Willoughby* of *Eresby*: And the said Petition was endorsed in these words, *Her Majesty hath commanded me to signifie to your Lordships, That upon the humble suit of the Lord* la Ware, *she is pleased that the matter shall be considered and determined in the House*, *Rob. Cecil.* Which Petition being read in the Upper House of Parliament, the consideration thereof was committed to the Lord *Burghley*, Lord Treasurer, and divers other Committees, who at his Chamber at *Whitehal*, heard the Councel Learned on both parties, in the presence of two Chief Justices, and divers other Justices; and two Objections were made against the Claim of the said Lord *la Ware*. [1] [b]

First, Forasmuch as his Father was disabled by Act of Parliament to claim the Dignity, the Petitioner could not convey by him who was disabled, as Heir to his Great Grand-father, and by consequence he cannot have the place of his Great Grand-father, But his Fathers place. But it was resolved by the Justices, That there was a difference betwixt a Personal and Temporal disability, and a disability absolute and perpetual: As where one is attained of Treason and Felony, the same is an absolute and perpetual disability by corruption of Blood, for any of his posterity to claim any Inheritance in Fee-simple as Heir to him, or to any Ancestor above him; but when one is but disabled by Parliament (wihout any Attainder) to claim the Dignity for life, the same is a personal disability for life onely, and his Heir after his death may claim as Heir to him, or to any of his Ancestors above him.

The ſecond Objection was, That the ſaid *William* had accepted of a new Creation of the Queen, which dignity newly gained, did diſcend to the Petitioner, which he could not wave, and therefore the Petitioner could not have other place then his Father had. To which, it was anſwered and reſolved, That the Acceptance of a new Creation by the ſaid *William*, could not hurt the Petitioner, becauſe that the ſaid *William* was at that time diſabled, and in truth, was not a Baron, but onely an Eſquire; ſo that when the old and new Dignity diſcend together, the old ſhall be preferred. Which reſolution was well approved by all the Lords Committees, which was accordingly reported to the Lords of the Parliament, and allowed by them all.

Whereupon it was ordered by the Lords, That the Queen ſhould be acquainted with it by the Lord Keeper of the Great Seal, which was done accordingly, and the Queen confirmed the ſame alſo: All which was ordered and entred accordingly. Whereupon, at the ſame Parliament the [2] Lord *de la Ware* in his Parliament Robes, was by the Lord *Zouch* (ſupplying the place of the Lord *Willoughby*, then within age,) and the Lord *Berkley* alſo in their Robes, brought into the Houſe, and placed in his ſaid place, *viz.* next after the Lord *Berkley*; Garter King of Arms attending upon them, and doing his office: And I was of Councel with the Lord *de la Ware*.

Hill. 7. Jacobi.

Auditor *Curle*'s Caſe.

[b] IT is enacted by the Statute of 32 *H.* 8. *cap.* 66. That there ſhall be two perſons to be named by the Kings Highneſs, which ſhall be called the Auditors of the Lands of his Graces Wards, and ſhall be called the Fourth Officer of the ſame Court: Which Office is in part Miniſterial, as to the auditing of Accompts, and in part Judicial; for he is ſworn by force of the ſaid Act, That you ſhall not take nor receive of poor nor rich, any gift or reward in any matter or cauſe depending in the ſame Court: And in the ſame Statute there is a Proviſo, That *John Peryent* which by the Kings Letters Patents hath been heretofore, and now is Auditor of his Graces Wards Lands, ſhall continue and be one of the two Auditors mentioned in this Act, during the term of his natural life. King *Henry* the Eight, *An.* 32. of his Reign, by his Letters Patents under the Great Seal, doth nominate and conſtitute *John Peryent unum Auditorum curiæ ſuæ Wardorum & liberationum, habendum* to him for time of his life, with a Fee of forty marks *per annum*. *John Peryent*, *An.* 36 *H.* 8. doth ſurrender his Eſtate and Patent to *Henry* the Eight, and the King by his Letters Patents under the Great Seal, *in complementum tam prioris quàm poſterioris actus* (*viz.* of 32 & 33 *H.* 8.) granteth to *John Peryent* and *William Took officium unius Auditorum curiæ ſuæ Wardorum, habendum dictis John Peryent & Willielmo Took conjunctim & diviſim pro termino vitarum ſuarum & eorum alterius diutius vivent'*, [3] *cum feodo* 40 *marcarum*. *Peryent* dieth *An.* 6 *Ed.* 6. and *William Took* doth exerciſe and enjoy the Office alone until 30 *Eliz.* and then dieth. Queen *Elizabeth*, *An.* 31. of her Reign, by her Letters Patents *in complementum*, &c. *ut ſupra*, granteth to *Walter Took* and *William Curle officium unius Auditorum curiæ ſuæ Wardorum*, &c. *habend' dict'* Waltero & Willielmo *& alteri eorum conjunctim & diviſim pro termino vitarum ſuarum & eorum alterius diutius viventis*. Our Lord the King that now is *Anno* 4. during the lives of *Walter Tooke* and *William Curle*, by his Letters Patents (in which is recited the Grant made of the ſaid Office by Queen *Elizabeth* to *Walter Took* and *William Curle*) *& in complementum*, &c. *ut ſupra*, granteth to *John Churchil* and *John Tooke*, *Officium unius Auditorum, curiæ ſuæ prædictæ, habend' eiſdem* John Churchil & John Tooke *immediate poſt mortem prædict'* Walteri Tooke & Wil. Curle *& eorum alterius diutius viventis, vel à tempore quo officium illud per forisfacturam, ſurſum redditionem, ſive quemcunque alium modum primo & proximè vocaverit, aut ad manus noſtras devenire contingerit*. And afterwards *John Churchil* dieth, and the King Writing both the Letters Patents, the one made to *Walter Tooke* and *William Curle*, and the other to *John Churchil*, and *John Tooke in complementum*, &c. *ut ſupra, & ea intentione ut ſint duæ perſonæ poſt mortem aliquorum prædict'* Walteri, Willielmi & Johannis *qui ſint vocat' Auditores terrarum Wardorum ſuorum, ſecundum vim & intentionem Actus prædict'*, grants to *Richard Percival Officium unius Auditorum curiæ ſuæ prædict'*, &c. *habendum poſt mortem prædict'* Walteri Tooke, Willielmi Curle, & Johannis Tooke, *vel aliquorum duorum eorum qui citius mori contigerint, vel à tempore quo*, &c. *ut ſupra*: And afterwards *Walter Tooke* dieth, and *William Curle*, and *John Tooke*, and *Richard Percival*, are alive. And in this caſe divers Queſtions were made and argued by Learned Councel, on both parts, at divers days, as well in *Michaelmas* Term laſt paſt, as this Term: And upon good conſideration and confidence amongſt the two Chief Juſtices, and the Chief Baron, theſe points were reſolved.

1. That the Letters Patents made to *John Peryent* and *William Tooke de officio unius Auditorum curiæ ſuæ Wardorum*, were good: For although that the Statute doth Enact, That there ſhall be two perſons which ſhall be called the Auditors of the Lands, &c. So that there ſhall be

two

two persons and called two Auditors, yet it is but *unum officium*, and they both are but one Officer; and so the Statute it self speaketh, For two persons called Auditors, shall be called the Fourth Officer of the same Court: So that the Grant *de Officio unius Auditoris*, or *unius Auditorum*, is good enough; for *mala grammatica non vitiat conceſſionem.* And if the Grant had been in English, *viz.* The Office of one Auditor, or one of the Auditors of the Lands, *&c.* it had been good. And so is the Book adjudged by the advice of all the Justices in the like case, in 9 *Ed.* 4. *fol.* 1. Why King *Edward* the Fourth by his Letters Patents *Anno* 4. of his Reign, granted to *William Swyrenden* and *John Bagot*, *Officium unius Clericorum de Corona in Cancellaria dicti Domini Regis*, for term of their lives, *&c.* And in Assise brought in the *Kings Bench*, *Catesby* took exception to that Grant, because that it doth appear that *Officium unius Clericorum* is granted to two which could not be; That two could have the Office of one, no more then if he granted to two the Chief Justice of this place, it shall be void; for the matter it self proveth, That two cannot have it in Common, for none can be Chief Justice but one. But if *Officium Clerici de Corona* be granted to two, the same is good enough; and many other Exceptions were taken by him. And the Book saith, That the Justices said, that they talked of all these points with the Justices of the *Common Pleas*, and it seemed to them, that these matters were not to the purpose to stay Judgment, and so was conceived: For which cause it was awarded, That *Swyrenden* and *Bagot* should recover the Office, and their damages taxed by the Assise. By which Resolution of all the Justices, it appeareth, That when there is an Office of Clerk of the Crown in *Chancery*, that it is all one to grant *Officium unius Clericorum de Corona*, and to grant *Officium Clerici de Corona* to two, because there is but one Office: So in this case at the Barr there is but one Office, and two persons to supply it, and therefore the Grant is good; and in this case, this word (*unius*) is not numerative, but to note the unity, particularity, and identity of the Office. [b]

2. It was resolved, That although these two persons called Auditors, are but one Officer, yet the words in the Grant, *viz. Conjunctim & divisim, & alterius eorum diutius viventis*, are material: And if one office be granted to two, *Pro termino vitarum ſuarum*, (without more) by the death of the one of them, the Grant shall be void: For being an Office of trust, there shall be no Survivor of it. And in this case no Survivor can be: For inasmuch as it is enacted by the Act of Parliament, by which this new Court was erected, That there shall be two persons, *&c.* who have (as is aforesaid) Judicial voice, the King cannot constitute one onely, for the Subject by the Act hath interest in it, *Et ſecurius expediuntur negotia commiſſa pluribus:* But the King may constitute one at one time by one Patent, and another at another time by another Patent. And although he may so do, yet he who is first constituted, hath not any Judicial voice till the other be appointed; for it is enacted by the Statute, That two persons, *&c.* shall be one Officer: And therefore it was resolved, That these words *Conjunctim & divisim, & alterius eorum diutius viventis*, shall serve to this purpose, That the Survivor shall be one of the persons, to whom another shall be added. [4]

3. It was resolved, That this nomination by the King ought to be under the Great Seal of *England*, and not by word, nor by the Privy Seal, nor Signet, *&c.*

4. It was resolved, That the Grant made by the King to *John Churchil* and *John Tooke* in Reversion, after the death of *Walter Tooke* and *William Curle*, was void for three causes.

First, Because the same is as it hath been said, a Judicial Officer; for Auditors are one of the Judges of the Court: And as none can give any judgment of things which happen *in futuro*, so none can be a Judge *in futuro*; and the rule is, That *Officia judicialia non concedantur antequam vacent:* And great inconvenience would follow thereupon: For he who at the time of the Grant in Reversion, may be able and sufficient to supply the Office of Judicature, and to administer Justice to the Kings people, before that the Office falleth, may become unable and insufficient to perform it. And it was resolved, That neither the Office of Master of the Wards, nor of the Surveyor, nor Attorney of the same Court, can be granted in Reversion, because they are Judicial Offices.

Secondly, Although the Office be in part Judicial, and in part Ministerial, and Offices Ministerial may be granted in Reversion; yet because two persons shall have both these as one Office and one Officer, the same is by the Act of Parliament so entire, that it cannot be divided; for the King cannot make two Auditors of the Ministerial Office, and two as to the Judicial Office, for then there should be four persons, and the Act doth restrain it to two; neither can the King make one person to have the Judicial voice, and the other the Ministerial Office; for then there should be two Officers, and two Offices, and the Act maketh but one Officer; and then the one should have a distinct Office and voice, whereas the Act doth conjoyn them in two persons.

Thirdly, These words in the said Grant in Reversion, *Vel à tempore quo*, &c. *officium illud per mortem forisfactur', ſurſum redditionem, ſeu quemcunque alium modum*, &c. *vacari contigerit*, cannot (if the Ministerial Office might be onely granted in Reversion) take effect by the death of *Walter Tooke*, to make another to exercise the Office with the Survivor, because that a Grant to two; and then if *Walter Tooke* had died during their two lives, there should be three Officers, where the Act restraineth the same to two onely; and although that one dieth, the same doth not make the Grant, which is void at the time of the making of it good. Also the words are, *Quando officium illud*, &c. *vacare contigerit*; and that in this case shall be intended the whole Office; and that is not void till after the death of both the Patentees in possession. [b]

5. It was resolved, When *Walter Tooke* dieth, then *William Curle* doth remain one of the persons, *&c.* and the King may add another to him; and until another be added, his voice is suspended, as in the case of 14 *H.* 4. 35. If a Writ issue to the Sheriffs of *London*, and one

one of them dieth, the other cannot execute the Writ, becauſe that his power is ſuſpended until he have a Companion choſen to him.

6. It was reſolved, That the Grant made to *Richard Percival*, is void: Firſt, becauſe it is a Judicial Office, and (as is aforeſaid) cannot be granted in Reverſion: Secondly, Admitting that it may be granted in Reverſion, the ſame reciteth the Grant made to *John Tooke* and *John Churchil*, as a good Grant, whereas it was void; and the Grant of *Percival* is to begin after that, and ſo the King is deceived in his Grant.

Trin. 10 Jacobi.

Sir *John Heydon*'s Caſe.

[5] SIr *John Heydon* Knight, brought an Action of Treſpaſs of Battery, and wounding (which in truth was in a cruel and barbarous manner) at *Fakenham* in *Norfolk*, againſt *Froxmere Cocket*, *Thomas Cocket*, and *Jeffrey Cobb*; *Froxmere Cocket* appeared, againſt whom the Plaintiff declared with *Simul cum*, &c. And *Froxmere Cocket* pleaded, not guilty, and thereupon *Venire facias* iſſued, *&c.* And *Thomas Cocket* appeared, againſt whom the Plaintiff alſo declared with *Simul cum*, &c. who pleaded alſo not guilty, upon which, another *Venire facias* iſſued; and both theſe iſſues came to tryal at the Aſſizes at *Thetford* in *Norfolk*, *An.* 8. *Jac. Regis*, before the Cheif Juſtice of the *Common Pleas*, and in truth the iſſue againſt *Froxmere* was firſt tryed, and the Jury aſſeſſed Two hundred pound damages; and at the ſame Aſſizes the iſſue againſt *Thomas Cocket* was tryed, and *de bene eſſe* damages were aſſeſſed to Fifty pound; and the cauſe which moved the Jury to extenuate the damages againſt the others, was, That although they were parties, and of one quarrel, yet *Froxmere Cocket* was the moſt malicious and cruel. and he gave the ſaid barbarous and grievous wounds: *Jeffrey Cobb* appeared, and confeſſed the Action, and a Writ of Enquiry of Damages awarded upon the Roll, but none iſſued. And a great queſtion was moved and depended by divers Terms, how, and againſt whom, and for what damages, Judgment ſhould [b] be entred. And at the laſt, upon conſideration had of the Preſidents, and of our Books, it was reſolved by the whole Court, as followeth.

1. When in Treſpaſs againſt divers Defendants, they plead not guilty, or ſeveral Pleas, and the Jury findeth for the Plaintiff in all, the Jurors cannot aſſeſs ſeveral damages againſt the Defendants, becauſe that all is one Treſpaſs, and made joynt by the Plaintiff, by his Writ and Declaration; and although that one of them is more malicious and *de facto* doth more and greater wrong then the others, yet all coming to do an unlawful Act, and of one party, the act of one is the act of all, the ſame party being preſent. And therefore in ſuch caſe, if one onely giveth the mortal blow, whereupon death followeth, it is murder in all who are preſent, and of the ſame party, although the others do not intend to give the blow ſo mortal, as appeareth in *Mackallies* caſe, in the ninth part of my *Reports*: But in Treſpaſs againſt two, if the Jury find one guilty at one time, and another at another time, there ſeveral damages may be taxed; but if the Plaintiff himſelf confeſſeth, that they committed the Treſpaſs ſeverally, there the Writ ſhall abate; and ſo there is a difference by finding by Verdict, and confeſſion of the party. *Vide* 36 *H.* 6. 27. in *Maintenance*, 2. *H.* 7. 16. *b.* Alſo there is a difference betwixt an expreſs confeſſion, and not gain-ſaying, 8 *H.* 6. 13. 10 *Ed.* 4. 8. 11 *H.* 7. by *Mordant*, 8 *H.* 5. 5. 8 *Ed.* 3. 8. *b.* 17 *Ed.* 3. 43. *a.* 21 *Ed.* 3. 13. 18 *Ed.* 3. 49.

2. It was reſolved, That in Treſpaſs againſt two, where one cometh and appeareth, *&c.* againſt whom the Plaintiff declareth *Simul cum*, &c. who pleadeth and is found guilty by the Enqueſt to damages, and afterwards the other cometh, and pleads, and is found guilty; the Defendant who firſt pleaded ſhall be charged with the damages taxed by the former Enqueſt; for the Treſpaſs which the Plaintiff hath made joynt by his Writ and Declaration, and done at one time, cannot be ſevered by the Jury, if the Jury find the Treſpaſs to be done by all at one time, as the Plaintiff hath ſuppoſed. Againſt which it was objected, That the ſame may be miſchievous againſt the Defendant who laſt pleadeth; for exceſſive damages by conſent between the Plaintiff and the firſt Defendant may be found, with which the ſecond Defendant ſhould be charged; and he ſhould not have any remedy for to relieve himſelf by Attaint, in as much as he is a meer ſtranger to the iſſue, upon which the damages were aſſeſſed. But it was reſolved, That in ſuch caſe he ſhould have an Attaint; For although he be a ſtranger to the iſſue, yet becauſe that by the Law he is privy in charge, he ſhall have an Attaint; and therewith agreeth 44 *Ed.* 3. 7. adjudged in the [143] point; and *F. N. B.* 107 *a.* accordingly; and in 44 *Ed.* 3. 6. In Treſpaſs of Battery there is a maxim taken, That in every caſe where the Enqueſt is taken by the Wife of the party, by the ſame Enqueſt damages ſhall be tryed by all. *Vide Paſchæ*, 9 *H.* 6. *rot.* 345. in the *Common Pleas*, *Exoneratio Juratorum de damnis aſſidendis in tranſgreſſione ſuper veredicto ſuo, eo quod prius aſſeſſa fuerat per alium Juratorum verſos alios in le ſimul cum:* But in *Michaelmas*, 39 *H.* 6. 1. in an Action of Treſpaſs againſt many (who had pleaded in Bar the laſt Term) and one of them made default, which was recorded there; It is reſolved by the whole Court, That for ſaving of a Diſcontinuance, a Writ of Enquiry of Damages ſhall be awarded; but none ſhall iſſue, becauſe he ſhall be contri-

contributory to the damages taxed by the Enqueſt, at the coſts of the parties, if they find for the Plaintiff; and if they find againſt the Plaintiff, then the Writ of Enquiry of Damages ſhall iſſue forth. And the reaſon that no Writ ſhall iſſue forth at the firſt, to enquire of the damages, until, *&c.* is becauſe that if a Writ ſhall iſſue, and damages be found, it is but an Enqueſt of Office, and not at the coſts of the parties; and yet the Enquiry (if it ſhould be lawfull) ought to ſerve for all the damages; for the enquiry of them ſhall not be twice, and the others who have pretended to the Enqueſt, if the iſſue be found againſt them, ſhall be chargeable with thoſe damages which are found by Enqueſt of Office; and if they be exceſſive, they ſhould not have any remedy, and yet no default is in them; for they cannot have an Attaint, becauſe it is but an Enqueſt of Office: But in caſe when in Treſpaſs againſt two, they plead not guilty ſeverally, and ſeverall *Venire facias* are awarded; the Enqueſt which firſt paſſed, ſhall aſſeſs damages for all, and the ſecond Enqueſt ſhall not aſſeſs damages; but he ſhall be contributory to the damages aſſeſſed by the firſt, notwithſtanding he be not a party to it; and yet if the damages be exceſſive, he ſhall have an Attaint, and ſo no damages or miſcheif ſhall accrue to him in ſuch caſe. *Vide* 21 *Ed.* 3. 57. And there in the ſaid Book of 39 *H.* 6. 1. *Winſlade* the Prothonotary ſaith, It had been a common courſe here, that ſo ſoon as one hath made default, to award a Writ of Enquiry of Damages againſt him: And according to the ſaying of *Winſlade* in 19 *H.* 6. 8. a Writ of Enquiry of damages is awarded in ſuch caſe, but againſt Law, as before appeareth. And further, in arreſt of Judgment it was moved, That there was a Diſcontinuance againſt *Jeffery Cobb*, and the Diſcontinuance is not helped by the Statute of 32 *H.* 8. nor any other Statute; for the Judgment is given upon confeſſion, and not upon a Verdict. Alſo *Jeffery Cobb* is not party to the iſſue or the Enqueſt which aſſeſſeth the damages. *Vide Mich.* 1 & 2 *Phil.* & *Mar.* An iſſue joined betwixt the Demandant and the Vouchee, is out of the Statute of 32 *H.* 8. and yet he was party to the iſſue, But it was reſolved, That the ſaid Act did extend to the Caſe at Bar, becauſe that *Jeffery Cobb* was party to the Original; and one of the Defendants in the Action; for the words of the Statute of 32 *H.* 8. are, If any iſſue be tryed by oath of twelve or more indifferent men for the Plaintiff or Defendant, or for the party of the Tenant or Defendant, *&c.* So that the Vouchee is out of theſe words; but *Jeffery Cobb* in this caſe is one of the Defendants, and ſo within the words of the Act, and a Verdict in this caſe is given, to which he is ſo privy, that he may have an Attaint. Alſo it was affirmed by all the Prothonotaries, and ſo reſolved, That after the Writ of Enquiry of damages awarded, there is no diſcontinuance after in the *Common Pleas*, betwixt the Plaintiff and the Defendant, againſt whom the Writ of Enquiry, *&c.* is awarded; but the courſe is otherwiſe in the *Kings Bench:* And ſo it was adjudged between *Tooly* Plaintiff, and *Prieſton* Defendant, *Mich.* 29 and 30 *Eliz.* in the *Common Pleas*, and afterwards affirmed in a Writ of Error in the Court of *Kings Bench:* But there are divers preſidents in this Court, that in ſuch caſe diſcontinuances have been taken, which is a ſure way, *Et abundans cautela non nocet.* And afterwards in the caſe at Bar, Judgment was given for Sir *John Heydon* Plaintiff, for the Two hundred pound aſſeſſed, *&c.* againſt all the Defendants: Upon which Judgment, a Writ of Error was brought, and all the ſaid payments were moved and debated again at the Bar, and at the Bench in the *Kings Bench*, and upon good conſideration the Judgment before given, was affirmed by the whole Court. [b]

Note Reader, in *Mich.* 28 and 29 *Eliz.* in the *Kings Bench*, *Richard Gomerſal* brought an Action of Accompt againſt *John Gomerſal* of divers Receipts and Parcels; to all which, but to one, the Defendant pleaded to iſſue (and to one parcel pleaded nothing) and the iſſues were found for the Plaintiff: And it was moved in Arreſt of Judgment, That the Plea was diſcontinued, becauſe he did not anſwer to Parcel, as it is agreed in 7 *Ed.* 4. 24. and 7 *H.* 6. 5, *&c.* And it was objected, That that Diſcontinuance was not remedied by the Statute of 32 *H.* 8. Becauſe that no anſwer is given to one Parcel, and of Parcel the Plaintiff could not have Judgment according to his Declaration; for of the Parcel to which no Anſwer was made, no Judgment can be given.

3. But it was reſolved, and ſo affirmed in the *Kings Bench*, That the Statute of 32 *H.* 8. did extend unto it; for it is thereby Enacted, That after Verdict found, Judgment ſhall be given, any Diſcontinuance, *&c.* notwithſtanding: And accordingly Judgment was given of ſo much as was found by that Verdict. See *Herlakinden's* caſe in the Fourth part of my *Reports.* [7]

4. In the caſe at Bar; for as much as in Judgment of Law, the ſeveral Juries gave one Verdict at one time, the Plaintiff may have Election to have Judgment *De melioribus damnis* by any of the Enqueſts, and the ſame ſhall bind all; but there ſhall be but *unica executio. Vide Mich.* 10 & 11 *Eliz. Rot.* 758. *Hill.* 17 *Eliz. Rot.* 1042. *lib. intrat.* 589. *ſect.* 12. But in the caſe at Bar, in truth the greater damages were firſt taxed. *Vide* 19 *H.* 6. 8. by *Hody.*

5. It was reſolved, That where no Treſpaſs, the Defendants plead ſeveral Pleas all tryable by one Jury, and both the iſſues are found for the Plaintiff, the Jury cannot ſever the damages; and if they do, all the Verdict is faulty, as it appeareth, *Hill.* 43 *Eliz. Rot.* 1694. in the *Common Pleas* between *Auſten* Plaintiff, and *Willard* and two others Defendants in Battery; one pleaded not guilty, and the other pleaded of his own aſſault; and both the iſſues found for the Plaintiff, and ſeveral damages were given againſt them; and *per Curiam* it was not good.

And in this caſe a Record was cited, by which it appeareth, That *Edward Miles* brought Treſpaſs (which began in the *Kings Bench*, 7 *Jac. Regis*, *Rot.* 413.) againſt *Richard Prat*, *Thomas Richardſon* and *Nicholas Babbs*, for breaking and entring of his Cloſe and Houſe at *Nedeham Market*; and for taking and carrying away of a Cubbard of the value of Forty ſhillings, with divers Deeds, Evidences, contained in the ſaid Cubbard; a Copper of the value of Forty ſhillings, a Lead of

the value of Ten pounds, and Forty yards of Wainſcot, of the value of Nine pound, to the damages of the ſaid *Edward* of Two hundred pounds, *Nicholas Babbs* pleaded not guilty generally, *Thomas Richardſon* to all the Treſpaſs, but the breaking and entring the Cloſe and Houſe, pleaded not guilty: *Richard Prat* to all the Treſpaſs but the breaking and entry of the Houſe, and taking and carrying away of the Cubbard and Lead, pleaded not guilty. As to the breaking of the Cloſe and Houſe, *Thomas Richardſon* ſaid, and as to the breaking of the Cloſe and Houſe, and taking and carrying away of the Cubbard and Lead, *Prat* ſaid *actio non*, and pleaded in Bar a Statute
[b] Staple of One hundred and fifty pound, acknowledged by *Miles* to *Thomas Prat*, and that the ſaid Houſe and Cloſe, and the ſaid Copper and Lead *(inter alia)* were extended by force of the ſaid Statute, and by *Liberate* delivered to the ſaid *Thomas Prat*, who died poſſeſſed and inteſtate; and the Adminiſtration of the Goods and Chattels of the ſaid *Thomas* were committed to the ſaid *Richard Prat*; for which, the ſaid *Richard Prat* in his own right, and *Richardſon* as his ſervant entred into the ſaid Cloſe and Houſe, and took the ſaid Copper and Lead, as the Goods and Chattels of the ſaid *Richard Prat*, by reaſon of the ſaid Adminiſtration: *Miles* replyed, That there was no Record of the ſaid Extent and *Liberate* remaining in the *Chancery*. *Prat* and *Richardſon* rejoined, That there was ſuch a Record of the ſaid Extent and *Liberate* remaining in *Chancery*. All theſe Pleas were entred *Mich.* 7 *Jac. Regis*, and day was given to bring the Record *apud Weſtm. die Mercurii proxime poſt Craſtin. Purification. beatæ Mariæ ſuo periculo*; and alſo a *Venire facias* was then awarded for tryal of the ſaid iſſues retornable the ſame day. All which done *Prat* and *Richardſon* failed of the Record, whereupon it was awarded that *Miles* ſhould recover damages, and upon that it was then awarded *Venire facias tam ad triand. exitus prædict. quam ad inquirend. de damnis*, retornable. *Die Mercurii proxime poſt quinden'*, *Paſchæ*. And then it is entred in ſuch manner, *Poſtea continuat inde proceſſus inter partes præd. de prædict. placito per Jurat. poſit. inde inter eas in reſpect. coram domino Rege, apud Weſtm. uſque diem Martis prox. poſt Octab. Sancti Mich. tunc prox. ſequen'*, *Niſi Juſtic. domini Regis ad aſſiſas in Com. prædicto capiend. aſſign. prius die Martii* 24 *die Julii apud Bury St. Edmundi in Com. prædicto performam Statuti*, &c. *Venerint pro defect. Jurat'*, *&c.* At which Aſſiſes all the Iſſues were tryed for *Miles*, and ſeveral damages aſſeſſed as well for the Treſpaſs put in Iſſue tryable *per patriam*, as for the Treſpaſs tryed by the Record; the which Verdict afterwards at the day in Bank was quaſhed, becauſe the Jury had aſſeſſed the ſaid damages ſeverally. *Et quia Juratores prædict. male ſe geſſerunt in verdicto ſuo reddendo*; *Venire facias de novo* was awarded; and upon the ſecond tryal, all the Iſſues were found for the Plaintiff, and entire damages aſſeſſed for the whole Treſpaſs and Coſts of Suit, in the whole amounting to One hundred and fifeteen pound twelve pence: And it was moved in arreſt of Judgment, that there was not any continuance *à termino Paſchæ*, 8 Jac. *Regis*, *uſque terminum Trinitat.* then following;
Nec ab eodem termino uſque diem Martis proxime poſt Octabas Sancti Michaelis tunc proxime ſequentis.
[8] And although there was a full Diſcontinuance in the caſe, and although the Iſſue of *Nul tiel* Record, is not within the Statute of 33 *H.* 8. which ſpeaketh of the Verdict of twelve or more indifferent men: Yet for the Reaſons before rehearſed, Judgment was given for the Plaintiff, and afterwards a Writ of Error was brought upon that Judgment, and the onely Error aſſigned, was the ſaid Diſcontinuance; but for other Errors not aſſigned, as it was openly ſpoken in the Caſe at Bar, the Judgment given in the ſaid Caſe of *Miles*, was reverſed.

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[b]

Mich. 10 Jacobi.

Priddle and *Napper*'s Caſe.

IN an Attachment upon a Prohibition in the *Common Pleas* by *John Priddle*, *qui tam*, *&c.* againſt *Thomas Napper*, Gentleman, Proprietor of the Rector of *Tintenhul* in the County of *Somerſet*, and pleaded, That where one *Robert Sherburn alias Whitlocke*, late Prior of the Priory of St. *Peter* and *Paul* the Apoſtles, of *Mountacute* in the County of *Somerſet*, *ordinis Clunacenſis*, was ſeiſed of Two and twenty Acres of Land, called *Perins-hill alias Guilberts-hill* in *Tintenhul* in the ſaid County, and of the Rectory of *Tintenhul*, *Eidem Prioratui pertin. & ſpectan'*, *ac parcel. eiſdem Priorat. exiſten.* in his Demeſn, as of Fee in the Right of the ſaid Priory. And that the ſaid Prior and all his Predeceſſors, Priors of the ſaid Priory, before the Diſſolution of the ſaid Priory, were Rectors of *Tintenhul* aforeſaid, and had ever enjoyed the Rectory aforeſaid *Simul & ſemel* with the ſaid Two and twenty Acres of Land, *In manibus ſuis propriis in jure Prioratus ſui prædicti. ratione cujus idem nuper Prior & omnes prædict. alii Priores ejuſdem nuper Prioratus per totum tempus prædictum ante prædictum tempus diſſolutionis Prioratus illius, uſque ad tempus diſſolutionis*, &c. *Habuerunt & tenuerunt, ac idem nuper Prior tempore diſſolutionis*, &c. *Habuit & tenuit prædictas viginti & duas acras terræ exonerat'*, *acquietat'*, *& immunes de omnibus & omnimodis decimis*, *&c.* And that the twentieth of *March*, *Anno* 30. the ſaid Prior and Covent by their Deed enrolled in the *Chancery*, gave, granted, and ſurrendred the ſaid Priory,
[9] the ſaid Rectory, Land, and all the poſſeſſions thereof to King *Henry* the Eighth, his Heirs and Succeſſors; and that by force thereof, and of the Statute *Anno* 31 of King *Henry* the Eighth, of Diſſolutions, King *Henry* the Eighth was ſeiſed of the ſaid Rectory, and of the ſaid Land in his Demeſn as of Fee, as in the Right of his Crown; and ſhewed the Clauſe of the Statute *Anno*

31 *Hen.*

31 *Hen.* 8. of diſcharge of payment of Tithes; by force whereof, the ſaid King *Henry* the Eighth was ſeiſed of the ſaid Two and twenty Acres, diſcharged of payment of Tithes, and conveyed the Inheritance of the ſaid Two and twenty Acres to Sir *Thomas Freke*, and others; who 38 *Eliz.* demiſed the ſame to the ſaid *John Priddle* for Ninety and nine years, if three of his Sons or any of them ſhould ſo long live; and added their lives, and that the Defendant *Proprietarius Rectoriæ prædictæ, &c.* before the Biſhop of *Bath* and *Wells* ſued the Plaintiff for Tithe-Corn growing in the Two and twenty Acres of Land, *&c.* And the ſaid *Thomas Napper* to have a Conſultation, alleged a Grant by Letters Patents of Queen *Elizabeth*, in the ſecond year of her reign, of the ſaid Rectory to *Rive* and *Evelin*, and to their Heirs; and by mean conveyance, conveyed the ſaid Rectory to the ſaid *Thomas Napper* in Fee, and that he libelled for the ſaid Tithes, as was lawfull for him to do. *Abſque hoc quod prædictus Prior & omnes prædeceſſores ſui Priores præd. nuper Prioratus à tempore cujus cont. memoria hominum non extitit ante tempus diſſolutionis*, &c. *Nec non uſque ad tempus diſſolutionis*, &c. *Habuerunt & tenuerunt prædict. vigint. & duas acras terræ exonerat', acquietat. & immunes de omnibus & omnimodis decimis quibuſcunque ſuper prædict. vigint' & duas acras terræ quoviſmodo provenient'*, &c. *prout*, &c. *& hoc*, &c. *unde petit Judicium, & breve dicti domini Regis de conſultatione ſibi in hac parte concedi*, &c. Upon which, Iſſue was joyned, and the Jury before the Juſtices of *Niſi prius* gave a ſpecial Verdict, That the Prior and his Predeceſſors, time out of minde, *&c.* untill the time of the Diſſolution, were ſeiſed of the ſaid Two and twenty Acres of Land in their Demeſn, as of Fee in the right of the ſaid Priory; and that *Thomas*, late Prior of the ſaid Priory, was ſeiſed of the Advowſon of the ſaid Church of *Tintenhul* in Fee in the right of his Priory: And he being ſo ſeiſed *H.* 8. the Eighth day of *May*, in the Twentieth year of his Reign, by Letters Patents (the Exemplification of the Enrollment of which he ſhewed forth) *De gratia ſua ſpeciali ac certa ſcientia & mero motu ſuis licentiam dedit præfat. Thomæ tunc Priori nuper Prioratus, & ejuſdem loci Conventui & Succeſſoribus ſuis, quod ipſi & Succeſſores ſui dictam Eccleſiam Parochialem de Tintenhul prædicta, impropriare, conſolidare, incorporare, annectere, & unire, & eam ſic appropriat', conſolidat. incorporat', & unitam, in proprios ſuos uſus tenere poſſint*; with Proviſo to endow a Vicarage, and that a competent annual ſum ſhould be diſtributed to the poor, with uſual *non obſtante:* And that *John* Biſhop of *Bath* and *Wells*, Ordinary of the ſaid place, 4 *Sept.* 1529. by Indentures triparite, *viz.* One part ſealed with the Seal of the Biſhop, the other part ſealed with the Seal of the Prior and Covent of *Bath* (which confirmed the ſaid Indenture) and the third part ſealed with the Seal of the Dean and Chapter of *Wells* (which alſo confirmed the ſaid Indenture) *Eccleſiam parochialem de Tintenhul dictæ noſtræ Dioceſis & ſui Patronatus (ut aſſerunt) dictis Priori & Conventui & Succeſſoribus ſuis & domui ſive Prioratui ſuo prædict. cum conſenſu pariter & aſſenſu metuendiſſimi in Chriſto Principis & Domini Henrici Octavi Dei gratia*, &c. *Authoritate noſtra ordinaria annectimus, appropriamus & unimus per præſentes, ita quod cedente vel decedente Rectore ejuſdem Eccleſiæ Parochialis qui nunc eſt, ſeu aliter ipſa Eccleſia quoviſmodo vacari contigerit, liceat ipſis Priori Conventui ſuiſque Succeſſoribus per ſe vel per alium ſeu alios ipſorum nomine poſſeſſionem dictæ Eccleſiæ Parochialis authoritate propria intrare*, &c. *Et in proprios uſus convertere & imperpetuum retinere*: With Endowment of a Vicarage, and proviſion of a yearly Penſion to the poor: And afterwards the then Parſon of the ſaid Rectory died, after whoſe death the ſaid *Thomas*, Prior of the ſaid Priory, did enter into the ſaid Rectory, and was as well of the ſaid Rectory, as of the ſaid Two and twenty Acres of Land ſeiſed in his Demeſn, as of Fee in right of the ſaid Priory. And afterwards, the ſaid *Thomas* Prior, died, and *Robert* Prior, ſucceeded him. And that the ſaid Prior *Thomas*, and Prior *Robert*, all times after the ſaid Approbation held the ſaid Rectory with the ſaid Two and twenty Acres of Land in their own hands *Simul & ſemel*, in the right of his Priory, and found the Surrender of the ſaid Priory; and that the ſaid King *Henry* the Eighth, the Four and twentieth day of *July*, *Anno* 36 *H.* 8. by Indenture under the Seal of the Court of Augmentations, demiſed the ſaid Rectory to *William Petre*, Doctor of Law for One and twenty years, who aſſigned the ſame over to *Edward Napper*, and that no Tithes were paid untill the ſecond year of the reign of Queen *Mary*, and then the ſaid *Edward Napper* had a ſentence in the Court of Audience againſt one *Thomas Guil*, then Farmer of the ſaid Two and twenty Acres; and that after the ſaid ſentence, untill the Eighth year of Queen *Elizabeth*, Tithes were paid of the ſaid Two and twenty Acres, and conveyed the ſaid Rectory from King *Henry* the Eighth, by mean conveyance to Queen *Elizabeth*, and by the ſaid Letters Patents, and by diverſe mean Conveyances to *Napper*. *Et utrum ſuper tota materia*, &c. *Præd. Robertus nuper Prior & omnes prædeceſſores ſui Priores ejuſdem à tempore cujus contrar'*, &c. *Ante tempus diſſolutionis*, &c. *Nec non uſque ad tempus diſſolutionis*, &c. *Habuerunt & tenuerunt prædict. 22 acras terr' exonerat', acquietat', & immunes de omnibus & omnimodis decimis quibuſcunque*, &c. *Juratores penitus ignorant, & petunt adviſamentum Curiæ in præmiſſis, & ſi*, &c. And this caſe was oftentimes argued at the Bar by the Serjeants, and now this Term it was argued at the Bench. And in this caſe theſe points were reſolved.

[b]

[10]

1. That the Information upon which the Prohibition was granted, was ſufficient in matter: For although that every Pariſh Church is ſuppoſed to be Preſentative, and the Incumbent ought to come in by admiſſion, inſtitution, and induction; yet the Plaintiff in this caſe may preſcribe, That the Prior and his Predeceſſors, *&c.* time out of minde, *&c.* have been Rectors of the ſaid Church; for the ſame doth amount, That the ſame was Impropriate, *&c.* and the beginning of a thing done, time out of minde, cannot be known, *viz.* Whether it came by Union or Appropriation, and therewith agreeth 21 *Edw.* 4. 65. *a.* Where in Treſpaſs for taking of certain Cart-loads of Beans at *Bodman* againſt the Prior of *Bodman*, the Defendant ſaith, That

the Beans were growiug in a certain place in *B.* in the Pariſh of *B.* of which Pariſh he is *perſona impersonata*, *viz.* Incumbent; and he was driven to ſhew how he came to the Parſonage; for which he alledged title by preſcription, and how the Corn was ſevered from the nine parts, and that he took it, and the ſame was allowed for a good title to the Rectory: Wherefore as to this point, the Information was reſolved to be good; but the addition of the Impropriation had made it without queſtion. Alſo it was holden, That the Concluſion of the preſcription of the unity, *viz. Ratione cujus*, the Prior held the ſaid Land diſcharged of Tithes, was not formal; for in truth, by the unity (as it ſhall appear after) the Land was not diſcharged of Tithes, but of payment of Tithes; and ſo are the words of the Statute of 31 *H.* 8. (as alſo ſhall be after ſhewed) But yet it ſeemeth, that for as much as the preſcription it ſelf is well alledged in ſubſtance, ſo as the foundation of the prohibition is well, that the miſpriſion of the concluſion, and conſequence thereupon, ſhall not be a cauſe to grant a Conſultation.

2. That the Defendants Plea *Pro conſultatione habenda* (for he is in a manner an Actor) was inſufficient, becauſe he hath traverſed a thing not traverſeable, for the preſcription of the unity
[b] ought to have been traverſed; and not the concluſion, *viz. Ratione cujus*, and that for divers cauſes; one in Logick, The concluſion of a Syllogiſm cannot be denied, but the Major or Minor propoſition; ſo the ſame holdeth in Law, which is the perfection of Reaſon: And therefore in a *Præcipe* if one plead, That the Mannor of *D.* is Ancient Demeſn, and the Land in demand is parcel of the Mannor, and ſo Ancient Demeſn; the Demandant cannot ſay, That the Land in demand is not Ancient Demeſn, for the ſame is the concluſion upon the precedent propoſitions, *viz.* The firſt, That the Mannor is Ancient Demeſn; the ſecond, That the Land in demand is parcell of the Mannor; for *Sequitur concluſio ſuper præmiſſis*, and therefore it cannot be denied; and therewith agreeth 41 *Ed.* 3. 22. 48 *Ed.* 3. 11. and many other Books: So in the caſe at Bar; the Major. Where there is a perpetual unity of Rectory and Land therein, untill the time of Diſſolution, *&c.* there the Land is diſcharged of Tithes; but here hath been a perpetual unity of the Rectory of *Tintenhul* and the Two and twenty Acres; *Ergo*, the Two and twenty Acres are diſcharged of Tithes; this concluſion cannot be denied. Secondly, It is not onely a concluſion, but a concluſion of Law; and matter in Law ſhall not be put in Iſſue to be tryed by the Countrey; for the Rule is, *Quod quiſque norit, in hoc ſe exerceat*, and therefore, *Sicut ad quæſtionem facti non reſpondent Judices, ita ad quæſtionem Juris non reſpondent Juratores:* and if the Jury take upon them to know the Law, and do miſtake the Law, the Judges of the Law ſhall give Judgment upon the ſpecial matter, according to Law, without having regard to the concluſion of the Jury, who ought not to take upon them the Judgment of the Law; and therewith agreeth, *Plo. Com. Amy Townſhend's* Caſe. *Vide* 5 *Hen.* 7. *Carew's* Caſe. 9 *H.* 6. 38. 13 *H.* 7. 22, *&c.* And the Lord *Barkley's* caſe. *Plo. Com.* 230. One pleadeth a gift to King *Henry* the Seventh, and to the Heirs-males of his body, *virtute cujus* he was ſeiſed in Fee; the other confeſſeth the gift, *virtute cujus* he was ſeiſed in Tail, and no traverſe to the *virute cujus*, for the concluſion is the concluſion of the Law.

3. The Iſſue is not well joyned. Firſt, Becauſe the matter of the diſcharge is by reaſon of unity, which is by force of the Statute of 31 *H.* 8. and not by the Common Law; and Iſſue is joyned upon a diſcharge by the Common Law, *viz.* Preſcription in the Prior and his Predeceſſors to hold the ſaid Two and twenty Acres of Land diſcharged of Tithes, with a diſcharge by the Common Law. Secondly, Every Iſſue ought to conſiſt upon an Affirmative and Negative, and here is not any Affirmatve; for that which cometh after the *ratione cujus* is not alledged *affirmativè* or *poſitivè*, but as a conſequence upon the precedent matter. *Vide* 8 *H.* 6. 6. 36 *H.* 6. 15. 9 *Ed.* 4. 36. 6 *H.* 7. 5. And therewith agreeth the Reſolution of the Judges in the Biſhop of *Canterbury's* Caſe,
[11] in the Second Part of my *Reports*. So that here is not any Iſſue joyned of any matter alledged in the Information.

4. Upon the Verdict divers points were moved at the Bar. Firſt, If the ſaid Appropriation (as it was found) were good, or not. Secondly, If it were not good by the Common Law, if the Statute of 35 *Eliz. cap.* 3. hath ſupplied the Imperfection of it, or not. Thirdly, When the Jury finde ſufficient matter to the Bar Parſon of the Tithes, which was not parcell of their Iſſue, nor within the Iſſue, if without regard of this matter a conſultation ſhall be granted. Fourthly, If by the ſaid Impropriation and Unity, ſo ſmall time before the diſſolution, which could not be above nine or ten years, it ſhould be ſuch a diſcharge of Tithes as is intended within the Statute of 31 *H.* 8.

As to the firſt, it was objected, That the ſame Impropriation was void for two cauſes: 1. Becauſe the King hath given Licence of Impropriation of the Church of *Tintenhul*, by words of the *Preſent tence*, where it appeareth at the time of the Licence given, there was an Incumbent then of the ſame Church; ſo that no Appropriation could be made *in præſenti*, but *in futuro*, by ſpecial words to take after the death of the Incumbent. For as no Appropriation can be made of a Church which is full of an Incumbent, but in ſpecial manner to take effect after the death of the Incumbent: So the Kings Licence (without which the Appropriation cannot be made) ought to be ſpecial alſo; otherwiſe the King is deceived in his Grant, and by conſequence the Appropriation is void; and that no Appropriation can be made without the Kings Licence, *vide* Sir *William Ethingham's* Caſe, in 17 *Ed.* 3. 39. and *Plo. Com.* in *Grendon's* Caſe, *fol.* 493. *b.* And that in ſuch caſe the Appropriation ought to be made in, which ſpecial manner appeareth in *Grendon's* Caſe, and in 8 *Eliz. Dyer* 244. The ſecond cauſe was, That the Appropriation in the Caſe at Bar, was made to take effect in poſſeſſion, and not in ſuch ſpecial manner after the death of the Incumbent, as appeareth before it ought by the Law.

But

But it was resolved, The Appropriation was sufficient in Law: For it is true, that the Licence is general, and therefore it shall be taken in such sense, that it may take effect, and that is to be appropriated after the death of the Incumbent: And when the Letters Patents may be taken to two intents good, in many cases they shall be taken to such intent as is most beneficial for the King; but if Letters Patents may be taken to one intent good, and to another intent void; then for the Kings Honour, and for the benefit of the Subject, they shall be taken in such manner, that the Kings Grant shall take effect; for it was not the Kings meaning to make a void Grant; and therewith agreeth 21 *Ed.* 4. 44. and *Roger* Earl of *Rutland*'s Case, in the Eighth Part of my *Reports*; and in the Lord *Stafford*'s Case, in the same part; and the Case of Sir *John Molins*, in the Sixth part of my *Reports*; and the Lord *Chandos* Case, in the same Part; and the Earl of *Cumberland*'s Case, in the Eighth Part of my *Reports:* And so it was resolved to the principal Case, That the Licence shall be taken to this intent, to take effect after the death of the present Incumbent; and so much the rather, because the Letters Patents were *Ex certa scientia & mero motu*, and therewith agreeth a Record in the Book of *Entries*, *tit' quare impedit*, *division' Appropriation.* Where the License of Appropriation was general, and the Appropriation of the death of the Incumbent in these words, *Volens & concedens ut cedente vel decedente ipsius Ecclesiæ nunc Rectore, quod prædictus Abbas & Conventus ejusdem Ecclesiæ corporalem possessionem apprehenderent, ac fructus, proventus & obventiones perciperent & libere haberent.* And see the same Book, *tit. Droit* 1. [b]

As to the second cause, the same is mistaken; for it appeareth by the Instrument of Appropriation found within the Record, That it was by expres words to take effect after the death of the then Incumbent, *Ita quod cedente vel decedente Rectore dictæ Ecclesiæ qui nunc est, &c.* Another reason was added, That in as much as always the Kings Licence of Appropriation is made to the Body Spiritual, to which the Church shall be appropriated, and not to the Bishop, *&c.* And therefore it shall be presumed, that they would obtain the same in such form that it should avail them. Also the Licence of Appropriation is alwayes generall, and so are all the presidents; for although the Rector be alive at the time of the making of the Licence, he may dye, or resign, *&c.* before the Appropriation.

As to the second point, admitting the said Appropriation had been void, it was objected, that the Act of 35 *Eliz.* hath made it good; For thereby it is enacted and declared, That all Mannors, Lands, Tenements, and Hereditaments, which at any time heretofore were the possessions of any Abbey, Monastery, Priory, *&c.* which after the said Fourth day of *February*, in the Seven and twentieth year of the Reign of King *Henry* the Eighth, were granted or conveyed, or mentioned to be granted or conveyed, in or by any Letters Patents whatsoever, made by the said late King *Henry* the Eighth, to any person, *&c.* were and shall be reputed, taken and adjudged to have been lawfully and perfectly in the actual and real possession of the said late King, his Heirs and Successors, at such time as the same were granted by the said late King. And where it was answered by the Plaintiffs Council, That the said Act of 35 *H.* 8. extended onely to Letters Patents made onely by King *Henry* the Eighth; and the Letters Patents in the Case at Bar, were made by Queen *Elizabeth:* And so out of the said Act of 35 *Eliz.* it was resolved, That in truth the said Act of 35 *Eliz.* did not extend to this Case, but not for the Cause alledged by the Plaintiffs Council: For although it is true, that Queen *Elizabeth* granted the Inheritance of the said Rectory, yet it appeareth by the special Verdict, That King *Henry* the Eighth by his Letters Patents indented, had demised the said Rectory to *William Petre*, Doctor of Law for One and twenty years; and the Act of 35 *Eliz.* doth enact, That all Mannors, Lands, Tenements, and Hereditaments, mentioned to be granted, or conveyed by any Letters Patents whatsoever, made by King *Henry* the Eighth, to any person or persons, Bodies Politick or Corporate, shall be reputed, taken and adjudged to have been lawfully and perfectly in the actual and real possession of the said late King, his Heirs and Successors; in which purveiw four things were observed. [12]

1. The favourable penning of it, *viz.* Mentioned to be granted, although in effect nothing passeth by the Grant.

2. The generality of the words; first, concerning the quality of the Letters Patents, *viz.* In or by any Letters Patents whatsoever, be they under the Great Seal, the Exchequer Seal, the Court of Augmentation Seal, the Dutchy Seal, *&c.* Secondly, concerning the Estate or Interest which is mentioned to pass by the Letters Patents, which is left at large, and is not restrained to any in certain: And therefore if the Letters Patents purport a Grant for life, or for years, the Statute hath as great operation, as to the purview of the Act, as if the Letters Patents had purported a Grant of the Land in Tail, or in Fee.

3. The generality of the Purview; for it doth not extend onely to make the Grant good, but to vest the Mannors, Lands, Tenements, and Hereditaments, of the late Abbots, *&c.* in the actuall and reall possession of King *Henry* the Eighth.

4. Not onely in King *Henry* the Eighth, but to him, his Heirs, and Successors: So that Lands shall be as well vested in the King, his Heirs, and Successors, when the King granteth the Land for life or years, as where he granteth it in Fee-tail or Fee-simple; and so the Purview doth extend to three other Cases.

First, Where any such Laws, Tenements, or Hereditaments, came to the hands or possession of the late Kings *Henry* the Eighth.

Secondly, Or which were put in charge to, or for his Highness in his Court of Exchequer, or any other Courts of his Majesties Revenue.

Thirdly, Or by any Auditor, or other Officer of the said late King; and in every of these

Caſes the Purview hath as great operation, as in Caſes of Letters Patents, as to veſt ſuch Lands, Tenements, or Hereditaments in the King, his Heirs or Succeſſors.

But yet it was reſolved, That the ſaid Act of 35 *Eliz.* did not extend to this Caſe; For the Purview hath a qualification or reſtraint which hath not been mentioned before at the Bar: and that is, That in the ſaid four Caſes, ſuch Lands, Tenements, and Hereditaments, ſhall be reputed, taken, and adjudged, in the actual and real poſſeſſion of the ſaid late King, his Heirs and Succeſſors, at ſuch time as the ſame did ſo come to his Majeſties hands or poſſeſſion, or were ſo put in charge, or granted, or conveyed by the ſaid late King as aforeſaid (then cometh the qualification or reſtraint) notwithſtanding. Firſt, Any defect, want, or inſufficiency of, or in any Surrender, Grant, or Conveyance of the ſaid Mannors, Lands, Tenements, or Hereditaments, or any part thereof to the ſaid late King *Henry* the Eighth. Secondly, Or any other matter or cauſe whatſoever, by which his Highneſs was or might have been entituled to the ſame: So that the ſcope and Purview of the Act was to veſt in King *Henry* the Eighth, all the Lands, Tenements, and Hereditaments, which Abbots, *&c.* had, notwithſtanding the defects aforeſaid: But if the ſaid Appropriation were void, and was not given to the King by the Statute of Monaſteries, then the Prior of *Montacute* in the Caſe at Bar, had nothing in the ſaid Rectory, but the Advowſon onely, and *Jus præſentandi:* But yet the ſaid Act of 35 *Eliz.* is of great uſe and effect. For in as much as the Statute of 31 *H.* 8. gave not to the King any Monaſteries, Priories, *&c.* but onely which had been ſurrendred, granted to the King, *&c.* or were diſſolved; or which ſhould be ſurrendred, granted, *&c.* or diſſolved. This Act in the ſaid four Caſes hath ſupplied the defect or want of a Surrender, Grant, or Conveyance, alſo of an inſufficient Surrender, Grant, or Conveyance; ſo that be there any Conveyance to the King, or not; and if any be, although it be inſufficient, the ſaid Lands, Tenements, and Hereditaments, are actually veſted in the King his Heirs and Succeſſors. Secondly, If the Abbot, Prior, *&c.* had been diſſeiſed; or in any other Caſe, where an Office, *Scire facias*, Seiſure, *&c.* was requiſite to veſt the poſſeſſion in the King; there the latter words, *viz.* Or any other matter or cauſe whatſoever, by which his Highneſs was or might have been entituled to the ſame, did ſupply all ſuch means by which the King might have been lawfully entituled, and put in actual poſſeſſion. *Vide* 33 *Hen.* 8. *Brook, tit. choſe in Action* 14. The Queſtion there made where an Abbot, *&c.* was deſſeiſed, well explained and reſolved. But although that there be defect in the Appropriation, yet (if the Rectory be in reputation appropriate, and ſo hath been uſed) the ſame is given to the King by the Statute of 27 *Hen.* 8. or
[13] 31 *Hen.* 8. And therefore in 19 *Eliz.* in the Dean of *Paul's* Caſe, it was adjudged in the *Kings Bench*, That a Chantery or Colledge in reputation, and not in Law, was given to King *Edward* the Sixth, by the Statute of 1 *Ed.* 6. within theſe words, All and all manner of Chanteries, Colledges, *&c.* 27 *June*, *Anno* 29 *Eliz.* in the Chancery, upon an Aid Pryer of the King, by the courſe of the Common Law; the Caſe was between the Lord St *John*, Plaintiff, and the Dean and Chapter of *Gloceſter*, Defendant, for the Parſonage Impropriate of *Penmark* in the County of *Glamorgan*, becauſe that the Patron (who before the Appropriation, had granted the Advowſon to the Body Eccleſiaſtical, to which the Appropriation was made) in *Anno* 18 *Rich.* 2. was but Tenant in Tail, and yet it alwayes continued as a Church appropriate. It was Reſolved, by Sir *Thomas Bromley*, Lord Chancellour of *England*, *Gilbert Gerrard*, Maſter of the Rolls, *Shute* and *Windham* Juſtices, (which the Lord Chancellour in that Caſe aſſociated unto him) that that Rectory in Reputation was given to the King, by the Statute of Monaſteries.

Another Caſe was *Trin.* 30 *Eliz.* in the Exchequer Chamber, between *T. Grimes* and *H. Smith*, for the Parſonage of *Bulbenham*, in the County of *Leiceſter*, which *Anno* 22 *Ed.* 4. was appropriate to the Abby of *Sulby*, and no Vicarage endowed there, *&c.* according to the purview of the Acts of 4 *H.* 4. 12. 15 *R.* 2. 6. But there had continued a Vicar in Reputation, and the Rectory continued alſo as appropriated; and it was reſolved, That that Rectory was given to the King by the Statute of Monaſteries.

Hill. 4 *Jac.* in the Chancery, between *Bedel* and *Bear* for the Church of *Kumbalton*, which was appropriated in *An.* 40 *Ed.* 3. and the defect was, That *Humphrey de Bohun*, Earl of *Hereford*, (who granted the Advowſon of the ſaid Church to the Body Eccleſiaſtical, to which the Appropriation was made) was but Tenant in Tail; and reſolved clearly, That it was given to King *Henry* the Eighth, by the Statute of Monaſteries.

Note Reader, In the Statute of Monaſteries there is a ſaving of Rights, *&c.* but the Founders, Donors, *&c.* are excepted out of the ſaving; ſo they are bound by the Body of the Act.

As to the third point, upon the Verdict, it was reſolved, That for as much as the eſpecial matter found by the Jury, was not parcel of their charge, nor pertinent to the Iſſue, (admitting, That the ſpecial matter had been ſufficient to have barred the Plaintiff of the Tithes) ſhall not be regarded; for the party grieved thereby cannot have an Attaint, nor the Witneſſes puniſhed for perjury by the Statute of 5 *Eliz.* becauſe the ſaying of the Jury, nor the Teſtimony of the Witneſſes was not material to the Iſſue: ſo that in as much as the Iſſue is joyned upon preſcription in
[b] the Prior and his Predeceſſors, to hold the ſaid Two and twenty Acres diſcharged of Tithes, time out of mind, *&c.* they cannot give in evidence an Unity of the Rectory and Land for ten years onely; that if any colour ſhould be, that the ſame ſhould be a diſcharge, it is not a diſcharge by preſcription, time out of mind by the Common Law, but by the Statute of 31 *H.* 8. So that for the inſufficiency and impertinency of the points and parts of this Prolix Record, the other Juſtices did not ſpeak to the fourth point of the Verdict. But the Cheif Juſtice (for the better direction of this and the other lik Caſes) did declare how that the point had been reſolved before, and the Cauſes and Reaſons of the Reſolution thereof. It was long time in all the Courts

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at *Weſtminſter*, a great Queſtion upon the ſaid breach of the Statute of 31 *H.* 8. and the cauſe of the doubt thereof ſtood upon two conſiderations.

1. Upon the conſideration of the Nature and Qualities of Tithes before the ſaid Act.

2. Upon the words and purview of the Branch of 31 *H.* 8.

And as to the firſt, *Quota pars*, that is, *Decima pars*, which we call Tithes, is an Eccleſiaſtical Inheritance Collateral to the ſtate of the Land, and of their proper nature, due onely to an Eccleſiaſtical perſon by the Eccleſiaſtical Law; and therefore no unity of poſſeſſion can either extinct or ſuſpend them, but they notwithſtanding any unity, do remain *in eſſe*: So that they may be demiſed or granted to any Spiritual man, nowithſtanding any ſuch ſuſpenſion. Tithes are more Collateral to Land then a Warren, which the owner of the Land hath in it: For by the Feoffment of the Land without excepting of the Warren, the Warren is extinct, as it is holden in 35 *H.* 6. 56. But if a Prior who hath a Parſonage impropriate, infeoffeth another of part of the Glebe, yet he ſhall have Tithes againſt his own Feoffment, as it is holden in 42 *Ed.* 3. 13. *a.* And they are not like to a Leet; and yet if the Lord of a Leet purchaſeth Lands within it, his Leet is not ſuſpended, nor (if he make a Feoffment of the Land) his Leet is not extinct, as it is holden in 7 *Ed.* 2. *tit. Avowry* 211. And in 8 *Ed.* 2. *ibid.* 212. But he hath an Inheritance by the Common Law in the Leet, which is diſcendible, and which he may grant over to whom he pleaſe: But ſuch Inheritance a Lay-man cannot have in Tithes by the Common Law, neither ſhall they paſs by ſuch words as Temporal Inheritances ſhall paſs. And therefore *Mich.* 31 & 32 *Eliz.* in a Prohibition betwixt *John Parkins* and *Thomas Hinde*, Parſon of *Babington* in the County of *Somerſet*, the Caſe was, That the ſaid Parſon by Deed indented, did Leaſe his Glebe, *Cum omnibus proficuis & commoditatibus eidem ſpectantibus* for Ninety and five years, rendring rent *Pro omnibus exactionibus & demandis quibuſcunque dictæ Rectoriæ pro clauſo peæditto ſpectantibus*; and the queſtion was, if the Leſſee ſhould have the ſaid cloſe diſcharged of Tithes, during the Term: And it was reſolved by the whole Court, That the Tithes ſhould not paſs by [14] ſuch generall words; and as they are Tithes not ſevered, they are meer Eccleſiaſtical; for the ſubſtraction of which, no remedy lieth by the Common Law. If a Parſon purchaſeth Lands within his Rectory, and leaſeth his Rectory; the Leſſee ſhall have Tithes of the purchaſed Lands, and therewith agreeth 30 *H.* 8. *Dyer* 43. *Vide* 32 *H.* 8. *Brook*, *tit. Diſmes.* Then in as much, that if Tithes be conſidered of themſelves, before the ſeverance of them, they are meer Eccleſiaſtical, and ſo Collaterall to the eſtate of the Land, that no unity can extinguiſh or ſuſpend them, but notwithſtanding ſuch unity, they remain *in eſſe:* Then the words of the Act are to be conſidered, which are, That as well the King, his Heirs and Succeſſors, as all and every ſuch perſon and perſons, their heirs and aſſigns, which have or hereafter ſhall have, any Monaſteries, Parſonages appropriate, or other Hereditaments, *&c.* ſhall have, hold, retain, keep, and enjoy, all the ſaid Parſonages appropriated, *&c.* Houſes, Lands, Tenements, and other Hereditaments, *&c.* diſcharged and acquitted of payment of Tithes, as freely and in as large and ample a manner, as the ſaid late Abbots, Priors, *&c.* had, held, occupied, poſſeſſed, uſed, retained or enjoyed the ſame at the days of their diſſolutions: And upon theſe words, For as much as the unity doth not diſcharge nor ſuſpend the Tithes, but that they were *in eſſe* at the time of the diſſolution: And for as much alſo as theſe words (diſcharge and acquit) imply actuall immunity and freedom; and that the King and his Patentees have not them diſcharged and acquitted, but *ſub modo*, *viz.* In as large and ample manner, *&c.* as the ſaid late Abbots, *&c.* And the ſaid late Abbots held not the ſaid Lands in caſe of Unity diſcharged, but charged with the payment of them; for theſe cauſes ſhortly, it was doubted, If the ſaid Act ſhould extend to the Caſe of a perpetual unity; and it was urged, That if the ſaid Act of 31 *H.* 8. in caſe of perpetuall unity ſhall diſcharge in reſpect of it the Land of Tithes, it ſhould be wrong; and as it is ſaid in *Plo. Com.* in the Earl of *Leiceſter's* Caſe, The Parliament is a Court of moſt high Honour and Juſtice, of which none ought to think a diſhonourable thing. And the *Doctour and Student*, *fol.* 164. *cap.* 55. It cannot be intended, That a Statute which is made by Authority of the whole Realm, as well of the King, and the Lords Spiritual and Temporal, as of all the Commons ſhould do any thing againſt Truth, *&c.* And *Forteſcue. c.* 8. *Prudentiâ etiam & ſapientiâ neceſſario ſtatuta hujus regni referta putandum eſt, dum non unius aut centum ſolùm conſultorum virorum, ſed pluſquam trecentorum electorum hominum, quali numero olim Senatus Romanorum regebatur, ipſa ſunt edita.*

But at length upon great deliberation, it was reſolved and adjudged, That a perpetual unity, time out of mind, *&c.* till the diſſolution ſhould be *prima facie* a diſcharge of the Land of payment [b] of Tithes by force of the ſaid branch of 31 *H.* 8. for divers cauſes.

1. The Statute doth not ſay diſcharge of Tithes, but diſcharge of payment of Tithes, and divers other Reaſons, the cheif of which was, For the infinite impoſſibility, and impoſſible infiniteneſs; ſo that ſuch immunities and diſcharges which Religious Houſes had before of memory, cannot be known. And expreſly it was reſolved, That generall Allegation of Unity at the time of the Diſſolution, *&c.* without adding, That it was perpetuall, was not ſufficient: And although that it had been a perpetual unity, yet if the Farmers of the Lands of the Rectory had paid Tithes before the diſſolution, then the intendment and preſumption of Law, upon the perpetual unity, failed: And all this you may ſee in the Archbiſhop of *Canterbury's* Caſe, in the Second Part of my *Reports:* and divers Judgments and Reſolutions there cited. So that ſuch unity which is within the ſaid branch of the Act of 31 *Hen.* 8. ought to have four qualities. 1. Such unity ought to be *juſta*, righfull and not by wrong. 2. It ought to be *æqualis*, *viz.* Fee in the one, and the other; For if the Abbots, Priors, *&c.* have held by abuſe, time out of mind, *&c.* the ſame is

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not an unity within the Statute. 3. It ought to be perpetual, time out of mind, *&c.* 4. It ought to be *libera*, free of payment of any Tithes: But if their Farmers at Will, for years, *&c.* have paid Tithes to them (as hath been ſaid) the unity perpetual will not ſerve. But it was asked, What if the Appropriation were made in the times of *Ed.* 4. *H.* 6. *H.* 4. *R.* 2. *Ed.* 3, *&c.* and yet in Law, within time of memory; and unity had continued from the time of the Appropriation untill the diſſolution, and Tithes were never paid, neither by the Abbots, *&c.* or their Farmers: Should not the Statute extend to theſe cauſes? And it was anſwered, No, upon the point of unity; For if he will have aid of the Act of 31 *Hen.* 8. the unity as hath been ſaid, ought to be perpetual. But in ſuch caſe, here may be alledged the ſaid branch of the Act of 31 *H.* 8. concerning the diſcharge of payment of Tithes, *&c.* and that the Abbots, *&c.* time out of time, *&c.* untill the diſſolution, have held the Land diſcharged of Tithes as he may well preſcribe by the Cummon Law) and give ſuch evidence, that he may approve it: And ſo if in truth, the Land be diſcharged, he hath ſufficient remedy to relieve himſelf. See the Biſhop of *Wincheſter*'s Caſe, in
[15] the Second Part of my *Reports:* But if the Abbey or Priory, *&c.* were founded within time of memory, there he cannot preſcribe at all. And foraſmuch as in the principall caſe, the Appropriation was made in 20 *H.* 8. ſo that it appeareth to the Court, that before that time the Two and twenty Acres were charged with Tithes; for of Common Right, Tithes ought to be paid: For that cauſe the Cheif Juſtice did conclude, That the Two and twenty Acres were as this caſe is chargeable with Tithes; but if the parties be not herewith ſatisfied, they may begin again: For in as much as the Information, as it is reſolved, is good; and the Plea, *Pro conſultatione habenda*, altogether inſufficient; and the Verdict impertinent to the Iſſue, they would not grant a conſultation; and thereunto the whole Court agreed.

[*b*] *Mich.* 7 Jacobi.

Which is entred in the *Common Pleas. Paſchæ*, 11 Jac. *Rot.* 2559.

Doctour *Grant*'s Caſe.

THe Caſe was, That *Gabriel Grant*; Doctour in Divinity, Parſon of the Pariſh of St. *Leonard* in *Foſter-lane*, *Infra præcinctum Sancti Martini* the Grand, did Libell in the Spiritual Court before Doctour *Maſter*, Official of the Dean and Chapter of *Weſtminſter*, againſt *Edward Tailor*, Farmer of a great and ancient Houſe, called the Deans Houſe, within the Precinct of St. *Martins le Grand*, late parcell of the poſſeſſions of the Abbot of *Weſtminſter*: And alledged, That every Pariſhioner or Inhabitant having, or occupied a Manſion-Houſe, Shops, Ware-Houſes, Cellers and Stables, within the ſaid Pariſh of St. *Leonard*, within St. *Martins le Grand*, yearly every quarter of the year, at the Feaſts of *Eaſter*, the Birth of Chriſt, St. *John the Baptiſt*, and St. *Michael*, time out of mind, *&c.* or at leaſt from the Foundation, Dotation, and Erection of the ſaid Rectory of St. *Leonard*, by equall portions to the Parſons of the ſaid Rectory for the time being, *Nomine & loco decimarum ſuarum, juxta ratam cujuſlibet viginti ſo-*
[16] *lidat. redditus per annum, ex qualibet hujuſmodi domo, ſhopa, ſollar', cellar', ſive ſtabulo ſic tent. ſive occupat. in prædicta parochia, duos ſolidos legalis monetæ Angliæ, &c.* And that the ſaid *Edward Tailor* and his Family, did dwell in the ſaid Houſe three years, and had poſſeſſed the ſame for the ſame time *Sub annuali redditu ſexdecim librarum ſeu ſaltem* 12 *librarum, &c.* and ſo demanded Two ſhillings in the pound, *&c.* The ſaid *Edward Tailor* did exhibite an Information and Suggeſtion to the Court, That the late Abbot of *Weſtminſter*, and all his Predeceſſors, till the diſſolution of the ſaid Monaſtery which was *An.* 30 *H.* 8. had held the ſaid Houſe diſcharged of Tithes, and alledged the Statute of 31 *H.* 8. concerning the diſcharge of payment of Tithes, and conveyed to himſelf a leaſe for years, and thereupon had a Prohibition; to which the ſaid Doctour *Grant* approved, and *Tailor* declared againſt him to the effect aforeſaid, and Doctour *Grant* traverſed the ſaid Preſcription of diſcharge of Tithes; whereupon Iſſue was joyned, and tryed before me in *London* for Doctour *Grant*: And now it was moved by *Tailor*'s Councel, That upon the ſaid Libel, no Conſultation ought to have been granted; for of common right, no Tithes ought to be paid for Houſes of Habitation, nor for any Rent reſerved upon any Leaſe of them; for Tithes ought to be paid of things which grow and renew year by year by the act of God, *Vide Regiſter.* 54 *b. F. N. B.* 53. *tit. Diſmes* 16. and not for dwelling-houſes, or of Rents iſſuing out of Lands, reſerved and created onely and meerly by the Act of the party: And therefore in the City of *London*, the Parſons have Two ſhillings and eight pence in the pound, *&c.* in name of Tithes; but the ſame is by Decree made *Anno* 1535. which is enacted and confirmed by Authority of Parliament, *An.* 37 *H.* 8. *c.* 12. But St. *Martins le Grand* is not included within the ſaid Decree and Act, for the ſame is within *London*, and not of it; and therefore it remaineth at the Com-

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mon Law. And in 30 *Ed.* 3. *fol.* 1. *a.* and 38 *Ed.* 3. *fol.* 13. by *Finchden* it is ſaid, That the profits of the Churches in *London*, are the Oblations and Obventions.

But it was reſolved by the whole Court, That a Conſultation ſhould be granted, for it may have a lawfull beginning; for it may be, that for all the Tithes of the Land, upon which the Houſes are built, this *Modus decimandi* hath time out of mind been paid; and although the ſame be after built, it ſhall not take away the right of the Parſon in ſuch caſe. And becauſe it might have a lawfull beginning, and that the ſame hath been uſed time out of mind, *&c.* For this cauſe it was reſolved, That a Conſultation ſhould be granted.

It was reſolved, That for theſe moneys he might ſue in the Eccleſiaſticall Court, becauſe they are in the nature of Tithes, *viz.* *Modus decimandi*; and every ancient City and Borough hath for the moſt part ſuch Cuſtom *De modo decimandi* for their Houſes, for the maintenance of their Parſon. [b]

And as to the opinions in 30 *Ed.* 3. and 38 *Ed.* 3. it was ſaid, That *Obventio dicitur ab obveniendo*, and includeth Oblations, Rents, or other Revenues, which may well agree with the Reſolution before; and afterwards Conſultation was granted.

Mich. 11 Jacobi.

[17]

Sir *Henry Nevil's* Caſe.

Paſchæ, 9 *Jac. Regis*, *Rot.* 925. In a ſecond Deliverance between *Alexander Goodcrome*, Plaintiff, and *Henry Moor*, Defendant, in the *Common Pleas*, upon the long and intricate Record, the Caſe was ſuch. Sir *Henry Nevil* Knight, was ſeiſed of the Mannor of *Wargrave*, which extended into *Warfield*, and divers other Towns in his Demeſn as of Fee; whereof a Houſe, a yard of Land, and eighteen Acres of Lands were parcell. And *Alexander Goodcrome* alleged a Cuſtom in this manner, *viz.* That in the ſaid Mannor of *Wargrave* there is, and time out of mind, *&c.* here was a Cuſtomary Mannor, *viz.* The Mannor of *Warfield*; which Mannor of *Warfield*, for all the time aforeſaid, did conſiſt of Demeſn Lands, and Services Cuſtomary, *viz.* Of the aforeſaid Meſſuage, and yard of Land, and of eighteen Acres of Land, and all Rents and other the appurtenances cuſtomary in *Warfield*, to the ſaid cuſtomary Mannor appertaining; *Et quod prædict. tempore quo, &c.* *Necnon*, time out of mind, *&c.* divers parcells of the ſaid Meſſuage, and yard of Land aforeſaid, and of the ſaid eighteen Acres, were cuſtomary Lands of the ſaid Mannor of *Warfield*, and demiſed and demiſable by Copy of Court Roll of the ſaid Mannor of *Warfield*, by the Lord of the ſaid Mannor, or by the Steward of the Lord of the ſaid Mannor, for the time being, to divers perſons willing to take the ſame, in Fee ſimple, for life or years, at the will of the Lord, according to the cuſtom of the ſaid Mannor, *&c.* And that the ſaid Mannor of *Warfield*, is, and for all the time aforeſaid, was parcell of the ſaid Mannor of *Wargrave*, holden of the ſaid Mannor of *Wargrave* by Copy of Court Roll of the ſaid Mannor of *Wargrave*, and demiſed and demiſeable by Copy of Court Roll of the ſaid Mannor of *Wargrave*, by the Lord of the ſaid Mannor, or by his Steward for the time being, to any perſon or perſons willing to accept the ſame, in Fee-ſimple, for life or years, at the Will of the Lord, according to the cuſtom of the ſaid Mannor of *Wargrave*, by the name of one Meſſuage, and one yard of Land, and of eighteen Acres of Land, and all Rents, and other appurtenances in *Warfield*. [b]

And Sir *Henry Nevil* at the Court of his Mannor of *Wargrave*, *An.* 28 *Eliz.* did grant to *Robert Albany* the Mannor of *Warfield*, by the name of *Unius Meſſuagii, unius virgatæ terræ & 18 Acr. terræ, & omnium reddit. & aliorum pertin. in Warfield*, To have and to hold to the ſaid *Robert Albany* and his heirs, at the Will of the Lord of the Mannor of *Wargrave*, according to the Cuſtom of the ſame Mannor: And the ſaid *Alexander* further ſaid, That within the ſaid Mannor of *Wargrave* there is, and time out of mind, *&c.* there hath been a cuſtom, That every Cuſtomary Lord of the Mannor of *Warfield*, by his Steward, hath uſed and accuſtomed to hold a Court within the ſaid Mannor of *Warfield*, for and concerning his Cuſtomary Tenants of the ſaid Mannor of *Warfield*, according to the Cuſtom of the ſaid Mannor of *Warfield:* And that the ſaid two Acres, with the appurtenances in which, *&c.* are, and time out of mind, *&c.* were parcell of the ſaid Cuſtomary Mannor of *Warfield*, and demiſed and demiſeable, *&c.* And the ſaid *Goodcrome* did claim by Grant, by Copy, the ſaid two Acres made by the Steward of the Lord of the ſaid Cuſtomary Mannor of *Warfield*; and iſſue was taken. Whether within the ſaid Mannor of *Wargrave* there is, and time out of mind, *&c.* there was a Cuſtomary Mannor, *viz.* The Mannor of *Warfield* demiſed and demiſeable by Copy of Court Roll of the ſaid Mannor of *Wargrave*, provided, *&c.* And the Viſne was *De vicineto manerii de Wargrave*, and the tryall was at the Bar, and the iſſue was found for *Goodcrome* the Plaintiff, *viz.* That there was ſuch a Cuſtomary Mannor; and it was moved in Arreſt of Judgment, That there could not be ſuch a Cuſtomary Mannor by Law; for of a Copyhold (which is but a tenure at will) there cannot be Lord, Meſn, and Tenant; but of a Freehold at the Common Law.

But it was reſolved by the whole Court, That a Cuſtomary Mannor may be holden by Copy, and ſuch Cuſtomary Lord may hold Courts, and grant Copies, and ſuch Cuſtomay Mannor ſhall paſs by Surrender and Admittance, and fines ſhall be paid upon Admittance as well upon Alienation as Diſcent. And there may be Lord Cuſtomary Meſn, and Cuſtomary Tenant, as well in caſe where the Meſnalty is a Tenant at Will according to the cuſtom of the Mannor, as well as where there is a Tenancy at Will, at the Common Law of a Mannor. And if ſuch Cuſtomary Mannor be forfeited, the Lord ſhall have the Cuſtoms and Services appertaining to it; As if Tenant at Will of a Mannor grant Copies, and reſerve Rent and Services, theſe Rents and Services are annexed to the Mannor, and ſhall attend upon the owner of the Mannor after the will determined, although that the Lord of the Mannor doth not claim by or under, but above him and without any privity of eſtate: So in caſe of him who is Tenant for life or years of a Mannor, the Rents and Services reſerved by them, ſhall go to them in the Reverſion: And ſo note a difference betwixt a Reſervation at the Common Law, and by the Cuſtom of the Mannor. And afterwards a Writ of Error was brought, and the ſame matter aſſigned for Error, which was cleary over-ruled by the whole Court of *Kings Bench*; and Exception was alſo taken to the Viſne, that it ſhould be alſo of *Warfield*, but it was not allowed; for the iſſue riſeth upon the Cuſtom within the Mannor of *Wargrave*, and it appeareth that the Tenements in *Warfield* are parcell of the Mannor of *Wargrave*; and thereupon the Judgment was affirmed: And it was ſaid that the Mannor of *Aileſham* in the County of *Norfolk*, is holden by Copy, and other Mannors in other places.

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[b] # *Hill.* 11 Jacobi *Regis.*

Doctor *Ayray*'s Caſe.

John Alcock, Gentleman, brought an Action of Treſpaſs againſt *Henry Ayray*, Doctor of Divinity, *William Witham*, *William Parſons*, and *Thomas Prieſt* (which Plea began in the *Kings Bench*, *Trin. 9 Jac. Regis*, *Rot.* 43.) And declared of a Treſpaſs the firſt of *March*, in the Eighth year of the King in a Houſe of the Plaintiff, called the Parſonage Houſe, and the Plaintiffs Cloſes, *viz.* One called the Parſonage Cloſe, and another containing ten Acres of Glebe Lands at *Charleton* upon *Otemore*, in the County of *Oxford*. The Defendants pleaded *Not guilty*, and a ſpecial Verdict was given to this effect, That the places in which, *&c.* were parcell of the Glebe of the Rectory of *Charleton* upon *Otemore*; whereof the ſaid *Henry Ayray* at the time of the Treſpaſs, *&c.* was, and yet is Parſon. And that King *Edward* the third in the Fourteenth year of his Reign by his Letters Patents under the Great Seal, *Ad honorem Dei, & augmentation. cultus Divini, de gratia ſua ſpeciali conceſſit & licentiam dedit Roberto de Egleſfield Clerico ipſius nuper Regis, quòd ipſe in quodam Meſuagio ſuo cum pertin. in Oxon. in Parochia Sancti Petri in oriente, quandam Aulam Collegialem de Scholaribus, Capellanis, & aliis, perpetuis temporibus duratur', ſub nomine Aulæ Scholaribus Reginæ de Oxon', quæ per unum Præpoſitum de dictis Scholar. juxta ordinationem præfati Roberti inde faciend. gubernabitur, conſtruere & de novo fundare, ac meſuagium illud cum pertin. præfatis Præpoſito & Scholaribus dare poſſit & aſſignare, Habendum* [19] *& tenendum ſibi & ſucceſſoribus ſuis Præpoſitis & Scholaribus, Aulæ illius pro eorum inhabitatione imperpetuum. Et eiſdem Præpoſito & Scholaribus, quòd ipſi meſuagium prædictum a præfato Roberto recipere poſſint & tenere ſibi & ſucceſſoribus ſuis prædictis, ſicut prædictum eſt, tenore preſentium licentiam ſimiliter dedimus ſpecialem. Et memoratam Aulam cum Præpoſito & cæteris ſociis per electionem in futurum habitantibus & morantibus in eadem, quos ad verum Collegium erigimus & exiſtere extunc præponimus, & ut Collegium licitum & approbatum agnoſcimus, authoritate noſtra plena qua poſſumus, acceptamus, ratificamus, & confirmamus: Statut. de terris & tenementis ad manum mortuam non ponendis edit', aut quocunque alio ſtatuto vel ordinatione in contrarium factum non obſtante. Nolentes quod prædictus Robertus vel hæredes ſui, ſeu præfatus Præpoſitus & Scholares aut ſucceſſores ſui ratione præmiſſorum, &c. occaſionentur, moleſtentur in aliquo, ſeu graventur, &c.*

Further they found, That King *James* that now is, 11 *October*, *Anno* 8. of his Reign, had exemplified under the Great Seal the ſaid Charter in the Records of the *Chancery*, enrolled in the *Tower* of *London*. And in the Exemplication, the Clauſe of *ſub nomine*, was, *ſub nomine Aulæ Reginæ de Oxon'*, whereas in truth the Charter was *ſub nomine Aulæ Scholarium Reginæ*; ſo that this word (*Scholarium*) was in that Clauſe omitted.

And further they found, That the ſaid *Robert Egleſfield*, *Poſtea virtute licentiæ prædictæ fundavit Collegium prædict. in Oxon. prædict', & condidit diverſas leges & ſtatuta pro regimine Collegii prædicti & ſcholarium in eo allocat. & allocand. prout patet ex Rotulo patentium de Anno 1 Regis Rich. 2. Juratoribus prædictis in evidenc. oſtens*; the Tenor of which is entred in the ſpecial Verdict *in hæc verba:* By which it appeareth, That the ſaid *Robert de Egleſfield* by the ſaid Charter did nominate the ſaid Colledge, *Aula Reginæ æternaliter nominand'*, and *Scholares* alſo he nominated in divers places *Socii*; and by the ſaid Deed conſtituted divers Ordinances and Statutes, for the better Government of the ſaid Colledge. And the Jury further found, That King *Henry* the Eighth was ſeiſed of the Advowſon of *Charleton* upon *Otemore* aforeſaid,

ſaid, in Fee in the right of his Crown, and 4 *July*, 35 of his Reign, granted the ſaid Advowſon to *Richard Andrews* and *Nicholas Temple*, and their Heirs, who by their Deed 8 *July*, 35. granted the ſaid Advowſon to *William de Devendiſh*, and *Francis Shaw*, and their Heirs. And that 8 *July*, 1509. one *Hugh Hodgeſon tunc Præpoſitus Aulæ præd. & Scholares ejuſdem Aulæ, per nomina Hugonis præpoſit. Collegii Reginæ in Univerſitate Oxoniæ & Sociorum & Scholarium ejuſdem Collegii*, by their Deed under their Common Seal, did preſent one *Allen Scot* to the ſaid Church, then void, who was admitted, inſtituted, and inducted; and that the ſaid *Allen Scot*, 20 *May*, *Anno* 10 *Elizabeth*, (the ſaid *Allen* then being Parſon of the ſaid Church, and Provoſt of the ſaid Hall) by his Deed demiſed the ſaid Rectory of *Charleton* upon *Otemore* to *William Shillingford* for Eighty one years, and afterwards, *viz.* the thirtieth day of the ſame month of *May*. The Provoſt of the Hall or Colledge aforeſaid, and the Scholars of the ſaid Hall, by the name of Provoſt, Fellows, and Scholars of the Hall or Colledge of the *Queen* in the Univerſity of *Oxford*, Patrons of the Rectory of the Church of *Charleton ſuper Otemore*, by writing under their Common Seal, confirmed the ſame Demiſe; and that *Hugh* Biſhop of *Oxford*, Ordinary of the ſaid place, confirmed it alſo in the ſaid tenth year, in the life of the ſaid *Allen Scot*; and that *Allen Scot* died. After whoſe death, the ſaid *Henry Ayray* was lawfully, the ſaid Church being then void, preſented, inſtituted, and inducted; and that the ſaid *Henry Alcock* had the Eſtate and Intereſt of the ſaid *William Shillingford*, who entred into the ſaid Rectory, and was thereof poſſeſſed. And that the ſaid *Henry Ayray* then being Parſon, and the other Defendants, by his commandment entred into the Tenements, in which, *&c.* upon the poſſeſſion of the ſaid *Henry Alcock*; and the Queſtion which the Jury referred to the Court, was, Whether the ſaid Demiſe of the ſaid Rectory, were well confirmed or not. And it was objected, That as well the ſaid Confirmation, as the ſaid Preſentation, were utterly void, by reaſon of the miſtaking of the true name of the Corporation: And therefore the firſt Queſtion which was made, was, What was the true name of the Corporation; and they conceived, That the true name of the Corporation was *Præpoſitus & Scholares Aulæ Scholarium Reginæ de Oxon'*; and that name they collected out of the words of the Charter it ſelf, That the King did Licence the ſaid *Robert Egleſfield* to Found *Quandam Aulam Collegialem de Scholaribus*, &c. *ſub nomine Aulæ Scholarium Reginæ de Oxon'*, *quæ per unum Præpoſitum de dictis Scholaribus*, &c. *gubernabitur*. Then the ſame being the true name, betwixt the true name of the Corporation and the ſaid Confirmation, five differences were obſerved, [20] three in Addition, one in Alteration, and one in Omiſſion.

[b]

In Addition, firſt of the word (*Sociorum*) for the Confirmation is, Provoſt, Fellows, and Schollars, where it ſhould be Provoſt and Schollars.

Secondly, Of theſe words, (*vel Collegii.*)

Thirdly, Of this word (*Univerſitate.*)

In Alteration, *viz.* (*de*) for (*in*) for the true name of the Corporation was *de Oxon.* And the Confirmation was in *Univerſitate Oxon.*

In Omiſſion, of this word (*Scholarium*) in a Material place, where it ſhould be *Aulæ Scholarium Reginæ.* it is *Aulæ Reginæ.*

And in the Preſentation, divers variances were obſerved; one Alteration, *viz. Collegii* for *Aulæ*; and the other miſpriſions, in Addition, Alteration and Omiſſion.

And all theſe were argued at the Bar by *Coventry* and *George Croke*, on the Plaintiffs part, and by *Thomas Crew* and *Telverton*, Solicitor for the Defendant; and all the ſaid Variances, but one, were reſolved by all the Juſtices to be without any queſtion, and not worthy of Argument; and were not of any force to impeach the ſaid Confirmation or Preſentation: And the onely point, which had any ſcruple, was the ſaid Variance of leaving out (*Scholarium*) after this word (*Aulæ.*) And the ſame doth depend onely upon the conſideration of the true name of the Corporation; and what diverſity was betwixt this Caſe, and the Caſe of *Fiſher* and *Boys*, reported by me in the Tenth part of my *Reports*, in the Caſe of the Major and Burgeſſes of *Lynne*, you may ſee there; which Caſe was affirmed by all the Juſtices to be good Law.

And yet it was reſolved, That in the Caſe at Bar, as well the Confirmation as the Preſentation, was good enough, notwithſtanding the Omiſſion of the Iteration of this word (*Scholarium.*) For it was reſolved, That upon conſideration of the ſaid Charter of King *Edward* the Third, and of the ſaid Inſtrument of the ſaid *Robert de Egleſfield*, the true name of the Corporation was *Præpoſitus & Scholares Aulæ Reginæ de Oxon'*; for it appeareth by the Charter, it ſelf required onely once *Scholares*, and not any double Iteration of it (which was ſaid was *Oculus quæſtionis*) and that for divers Reaſons.

1. That in the clauſe of *ſub nomine*, this word is but once mentioned.

2. Although that in the *ſub nomine* it is ſaid *Aulæ Scholarium Reginæ*, yet in Conſtruction, as in many Caſes is uſed, it ought to precede theſe words *Aulæ Reginæ*; and that for three Cauſes.

First, Otherwiſe it ſhould be a ſole Corporation conſiſting upon a Provoſt onely; for then the Corporation ſhould be *per nomen Præpoſiti Aulæ Scholarium Reginæ*, and not a Corporation aggregate of many, as every one hath agreed it was.

[b]

Secondly, Preſently after theſe words, *Sub nomine Aulæ Scholarium Reginæ*, theſe words were added, *Quæ per unum Præpoſitum de dictis Scholaribus*, &c. *gubernabitur*: So that it clearly appeareth, that this word (*Scholares*) was but once mentioned in the Corporation.

Thirdly, Such conſtruction is directly by the three Interpreters *Omni exceptione majores*, *viz.* Of *Edward* the Third, in his Charter, the ſaid Founder *Robert Egleſfield* in his Inſtrument of Foundation, and the Incorporation it ſelf.

1. In the Charter in the next ſubſequent words, it is ſaid, *Ac Meſuagium illud cum pertin. præfat. Præpoſito & Scholaribus dare poſſit*, &c. Where theſe words *Præpoſit. & Scholares* are joyned together; alſo there the *Habendum* is *Habendum & tenendum ſibi & ſucceſſoribus ſuis, Præpoſitis & Scholaribus Aulæ illius.* In which words the King not onely doth conjoin the ſaid words together, but alſo the giveth precedency to this word *Scholaribus*, before *Aulæ illius*, and no mention of theſe words after, alſo *Nolentes quod præfat. Præpoſitus & Scholares aut ſucceſſores ſui*, &c.

2. In the Inſtrument of the ſaid *Robert Eglesfield*, the Founder doth ordain, That the ſaid Colledge ſhall be always called *Aula Reginæ*, and not *Aula Scholarium Reginæ*; and he ſaith, *Aula Reginæ æternaliter nominanda.*

3. The Incorporation it ſelf, from the ſaid time of Incorporation, never accepted any Grant, or made any Grant with double iteration of this word (*Scholares*) but with a ſingle mention of it onely, as appeareth by many, and almoſt infinite preſidents: Alſo it was never called in Vulgar Appellation, *Queens Schollars Colledge*; neither doth any one know it by ſuch name, but every one doth know it by the name of *Queens Colledge.* And by this determination of the true name, it appeareth, That there is not any affinity betwixt the ſaid Caſe of *Fiſher* and *Boys*, and the Caſe at the Bar; for there is a double iteration of this word (*Scholares*) in two materiall places, and in the Caſe but onely one ſingle mention of it.

And as to the other Variances, it was reſolved, That none of them were materiall.

For firſt, *Nomen eſt quaſi rei notamen*, and *Nomina ſunt notæ rerum*, and were invented to make a diſtinction between perſon and perſon; and in the Caſe at Bar, the Colledge was called by ſuch name that it might be well diſtinguiſhed from every other Colledge in the ſame Univerſity.

Secondly, Although it be ſaid in 21 *Ed.* 4. 55. and other Books, that the name of Incorporation is like the name of Baptiſm: Yet if the perſon be ſo deſcribed, that he may be certainly [21] known from other perſons, the Omiſſion, or in ſome Caſe the miſtaking of the name of Baptiſm ſhall not avoid the Grant; as a gift *Omnibus filiis J. S.* or *primogenito filio J. S.* or *uxori* of *J. S.* or *filiæ* of *J. S.* when there is but one, &c. 37 *H.* 6. 10. 11 *Ed.* 4. 2. 18 *Ed.* 3. 30 *Ed.* 3. 18. 12 *Aſſ.* 16. and in 27 *Ed.* 3. 385. The name of Baptiſm of the the Abbot of *W.* was *Richerus*, and he by the name of *Richardus*, Abbot of *W.* made a Grant; and although his name of Baptiſm was miſtaken, yet becauſe the other words, *viz.* Abbot of *W.* did certainly deſcribe the perſon; for this cauſe the Grant, notwithſtanding the miſtaking of the name of Baptiſm, was good. So if a Grant be made to *J. S. Et Margaretæ uxori ſuæ*, where the Wives name is *Margery*; or to *J. S. Et Mariottæ uxori ſuæ*, where the Wives name is *Marion*, yet the Grant is good; although the name of Baptiſm be miſtaken, becauſe *uxori ſuæ* is a certain deſcription of the perſon. 1 *H.* 5. 8. 46 *Ed.* 3. 22. 1 *Aſſ.* 11. 12 *Aſſ.* 16. 9 *H.* 7. 9. 3 *H.* 6. 25. 12 *R.* 2. *Feoffments & Faits* 58. 22 *Edw.* 3. *Brief* 936. 9 *Edw.* 3. 14. 46 *Edw.* 3. 22. 14 *H.* 7. 21. So (King) is a name of Incorporation; yet a Grant made to the King by the name of (Sovereign Lord *James*) omitting this word King, is good enough: For, *Nihil facit error nominis cum de corpore conſtat*; and this was an old and conſtant opinion in the Caſe of Corporations. And therefore in 26 *Ed.* 3. 66. 67. *Iſabel*, Queen of *England*, brought a Writ of Covenant againſt *William*, Prior of *Coventry*, for that *Hugh*, Prior of *Coventry*, his Predeceſſour, and his Covent, did ſubmit themſelves to the Award of the ſaid Queen and her Council, for the Heritage which was of *R. N.* in *Coventry*, *Et partibus adjacentibus*; and of the Queens Tenements in *Coventry*, and of thoſe which were in aid of her, and alſo of the Tenements of the Prior of *Coventry*, and which were in aid of him; and the Deed of Covenant, was *Hugh*, Prior of our Lady of *Coventry*. *Mutford* who was of Council with the Defendant, you have omitted in your Writ and Count (Our Lady) Judgment for the variance betwixt the Corporation and the Specialty: To which *Green* of the Plaintiffs Council ſaid, That the Prior, and alſo the Church of *Coventry*, is founded by the name of St. *Michael*, and ſo I cannot have a Writ according to the Specialty; for you may abate the Writ, notwithſtanding the Deed ſhall be good; and *Mutford* by the Rule of the Court was put to Anſwer; for which cauſe he pleaded other matter. So that in thoſe days the miſtaking of the name of the Saint, to whom the Corporation was dedicated, was not ſufficient to make void the [b] Deed; becauſe that *Hugh*, Prior of *Coventry*, was a certain deſcription of the Corporation. But he might abate the Writ, becauſe he might purchaſe another Writ. See *F. N. B.* in the Writ *de Corodio habendo*, the name of the Saint omitted.

And where there was a Prior of Our Lady of *Southwark*, and a Prior of the *Trinity* of *London*; and the ſaid Prior of Our Lady of *Southwark*, of old time by the name of the *Cannons* of *Southwark*, granted by their Deed to the other Prior, by the name of *Cannons* of *London*, An Annuity, &c. The ſame was adjudged good in 17 *Edw.* 3. 32. For although the preciſe name of the Corporation was not purſued, and the Saint to whom the Houſe was dedicated left out; yet becauſe that in truth the Prior of each of the Houſes was one of the Cannons thereof; for that cauſe (for as much as *conſtabat de perſonis*) prudent and grave Antiquity did adjudge ſuch a Grant good.

Alſo it appeareth in our Books, that the name of the Corporation of *Templers*, was, *Magiſter Militiæ Templi de Jeruſalem in Anglia & confratres ſui*, 3 *E.* 3. 11. 5 *Edw.* 3. 36. 31 *Edw.* 3. *Tryal* 99. And the name of the Corporation of the Priory of St *Johns* of *Jeruſalem*, *Prior Hoſpitalis Sancti Johannis de Jeruſalem in Anglia & confrates ſui*, as appeareth in 44 *Edw.* 3. Then the Statute *de Templariis* is worthy of conſideration, *Anno* 17 *Edw.* 2. in the preamble, of which mention is made, *De adnullat. ordinum Militiæ Templi & de fratribus ejuſdem ordinis*, and

and in the Body of the Act, *Ordo Militiæ Templi & de fratribus ejuſdem ordinis.* And it is Enacted by the ſame Act, *Quod omnia terræ tenementa*, &c. *quæ fuerunt dictorum Templariorum, aſſignentur & liberentur ordini fratrum Hoſpitalis Sancti Johannis Jeruſalem. Habend. & tenend. eiſdem Priori & fratribus & ſucceſſoribus ſuis, de Domino Rege & aliis Dominis feodorum prædict', per illa eadem ſervicia per quæ fratres ordinis Militiæ Templi ea tenuerunt:* In which Act, although the Makers of the Act do not follow the preciſe words of the Corporation, either of the Templers or Hoſpitalers; yet becauſe they were ſo certainly deſcribed, *Quod conſtat de perſonis*, the words of the ſaid Act were ſufficient to transfer the Poſſeſſions, *Magiſtri Militiæ Templi Jeruſalem in Anglia & confratrum ſuorum, Priori Hoſpitalis Sancti Johannis Jeruſalem in Anglia & confratribus ſuis.* And ſo hath it been alwayes allowed in our Books. 1 *Edw.* 3. 9. 3 *Edw.* 3. 11. 5 *Edw.* 3. 36. 35 *H.* 6. 46. *Vide* 2 *Edw.* 4. 24. *John*, Abbot of *D.* maketh an Obligation by the name of *J. C. Clericus de D.* and held good; and yet the Abbot is a dead perſon, as to all reſpects, but to ſuch Acts which he doth as Abbot: And a man may have a Writ of Right of Advowſon, *De Advocatione Eccleſiæ de D*; and then if there be two Churches in one Town, the Tenant ſhall have the veiw; but if there be two Churches in one Town dedicated to two ſeverall Saints, for example, St *Mary* and St. *Peter*, then if a Writ be brought *de Advocatione Eccleſiæ Sanctæ Mariæ de D.* the Tenant ſhall not have the view; So by that appeareth, That in a Writ of Right of Advowſon, wherein the Advowſon of the Church ſhall be recorded, the Demandant may in his Writ, add or omit the name of the Saint at his pleaſure. 48 *Ed.* 31. 21 *Ed.* 3. 57. 36 *H.* 6. 16. *Regiſtr.* 33. & *F. N. B.* 49. *Si Præbendarius Præbendæ de N. in Eccleſia Sancti Petri Eborum*, without ſaying *in Eccleſia Cathedrali*, which is in truth its right name. So there *in Eccleſia Sancti Pauli London'*, and *in Eccleſia beata Mariæ Lincoln'*, &c. And in 18 *Ed.* 3. *fol.* 10, & 11. the Caſe was, That in the Town of *Toft Newton* there was two Churches, one of St. *Michael*, the other of St. *Peter* and St. *Paul:* And the truth was, That *Toft-Newton* was one Town, and in that was a Church known by the name of the Church of *Toft-Newton*; and in *Newton*, which was a Hamlet of *Toft-Newton*, was another Church known by the name of *Newton* onely; and there a *Quare impedit* was brought *ad Eccleſiam de Tof-Newton*, without ſaying more, and well, although the Saint was omitted; becauſe there was a ſufficient difference by which the Church, whereof the Writ is brought, may be known. And therefore *Wilby*, Cheif Juſtice, who gave the Rule, ſaid, That the Church is certain enough; for which cauſe, anſwer. And there Iſſue was taken not of the name of the Town, but of the ſirname of the Church, *viz.* That there were two Churches in *Toft Newton*, without that that any of the Churches beareth the name of *Newton.* And in 17 *Ed.* 3. 48. one was named *Burgenſis de novo Caſtro ſuper Tinam*, and Exception was taken, That *Burgeſs* ought to be of a Town certain, and not of a Caſtle, *Sed non allocatur*; for the ancient Judges of the Law did reject ſuch niceties concerning Appellations or Names. [22]

And as to the Addition of this word *(Sociorum)* in the Preſentation, the ſame doth not impeach the Preſentation; for notwithſtanding this Addition, the Colledge is certainly enough deſcribed, that it may be diſtinguiſhed from every other; and for any thing that appeareth in the Caſe, *Socii & Scholares* may be *Synonima:* And in the ſaid Charter, the King nameth *Scholares* by the name of *Socii*, *Vide* 20 *Ed.* 4. 20. according to the Reſolution.

And for the Addition of *(Univerſitate)* it was clearly over-ruled, as before it was in the ſaid Caſe of *Fiſher* and *Boys*, and for the Reaſons and Cauſes there rehearſed.

So for the Addition of theſe words *(vel Collegii)* after this word *(Aulæ)* and for putting of this word *(Collegii)* in the place of *(Aulæ)* none of theſe have any colour of any materiall variance, but they are they the ſame *re & ſenſu.* And the ſaid King *Edward* the Third in his Charter called the ſaid Hall a Colledge, as in truth it is. [b]

And I have the briefer reported this Caſe, becauſe I have publiſhed the Caſe of the Major and Burgeſſes of *Lynne*, in the laſt part of my *Commentaries*, which ſtands in effect upon the ſame Argument; and divers Judgments cited there, do tend to the ſame end.

[23]

Trin. 12 Jacobi.

Henry Harpur's Caſe.

IN an *Ejectione firmæ* between *John Werral* Plaintiff, and *Henry Harpur* Eſquire, and *Barbara* his Wife, Defendants, which began *Trin.* 11 *Jac. Regis*, *Rot.* 553. in the *Kings Bench*. The Plaintiff declared, That were *Thomas Seylyard*, Eſquire, and *Elizabeth* his Wife, 24 *May*, *Anno Regni Domini Jacobi*, *nunc* 11. *apud Bredon*, in the County of *Leiceſter*, by their Indenture, *&c.* ſhewed forth, demiſed to the ſaid *John*, a Houſe, thirty Acres of Land, ten Acres of Meadow, and twelve Acres of Paſture, with the appurtenances in *Workington in Parochia de Bredon*, in the County aforeſaid: And alſo *unam capellam cum pertin. in Workington in Parochia de Bredon prædict'*, *nec non omnes & omnimodas decimas quaſcunque annuatim provenient. in Workington & Willeſdon prædict. in Parochia de Bredon prædict. in Com. prædict. per nomina totius illius Meſuagii, cum omnibus domibus*, &c. *clauſis terris, pratis, paſtur', communis, & hæreditamentis illic pertinen. in campis ſeu hamlet. de Workington in Parochia de Bredon in com. prædict'*, *ac etiam per nomina omnium & omnimodarum decimarum quarumcunque annuatim creſcen. in hamlet. de Workington & Willeſdon in prædict. Parochia de Bredon*, *cum pertin'*, *habend. & tenend. tenementa & decimas prædict. cum pertin'*, from the Feaſt of the Annunciation of our Lady, then laſt paſt, for ſeven years; by force whereof, the ſaid *John Wirral in tenementa & decimas prædicta*, 24 *die Maii*, *Anno* 11. *ſupradict. intravit, & fuit inde poſſeſſ. quouſque prædict. Henricus & Barbara poſtea*, *viz.* *Eodem* 24. *die Maii*, *Anno* 11. *ſupradicto apud Bredon prædict. vi & armis in tene-*
[b] *menta & decimas prædict. cum pertinen. ſuper poſſeſſionem ipſius Johannis inde intraverunt*, and did eject him to his damages of forty pound. And upon *Not guilty* pleaded, the Jury gave a ſpecial Verdict to this effect. *Henry Beaumont*, Knight, was ſeiſed in Fee of the Mannor of *Gracedieu*, in the County of *Leiceſter*, and held the ſame of the King by Knights Service *in capite*; and was alſo ſeiſed in Fee of the Mannor of *Normanton*, in the County of *Derby*, and held the ſame of the King by Knights Service *in capite*. And the firſt day of *October*, 2 *Jacobi*, by Indenture, bearing date the ſame day and year, in conſideration of a marriage to be ſolemnized between him and *Barbara Faunt*; and for the advancement and preferment in living of ſuch Iſſue which he and the ſaid *Barbara* ſhould have, did Covenant and Grant with *Andrew Noel* and *Henry Haſtings*, Knights, and their Heirs, That the ſaid *Henry Beaumont* and his Heirs, would ſtand ſeiſed of the ſaid Mannors, to the uſes following, *viz.* Of the ſaid Mannor of *Gracedieu* to the uſe of the ſaid *Henry Beaumont*, and the Heirs-males of the body of the ſaid *Henry*, upon the body of the ſaid *Barbara* to be begotten; and afterwards to the uſe of *John Beaumont*, his ſecond Brother and the Heirs-males of his body; and after to the uſe of *Francis Beaumont* his younger Brother, and the Heirs-males of his body; and afterwards to the uſe of the right Heirs of the ſaid Sir *Henry*. And of the Mannor of *Normanton* to the uſe of the ſaid *Henry* and *Barbara* for the Joynture of the ſaid *Barbara*, and to the Heirs of the body of the ſaid *Henry*; and afterwards to the uſe of the ſaid *John Beaumont*, and to the Heirs-males of his body, and afterwards to the uſe of the right Heirs of the ſaid Sir *Henry*: And afterwards the ſaid Sir *Henry* married the ſaid *Barbara*.

And the Jury further found, That one *Edward Sharp* was ſeiſed in Fee of the ſaid Tenements and Tithes ſpecified in the Declaration, *&c.* and held them of our Sovereign Lord the King, as of his Mannor of *Eaſt-Greenwich* in Free-Soccage by Fealty onely; and 7 *Martii*, *Anno* 3. *Domini Regis nunc*, by his Indenture, bearing date the ſame day and year, and enrolled according to the Statute, in conſideration of One thouſand two hundred and twenty pounds, bargained and ſold unto the ſaid Sir *Henry Beaumont* and his Heirs, the ſaid Tenements and Tithes, in which, *&c.* by force whereof he entred, and was ſeiſed thereof in his Demeſn as of Fee. And afterwards the ſaid Sir *Henry*, 7 *July*, *Anno* 3. made his laſt Will and Teſtament in writing, and thereby deviſed that his Executors ſhould ſell the ſaid Tenements and Tithes, in which, *&c.* And made his Siſter *Elizabeth*, *John Town*, and *Edward Sharp*, his Executors. And the ſaid
[24] Sir *Henry* ſo being ſeiſed of the Mannors, Tenements, and Tithes, as is aforeſaid, 7 *July*, *Anno* 3. *ſupradicto*, died thereof ſeiſed, having Iſſue on the body of the ſaid *Barbara*, one *Barbara* his Daughter and Heir. And that the ſaid Mannor of *Gracedieu* at the time of the making of the ſaid Indenture, and at the time of the death of the ſaid Sir *Henry*, was of the yearly value of thirty pound; and that the Mannor of *Normanton* was then of the yearly value of eighteen pound; and that the Tenements and Tithes, in which, *&c.* were then of the yearly value of three pound: And that the ſaid Executors for money, ſold the Tenements and Tithes, in which, *&c.* to *Thomas Wroth*, Eſquire, and *William Towſe*, Eſquire, and their Heirs, who conveyed them to *Elizabeth*, one of the ſaid Executors, and her Heirs, who married *Thomas Seylyard*, who made the Leaſe, ſpecified in the Declaration to the Plaintiff, *Prout*, *&c.* by force, whereof the ſaid *John Wirral* entred into the ſaid Tenements and Tithes, in which, *&c.* and was poſſeſſed thereof, till the Defendants *Vi & armis* into the Tenements and Tithes did enter and eject the Plaintiff, and ſo ejected and put out of his poſſeſſion; did hold him out, and yet do hold him out: And if upon the whole matter the Defendants

fendants were guilty, or not, the Jury prayed the Advice of the Court. And after that this Caſe had been argued in ſeverall Terms at the Bar, and this Term by the Juſtices at the Bench, It received the ſame Reſolution which was in *Lovie*'s Caſe, which I have publiſhed in the Ninth Part of my *Reports*; and therefore I will make a more Summary Report of this Caſe

And in this Caſe it was firſt reſolved, That if the Kings Tenant by Knights Service *in Capite*, convey his Lands holden *in Capite*, To one of his ſons in Fee, or to the uſe of his Wife in Fee, *&c.* and afterwards he purchaſeth Lands holden in Soccage, That in this Caſe he may by his Will in writing, deviſe all the Land in Soccage for the Reaſons and Cauſes in the ſaid *Lovie*'s Caſe.

Secondly, That the Reverſion of the Fee which the ſaid Sir *Henry* hath expectant upon the Eſtates in Tail, ſhall hinder the Deviſe of the other Lands for a third part of the other Lands holden in Soccage; although upon the Creation of the ſaid Eſtate of the Mannor of *Normanton*, to him and his Wife, and the Heirs of his Body; the King is to have a third part in Ward during the life of the Wife, by the Statute, for the ſame Eſtate, upon which the Reverſion doth depend; and although it be a ſick Reverſion without Rent, or any profit.

Thirdly, That although the Reverſion of the Fee doth continue in him, yet he may deviſe two parts of the Lands new purchaſed; and if he grant over the Reverſion in Fee, he might have deviſed all the Land in Soccage purchaſed after. [b]

Fourthly, That although he hath executed his power for more then two parts, to the uſe of his Wife; yet for the Lands in Soccage which he purchaſeth after (if the Reverſion had not continued in him) he might have deviſed the whole, notwithſtanding the Execution of his power before. And foraſmuch as the Reverſion of the Fee doth continue in the Caſe at Bar, the Deviſe was good for two parts; and the ſame Reaſons were given for all theſe Reſolutions in that Caſe at Bar, which are reported in *Lovie*'s Caſe.

Fifthly, It was objected, That nothing paſſed to *John* and *Francis*, Brethren of the ſaid Sir *Henry*, for two cauſes.

1. Becauſe they were not within the conſiderations expreſſed, *viz.* For the advancement of the ſaid *Barbara*, and of the Iſſues which he ſhall beget on the body of the ſaid *Barbara*; ſo that the Brothers are out of the conſideration; For *expreſſum facit ceſſare tacitum.* And therefore if I Covenant by Deed indented, that in conſideration of One hundred pound paid to me by my ſon, That I will ſtand ſeiſed to the uſe of him and his Heirs; if the Deed be not enrolled according to the Statute, nothing ſhall paſs, becauſe that the expreſs valuable conſideration doth take away the tacite and implyed conſideration of bloud; and no other conſideration can be added, then is contained in the Deed, becauſe that the ſubſtance of the Agreement is by aſſent of the parties referred to the Deed.

2. It is not found *de facto*, that the ſaid *John* and *Francis* were his Brethren, and ſo by the Covenant nothing veſts in them in Remainder; and then when Sir *Henry* dieth without Iſſue-male, the Mannor of *Gracedieu* doth diſcend to *Barbara* in Fee-ſimple; ſo that a full third part, and more doth diſcend to her: For which cauſe the Deviſe ſhall be good for all the ſaid Lands and Tithes, in which, *&c.* holden in Soccage; and ſo Judgment ſhall be given for the Plaintiff for the whole.

But it was reſolved, That the uſes were well raiſed to the Brothers in Remainder, and a Judgment was cited in this Court in Debt between *Elizabeth Bedel*, Plaintiff, and *Michael Bedel*, Defendant, which began *Hill.* 1 *Jac. Rot.* 375. and is in the Seventh Part of my *Reports*; whereupon the Record of the Caſe was ſuch. *Robert Bedel* ſeiſed in the Fee of a Houſe, *&c.* in *Juer* and *Langley*, in the County of *Buckingham*, had iſſue by *Elizabeth* his Wife, three Sons, whereof *James* was the ſecond, and the ſaid *Michael* Defendant the third; by Deed indented, tripartite between the ſaid *Robert* and his Wife of the firſt part, and the ſaid *James* his ſecond ſon of the ſecond part, and the ſaid *Michael* his ſon on the third part, in conſideration of natural affection, and fatherly love which he had to the ſaid *James* and *Michael*: And for their better preferment and advancement, the ſaid *Robert* did covenant with the ſaid *James* and *Michael*, That he and his Heirs would ſtand ſeiſed of the ſaid Houſe, *&c.* to the uſe of himſelf for life, and afterwards to the uſe of the ſaid *Elizabeth* his wife for life; and afterwards of one moyety to the uſe of the ſaid *James* in Tail, and of the other moyety unto the uſe of the ſaid *Michael* in Tail; and afterwards *Robert* died, and all this matter was found by ſpecial Verdict; and the ſole queſtion of this Caſe was, If any uſe ſhould be raiſed to *Elizabeth* his Wife. And the two objections were moved againſt the Wife, which have been made againſt the Brothers in the Caſe at Bar. [25]

And it was reſolved, as to the firſt, That the conſideration that ſhe was his Wife, was apparent in the Deed, and no other conſideration was expreſſed to raiſe a Uſe to her, but that ſhe was his Wife: And therefore if the Caſe which hath been put, ſhould be admitted, where the Father doth covenant by Deed indented with his Son, in conſideration of One hundred, that he will ſtand ſeiſed to the uſe of him and his heirs; that in that Caſe the Deed ought to be enrolled, or nothing ſhall paſs: Yet it is not to be likened to the Caſe at Bar, becauſe that there is a valuable conſideration expreſſed in the Deed to be given by the Son; but ſo it is not in the Caſe at Bar. And a conſideration which ſtandeth with the Deed, may be added notwithſtanding, that it is not contained in the Deed, as it is adjudged in 3 & 4 *Ph. & Ma. Dyer* 146. *Viller*'s Caſe, and ſo reſolved in the Firſt Part of my *Reports*, in *Mildmay*'s Caſe.

As to the ſecond, it was reſolved, That it needeth not to be added that ſhe was his Wife, for the

the ſame is apparent in the Deed, *Et Manifeſta probatione non indigent. Vide* 13 *H.* 4. 17. in Aſſiſe of *Mortdanceſter.* 46 *Ed.* 3. 33 *H.* 6. 13. 3 *H.* 6. 32. *Plo. Com.* in *Talbot's* Caſe, *&c.* That things apparent need not to be added; and if it be truth ſhe was not his wife, the ſame ſhall come in of the other part; and for theſe cauſes it was adjudged, That the Uſe was well raiſed to the ſaid wife. Upon which Judgment, a Writ of Error was brought in the *Exchequer* Chamber, *Mich.* 5 *Jac.* And after divers Arguments heard at the Bar, the Judgment was affirmed for the Reaſons and Cauſes aforeſaid, *una voce* by all the Juſtices of the *Common Pleas*, and Barons of the *Exchequer.*

Sixthly, It was reſolved, That for the Mannor of *Gracedieu*, the Eſtate-tail did vaniſh by the death of Sir *Henry*, without Iſſue-male; and therefore ſuch Eſtate-tail which ſo vaniſheth by his
[b] death, is not any cauſe to reſtrain the Deviſe for any part, as oftentimes it hath been reſolved; but the Reverſion in Fee in this Caſe, is the cauſe to reſtrain the Deviſe for the third part: So that it was reſolved upon the whole matter, That the Plaintiff ſhould have Judgment for two parts againſt the Defendants. But the Chief Juſtice well obſerving the Declaration, and the Viſne, in the concluſion of his Argument, moved theſe Exceptions.

1. That the *Ejectione firmæ* is brought *De omnibus & omnimodis decimis in Workington*, *&c.* without ſaying, *garbarum*, *fœni*, *lanæ*, *agnellorum*, or any certainty of the nature or quality of the Tithes, whereof a certain Judgment may be given, or Execution had, *Habere facias poſſeſſionem*; and the ſame appeareth in the Aſſiſe brought *De quadam portione Decimarum*, *&c.* in 7 *Ed.* 6. *Dyer* 84. And although that the certain number of them ſhall not be expreſſed, for the fruitfulneſs or barrenneſs may encreaſe or diminiſh them; yet the ſeverall kinds ought to be expreſſed. Alſo it may be, That all the Tithing doth conſiſt in *modo decimandi*, by payment of a yearly ſum in ſatisfaction of Tithes, whereof no *Ejectione firmæ* lieth. And the Statute of 32 *H.* 8. which giveth the Action for Tithes, gives it as they ſhould or might do for Lands; but in an Action for Lands, the Plaintiff ought to ſhew the quality or nature of them, as Land, Meadow, Paſture, Wood, *&c.* *Paſchæ*, 5 *Jac. Regis*, The Counteſs of *Oxford* brought a Writ of Dower to be endowed of Predial Tithes, *&c.* within ſuch a Town: And in the ſame Caſe it was holden, That the moſt certain Aſſignment is of the third Sheaf; for if the Garbs of the third part of the Arable Land be aſſigned, it is in the Election of the Terre-Tenant, whether he will ſow the ſame, or not. So *Mich.* 3. & 4. *Eliz.* reported by Serjeant *Benlows* for Law, in Dower of a Mill in *Wadeſmil* in the County of *Hertford*, the Aſſignment was of the third part *Molendini*, viz. *De integro Molendino per quemlibet tertium menſem*, *&c.*

2. It is not formal to bring an *Ejectione firmæ de una capella*, but it ought to be by the name of a Houſe.

3. The Viſne was *de vicineto Parochiæ de Bredon*, which was ill awarded: For firſt, the Leaſe and the Ejectment alſo were alleaged to be done in *Bredon* which ſhall be intended to be a Town, and the Houſe and Lands are alleaged to be in *Workington* (which alſo ſhall be taken for a Town) in the Pariſh of *Bredon*; ſo that now it appeareth to the Court, That there is a Town called *Bredon*, a Pariſh called *Bredon*, and *Workington* a Town in the Pariſh of *Bredon*, and the Tithes were alleaged to be in *Workington* and *Willeſdon* (which alſo ſhall be intended to be a Town) *in Parochia de Bredon*: So that the Viſne ought not to be out of the Pariſh of *Bredon*, but out of *Bredon*, *Workington*, and *Willeſdon*; for the Viſne ſhall be always awarded out of the place, which containeth the
[26] moſt certainty. And although that *Workington* and *Willeſdon* are called Hamlets in the *pernomen*, yet the Court ought to adjudge upon that which is alleaged by the Plaintiff in his Declaration. And the Chief Juſtice ſhewed the reaſon that moved him to take theſe Exceptions, which was, That if they ſhall give Judgment, it might be reverſed by a Writ of Error for theſe cauſes, which might be a blemiſh in time to come to their Reſolution concerning the matter in Law: For which cauſe, with the conſent of the whole Court, for the cauſe aforeſaid, no Judgment was entred. But it was ſaid at the Bar, That the *Court of Wards* where a Bill doth depend for this matter, (and by order of which Court, the matter in Law was to be adjudged by the Common Law) would take order for the poſſeſſion accordingly.

Trin. 12. *Jac.*

Henry Pigots Caſe.

BEnedict *Winchombe*, Eſquire, brought an Action of Debt againſt *Henry Pigot*, which was entered. *Trin.* 11. *Jac. Regis*, *Rot* 566. in the *Kings Bench*, upon an Obligation made to the Plaintiff in Sixty pound, 2 *May*. 8 *Jac.* The Defendant without demand of Oyer of the Obligation, or Condition pleaded *Non eſt factum*. And the Jury gave a ſpecial Verdict to this effect, That the Obligation was made to the plaintiff in the manner he had declared, and found the Obligation in theſe words. *Noverint univerſi per præſentes nos Goergium Watkins, Generoſ. Henricum Pigot de Civitate Oxon' Draper, & Johannem Pyme de eadem Civitate Cordwayner teneri & firmiter obligari Benedicto Winchomb armig' in* 60 *libris, &c.* And in truth, the Plaintiff was Sheriff of the County of *Oxford*, and the Condition of the Obligation was, That the ſaid *George Watkins* ſhould appear in the *Kings Bench*, *Menſe Paſchæ*, to anſwer to *George Cottle* in a Plea of Treſpaſs; and that the ſaid Obligation was delivered by the ſaid *Henry Pigot*, as his Deed to the uſe of the Plaintiff; and that after the delivery of the Deed, theſe words following, *viz.* (*Vice-Com' Comitatus Oxon'*) were inſerted and enterlined in the ſame writing after the ſaid words (*prædictum Benedicto Winchcomb armig'*) and before the ſaid words (*in ſexaginta libris*) before in the ſaid Obligation mentioned, without the knowledge and privity or command of the ſaid *Benedict*; And whether upon the whole matter, *&c.* it ſhall ſeem to the Juſtices and Court, that the ſaid writing be the Deed of the ſaid *Henry*, or not, the Jury know not, and pray the Advice of the Court, *&c.* And in this caſe theſe points were reſolved. [b] [27]

Firſt, When a Legal Deed is raſed whereby it becometh void, the Obligor may plead, That it is not his Deed; and give the matter in evidence, becauſe at the time of the Plea pleaded, it is not his Deed.

Secondly, it was reſolved That when any Deed is altered in a point material by the Plaintiff himſelf, or by any ſtranger without the privity of the Obligee, be it by interlineation, addition, raſing, or by the drawing of a Pen of a line through the midſt of any material word, that the Deed thereby becometh void: As if an Obligation be to be made to the Sherif for appearance, *&c.* and in the Obligation the Sheriffs name is left out; and after the delivery thereof, his name is inſerted or enterlined, either by the Obligee or a ſtranger, without his privity, the Deed is void. So if an Obligation be raſed, by which the firſt word cannot be ſeen, or if it be drawn with a Pen and Ink through the word, although that the firſt word be legible, yet the Deed is void, and ſhall never make an Iſſue, whether the ſame were in any of the Caſes altered by the Obligee himſelf, or by a ſtranger, without his privity: So if one make an Obligation of ten pound, and after the ſealing of it, ten pound is added, and it is made twenty pound; it is void. So if the Obligor himſelf altereth the Deed by any of the ſaid ways; although it be in words not material, yet the Deed is void: But if a ſtranger without his privity altereth the Deed by any of the ſaid ways in any point not material, it ſhall not avoid the Deed. *Vide Dyer.* 9 *Eliz. fol.* 261, *b.* And therefore in the principal caſe, the addition by a ſtranger, without the privity of the plaintiff, being in a point not material for any thing that appeareth to the Court; for this cauſe, Judgment was given for the Plaintiff; and ſo you will the better underſtand the Book in 14 *Hen.* 8. *fol.* 25. *b.* And in this caſe it was moved at the Bar, when a Deed ſhall be good in part, and void in part: As to that, I conceive, there is a difference, when a Deed is void *ab initio*, and when it becometh void by Miſfeſance *ex poſt facto*. Alſo there is a difference when the Deed which is void in part *ab initio*, doth conſiſt upon the entierty, and when upon divers ſeveral Clauſes; and in theſe alſo there is a difference, when the ſeveral Clauſes are abſolute and diſtinct, and when they are ſeveral, and yet the one hath dependency upon the other.

As to the firſt, it is agreed, in 14. *Hen.* 8. 25. 26. *&c.* That if any of the Covenants of an Indenture, or the Conditions endorſed upon an Obligation, are againſt Law, and ſome good and lawful; that in this Caſe the Covenants or Conditions which are againſt Law, are void *ab initio* and the others ſtand good. So if three diſtinct obligations be written upon one piece of Parchment and one of them is red only to the Obligee, and he being a Layman not lettered, ſealed this Deed, it is good for that which was read, and *ab initio* void for others: And this caſe is agreed by *Brudnel* and *Pollard*, in 14 *Hen.* 8. 26. in 9 *Hen.* 5. *fol.* 15. One brought Debt for twenty pound againſt another, and declared upon an Obligation of the ſame ſum; the Defendant pleaded, That he was a Layman, and could not read, and that he did acknowledge to be boud to the Plaintiff by the ſame Deed in twenty ſhillings which he hath paid, and ſhewed an Acquittance thereof; and as to the remnant of the ſum in the ſaid Obligation, it was not his Deed, and the ſame was holden a good Plea; Which Caſe being of an entire ſum, proveth without queſtion, That if there be two abſolute and diſtinct clauſes in a Deed, and the one be read to the party not lettered, and the other not, that the Deed is good for the clauſe which was read, and *ab initio* void for the reſidue: And although that the Deed conſiſting upon an entire ſum, was void for all, as it is agreed in 14 *H.* 8. & 30 *Ed.* 3. 31. yet it was wiſely done by the Defendants Council in 9 *Hen.* 5. to plead the truth of his Clients caſe, and not to leave the matter upon any queſtion in Law, when the truth of the matter would take away all queſtions, in 30 *Ed.* 3. *caſu ultimo*. In Aſſiſe before *Stuffe* and others in the Country, the Defendant pleaded a Feoffment of the Plaintiff to him by Deed of the Land, To [b]

have and to hold to him and his heirs, comprehending a Letter of Attorney for to deliver Seiſin, *&c.* And in truth, the Plaintiff was a Layman not lettered, and that the Deed made with Warrant of Attorney was read to him, according to the form of an Eſtate-tail, and that upon the ſame intent, he ſealed and and delivered the Deed with the Letter of Attorney in it, to make Livery of Seiſin: And in that caſe, although the Clauſe of Feoffment in Fee, and the Warrant of attorney, are two diſtinct Clauſes; yet foraſmuch as the Warrant of Attorney doth depend upon the Feoffment, and hath relation to an Eſtate in Fee, although it were well and truly read; all was adjudged to be void: And *Thorp* Juſtice ſaid, That every Deed ought to have writing, ſealing, and delivery, and when any thing ſhall paſs from them who had not underſtanding but by hearing onely, it ought to be read alſo: And it is true, that he who is not lettered, is reputed in Law
[28] as he who cannot ſee, but hear onely; and all his underſtanding is by his hearing. And ſo a man who is lettered and cannot ſee, is as to this purpoſe taken in Law for a man not lettered: And therefore if a man be lettered, and be blind, if the Deed be read unto him in other manner, he ſhall avoid the Deed, becauſe all his underſtanding in ſuch caſe is by his hearing, as it was reſolved in the caſe of *John Shuter*, of the County of *Wilts*, in the *Star-Chamber*, *Mich.* 9. *Jac. Regis*, who was a man of One hundred and fifteen years old, at the time of his death. In 47 *Edw.* 3. 3. *John Pinſchon* brought an Action of Debt againſt *Thomas Gerves*, and others, Executors of *John Northgate*, upon an Obligation made by the Teſtator of One hundred pound, the Defendant pleaded a Releaſe of the Plaintiff of all manner of Actions; and alſo the Plaintiff by that Deed had received Twenty pound of the Teſtator, *&c.* And the Deed was read, which expreſſed, That he had received Twenty pound *in ſolutione de* 100*l.* *& etiam remiſ. omnimodas actiones, &c.* To which the plaintiff ſaid, That the Teſtator was endebted to him in Twenty pound for other Contracts; and it was agreed betwixt them, that the Plaintiff ſhould releaſe that Twenty pound; and becauſe that the Plaintiff was a Layman, and knew not what was written within the Deed, and what not, by Agreement the Deed was delivered to the ſaid *Thomas Gerves*, now one of the Executors, to keep upon ſuch Condition, That if the Deed do not ſpeak but of Twenty pound, in which he was bound to him, that then the Deed ſhould be delivered to *John Northgate*; and if not, that it ſhould be delivered to the Plaintiff: And there *Finchden*, Chief Juſtice, ſaith, If that which you ſay be true, you may ſafely deny the Deed; for as to parcel which was made according to the Agreement, the Deed is good; and as to the other parcel, that a thing is written, of which you know nothing: So that as to parcel you may acknowledge a Deed of parcel, and as to parcel which was not read to him, to deny the Deed. And the ſame is in a manner affirmed by *Perſay*, but he ſaith it ſhall be abſurd for Lay-people to plead, Not his Deed as to parcel: But afterwards it ſeemed, That the delivery to *Thomas Gerves*, was not any delivery of the Deed, if the Conditions were not performed: For which cauſe the Plaintiff ſhewed, That the Conditions were performed, and that the Deed by the plaintiffs aſſent was deliverd to the Teſtator; upon which iſſue was taken, *viz.* That the Deed was not delivered to him in his life time with the plaintiffs aſſent, which caſe is cited in 14 *Hen.* 8. 26. to be adjudg-
[b] ed, but is there ill reported by the Reporter. But if a Deed containeth divers diſtinct and abſolute Covenants, if any of the Covenants be altered by Addition, Interlineation, or Raſure, this Miſeſeance *Ex poſt facto* ſhall make void the whole Deed, as it is holden in 14 *Hen.* 8. 25, 26. For although that they are ſeveral Covenants, yet it is but one Deed. 3 *Hen.* 7. *fol.* 5. If two be bounden in an Obligation, and afterwards the ſeal of one of them is broken off, this Miſeſeance Ex *poſt facto* ſhall make void the whole Deed againſt both. *Vide Matthewſon, Mic.* 39 *and* 40 *Eliz.* In the fifth part of my *Reports.*

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[29]

Trin. 12. *Jac.*

Alexander Powlters Caſe.

ONe *Alexander Powlter* of *New-Market*, in the County of *Cambridge*, of extream malice of ill will *Felleo animo* did burn a Houſe in the ſaid Town, upon which the moſt part of the ſaid Town was burnt and conſumed: For which offence, at the Aſſiſes at *Cambridge*, in Autumn laſt paſt, he was Indicted and Convicted by Verdict, and prayed his Clergy; and if he ſhould have his Clergy, or not, was the queſtion. And now this Term all the Judges of *England* met together for the reſolving of this point; and upon the conſideration of divers intricate, ill-compiled and compoſed Statutes, they were in doubt whether he ſhould have his Clergy, or not. But it was agreed by them all, that the ſame was Felony at the Common Law, as appeareth by *Britton*; *fol.* 16. and *Bracton*, and 11. *H.* 7. *fol.* 1. And it was accounted in Law a heinous and exorbitant Felony; for by the Statute of *Weſt* 1 *cap.* 15. it is declared, That ſuch as are taken for Houſe-burning Felonioufly done, or for counterfeiting the Kings Seal, or for Treaſon, touching the King himſelf, ſhall in no ways be repleviſable. By which it appeareth, Firſt, That it was Felony at the Common Law; and ſecondly, That it was ſo heinous, that he was not bailable, no more then for High Treaſon.

But

But yet it was resolved, That for the great favour and respect which the Law doth attribute to men of *Holy Church*, for this Felony at Common Law, the offender (who was not so disabled, that he could not be enabled by any dispensation which might be made to be a member of the Church; as if he were blind, *&c.* or in respect of Sex, *viz.* A Woman, as appeareth in 22 *Ed.* 3. *Corone* 461.) should have his Clergy by the Common Law. For the Common Law doth not deny *beneficium clericatus* the benefit of his Clergy, but in certain cases: As if a man be convicted of any Heresie, he shall not have his Clergy for any Felony, *&c.* the same Law of a *Saracen*, *Jew*, or other *Infidel*, *Gravius est enim divinam quam temporalem lædere Majestatem*; the same Law in High Treason against the King; and of Petit Treason also before the Statute of 25 *Ed.* 3. 4. *Vide* 19 *H.* 6. 47. for High Treason, accordingly. But a man excommunicated by the *Holy Church* for any Ecclesiastical cause, or Outlawed by the Common Law for any Felony, because that he might have his Clergy, shall have his Clergy. Also in case of Sacriledge a man shall be ousted of his Clergy, as it appeareth in 20 *Ed.* 2. *Corone* 193. 12 *Ass pl.* 39. 12 *Ed.* 3. *Corone* 120. 22 *Ed.* 3. *ibid.* 357. 26 *Ass.* 19. 27 *Ass.* 42. at the Common Law, *Insidiatores viarum*, *& depopulatores agrorum*, had not their Clergy, as appeareth by the Statute of 4. *H.* 4. 2. And before the Statute of 4 *H.* 4. 2. And before the Statute of *Articuli Cleri*, *cap.* 15. he who confessed the Felony, could not have his benefit of Clergy, because he could not make his Purgation. And although the Statute speaketh onely in case of Abjuration, and of an Approver, yet the Judges *in favorem Ecclesiæ* did extend it to all Confessions upon the Arraignment of the Offender. 10 Ed. 3. *Corone* 147. 12 *Ed.* 3. *Corone* 117. 27 *H.* 6. 7. 34 *H.* 6. 49. 7 *Ed.* 4. 29. 8 *Ed.* 4. 26. 9 *Ed.* 4. 28. 13 *Ed.* 4. 3. 22 *Ed.* 4. *Corone* 44. 15 *H.* 7. 9. And Clergy not onely at the Suit of the King upon Indictment, but upon Approvement, and at the Suit of the party in Appeal, 40 *Ed.* 3. 42. 40 *Ass.* 17. 11 *Hen.* 4. 93. And generally in all cases, when the life or any [b] member of the offender, as cutting off his hand, *&c.* is not in jeopardy, the offender shall have his Clergy, as in case of Petit Larceny, *Stanford* 124 a. So that it was resolved, That at the Common Law for this Felony for burning of Houses, the offender shall have the priviledge of his Clergy.

Then it is to see if this priviledge be taken away by any Statute: And therefore it is to know, That by the Statute of 23 *H.* 8. 1. it is enacted, That no person or persons which shall be found guilty of any manner of Petit Treason, or for wilfull Murder, of Malice prepensed, or for robbing [30] of any Churches, Chapels, or other holy places; or for robbing of any person or persons in their dwelling-house, or dwelling-place, *&c.* Or for robbing of any person or persons in or near the High-way; wilfull burning of any dwelling-houses or Barns wherein any Corn is, or the procurers or Abetters of the same, be admitted to the benefit of his or their Clergy (such as be within holy Orders, that is to say, Of the Orders of Subdeacon, or above, onely excepted.) So that this Statute doth ouste the principal offenders aforesaid, of the priviledge of his Clergy, and their Accessories before. And it is to be marked, that the Statute doth not say, That no person or persons that shall upon his or their Arraignment, plead not guilty, and shall be found guilty; for then that should be taken for found guilty by Verdict: But the words are, That no person that shall be found guilty of petit Treason, *&c.* And the same may extend as well to Confession of Record (for the Court findeth him guilty upon his own confession before them) as to finding by Verdict of Twelve men, when the Offender denieth the fact, and pleadeth not guilty; and the case of Confession is the stronger case: For although he be found guilty by Verdict, yet he may be innocent, and for that he may have his Clergy at Common Law, and make his purgation; but if he hath confessed the offence upon Record, he shall not have his Clergy by the Common Law, because he cannot clear himself, when the Court findeth his Confession on Record; for in the intendment of Law (against an expres and voluntary confession in Court) he cannot be innocent. *Confessus in judicio pro judicato habetur*, *& quodammodo sua sententia damnatur.* And therewith agreeth a Proviso in the said Act of 23 *Hen.* 8. which hath made him who confesseth the Felony, in equipage with him who is adjudged for the Felony, the words of which are; Provided, That this Act extend not to give any benefit to any such persons, which after their Confession or Judgment given against them, of or for Felony, *&c.* *Vide* 25. *Edw.* 3. 42. and *Stanford* 122. *c.* Attainder by confession is the strongest Attainder that can be, for the vehement presumption that the Law hath of the truth; for it shall be absurd to say, That he hath not done such a Felony, after that the party himself hath confessed the same to the destruction of him and all his offspring. [c]

And where the Statute of 8 *Hen.* 6. 9. enacteth, That if the party grieved recovereth by Assise, or by Action of Trespas, and it is found by Verdict, or in other manner, in due form of Law; That the Defendant entred with force, *&c.* that the Plaintiff shall recover treble damages in such case, if the Defendant confesseth the Action, or maketh default, or pleadeth not, or pleadeth an insufficient Plea, and upon Demurrer, Judgment is given against him. In all the said Cases, the same is a finding within the Statute; For their is one finding by the Jury, and another by the Judges; and when the Defendant confesseth it, the Judges find sufficient matter before them to give Judgment: See for the same, Serjeant *Bendlows* Reports. And so was it taken in 6 *H.* 8. and in 4. & 5. *Phil.* & *Mary*, in a Writ of Error; and so I have heard the Lord *Dyer* vouch a Judgment accordingly in [b] divers of the said Cases, upon the Statute of 8 *Hen.* 6. And therefore the opinion of *Stanford*, *fol.* 12. That in case of Confession, the offenders in these great and heinous offenses, shall have their Clergy, is not taken to be Law; and the constant and continual experience of Judges in their Circuits hath been to the contrary. Also this Act of 23 *H.* 8. extendeth as well to Appeals and Approvements, as Indictments: But yet in this Statute there were found divers great defects; for

the ſaid Offenders, and their Acceſſories before, have by an eaſie means their Clergy, notwithſtanding this Statute: For if the Offender had upon his Arraignment ſtood mute, or would not directly anſwer (which is all one) or would have challenged above the number of Twenty, he ſhould have the benefit of the Clergy, notwithſtanding this Statute; for in theſe caſes they are not found guilty of the Felony, as the Statute ſpeaketh, but ſhall have Judgment *fort* and *dure* for their contumacy, becauſe they will not anſwer according to Law, nor put themſelves upon their Country. Alſo if the Offender had not appeared, but had been Outlawed for any of theſe offenſes, yet notwithſtanding thoſe Statutes, he ſhould have his Clergy; for he was not found guilty of the Felony, but Outlawed for his default. Alſo although the Defendant had committed Burglary, yet if it were without Robbery; he ſhould have his Clergy, notwithſtanding this Statute; and ſo ſhould the Acceſſories as well before as after: And ſo as to ouſte the Acceſſories before of their Clergy in all the ſaid offenſes, the words are (be found guilty) ſo that the ſame defects are alſo in this clauſe as in the former.

After that was the Statute of 25 *H.* 8. *cap.* 3. made, which reciteth the Act of 23 *H.* 8. and further enacteth, That if in thoſe caſes the perſon arraigned ſtandeth mute, or will not directly anſwer, or challenge above the number of Twenty, he ſhall loſe the benefit of his Clergy in like manner and form as if he had directly pleaded, *&c.* and thereupon had been found guilty according to the Laws of the Land. By which words, the intention of the makers of the Act appeareth, That he who is found guilty of any of the ſaid offenſes (which extendeth as well to Confeſſion, as to Verdict) ſhall loſe his Clergy: And therefore although the Act of 23 *Hen.* 8. is not revived, yet there are ſufficient words in the Act of 25 *Hen.* 8. to ouſte him, who is found guilty, of his Clergy: And the ſame
[31] alſo appeareth, was the meaning of the makers of the Act of 5 *&* 6 *Ed.* 6. For if the Act of 25 *H.* 8. had not extended to him who is is found guilty by Verdict or Confeſſion, they would not have received the ſame to ouſte the Offender of the priviledge of his Clergy onely; in caſe when he ſtood mute, or would not anſwer, or challenge above the number of twenty; and not where he is found guilty by Verdict or Confeſſion. Alſo the words of the Act of 5 *&* 6 *Ed.* 6. are, that the ſaid Act of 25 *H.* 8. ſhall remain and be in full ſtrength and vertue, in ſuch manner and form as it did before the making of the Act of 1 *Ed.* 6. And before the ſame Act, without queſtion, he who was found guilty by Verdict or Confeſſion, was ouſted of his Clergy. But this Act of 25 *H.* 8. had not by any words in any caſe taken away Clergy of the Acceſſory before, which was a great defect, for if he were found guilty according to 23 *H.* 8. as well the acceſſory before, as the principal before, was ouſted of his Clergy, but if he ſtood mute, or anſwered not directly, or challenged above the number of twenty: In theſe caſes the principal was ouſted of his Clergy by 25 *H* 8. Yet in the ſame caſes the acceſſory before was not ouſted of his Clergy. And this Act of 25 *H.* 8. doth not extend to appeals or approvements, but onely to Indictments; for the words are, if any perſon be indicted *&c*, It was enacted by the ſame Statute, That if any be indicted for Felony, the ſtealing of any Goods in any County, and thereupon arraigned, be found guilty, or upon malice ſtands mute, or challengeth peremptorily above the number of twenty, without directly anſwering to the Law; they ſhall loſe the benefit of their Clergy, in the ſame manner and form as they ſhould, if they had been indicted, arraigned, and found guilty in the ſame County, where the Robbery or Burglary was done or committed. If it ſhall appear to the Juſtices, before any ſuch Felons or Robbers be arraigned, by evidence given before them, or by examination, That the ſame Felonies, whereupon they be ſo arraigned, had been ſuch Robberies or Burglaries, &c. Wherefore by the ſaid Statute they had loſt the benefit of their Clergy, if they had been found guilty thereof in the ſame Shire. And there is alſo defect in this branch; for the ſame doth not extend to the caſe, when the Offenders for any of the ſaid offenſes are Outlawed, &c. And alſo it doth not extend to acceſſories before in ſuch caſes: And it is to know, That when the Offender doth confeſs the Indictment, or ſtandeth mute, or challengeth above the number of twenty, although that no evidence can be given againſt him, yet the words of the Statute are (or by Examination) which words have relation when the Offender doth confeſs the offence, or ſtandeth mute, or challengeth above the number of twenty. Then was the Statute of 1 *Ed.* 6. 12. by which it is enacted, That no perſon that ſhall be in due form of Law, attainted or convicted of Murder, of Malice prepenſed, poyſoning of Malice prepenſed, break-
[b] ing of any Houſe by day or night, any perſon being then in the ſame Houſe and put in fear or dread, or for robbing of any perſon in or near the Highway; or for felonious ſtealing of Horſes, Geldings, or Mares; or for felonious taking of any Goods out of any Church, &c. or being thereof indicted or appealed, and thereupon found guilty by Verdict of twelve Men: or ſhall confeſs the ſame upon his or their arraignement, or will not anſwer directly, or ſtand mute, ſhall not be admitted to have the benefit of Clergy or Sanctuary. And that in all other caſes of Felony, other than ſuch as are before mentioned; all perſons that ſhall be arraigned and found guilty, or ſhall confeſs the ſame, or ſtand mute in form aforeſaid, or will not directly anſwer, ſhall have the priviledge of Clergy or Sanctuary, as they might have had before the Firſt year of King *Henry* the Eighth. And this Act of 2 *Ed.* 6. hath made divers great alterations.

1. By this general clauſe, Clergy was reſtored to him who offended in burning of Houſes, and to the acceſſories before.

2. All acceſſories before in caſe of Petit Treaſon, Murder, Burglary, or other offences mentioned in the Act of 23 *Hen.* 8. were reſtored to their Clergy by the ſaid general clauſe; and therefore they erred, who held, that the acceſſory to a Burglary, ſhould be ouſted of his Clergy: For at that time, as well every acceſſory in Burglary, as well before as after, ſhould have his Clergy; and the ſame appeareth by the Judgment of the whole Parliament of 2 & 3 *Phil.* & *Mary.* by which

it

it is enacted, That the benfit of Clergy ſhould be taken from *Benedict Smith*, &c. for the murder of *Rufford*, if the ſaid *Benedict* ſhould be found guilty, as acceſſory to the murder, &c. Note, the ſaid murder was ſo barbarous and ſo heinous, that Clergy was taken from him, and others, being but acceſſory before, after the offenſe committed. *Vide* 3 & 4 *Phil.* & *Mary*. *Dyer*. 133. where mention is made he was ouſted of his Clergy by the ſame Act of 2 & 3 *Phil.* & *Mary*, which proveth, That if the ſame Act had not been made, that he might have his Clergy.

3. By this general clauſe, Clergy was reſtored to heinous offenders in piracy upon the Seas, which was taken away by the Statute of 28 *Hen.* 8. *cap.* 15. and in divers other caſes.

4. The words concerning Attainder, of breaking of Houſes onely, ſhould be repugnant and very abſurd, if they be not ſupplied by a reaſonable intendment and good conſtruction; For as *Stanford* 126. *a.* well obſerveth, If any break any Houſe by night, without intent to commit Felony, it is not Burglary nor Felony (and therefore theſe words, with felonious intent, fail;) and alſo, if he break a Houſe in the day, although he hath a felonious intent, if he carry away nothing, it is not Felony; and therefore in that caſe, theſe words, (And ſteal Goods felonioufly) are inſerted: And yet *Stanford* holdeth, That theſe general and incertain words ought to be ſupplied with an Intendment, *viz.* Where he is Attainted and Convict of breaking of the Houſe in the night *Burgulariter*, or of the breaking of the Houſe in the day, and of the ſtealing of the Goods there within; but as to the caſe of Burglary, this Act hath made an alteration more ſtrict then 23 *Hen.* 8. had, For this Act doth take away Clergy in caſe of Burglary, without any ſtealing of Goods. [32]

5. This Act of 1 *Ed.* 6. doth add a thing not material, and omitteth a thing much material, which was compriſed within the Acts of 23 & 25 *Hen.* 8. For that took away Clergy from him who poyſoned another of prepenſed Malice, which without queſtion is wilfull Murder; and for that the offender was ouſted of his Clergy by the ſaid Acts of 23 & 25 *Hen.* 8. And it omitteth the heinous offence of burning Houſes, and yet taketh away Clergy from him who committeth Burglary, although he impair the Houſe, little or nothing, and *implicite* alloweth Clergy to him who burneth the whole Houſe; and not onely one houſe, but the greater part of a Town, as it was in the caſe now in queſtion.

6. There is a great defect in this Act in ouſting offenders of their Clergy; for it doth not extend where the offender doth challenge above the number of twenty, which was included within the Act of 25 *Hen.* 8. But the ſame is remedied by the reviving of the Act of 25 *Hen.* 8. by the Statute of 5 & 6 *Ed.* 6. as appeareth before.

7. There is a great Repugnancy in the ſaid general Clauſe; For notwithſtanding that, If any offender who is to be reſtored to the benefit of the Clergy, whereof he was ouſted by any former Statute, challenge above the number of twenty; or if he be Outlawed for the ſame Felony, he ſhall not be reſtored to his Clergy; for this clauſe doth not extend but where the offender is found guilty by Verdict or Confeſſion, or ſtandeth mute, or will not directly anſwer.

8. He who committeth Robbery or Burglary in one County, and carrieth the Goods into another County, &c. who was ouſted of his Clergy by 25 *Hen.* 8. was reſtored to his Clergy by theſe general words.

9. This Act extendeth to all perſons, *viz.* as well to thoſe who are within holy Orders, who were excepted out of 25 *Hen.* 8. as to other Lay-people.

10. This Act of 1 *Ed.* 6. in other points hath ſupplied ſome of the defects which were in the former Statutes, concerning the offences mentioned in the ſame Act.

For firſt, The former Statutes did not extend, as appeareth before, where the Offender was Outlawed for any of the Offenſes mentioned in them; but this Act extendeth to men Outlawed, Attainted by Battel, Abjured, Attainted by Parliament; for the words are, If any hereafter ſhall in due form of Law be attainted; which words extend to every manner of Attainder. [b]

Secondly, This Act doth extend by expreſs words to the caſe of Confeſſion; for the next words of this Act are (or Convict) and the ſame is by Verdict or Confeſſion: So that the clauſe for ouſting of Clergy, is better penned as to theſe points, than the general clauſe for Reſtitution of Clergy, as it appeareth before. And it is to be marked, That this Act of 1 *Ed.* 6. extendeth as well to Appeals and Approvements, as to Indictments. And afterwards the Statute of 5 & 6 *Ed.* 6. *cap.* 10. was made, the title of which was, That ſuch as rob in one Shire, and flie into another, ſhall not have the benefit of the Clergy.

This Act firſt reciteth the ſaid Act of 25 *H.* 8. which reciteth the other Act of 23 *H.* 8. And in which, mention is made of burning Houſes; and further, the addition which the Act of 25 *H.* 8. maketh; and alſo the branch concerning the ſtealing of Goods in one County, and of carrying the theft into another County. And for the ſaid Act of 5 & 6 *Ed.* 6. reciteth the Purview of the ſaid Act of 1 *Ed.* 6. word for word (in which the omiſſion of burning of Houſes, appeareth) and alſo the ſaid general and beneficial branch for Clergy of the Act of 1 *Ed.* 6. And then after the recital of theſe three Statutes, the words of the Act of 5 & 6 *Ed.* 6, are, By reaſon whereof divers and many perſons, ſince the ſaid firſt year, have committed ſuch Robberies and Burglaries, and after have been taken with the manner in another County, and there indicted, arraigned, and found guilty, have had and enjoyed their Clergy; which they could not have had, if the ſaid Statute of 25 *H.* 8 had ſtood in force; For redreſs whereof, be it enacted, That the ſaid Act made in the ſaid Five and twentieth year, touching putting of ſuch offenders from their Clergy; and every Article, Clauſe, and Sentence contained in the ſame, touching Clergy, ſhall from henceforth, touching ſuch offences from henceforth to be committed and done, ſtand, remain, and be in full ſtrength and vertue, in ſuch manner and form, as it did before the making of the ſaid Act of 1 *Ed.* 6. any Clauſe, Article, or Sen-

Sentence compriſed in the ſaid Act, made in the ſaid firſt year, to the contrary notwithſtanding.

And the whole ſcruple of this Caſe, doth conſiſt upon theſe words of the body of the Act of 5 & 6 *Ed. 6.* and of a conceit which *Stanford* maketh, *Lib. 2. cap. 43. fol. 128. a.* That the Act of 25 *Hen.* 8. is not revived in all, but onely in that part which concerneth the ſtealing of Goods in one County, and the carrying of them into another, by reaſon of theſe words (ſuch offenders, and [33] ſuch offenſes, *&c.*) which hath relation onely to the offender, which is expreſſed before in the ſame Act.

To this was added by others, two other Objections. Firſt, That the Title or ſtile of this Act is particular, *viz.* That ſuch as rob in one County, and flie into another, ſhall not have benefit of Clergy; whereby the intent of the makers of the Act, appeareth to what thing the ſaid Act ſhall extend: And the caſe of *Stradling* and *Morgan*, *Plo Com.* 203. *b.* proveth, That where the particular ſtile of the Act of 7 *Ed. 6.* concerning the Revenues of the King, doth limit and qualifie the general words of the body of the Act, *viz.* (Any Receiver) to extend onely to the Kings Receivers, according to the title of the Act.

Another Objection was made by ſome, That admitting that the ſaid Act of 5 & 6 *Ed. 6.* hath revived the whole Act of 25 *Hen.* 8. Yet foraſmuch as the Act of 23 *Hen.* 8. was not revived, the ſaid *Alexander Powlter* in the caſe now in queſtion, ſhall have his Clergy: For as it hath been ſaid, the Act of 23 *H.* 8. extendeth onely when the offender is found guilty (which is our caſe,) and the Act of 25 *H.* 8 reciteth the ſaid Act of 23 *H.* 8. and maketh addition when the offender ſtandeth mute, or will not anſwer, or challengeth above the number of Twenty: So that the Act of 25 *H.* 8. extendeth not to the caſe where the offender is found guilty by Verdict or Confeſſion, becauſe the Act of 23 *H.* 8. hath provided for that. And in as much as the general words of the ſaid Act of 1 *Ed. 6.* hath taken away the force (but in one ſpecial caſe as aforeſaid) of both the Statutes of 23 *H.* 8. and 25 *H.* 8. and the Act of 5 & 6 *Ed. 6.* hath revived onely the Act of 25 *H.* 8. for this cauſe in the caſe now in queſtion, the benefit of Clergy is not taken away.

Againſt which it was argued by the other Juſtices.

Firſt, that the Statute of 5 & 6 *Ed. 6.* hath revived the whole Act of 25 *H.* 8. concerning Clergy.

Secondly, that the Act of 25 *H.* 8. hath taken away the benefit of Clergy from him who is found guilty of burning Houſes, by Verdict or Confeſſion.

Thirdly, They cited a Judgment in Parliament to prove it.

Fourthly, They confirmed it by a conſtant opinion and proceeding of the Juſtices of Aſſiſes in their Circuits.

As to the firſt, is was ſaid, That this Relative *(ſuch)* referreth rather to the precedent matter, than to the particular form of words, to the end, That the remedy intended by the makers of the Act, ſhould be of as great extent as the malady and miſchief was, *(ſuch)* ſhall be taken (ſuch in miſchief, and ſuch in inconvenience,) and all ſuch as inform of words, as is mentioned before. [b] And therefore the Statute of *Weſtm. 2 cap. 5.* is, *Cum quis jus præſentandi non habens præſentaverit ad aliquam Eccleſiam*, &c. *per quod hæredes infra ætatem exiſtentes per fraudem & negligentiam cuſtodum*, &c. *Statutum eſt quod hujuſmodi præſentationes*, &c. *non ſint hujuſmodi rectis hæredibus*, &c. *ita præjudiciales.* And the caſe in 44 *Ed.* 3. 21. That an Infant had an Advowſon by diſcent, and avoided an Uſurpation without Averment, that he was in Ward; becauſe that this word *(hujuſmodi) viz.* ſuch; ſhall be taken ſuch in miſchief, *viz.* to provide for all the miſchief; and having an Advowſon by diſcent (which was the ſubſtance) it matters not, whether he was in Ward, or not. So the Statute of *Weſtm. 2. cap. 12.* the preamble ſaith, *Per appellatores nihil habentes*, &c. And the body of the Act is, *Statutum eſt quod cum aliquis ſic appellatus*, &c. Yet without queſtion, If the Appellor be ſufficient, notwithſtanding this word (if) the Statute extendeth to it. And where the Statute of 21 *Hen.* 8. 15. ſpeaketh in the Preamble of Leaſes made for great Fines (for the Incomes, &c.) And the Purview is, That all ſuch Termors ſhall or may ſalſifie it, hath been always taken, That the Statute extendeth to Leaſes made, either for a ſmall Fine, or for no Fine: So the Preamble of the Statute of 32 *H.* 8. *cap.* 33. ſpeaketh of Diſſeiſins with ſtrength: And the body is, That the dying ſeiſed of ſuch Diſſeiſor, &c. the ſame extendeth to a Diſſeiſin without force; for, ſuch in miſchief: And ſo it is holden in 3 & 4 *Phil. & Mary. Dyer* 219. and ſo in many other Caſes. And as to the ſtile, or title of the Act, it is not any parcel of the Act; and old Statutes are without any title, and many Acts are of greater extent than the titles are; As the Statute of *Uſes*, 27 *Hen.* 8. *cap.* 10. the title is, An Act expreſſing an Order for Uſes and Wills; and yet the body of the Act doth extend to Joyntures and Dowers of Women.

And ſo in this caſe they argued, That the body of the Act of 5 & 6 *Edw. 6.* was more ſpacious than the title, but not more ſpacious than the preamble; for the preamble doth extend to two miſchiefs, one *implicitè* by recitál and the other *explicité* by expreſs words: *Implicitè* by the recital of 23 & 25 *H.* 8. which extendeth to burning of Houſes; and by recital of 1 *Ed. 6.* in which was the omiſſion of burning of Houſes (which was thought to be by the negligence of the writer; for it is a more heinous offence, than many other there mentioned,) *Explicitè*, of Robbery, *&c.* in one County, and carrying into another County; then when the words are, For redreſs whereof be it enacted, &c. It doth not refer onely to the later, which was the offence of commiſſion, but alſo to the omiſſion of the offence of burning of Houſes in the Statute of 1 *Ed. 6.* And then this word *(ſuch)* ſhall have reference to burning of Houſes, as well in the Statute of 23 *H.* 8. as in the ſaid Act of 25 *H.* 8. Both which are recited in the ſame Act of 5 & 6 *Ed. 6.*

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Another reaſon was added, That the Purview of the Act of 5 & 6 *Ed.* 6. hath a double ſentence, *viz.* That the ſaid Act of 25 *H.* 8. touching the putting of ſuch offenders from their Clergy, if it ſhall be admitted to extend onely to Robbery in one County, and carrying into another; yet there is another ſentence in the ſame Act, and every Article, Clauſe, and Sentence, contained in the ſame, touching Clergy, ſhall from henceforth touching ſuch offences, remain, and be in full ſtrength and vertue.

And it was argued, That the latter clauſe ſhould extend to the whole Act of 25 *H.* 8. for divers reaſons.

1. Becauſe that the firſt ſentence had been ſufficient for the Robbery in one County, and carrying into another; and then this latter ſentence which hath more general words, *viz.* And every Article, Clauſe, and Sentence, &c. ſhould be vain and ſuperfluous, *Et viperina eſt expoſitio quæ corrodit viſcera textus.*

2. There was not but one clauſe or ſentence, concerning Robbery in one County, and carrying into another; and this branch of 5 & 6 *Ed.* 6. ſaith, All and every Article, Clauſe, and Sentence, concerning Clergy; ſo that it ſhall be hard, that theſe general words ſhall be reſtrained to a particular clauſe and ſentence; but the good expoſitor doth make every ſentence to have its operation to ſuppreſs all the miſchiefs before in the ſaid Act, and chiefly thoſe which are expreſſed in the Act it ſelf (as it is in the caſe in queſtion.) And although that the latter words of this ſentence, be, Shall from henceforth concerning ſuch offences, remain in force. In good conſtruction theſe words (ſuch offences) ought to have reference to ſuch offences, as are contained in any Article, Clauſe, or Sentence of the Act of 23 *Hen.* 8. concerning Clergy. And by ſuch conſtruction, ſuch heinous offence ſhall not paſs in effect with impunity; and malefactors ſhall not be encouraged to burn, not onely Houſes, but Towns and Cities, and ſhall paſs with a little burning in the hand. And by this Conſtruction, all the Statutes will ſtand together, and be well reconciled, and ſhall agree with the conſtant and continual experience of the Judges. And it is frequent in our Books, That Penal Statutes have been taken by Intendment, to the end, they ſhould not be illuſory, but ſhould take effect according to the expreſs intention of the makers of the Act. And therefore it was enacted by the Statute of 27 *Ed.* 3. *cap.* 1. That he who draweth any one to the Court of *Rome*, in a plea which might be determined in the Kings Court; or of things whereof Judgment is given in the Kings Court; or who ſue in any other Court, to defeat or impeach the Judgments given in the Kings Courts, ſhould have day containing the ſpace of two months, &c. And if they come not at the ſame day in proper perſon, they ſhall be out of protection, &c. [b]

A Queſtion was moved in 10 *Ed.* 3. 11. (which was within three years after the making of this Act) If the offendor make not default, but appeareth, and pleadeth, and is condemned, if he ſhall have the high and penal judgment of *Præmunire* given by the ſame Act. But afterwards in 39 *Ed.* 3. 7. Judgment was given againſt the Biſhop of *Chichester*, who appeared, That he ſhall be put out of protection, &c. And yet the Letter of the Statute is, That if they do not appear the ſame day they ſhall be out of Protection; *à fortiori*, when he appeareth and anſwereth nothing to it, ſuch Judgment ſhall be given, for in equal miſchief, much more ſtronger; when in ſuch caſe he appeareth and pleadeth, and is found guilty, there he ſhall have Judgment upon the ſaid Statute, as it is adjudged in *Ferebies* caſe in 44 *Ed.* 3. 36. *a.* & *b.* And yet it is out of the words of the Act, which onely ſpeaketh of default; and infinite Judgments upon the ſame Statute have been given accordingly. And therefore *Qui hæret in litera hæret in Cortice*; which caſe was ſaid hath greater defect of words, then the caſe now in queſtion.

By the Statute of 8 *H.* 6. *cap.* 12. it is ordained, That if any Record, or any parcel thereof, &c. be voluntarily carried away, &c. by reaſon whereof any Judgment be reverſed, and ſuch ſtealer, carrier away, withdrawer or avoider, &c. are adjudged for Felons.

And in 2 *Rich.* 3. 19. an Action of Debt was brought againſt *J. B.* whereas in truth his name was *W. B.* Proces continued untill he was Outlawed, and the Original was raſed, and the 3 *Capias* made *W. B.* and the Rolls raſed and made accordingly. This Act was reſolved to be Felony by all the Juſtices; and yet by that, the Outlawry was made good, &c. So by the Statute of 25 *Ed.* 3. the killing of the Maſter is adjudged Treaſon, and the ſame extendeth by conſtruction to the Miſtreſs, as it is holden in 19 *H.* 6. 47. And in many other caſes, Penal Statutes have been taken by Intendment to remedy the miſchief, in advancement of Juſtice, and in ſuppreſſion of crimes and heinous offences.

As to the ſecond, The Statute of 25 *H.* 8. hath taken away the Clergy from him, who is found guilty of burning of any Houſe; for the ſaid Act of 25 *H.* 8. takes away Clergy from him, who in ſuch caſe upon his Arraignment ſtands mute, or will not plead, or challengeth above the number of twenty: In like manner and form, as if he were found guilty after the Laws of the Land; which are affirmative words, and taketh away the Clergy from him, who is found guilty according to the Laws of the Land. [35]

As to the third point, The makers of the Statute of 4 & 5 *Phil.* & *Mary. c.* 4. knowing that by the ſaid Statute of 25 *H.* 8. which was revived by the Statute of 5 & 6 *Ed.* 6. Clergy was taken from the principal offenders in the ſaid caſe of burning of a Houſe, and not of one Acceſſory; have provided that the Acceſſories before, in ſuch caſe ſhall be ouſted from their Clergy; which was taken by divers of the Juſtices to be a good interpretation of the whole Parliament, of all the ſaid Acts concerning this matter, That if the principal ſhould have his Clergy, it ſhould be abſurd, and never ſeen in the whole Law; that the Clergy ſhould be taken from the Acceſſory onely, and leave the principal offender at large to have his Clergy. Secondly, It ſhould be in vain by the ſaid Act

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of 4 & 5 *Phil. & Mary*, to take away Clergy from the Acceſſory before, and to leave the principal to have his Clergy. For if the principal hath his Clergy before Judgment, the Acceſſory ſhall not be arraigned; as it is holden in the Fourth part of my *Reports*.

Note Reader, That the ſaid Act of 4 & 5 *Phil. & Mary*, taketh away Clergy from him who is Acceſſory, before the offence of burning of a Houſe, &c. ſhall extend where the Acceſſory is Outlawed or otherwiſe Attainted or Convicted, or ſtandeth mute, or denieth to anſwer directly, or challengeth above the number of twenty; which is well and perfect to that, but that Act doth not extend to every Burglary, or breaking of houſes, &c. but onely when robbery is done.

As to the fourth point, Upon Conference had with divers Clerks of Aſſiſes, and other ancient Clerks, and upon the ſight of divers and many Records, it appeareth, That the principals and Acceſſories before have been ouſted of their Clergy, in the caſe of burning of Houſes: For their manner of Entry where Clergy doth not lye, is to ſay *Cul. ſuſ. per coll.* But when Clergy lieth, the Entry is, *Petit librum*, &c. And all the preſidents but one (which was before Sir *John Puckering*, and his Companions, Juſtices of Aſſiſe, in the County of *Eſſex*) were, *Cul. ſuſ. per Collum*, without the words, *Petit librum*. Upon all which matter, and upon view of the ſaid preſidents, it was reſolved, That the ſaid offender in the caſe in queſtion ſhould be put from his Clergy; and accordingly at the laſt Aſſiſes in the County of *Cambridge* (although the offender could read well) Judgment was given upon him, and Execution done accordingly; and order given, that he ſhould be
[b] hanged in chains near the place where the offence was done, and ſo he was.

Note Reader, As to Burglary and Robbery in Houſes, &c. For as much as Doubts and Queſtions may ariſe upon it, as hath been ſaid, I have thought it neceſſary (by way of *Appendix*) to make a ſhort Explanation of it, and of ſome other things, to the intent, That of the one ſide, great offenſes ſhould not paſs unpuniſhed, nor of the other ſide, the ſubject be deprived of the priviledge which the Law giveth him.

By the Statute of 18 *Eliz. cap.* 7. it is enacted, That if any perſon ſhall commit any Felonious Burglary, and ſhall be found guilty by Verdict, or ſhall be outlawed, or upon his Arraignment ſhall confeſs the ſame; in every ſuch caſe he ſhall be put from his Clergy. By this Act it is commonly holden, and ſo publiſhed in ſome Books in Print, That none ſhall have Clergy who committeth any
[ ] Felonious Burglary. And it is to ſee if the ſame be well underſtood, and the ſecret thereof is worthy your apprehenſion and knowledge, for this Statute of 18 *Eliz.* extendeth onely to three caſes, *viz.* Where the offender is Outlawed, or is found guilty by Verdict, or confeſſeth the ſame: And therefore if any one be indicted of Burglary generally at the Common Law, (without ſomething ſpecial and without any allegation according to certain Statutes in ſuch caſe, provided) if the offender be Outlawed, or if upon not guilty pleaded, he be found Guilty by Verdict; or if he confeſs the ſame, he ſhall be ouſted of the priviledge of Clergy by this Statute, but if he be arraigned upon ſuch generall Indictment, and ſtandeth mute, or will not anſwer, or challengeth above the number of twenty; in ſuch caſes, upon ſuch Indictment, he ſhall have his Clergy. And therefore it ſhall be wiſely done, that the Indictment do comprehend according to the Statutes of 23 *Hen.* 8. 1. 1 *Ed.* 6. 12. That ſome perſon was in the Houſe, and put in fear, &c. for in ſuch caſe the ſame Act doth put him from his Clergy; or according to the Statute of 5 *Ed.* 6. 9. the owner, his wife, or children, being ſleeping or waking; for if any ſuch ſpecial matter be contained in the Indictment, then if the offender ſtandeth mute, or will not directly anſwer, or challengeth above the number of twenty, he ſhall be put from his Clergy.

Alſo the ſaid Acts of 1 & 5 *Ed.* 6. are neceſſary to be explained, *viz.* The Act of of 1 *Ed.* 6. 12. ought to be expounded as it hath been before: and although that this Act doth extend to a ſingle Burglary without Robbery, yet it requireth, that ſome perſon be then in the Houſe that is put in fear: For if the party were there, and was not put in fear; as if he be ſleeping, or awake, or in another part of the Houſe, and not put in fear; then notwithſtanding ſuch Burglary, he ſhall have his Clergy; notwithſtanding the Statute of 23 *H.* 8. doth joyn Robbery with Burglary in ſuch
[b] caſe, and the Statute of 1 *Ed.* 6. 12. which extendeth to ſingle Burglary, but both agree, That the perſon ought to be put in fear. And the laſt Act alſo of 5 *Ed.* 6. is worthy of Expoſition, For firſt, the ſame joyneth Robbery with Burglary: So that the offender breaketh the houſe in the night, with a Felonious intent, without taking any thing; although that the perſon be put in fear, yet he ſhall have his Clergy. Secondly, This Act doth extend onely when the offender is found guilty of the Felony, and not when the offender is Outlawed, or ſtandeth mute, or will not anſwer, or challengeth above the number of twenty; and therefore the ſureſt way is in the Indictment, to follow the Statute of 1 *Ed.* 6. 12. For that as to Burglary is the moſt ſure and compleat Law, as to ground an Indictment of Burglary.

But all this which hath been ſaid extends to the principal offenders in Burglary, and it is requiſite that ſomething be ſaid in what caſes the Acceſſories in this offence ſhall have the Clergy, and in what not. The Statute which taketh away the priviledge of Clergy, in this and divers other caſes, is the ſaid Statute of 4 & 5 *Phil. & Mary*: for the Act of 23 *Hen.* 8. which denieth Clergy to the Acceſſory before, is (as hath been ſaid) taken away: As to that by the ſaid general clauſe of 1 *Ed.* 6. and the Act of 18 *Eliz.* doth not extend but to the Principal: And therefore the words of the ſaid Act of 4 & 5 *Phil. & Mary*, are to be conſidered; and as to this purpoſe they are. All and every perſon and perſons that ſhall maliciouſly command, hire, and counſel any perſon or perſons, to do any Robbery in any dwelling Houſe or Houſes, ſhall loſe the benefit of his Clergy; and of ſuch effect was the Statute of 23 *Hen.* 8. 1. And the Statute of 25 *H.* 8. extendeth onely to the principal, by which it appeareth, That if the commandment be made to do any Felony or

Robbery

Robbery of Goods, that ſuch an Acceſſory before ſhall have his Clergy, *Vide Stanford, lib.* 1 *cap.*24. For which other Felonies, Burglary may be committed.

But let us leave Burglary which ought to be done in the night, and let us ſee in what caſes a man ſhall be put from his Clergy, when he breaketh any dwelling Houſe in the day time.

1. Upon the Statutes of 23 *H.* 8. 25 *H.* 8. 1 *Ed. 6. cap.* 12. 5 & 6 *Ed. 6.* 9. it is clear, That there ought to be an Actual Felony done, beſides the breaking of the Houſe in the day, for the breaking of the Houſe onely in the day time, although it be with a Felonious intent, without taking away ſomething, is not Felony; and therefore there needeth no Clergy in the caſe. [b]

2. Upon the ſaid Statutes of 23 & 25 *H.* 8. there oughe to be then either the owner, his Wife, or his Children, or ſervants there put in fear; and by 1 *Ed. 6.* 12. ſome perſon ought to be in the Houſe and put in fear: And by 5 & 6 *Ed. 6. cap.* 9. If the owner, Wife, or ſome of his Children or Servants, be in any part of the Houſe ſleeping, or waking, and all the other points concerning the Attainder, Conviction, ſtanding mute, &c. in caſe of Burglary, doth extend alſo to Robbery in a dwelling houſe in the day time: And he who robbeth any perſon in any Booth or Tent in any Fair or Market, the owner, his Wife, Children, or ſervants, being aſleeping or awake, ſhall be put from his Clergy by the Statute of 1 *Ed. 6. cap.* 12. and 6 *Ed. 6. cap* 9. But two things in the caſe of Robbery in a dwelling Houſe in the day time, are to be reſerved. None of theſe Statutes putteth the party from his Clergy in caſe of Robbery, in a dwelling Houſe in the day time, but in two caſes.

1. If any perſon be put in fear upon the Statute of 1 *Ed. 6. cap.* 12. and other Statutes before.

2. If the owner, his Wife, his children, or ſervants, be then in another part of the ſame Houſe, although that they be not put in fear, the offender ſhall be put from his Clergy by the Statute of 5 & 6 *Ed. 6. c.* 9. but if a ſtranger be there by the owners leave, the offender ſhall have his Clergy, for it is out of the words; and of ſuch opinion is *Stanf.* 125. *b.* who voucheth the opinion of all the Juſtices to be accordingly,

But a doubt was conceived upon theſe Statutes, If any in the day time hath broken an out-houſe, as a Barn, Stable, &c. if the ſame ſhall be ſaid as to put the offender from his Clergy, a dwelling-houſe; and afterwards the Statute of 39 *Eliz. c.* 15. was made, by the which it is enacted, That he who ſtealeth to the value of five ſhillings in any dwelling-houſe or out-houſe in the day time, although that no perſon be within it, ſhall be ouſted of his Clergy. And it is to know, That none of the ſaid Statutes do extend to any Acceſſory before the Robbery in a Houſe in the day time, but onely (as it hath been often ſaid) the Statute of 23 *H.* 8. and the Statute of 4 & 5 *P.* & *M.* and the Statute of 23 *H.* 8. as to this point, is taken away by the Statute of 1 *Ed. 6. c.* 12. Then it is to ſee, in what caſes the Acceſſory before ſhall have his Clergy, and in what not. And therefore the ſaid Act of 4 & 5 *P. M.* is to be again revived and conſidered as to this point. For in caſe where the Clergy is taken away from the Principal, in caſe of Robbing in any dwelling houſe in the day, before the ſaid Act of 4 & 5 *P.* & *M.* in ſuch caſe the Clergy is taken from the Acceſſory before by the Statute of 4 & 5 *P.* & *M.* [37]

But firſt, This Act doth not extend to Acceſſories before, in caſe of robbing in a Booth or Tent, be it in the day or in the night; for theſe are not eſteemed in Law for a dwelling houſe, as the Statute of 4 & 5 *P.* & *M.* ſpeaketh, and as well appeareth in the recital of 5 & 6 *Ed. 6. c.* 9. Alſo the Statute of 4 & 5 *P.* & *M.* doth not extend to the offence within the Act of 39 *Eliz.* which was made long time after the Act of 4 & 5 *P.* & *M.* and the Act of 39 *Eliz.* doth take away Clergy from the Principal offender onely. And you may take this for a general rule, That every Act which taketh away Clergy from the Principal, and ſpeaketh nothing of the Acceſſory; that the Acceſſories as well before as after, ſhall have their Clergy, as it was holden by all the Juſtices, 1 *Mar. fol.* 99. *Dyer.*

Another general Rule is, In all caſes where a man is ouſted by any Statute for any offence from the benefit of his Clergy, the ſame offence ought to be contained in the Indictment, or Appeal, in ſuch manner and form, and with the ſame circumſtances as is contained in the Statute, or otherwiſe the offender ſhall have his Clergy; becauſe that the Statute which ouſteth him of his Clergy not being purſued, the offender is left to the Common Law.

For example, upon the ſaid Act of 4 & 5 *P.* & *M.* the words are, All and every perſon or perſons that ſhall maliciouſly command, hire, or counſel any perſon to commit or do any Petit Treaſon, wilful Murder, or to do any Robbery in any dwelling houſe, &c. or wilfully to burn a dwelling houſe, &c. And thereupon the caſe in 2 *Eliz. Dyer* 183. was, That a man is indicted of Robbery of another in his Manſion-houſe, he being in the ſaid houſe, and put in fear; and another is indicted, becauſe that he Feloniouſly before the ſaid Robbery, procured and counſelled the Principal to commit that Robbery; in which Indictment of the Acceſſory, this word (Feloniouſly) was left out. And by the opinion of all the Juſtices of Aſſiſe in their Aſſembly, except the Chief Juſtice, and *Anthony Brown*, for want of this word (Feloniouſly) in the Indictment, the party had his Clergy, becauſe that the words of the Statute of 4 & 5 *P.* & *M.* were not purſued. Alſo in 18 *Eliz.* a ſervant of the Lady *Laxton* of *London*, was indicted for procuring Feloniouſly of the Robbery of his Miſtreſs by one *Crompton*: but in the Indictment there wanted *Conſuluit, Conduxit, vel præcepit*, and alſo Maliciouſly; and therefore Clergy was allowed to him after Judgment by the opinion of the Juſtices.

[38]

Mich. 12. *Jac.*

Metcalfes Case.

WOod and others brought a Writ of Accompt in the *Common Pleas* against *Metcalfe*, and upon Issue found against him, Judgment was given *Quod computet, & ideo in misericordia quia non prius computavit.* Upon which Judgment, *Medcalfe* brought a Writ of Error; and now two Questions were moved.

First, If after this Judgment, the Writ of Error lieth or not?

Secondly, If a Writ of Error lieth not, If the Record be removed or not? And it was argued on the Plaintiffs side, That the Writ of Error well lieth: For after this Judgment, if the Plaintiff dieth, or if the Plaintiff be a Woman, and after this Judgment taketh Husband, the Writ shall not abate; and so it is adjudged in 27 *Ed.* 3. 87. *a.* and therewith agreeth 24 *Hen.* 4. 1. wherein a Writ of Accompt against one as Bailiff, and *ne unque son bailie* pleaded; and after tryal against the Defendant, Judgment was given, that the Defendant should Accompt; and afterwards the Plaintiff dieth, his Executors shall have a *Scire facias* against the Defendant, which was served, and he appeared not; for which a *Capias ad computand'* issued forth against him retornable at a certain day; and the Plaintiff prayed an *Exigent* against him, and had it. *Vide* 21 *Ed.* 3. 32. and in 21 *Ed.* 3. 7. In *Robert de Holywels* case, it is adjudged, That after such Judgment, the Plaintiff cannot be Nonsuit; but notwithstanding his default, he may have a *Capias ad computandum* within the year, and a *Scire facias* after the year; and therewith agreeth 3 *Hen.* 4. 7. And there it is said, That by the Judgment that the Defendant shall Accompt, that the Original is determined, 21 *Hen.* 6. 26. in *John Ferrers* case: But there it is said, That although that in such case the Plaintiff cannot be Non-
[b] suit, yet the default of the Plaintiff in such case shall be a Bar to him for ever; and so is a judgment there cited in 19 *Ed.* 3. by *Wilby*, *Vide* 18 *Ed.* 2. *Accompt* 123. 21 *Ed.* 3. 7. 1 *Hen.* 7. 2. 3 *Hen.* 4. 7. 41 *Ed.* 3. 3. *a.* It is holden, that if two be adjudged to Accompt, and the one dieth, the other shall accompt all one, and the Writ shall not abate *Vide* 31 *Ed.* 3. *Accompt*, *Saltham.* *Vide* 34 *Ed.* 1. *Brief* 854. 1 *Ed.* 4. In a Writ of Accompt, the Defendant was awarded to Accompt, and a *Capias ad computandum* awarded; and the Defendant came in by *Cepi corpus*, and the Auditors were assigned to him, &c. For which the Defendant entered in Accompt and pleaded a payment by the command of the Plaintiff, the Plaintiff traversed the Commandment; and upon that they were at Issue, and after Issue joyned, the Defendant was bailed by Recognisance; and afterwards the Issue was discontinued by the Demise of the King, *Edward* the Fourth, before Verdict given. And in that case two points were resolved.

1. That the Bail were discharged by the Demise of the King.

2. That after such Judgment given, that the Defendant should Accompt, always the Entre is, *Ideo consideratum est quod prædict' M. computet, & idem, M. in misericordia, quia prius non computavit*, which proveth, That the same is a Judgment, and by consequence a Writ of Error lieth upon it.

But it was resolved by the whole Court, That the Writ of Error upon this Judgment *quod computet*, &c. before the final Judgment given, lay not. And the same appeareth by the words of the Writ of Error, *Quia in recordo & processu, & etiam in redditione judicii loquelæ quæ fuit in curia nostra coram vobis*, &c. *per breve nostrum inter W. & M. quod idem M. redderet præfat' W. rationabilem computum suum de quo fuit Receptor denariorum*, &c. *Error intervenit manifestus ad grave damnum ipsius M.* &c. *Nos errorem si quis fuerit modo debito corrigi, & partibus prædictis plenam & celerem Justiciam fieri volentes in hac parte, Vobis mandamus; quod si judicium inde redditum sit, tunc recordum & processum loquelæ præd' cum omnibus ea tangentibus*, &c. *nobis*, &c. *mittatis & hoc breve*, &c. And all the Question of this case was, What Judgment was intended in the Writ of Error *viz.* That, *quod defendent computet*, or the latter Judgment. And it was resolved, That no Writ of Ertor lieth till the last Judgment be given; and that for divers Reasons.

1. When a thing (whereof there is divers degrees and qualities) is found indefinitely mentioned in a Writ, Count, or other Record, the principal thing, and the most worthy shall be intended; as 6 *Eliz. Dyer* 236. A penalty inflicted by Act of Parliament to be recovered in any of the Courts of Record of the Queen, shall be intended of the principal Courts at *Westminster*, 20 *Hen.* 6. 23.
[39] In an Accompt, supposing the Defendant to be his Receiver from the Feast of St. *Michael*, shall be next the Feast of *Michael* Archangel, and not St. *Michael De monte tumbæ.*

So 13. *Hen.* 4. 44. 21 *Hen.* 6. 8. 37 *Hen.* 6. 29. If the Father and Son be of one name, *viz. J. S.* if *J. S.* be named generally in a Writ, Count, or other Record, it shall be meant of the Father; for he is the more worthy. So 10. *Ed.* 4. 11. 7 *Rich.* 2. *Tit. Bar.* 241.

If a man be bound to prove a thing, he ought to prove it by the principal proof in Law, and that is by Jury: And so if it be spoken of Fee, it shall be meant Fee-simple; and if of Escuage, it shall be intended the principal Escuage in certain. *Vide Lit. fol.* 21. And see a notable case to this purpose, in 5 *Edward* 1. *Reseeit* 165. Where the case was, That in Admeasurement of Pasture against a man and his Wife, Judgment was given that Admeasurement should be made; and afterwards it was done in the Country, and retorned into the *Common Pleas*, 15 *Hillary*. At which day, the Husband made default, and the Wife came into the Court before the Judgment

Judgment given in the Principal, and prayed to be received; notwithſtanding that, it was ſaid. That ſhe was come too late after the Admeaſurement awarded, which is a Judgment: To which it was ſaid by *Herle*. That that was not a Judgment upon the Principal. And where the Statute of *Weſt.* 2. *cap.* 3. is, *Si uxor ante judicium venerit*, &c. The Statute muſt be intended of the Principal Judgment.

So in 22 *Ed.* 3. *Tit. Reſceit* 139. in an Aſſiſe of Mortdanceſter againſt the Husband and Wife, the Aſſiſe was Awarded by Defauls, and the Aſſiſe remaineth *pro defectu juratorum*; and now the Wife prayed to be received: And it was objected, That Judgment was given, that the Aſſiſe ſhould be taken: and afterwards the Wife who came before the final Judgment, was received; and therein agreeth 17 *Ed.* 2. *Reſceit* 173. and 22 *Aſſ. pl.* 22. After the Aſſiſe Awarded, the Wife was received. 24 *Ed.* 3. 29. and divers other Books.

2. The ſaid words, *Si judicium inde redditum ſit, &c.* are intended not onely of the Principal Judgment, as appeareth before, but alſo of the whole Judgment, *viz.* When all the matter within the Original is determined, as in 34 *Hen.* 6. 18. in *Humphrey Bohuns* Caſe, in a *Quare impedit* brought againſt two; one pleadeth to iſſue, and the other confeſſeth the Action; upon which confeſſion, Judgment is given: And he againſt whom Judgment was given, ſueth a Writ of Error to remove the Record into the *Kings Bench*: *Priſot* and the whole Court, the ſame cannot be; for the Writ of Error ſhall rehearſe all which are parties to the Original Writ; and then the Writ ſaith, *Et ſi judicium inde reditum ſit, tunc recordum illud habeatis*; wherefore the ſame proveth that it cannot be before the whole matter be determined. To which *Littleton* ſaith, If a Writ of Treſpaſs be brought againſt two, and one appeareth and pleadeth; ſo that he is attainted of the Treſpaſs, and Judgment given againſt him, notwithſtanding that the matter is not determined againſt the other, yet he againſt whom the Judgment was given, ſhall have a Writ of Error, and the Plea ſhall be removed. *Priſot*, no truly, and the contrary to what you ſay, was here lately adjudged in the Caſe of the Lord *Cromwel*, againſt *Cawary*, and others. 32 *Hen.* 6. 5 & 6. *b.* In Treſpaſs by the Lord of *S.* againſt one for taking of his Cattle, as to parcel, the Defendant pleaded not guilty, and as to the other, he pleaded another plea, upon which the Plaintiff did demur, and afterwards the Iſſue was found for the Plaintiff, upon which he had Judgment: Yet he ſhall not have a Writ of Error, till the whole matter be determined. [b]

And the reaſon of the ſaid Caſe is, That if the Record be removed, till the whole matter be determined, there ſhall be a failer of right: For the Judges of the *Kings Bench* cannot proceed upon the matter which is not determined, and upon which, no Judgment is given; and the whole Record ought to be either in the *Common Pleas* or in the *Kings Bench*: alſo the Original is entire, and cannot be there, and here likewiſe. 39 *Hen.* 6. *Tit. Error* 11. A man caſt in a Writ of Error of a Judgment given (where the Judgment was given of the Principal, and of the Damages, and not of the Coſts;) for which cauſe it was rejected, becauſe that the Writ is Conditional, *Si judicium inde redditum ſit*, 12 *Eliz. Dyer* 291. In a Formedom brought by *Fitz-Williams*, againſt *Coply*, the Demandant had Judgment for part, &c. and afterwards the Tenant brought a general Writ of Error before the Diſcuſſion of the reſidue, and earneſtly prayed, that the Record might be removed into the *Kings Bench*; but the Court would not grant it, before the whole matter demanded was determined; for otherwiſe they ſhould proceed in a Plea without a Warrant; and alſo the Writ of Error ſaith, *Si judicium inde redditum ſit*: And this word (*inde*) goeth to the whole demand

So in the caſe at Bar, the Record ſhall not be removed untill the whole matter of the Accompt be determined, and Judgment be given for the whole, and that cannot be till the Judgment be given of the arrerages and damages, &c. *Ne curia Domini Regis deficeret in juſtitia exhibenda*, The Record ſhall not be removed till the whole matter be determined.

3. The Writ of Error is to be meant, not onely *De principali & integro*, but alſo *De judicio graviter damnoſo*: And as to that, it is to know, That the Original Writ of Accompt, notwithſtanding the ſaid Award, doth remain undetermined; and upon that the Judgment in the end ſhall be given: for the Original is, that the Defendant *Computet*, &c. and then the Defendant doth enter in Accompt before Auditors, &c. before whom he pleads to Iſſue, which is found by Verdict, or in other manner, that he is in arrerages of a certain ſum; and then the Plaintiff by force of the ſaid Original Writ of Accompt ſhall have finall, or definitive Judgment. *Ideo conſideratum eſt quod præd' W. recuperet verſus præfat. M.* as much as he is found in arrerages, *Et damna occaſione interplacitationis*, &c. And that is the Judgment by which the Defendant is charged with the Accompt, which is the effect of his ſuit; and the other Award is but as an Acceſſory unto it: For by the Award *quod computet*, no ſum is recovered, nor doth it make an end of the Original; but is onely a means to bring it to the end: But the Judgment, by which he ſhall recover not onely the arrerages of the Accompt, but damages alſo (as is aforeſaid) is the end and determination of the Original: And therefore the Writ of Error may well ſay *ad grave damnum* of him who was Defendant in the Accompt; for by the Judgment he hath loſs, but not by the Award; and therefore the Judgment meant in the Writ of Error is *Judicium graviter damnoſum* to the Defendant. [40]

The fourth Reason was. That the Award *quod computet*, is but an Award, as an Award that the Assise shall be taken, Award in Wast, of a Writ of Enquiry in Wast, in Trespass, &c. a Writ of Enquiry of Damages, *in partitione facienda*, and Award *quod partitio fiat*, an Award that one shall be ousted of Aid, and the like, which are but Awards of the Court, and are but interlocutory and not definitive; whereupon no Writ of Error lieth till the last Judgment be given: And therewith agreeth, 7 *Rich.* 2. *Tit.* Error 68. by *Belknap*, *Skipwith*, and the whole Court; That a man prayeth in Aid, and be ousted of the Aid by Award, he shall not have a Writ of Error of that Award, before that the principal plea be determined. *Vide* 17 *Ed.* 3. 5. In Bar in Presentment: *Et à sententia interlocutoria non appellatur jure Civili.*

5. Till the latter Judgment, the parties have done by the Roll, which proveth that the Plea doth remain undetermined. And *Hill.* 39. *Eliz. Rot.* 327. *Anne* Countess of *Warwick* brought a [b] Writ of Partition against *Henry* Lord *Berkley*, where Judgment was given upon a special Verdict, *Quod partitio fieret*; and before the last Judgment, *viz.* (after Partition made) *Quod partio firma & stabilis imperpetuum teneatur*; the Lord *Berkley* brought a Writ of Error, and it was resolved, That the Writ of Error lay not till the Principal Judgment given, which determineth the Plea: As in a Writ of Dower when Judgment is given that she shall recover her Dower, there the Original is determined; and yet the Shrieff shall make Execution of the third part by Meets and Bounds, which Process needeth not to be retorned.

And for direct Authority in the point *in terminis terminantibus*, in 21 *Ed.* 3. *fol.* 9. *Thorp* came to the Bar, and said, How that *A.* brought a Writ of Accompt against *B.* who was Awarded to Accompt, and a *Capias ad computandum* issued against him: And now the said *B.* hath brought a Writ of Error to disturb the Accompt; and prayed, That the Record might not be sent till he hath accompted: *Stouse*, no more it shall not be; for the Plea is not ended untill he hath accompted: And for that cause the Court granted him, That the Record should not be removed. *Vide* 21 *Ed.* cap. 3. *Tit. Accompt*, *Statham. Vide* 6. *Ed.* 4. *cap.* 2 & 3.

And it is holden in 1 *Hen.* 7. 2. *b.* in these words. So soon as the Defendant is adjudged to Accompt, and they are at issue before Auditors, and the Enquest is ready to pass, and the Plaintiff maketh default; now shall the Plaintiff be Nonsuit, and shall not be reserved after: And if the Plaintiff be present, and will not sue forward, he shall be barred in the Principal Action: For they say, That though the party be adjudged to Accompt, yet the Action is not clearly determined until the Accompt be determined; for the Accompt doth depend upon the Original, and all is but one; and so the Nonsuit or Discontinuance now upon the Process upon the Accompt, is a Discontinuance of the whole Action: And it is not like to other Actions where the Plaintiff hath once Judgment, for to recover; then the Action is clearly determined to all intents: And when he sueth a *Scire facias* to have Execution, he may be Nonsuit in it; but that maketh nothing to the Original Judgment.

And yet upon consideration of these, and all the other Books, it may well be that to divers intents and purposes (as in the said Books appeareth) the said Award (*quod computet*) is a Judgment, but not such a Judgment (for the Causes and Reasons before) as is intended within the words of the Writ of Error, *Si judicium inde redditum sit*; And for the most part every particular case which hath been ruled in the said Books, may well stand upon several and particular Reasons.

[41] Note Reader, Whereas it is said in this case, That a Writ of Error lieth not upon an Award, till the principal Judgment is given; and where it is also said, That no Writ of Error lieth until the whole matter in the Original be determined: Both these Rules are regularly true; but yet each of them hath Exceptions; for as to the first in 18 *Hen.* 7. *Trin. Rot.* 3. in the *Kings Bench* the case was, That one *Eaton* was indicted of the death of *John M.* before the Justices of the Peace in the County of *Lincoln*; upon which, a *Capias* was Awarded, and that upon an Exigent; after which, *Eaton* died before any Attainder; upon which Award of the Exigent, his Administrators brought a Writ of Error; and it was adjudged, That the Writ of Error did lie; and the reason was, Because that by the Awarding of the Exigent, his Goods and Chattels were forfeited; and of such Awards which tend *ad tale grave damnum* of the party, a Writ of Error lieth, although the Principal Judgment was never given; and in this case, *Exceptio probat regulam, & sic de similibus.*

As to the second, you shall find in 36 *Hen.* 6. *Tit. Fieri facias* 3. it is holden, That in Debt against divers, by several *Præcipes*, if there be Error in the Judgment against one, he shall have a Writ of Error: For in these Originals, in which are several Counts, and Error is against one, he shall have a Writ of Error, and the Record of his Count, and the pleading &c. shall be severed from the Original, and removed into the *Kings Bench*; and yet the Original doth stay here, (as well because the Court of *Common Pleas* is in possession of it, as because that otherwise the *Common Pleas* could not proceed to determine the residue without the Original; and in such case, as I conceive, If Error be in the Original upon a *Certiorari*, the Chief Justice shall certifie but the tenor of it.) But where the Original is one, and one Count, he cannot have a Writ of Error till the whole be determined: For the Record cannot be in the *Kings Bench*, and here also.

Alſo it is to be noted, That in the principal caſe of 36 *Hen. 6. ubi ſupra,* That the Writ of *Entreſur Diſſeiſin* was brought of Land, and of Rent; as to the Land, they were at iſſue, and it was found for the Demandant; and the Rent did depend in Plea; for which cauſe, for the Land he ſhall have Judgment, &c. And there *Priſot* ſaith, Bring to us a ſpecial Writ of Error, if you will, and we will adviſe (when we ſee the Writ) if it ſhall be allowed, or not. And in the ſame caſe the opinion of the Courts, was, That the party in the principal Caſe ſhould not have Judgment of his coſts of Suit, until the Original (that is, all the Original matter) be determined; for he cannot know what damage he ſhall be at before that the Suit be determined. *Vide Dyer* 12 *Eliz.* 291. *b.* [b]
Vide 36. *Hen.* 6. 13.

As to the ſecond point it was reſolved, That the Record is not removed, becauſe that until ſuch Judgment given as is intended in the Writ, the Chief Juſtice of the *Common Pleas* hath not Authority to ſend it; for the words are, *Si judicium inde redditum ſit, tunc recordum & proceſſum,* &c. *mittatis,* &c. And therefore the Record doth yet remain in the *Common Pleas*; upon which they may proceed, notwithſtanding the Roll be marked *Mittitur,* &c.

Mich. 12. *Jac.*

Richard Godfreys Caſe. [42]

Robert Bullen Plaintiff, in a Replevin againſt *Richard Godfrey* Eſquire, *Owen Godfrey*, and *John Hayns*, which began *Mich.* 11. *Jac. Regis Rot.* and declared, That they took his Cattle, *viz.* Two Cows, &c. at *Bathele*, in a place called the Common, &c. The ſaid *Richard* doth avow, and the ſaid *Owen* and *John* as Bayliffs to *Richard*, make Conuſance of taking the ſaid Cattle, becauſe that the ſaid *Richard Godfrey*, was, and yet is ſeiſed of the Mannor of *Bathele*, in the County of *Norfolk*, (whereof the place where was parcel,) &c. in Fee. And that the ſaid *Richard*, and all thoſe whoſe eſtate he hath in the ſaid Mannor, time out of mind, have had a Leet one in the year, *viz.* within a month after *Michaelmas*, to be holden before his Steward, as to the ſaid Mannor appertaining: And that ſuch Steward for the time, being time out of mind, &c. hath uſed to ſwear twelve or more of the Inhabitants and Reſiants within the Leet aforeſaid, to be chief Pledges of the Leet, to enquire of all the Articles concerning Leet, and to preſent them: And that within the ſaid Mannor, time out of mind, there hath been ſuch Cuſtom, that the ſaid chief Pledges of the ſaid Leet for the time being, ſo ſworn, have uſed time out of mind, &c. at every Leet to preſent (*inter alia*) that themſelves, the chief Pledges ſhould pay to the Lord of the Manor for the time being *Pro capital' argent' ſive pro certo Letæ* Ten ſhillings, and have paid it at the ſame Leet.

And that at the Leet holden at the ſaid Manor, within a month after the Feaſt of St. *Michael.* 10 *Jac.* before *Thomas King*, then Steward of the ſaid *Richard Godfrey* of the ſaid Leet, the ſaid Steward ſwore the ſaid *Robert Bullen*, *John Shaxton*, *Robert Daniel*, and others, to the number of [b] twelve chief Pledges of the Leet, and to enquire of the Articles of the Leet; and they being ſo ſworn, at the ſaid Leet *Contemptuosè recuſaverunt præſentare quod ipſi iidem capitales plegii ſolverunt præfato Ricardo Godfrey, tunc domino Manerii prædicti ad illam eandem Letam, pro capitali argento, ſive certo Letæ xs: Necnon adtunc & ibidem contemptuosè recuſaverunt ſolvere Ricardo ad eandem Letam,* (the ſaid chief Silver or certainty of Leet) *ob quòd prædict' Thomas King Seneſchallus,* &c. &c. *ad illam eandem Letam finem ſex Librarum ſuper eoſdem capitales plegios ad tunc & ibidem impoſuit.*

And becauſe the ſaid ten ſhillings for chief Silver, or certainty of Leet, and the ſaid Fine of ſix pound, to the ſaid *Richard Godfrey*, were behind and not paid; the ſaid *Richard Godfrey* did avow, and the ſaid *Owen* and *John* did acknowledge taking of the ſaid Cattle in the place, where, &c. for the ſaid ſeveral ſums of ten Shillings, and ſix pound, &c. Upon which Avowry, the Plaintiff did demur in Law. And in this caſe four points were moved and Argued at the Barr.

1. If the ſaid Fine being joyntly impoſed, was lawful?
2. If it were not duly ſet; if it were void, or voidable?
3. If the Avowant might diſtrain for the ſaid chief Silver, or certainty of Leet?
4. When the Defendant Avoweth the taking for two diſtinct cauſes; and it appeareth of his own ſhewing, that one of them is not any cauſe in Law, and that the other is a juſt cauſe, if he ſhall have Retorn of the Cattle?

And this caſe was ſundry Terms argued at the Bar, and this Term by the Bench.

As to the firſt Queſtion, it was reſolved, That the Fine impoſed upon the Jurors joyntly, was not lawfully ſet, but ought to have been aſſeſſed upon them ſeverally, and chiefly in this caſe, Becauſe what produceth the Fine was ſeveral; for the refuſal of every of them was ſeveral and perſonal; and the refuſal of the one is not the refuſal of the other: And therefore it was reſolved, That if ſome refuſe, and the others are ready to preſent, &c. Thoſe who refuſe, ſhall be onely fined. And therefore the caſe which *Priſot* putteth in 35 *Hem. 6. Tit. Examination* 17. That if one of the Enqueſt eſcapeth after that they were ſworn, ſo that they cannot give their Verdict, although that the others were not aſſenting to it, that yet they ſhould be all fined, was utterly denied to be Law;

ſo

for *nemo debet puniri pro alieno delicto*, to which he is not party, privy, conſenting nor aſſenting,
[43] for then it might be ſaid *Rutilius fecit, Æmilius plectitur.* And it was ſaid, That the ſaid Caſe was ill reported, and ill printed. *Vide Plo. Com.* 519. *Welkdons* caſe. One Juror who onely miſdemeaned himſelf, was onely impriſoned and fined. *Vide* 36 *Hen.* 6. 28. And with this reſolution agreeth, 10 *Ed.* 3. *fol.* 9. 10. where *William Freeman* brought a Replevin againſt the Abbot of *Ramſey*, and others, of taking of his Cattle; the Lord avowed the taking, by reaſon that he is Lord of the Hundred of *F.* within which Hundred he had many Leets to hold once in the year in the Town of *M.* within the ſame Hundred, &c. And that the ſaid *William Freeman* is Reſiant, &c. And that at ſuch a Leet holden within the Hundred, twelve were ſworn to preſent things preſentable; and this *William* was one of them: And after that they had received the Articles, they were commanded to anſwer to the ſaid Articles, &c. And they refuſing, that this *William* and the others were amerced; and the Ammercement of *William* was affered to half a week, and for the ſame he avowed. To which, *Aſhton* of Council with the Plaintiff, took Exception againſt the Avowry, becauſe the Avowant doth ſuppoſe they were amerced in common; and afterwards he ſaid, That the Amercement of *William* was affered, and ſo was the Afferance ſeveral, and the Amercement common. Judgment of the Avowry? To which it was anſwered and reſolved, That ſo ſhall the Law be; for becauſe that all refuſed, all ſhall be amerced; but when the ſum ſhall be impoſed or affered, it ſhall be upon every one ſeverally *Secundum qualitatem delicti ſalvo contenemento ſuo*; and afterwards the Plaintiff was commanded to ſay further. And in 4 *Eliz. Dyer* 211. the Jurors of a Leet refuſing to anſwer the Articles of the Leet according to their Oath, the Steward did ſet a Fine upon each of them.

It was further reſolved, That in a ſtronger caſe then the caſe at Bar, where the foundation is joynt, yet the Fine ſhall be ſeveral: As in Aſſiſe againſt two, the Diſſeiſin is found with force, although the Diſſeiſin be joynt, yet the Fine ſhall be ſeveral: And therewith agreeth 10 *Ed.* 3. 10. *a.* So in 30 *Ed.* 3. 1, 2. 30 *Aſſ. pl.* 49. Two were joyntly convicted in the *Kings Beneh*, in a Bill of Treſpaſs of Reſcous done in *Middleſex*, to the damages of forty pound, who joyned in Attaint. And there it is holden, That though the Fine and Impriſonment be ſeveral, yet foraſmuch as the Plaintiff hath joyned them in one Action, they may well joyn in an Attaint againſt him. And ſo F. *N. B.* 75. *g.* in a Court Baron, if two are amerced for one Treſpaſs outragiouſly, they ſhall not joyn in a Writ *De Moderata miſericordia*; for they ſhould be ſeverally amerced, although the Treſpaſs be made jontly: So in a plaint ſued by two, if they be Nonſuit, the Amerciament ſhall
[b] be ſeveral. And it is to know when Judgment is given in the *Kings Beuch* or *Common Pleas*, against two *& ideo in miſericordia*, yet when it is affered by the Coroners in the Country, the Amercement ſhall be ſet upon them ſeveral. *Vide* 1 *Hen.* 7. *b.* and *Greſlys* caſe, in the Eighth part of my *Reports*. But if a Jury appear at the Bar, and the Plaintiff be Nonſuit, the Judges may amerce the Plaintiff; and the Jury who are of the ſame Country may affereit, as it is holden in 18 *Ed.* 3. 13. And there is a difference as to this purpoſe, betwixt a Fine and an Amercement: For the Fine is ſet by the Court, and therefore needeth not to be affered; but an Amercement ough to be affered by the Country; and therewith agreeth 7 *H.* 6. 12. 10 *H.* 6. 7. *Vide Greſleys* caſe, and *Plo. Com. Weldons* caſe, 519. And when there are divers Defendants, and they are by Law to pay a Fine, then the Judgment is *ideo capiatur*, and the ſame is for a Fine; for the impriſonment is not but till the Fine be paid, and therewith agreeth 17 *Edward* 3. 73. *a.* 9 *Edward* 3. 6. *Vide* 34 *Henry* 6. 14. And that is the Cauſe; that when the Entre is *ideo capiatur*, that he ſhall not be amerced, becauſe he is to pay a Fine. And although the Entre be *ideo capiantur*, yet it ſhall be taken *reddendo ſingula ſingulis*; for the damages of the party they ſhall be taken by a joynt *capias ad ſatisfaciendum*; but for the Fine due to the King, they ſhall be taken ſeverally by *Capias pro fine*, as appeareth before; that they ſhall be ſeverally impriſoned, and ſeverally fined; for it is not reaſon, that three ſhould be impriſond, till the other hath paid his Fine. And in all caſes, when the mean to attain to the Fine is ſeveral, the Fine it ſelf ought to be ſeveral; and yet in ſome caſe the Fine or Amercement ſhall be impoſed upon divers joyntly, ſometimes upon a Country, ſometimes upon a Hundred, and alſo upon a Town, &c. As for the eſcape of a Murderer, &c. *Vide* 22 *Ed.* 3. *Corone* 238. 2 *Ed.* 3. *Ibid.* 147. 3 *Ed.* 3. *Ibid.* 302. 316, & 10 *Ed.* 3. 10. *a.* And that is for the incertainty of the perſons, and for the infiniteneſs of the number.

And it was obſerved, That of Courts, ſome may fine and not impriſon, as the Court Leet; ſome cannot fine nor impriſon, but amerce, as the County-Court, Hundred, Court Baron, &c. For no Court may fine and impriſon which is not a Court of Record, as is *F. N. B.* 73. *b.* If a man be convicted before the Sheriff in a Writ of Recaption, the Defendant ſhall be but amerced; but if he be convicted in a Writ of Recaption before the Juſtices, *viz.* in a Court of Record, the Defendant ſhall be fined and impriſoned; but then he ſhall not be amerced, and therewith agreeth, 9 *Hen.* 5. 1. *b.* Some may impriſon and not fine, as the Conſtable at the Petit Seſſions, for any affray made in diſturbance of the Court, may impriſon but not fine. Some Courts cannot impriſon, fine, nor amerce, as the Eccleſiaſtical Courts holden before the Ordinary, Archdeacon, &c. or their Commiſſaries, and the like, who proceed according to the Canon or Civil Law. *Vide Brook, Tit. Error* 177. And ſome Courts may fine, impriſon, and amerce, as the caſe requireth, as the Courts of Record at *Weſtminſter*, and elſewhere.

It was alſo reſolved, That the reaſonableneſs of the Fine ſhall be judged by the Juſtices; and if it appears to them to be exceſſive, it is againſt Law, and ſhall not binde; for *exceſſus in re qualibet jure reprobatur communi*, as exceſſive diſtreſs is forbidden by the Common Law, 41 *Ed.* 3. 26. (For the Act of *Articuli Super Chartas, cap.* 12. *Non capietur gravis diſtrictio*, extendeth to the King onely

onely.) *Vide* 27 *Aſſ. pl.* 51. 28 *Aſſ. pl.* 50. 11 *Hen.* 4. 2. 8 *Hen.* 4. 16. And it appeareth by the Statute of *Weſtm.* 1 *cap.* 35. That exceſſive or outragious Aid is againſt Law, and therewith agreeth *Glanvil, lib.* 9. *fol.* 70. *F. N. B.* 82. and *F. N. B.* 75. and *Magna Charta, cap.* 14. Exceſſive Amercement is againſt Law. *Nullus liber homo amercietur*, &c. *Niſi ſecundum qualitatem delicti*; 10 *Ed.* 4. 10. *a. Accompt.* The ſame Law of exceſſive Diſtreſs in reſpect of the multiplicity, is againſt Law. 27 *Aſſ.* 50, 51. *F. N. B.* 178. *b.* 9 *H.* 7. 3. An Aſſiſe lieth of often Diſtreſs. 14 *Henry* 4. 9. An exceſſive Fine at the Will of the Lord, ſhall be ſaid oppreſſion of the people.

And if Tenant in Dower hath Villains or Tenants at Will, who are rich, and ſhe by exceſſive Fines and Taxes maketh them poor and Beggars; it is by the Law adjudged to be againſt Law, and to be Waſte, as appeareth in 16 *H.* 3. *Waſte* 135. 16 *Hen.* 7. & *F. N. B.* 60. *b.* & *Regiſter' Judic'* 25. Waſte lieth *in exulando Henricum & Hermanum*, &c. *Nativos, quorum quilibet tenuit unum Meſuagium & unam virgatam terræ in villa de T. per graves & intolerabiles diſtrictiones.* By which it appeareth, That ſuch intolerable oppreſſion of poor Villains, and Tenants at Will, is to the diſ-inheritance of him in the Reverſion, and againſt the Common Law of the Land.

And in the fourth Part of my *Reports*, If Fines of Copiholds of a Manor be in certain, the Lord cannot demand, or exact exceſſive or unreaſonable Fines; and if he do, the Copiholder may deny to pay it, and the reaſonableneſs of the Fine ſhall be determined by the Juſtices, &c. *Quam rationabilis debet eſſe finis non definitur, ſed omnibus circumſtantiis inſpectis pendet ex Juſticiariorum diſcretione.* And ſo it was adjudged in the *Common Pleas*, between *Stallon* Plaintiff, and *Brady*, Servant of *Thomas Willows*, Lord of the Manor of *Fendition*, in the County of *Cambridge*, *Paſchæ* 9 *Jac. Rot.* 1845. [b]

As to the ſecond point, it was reſolved, That when a Fine is ſet againſt Law, as joynt, when it ſhould be ſeveral, as in the Caſe at Bar; or if it be unreaſonable, it may be avoided by Plea, and Judgment of the Court in which the Suit dependeth, for other remedy is not given to him.

As to the third point, it was reſolved, That the Avowant could not diſtrain for this certainty of Leet, becauſe it was againſt common right, and for the private of the Lord of the Leet, which the Lord could not have without preſcription; and therefore as he ought to preſcribe in the Principal, ſo he ought to preſcribe in the Diſtreſs. In 6 *Ed.* 3. 10. the caſe was, That *William* brought a Replevin againſt *John*, of taking of his Cattle; the Defendant avowed, that the ſaid *John* was chief deſigner of the ſame Hundred (which is meant of the Leet) of *F.* And ſaid, that the Lord of the Hundred had every year two marks to receive; the one moyety at the Hundred holden next after the Feaſt of *Eaſter*, and the other moyety at the Hundred next after the Feaſt of St. *Michael*. And that the Lords, time out of mind, had been ſeiſed of the ſaid Preſtation, to receive the ſame by the hands of the chief Deſigners.

And further ſaid, That they levied the ſaid two marks of all the Reſians within the precinct of the Hundred, according as they had Lands and Goods; and he and all the chief Deſigners had ſo levied it, time out of mind; and as to one mark, the Plaintiff was aſſeſſed according to his Lands and Goods which he had, in eight pence; and for the eight pence behind, he avowed: In which it was obſerved, That the ſaid two marks being againſt common right, he did preſcribe to levy it: And there Sir *William Herle* ſaid, That in many places of *England*, thoſe which are in deſign, ſhall make the Preſtation, and the Freeholders not.

In 11 *Hen.* 4. 89. and *Reſid'* 13 *Hen.* 4. 9. in a Replevin, the Defendant as Bailiff of the Abbot of *Cerve*, becauſe that the Abbot is ſeiſed of the Hundred of *Tetecombe*, in the County of *Dorſet*, and hath there a Hundred from three weeks to three weeks, and hath three Leets every year; one to be holden 15 *Michael*, the ſecond the Monday after *Hillary*, and the third at *Holyday*; to which Leets come three Deſigners with their deceivery, and preſent things preſentable, whereof one is called the firſt deſign, the ſecond, the ſecond deſign, and the third, the third deſign; who with their deſigns yield *de ceco Letæ*, a certain Rent at the Leet days; and becauſe the deſigne comes not the Monday after *Hillary*, *Anno* 10. the ſame deſign was amerced ſix pence; and alſo that the Rent *de certo Letæ* was not paid at the Leet holden after *Eaſter*, the deſigner was amerced with all the deſign; and ſo for two cauſes he avowed: And there *Terwitt* took Exception to the Avowry, That the Lord ſhould not amerce the deſign for non-payment of the Rent. To which Sir *William Thirning*, Chief Juſtice, who gave the Rule, anſwered, That he ſhould be amerced in that caſe where the ſame is payable at the day of the Leet. Secondly, the Court there held Clearly, That where a man of deſign is amerced in the Hundred, or Leet, that his Cattle ſhall be taken, that is, diſtrained well enough in what place ſoever they are found within the Hundred, although it be in another deſign. *Vide* 15 *Eliz. Dyer* 322. For an Amercement in a Court Baron, the Lord ſhall not diſtrain without preſcription. *Vide* 44 *Ed.* 3. 13. But for a Fine, and all Amercements in a Leet, a Diſtreſs is incident of common right. See *Greſleys* caſe before. [45]

As to the fourth point, Admitting that he may diſtrain for the certainty of the Leet, and that the ſetting of the Fine is void; and he hath avowed the taking of the Cattle for both cauſes; and it appeareth of his own ſhewing, that he hath no cauſe for one, if he ſhould have a Retorn, or not, was the queſtion. And it was objected, That in ſuch caſe he ſhould not, becauſe that the Avowant is an Actor, and the Avowry is in lieu of an Action: And if a Writ be brought for two things, and it appeareth by the Plaintiffs own ſhewing, that he hath no cauſe for Action of one, the whole Writ ſhall abate; for they ſaid, That the Writ which is the foundation of the Action, ought to comprehend truth; and if it be apparant, That there wanteth truth in the Writ, the Writ ſhall abate

bate. And therefore ſome took a difference, when one bringeth an Action for two things, and it appeareth in the Writ that he miſtaketh the truth of the matter of one of them, there all the Writ ſhall abate. As if a man bring an Action of Debt, or avoweth for a Rent at two days, and one is not come, it was ſaid, the whole Writ or Avowry ſhall abate: But when the Demandant miſtaketh the Law for one of them, as if Waſte be aſſigned in Oaks and Blackthorn, there is a miſpriſion of the Law. Others took difference betwixt General Writs, as Dower, *Unde nihil habet*, Aſſiſe, Waſte, &c. And therefore if the Demandant in Dower, make her demand to be endowed of the third part of the Common, *ſans* number; or if he bring an Aſſiſe of Land and Annuity; or if he aſſign Waſte in Timber and Blackthorn; in ſuch caſes, foraſmuch as the Writs are general,
[b] it ſhall ſtand for ſo much as may be maintained by Law, for the Writ doth remain true; but in ſuch caſe the Count, Plaint, or Aſſignment, ſhall abate for the reſt; but it is otherwiſe when the Writ doth comprehend Certainty, and it appeareth that the Writ doth not lie for part, there the whole Writ ſhall abate.

Know Reader, That the Law doth not warrant theſe differences in all, but the common and true rule and difference is; Where a man bringeth an Action, be the Writ general, or certain, and particular; and he demandeth two things, and of his own ſhewing, That he cannot have an Action, or better Writ for one of them; there the Writ ſhall not abate for the whole, but ſhall ſtand for that which is good: But when a man bringeth an Action for two things, and it appeareth, That he cannot have the Writ for one thing, but he may have another in another form; there the Writ ſhall abate for all, and ſhall not ſtand for that which is good. And therefore, if Executors bring a ſpecial Writ upon the Statute of 4 *Ed.* 3. *cap.* 7. for breaking the Teſtators Cloſe, and carrying away a certain ſum of money *in vita Teſtatoris*; and although it be certain, and it appeareth of his own ſhewing, yet foraſmuch as for the breaking of the Cloſe, he cannot have an Action, the Defendant was ruled to anſwer to the money, in 11 *Henry* 4. *cap.* 3. 38 *Henry* 8. *cap.* 24. 25.

In Detinue of a Box ſealed with Charters and Muniments concerning the Plaintiffs Inheritance, the Plaintiff counted of four Charters come to the Defendants hands by Trover, and entituleth himſelf well to three; and it appeareth by his Count, that the fourth did concern Land, whereof the Plaintiff and his Wife were joyntly ſeiſed, as appeareth by his own ſhewing; but becauſe the ſame went to the Action, as to the Husband (for he alone, in ſuch caſe, cannot have any other Action;) for this cauſe it was adjudged, That the Writ ſtood good for the Remnant, 9 *Hen.* 6. 54. 16 *Hen.* 7. 5.

If a man bring a Formedon of Land, and of an Advowſon, although that the Writ be certain, yet foraſmuch as it goeth to the Action of the Writ; as to that the Writ ſhall ſtand good for the Land. 9 *H.* 7. *cap.* 4. and 16 *H.* 7. *cap.* 5. 37 *H.* 6. 25. *b.*

So if a mann make Avowry of the taking of Diſtreſs for divers Rents arear, and it appeareth upon his own ſhewing, that parcel is not yet due, yet the Avowry is good for the Remnant, and ſhall not abate the whole. *Vide* 44 *Edward* 3. 13. 48 *Edward* 3. 4, & 5. 22 *Eliz.* Dyer 369. 370.

A man brought a Writ of *Ejectione cuſtodiæ terræ & hæredis*, and the parties pleaded to Iſſue, and is was found for the Plaintiff, and the Plaintiff had Judgment of the Land onely; for it lieth not
[46] of the Heir. *Vide* 8. *Ed.* 2. *Brief* 847. 41 *Ed.* 3. *Brief* 543. 26 *Ed.* 3. 64. 9 *H.* 6. 10. 46. 11 *H.* 6. 5. 22 *H.* 6. 14. 26 *H.* 6. *Attaint* 4. 6 *Ed.* 4. 7. 8 *Ed.* 4. 3. 18 *Ed.* 4. 27. 21 *Ed.* 4. 24. But if a man bringeth a Writ of Entry of the nature of an Aſſiſe of two Acres, whereof his own ſhewing for one, he ought to have a Writ of Entry in the *Per*; or in the like caſes, there the whole Writ ſhall abate, becauſe he may have a better Writ, as to one Acre; and the ſame doth not extend to the Action, but to the Writ onely, 16 *H.* 7. 5. *Accompt. Vide* 20 *H.* 7. *p. ultimo.* And Judgment was given for the Plaintiff againſt the Avowant.

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[b]

Micb. 12. *Jac.*

Richard Lifords Caſe.

IN Treſpaſs by *Thomas Stamp* Gentleman, Plaintiff, againſt *John Clinton* Defendant, which began *Trin.* 12 *Jac. Rot.* 343. and declared (*inter alia*) of his Cloſes, called *Wittenhams* in *Peaſmer*, in the County of *Berk*; the Defendant pleaded, That one *John Liford* deceaſed, Father of the ſaid *Richard Liford*, was ſeiſed of a Capital Meſſuage, called *Peaſmer* Farm, and of divers Lands and Tenements appurtenant to it, in *Peaſmer* aforeſaid, whereof the ſaid Cloſe called *Wittenhams* were parcel, &c. in his Demeſn, as of Fee; and the laſt of *July*, 4. *Jac.* by his Deed, indented, demiſed, to the ſaid *Thomas Stamp*, and to one *Mary Parker*, the Tenements aforeſaid, in which (*Excepto uno cotagio vocat'* the Forge, *ac omnibus arboribus, quercubus, ulmis, & fraxinis ad tunc creſcen', ultra creſcentium* 21 *annorum* (*arboribus decas' nō exiſten' maeremium tantummodo reſervat'* &c.) To have and to hold, the Tenements aforeſaid, with the appurtenances whereof, &c. (Except before excepted) to the ſaid *Thomas Stamp*, and *Mary Parker*, for, and during

during the natural life of the ſaid *Thomas* and *Mary*, and the longer liver of them: By force of which Demiſe, the ſaid *Thomas* and *Mary*, afterwards, *Et ante præd' tempus quo*, &c. into the Tenements aforeſaid, in which, &c. did enter, and were, and yet are thereof, ſeiſed as of Freehold for term of their lives. And the ſaid *John Liford* being ſeiſed of the Reverſion, 8 *Jan.* 6. *Jac.* by his Deed indented for him and his, did Covenant with *John Winchcomb* and *Vincent Smith*, as well in conſideration of a Marriage, to be ſolemniſed betwixt the ſaid *Richard*, ſon and heir of the ſaid *John Liford* and *John Shepreve*, as in conſideration of Paternal love and affection to the ſaid *Richard*, and his other ſons; that he and his heirs *Extunc in poſterum ſtarent & eſſent ſeiſiti de Tenementis prædict' cum pertin. ſuperius dimiſſis*, to the uſe of the ſaid *Richard*, and the Heirs-males of his body; and after wards to the uſe of *Thomas* his ſon, and the Heirs-males of his body; and with divers other Remainders to *Daniel* and *Nathaniel*, his ſons, leaving the Reverſion of the Fee-ſimple in himſelf: By force whereof, and of the Statute of *Uſes*, the ſaid *Richard* was ſeiſed of the Reverſion of the Tenements in Tail; and the ſaid *John Clinton* by his Commandment, did enter into the ſaid Cloſes called *Wittenhaws*, to ſhew to *Henry Lawrence* and *William Lawrence*, certain Oaks then growing in the ſaid Cloſes; which at the time of the Demiſe, were above the Age of one and twenty years, and which to the ſaid *Richard Liford*, *de jure pertinebant*, and there then ſold to them ſix Oaks, &c. *prout ei bene licuit, quæ eſt eadem fractio*, &c. and demanded Judgment of the Action, &c. Upon which Plea, the Plaintiff did demur in Law: And this caſe was divided into two general Queſtions; the Firſt, What thing was excepted by the exception of the Trees? Secondly, What thing ſhould paſs by the ſaid Conveyance of the Reverſion? [47]

And that the Trees ſhould not paſs to *Richard Liford*, For Objections were made.

Firſt, that by the exception, the Trees remain as Chattels in the Leſſor.

The ſecond admitting, That by the exception, the Trees do remain in him as an Inheritance; then by the exception the ſoil it ſelf is excepted to the Leſſor.

The third, That a Freehold or Inheritance in poſſeſſion, cannot be by the Rules of the Common Law, parcel of the Reverſion expectant upon the Freehold.

The fourth, That by the ſaid Covenant, *John Liford* covenanted to ſtand ſeiſed *de Tenementis præd' cum pertin' ſuperius dimiſſis*, and therefore *Richard Liford* could not have more then were demiſed, and the Trees were not demiſed.

As to the Firſt, they conceived, That by the exception the Trees were Chattels in the Leſſor, divided in Law from the Freehold and Inheritance of the Land: For when a man Leaſeth Lands for life, the property of the Trees is in the Leſſee, and the Leſſor hath but a poſſibility to have them again, *viz.* If they remain annexed to his Inheritance when the Leſſee for life dyeth: And therefore it is reſolved by the whole Court in the Abbot of *Tores* Caſe, in 21 *Hen.* 6. 40. That if a man maketh a Leaſe for life of his Land, he cannot give the Trees to a ſtanger, becauſe that he hath not but a poſſibility; and by conſequence when he excepteth them to himſelf, they remain in him as Chattels. And it is holden in 12 *Ed.* 4. 8. That if a man maketh a Leaſe for years, and the Leſſee cutteth the Trees, the Leſſor cannot take them away. *Vide* 13 *H.* 7. 9. 12 *Ed.* 4. 52. And if the Leſſor cutteth the Trees, the Leſſee ſhall have them as it is holden in 44 *Ed.* 3. 44. Which Books [*b*] and many others, prove, That the property of the Tree is in the Leſſee for years, *à fortiori* in the Leſſee for life; and therefore when the Leſſor excepteth them, he ſhall have them as Chattels ſevered from the Land. And they much relied upon the Book in 2 *El. Dyer* 184. in *Daunſeys* Caſe, where queſtion is made, when Trees are excepted in caſe of Leſſee for years, whether they ſhould be Chattels in the Leſſor; of which they would never have made any doubt, in caſe of Leſſee for life; for the Law maketh a great difference between an exception, in the caſe of a Leaſe for life. And therefore if a man maketh a Leaſe for life of a Manor, excepting one Acre, this Acre, during the Leaſe, is not parcel of the Manor; For in ſuch caſe, in a real Action brought of the Manor, exception ought to be made; otherwiſe it is in caſe of a Leaſe for years, as appeareth 38 *H.* 6. 38. *a. Plo. Com.* 103. in *Fulmerſtons* Caſe. So if the King maketh a Leaſe for life of a Manor, without ſpeaking of the Advowſon, there the Advowſon doth remain in the King as in Groſs, *quod omnes conceſſerunt*, as appeareth in 38 *H.* 6. 34. *b.* And there it is adjudged, That by Grant of the Reverſion, *habendum* the Reverſion with the Advowſon, the Advowſon ſhall not paſs to the Patentee; for the Advowſon in ſuch caſe was ſevered and became in groſs as to the Fee, which was ſaid hath great affinity with the caſe at Bar.

Secondly, Admitting that the Trees are reſerved as an Inheritance in the Leſſor; then the Land it ſelf, upon which the Trees grow, is thereby excepted, as it is reſolved in *Ives* caſe, in the Fifth part of my *Reports. Vide* 44 *Ed.* 3. 22. 46 *Ed.* 3. 22. 17 *Aſſ. pl.* 49. 3 *H.* 6. 45. 16 *Ed.* 4. 2. 14 *H.* 8. 1. 33 *H.* 8. *Br. Reſervation* 79. 6 & 7 *Ed* 6. *Dy.* 39. And then it cannot paſs by the Conveyance of the Reverſion for it was not any part of the Demiſe: And therefore if a man maketh a Leaſe for life of a Manor, excepting one Acre, and afterwards granteth the Reverſion of the Manor to another in Fee, the Acre in poſſeſſion ſhall not paſs, but is ſevered from the Manor for ever: As if *A.* be diſſeiſed of an Acre, parcel of his Manor, although the Acre in right be parcel of the Manor, the right of that Acre ſhall not paſs, but is ſevered from the Manor for ever, as it is holden in 38 *H.* 6. 38. *a.* So if a man be diſſeiſed of a Common appendant, notwithſtanding the Diſſeiſin, the ſame in right is Appendant to the Manor; and yet if during the time of the Diſſeiſin, a Feoffment in Fee be made of the Manor, the Common is ſevered and extinct for ever, as it is holden in 4 *Ed.* 3. 46. & *F. N. B.* 180. *f.* So in the caſe at Bar, by the exception of the Trees, the Soil it ſelf is excepted, wherefore it cannot paſs by the Grant of the Reverſion.

Thirdly, It was objected, That a Reverſion expectant upon a Freehold, may be Parcel or Appendant to a Freehold and Inheritance in poſſeſſion, but a Freehold or Inheritance in poſſeſſion, cannot be parcel or Appendant to a Reverſion expectant upon a Freehold, as it is holden in 38 *H.* 6. 38.

Fourthly, The Conveyance of the Reverſion doth not touch the Trees, and the Soil under them; for the ſaid Conveyance doth recite the ſaid Demiſe of the Land, with the exception of the Trees, [48] and conveyeth *Tenementa præd' cum pertin' ſuperius dimiſſ.* and the exception is not any parcel of the Demiſe; as it is agreed in 3 *H.* 6. 45. And therefore the ſaid Conveyance doth not extend to the Trees excepted, and by conſequence they cannot paſs with the Reverſion; and for theſe cauſes the Plaintiff ought to recover.

On the other ſide it was argued by the Defendants Council, and reſolved by the whole Court, that the Plaintiff ought to be barred.

And as to the Firſt, it was anſwered and reſolved, that the Trees notwithſtanding the Exception, do remain parcel, and grow out of the Inheritance of the Land, and are not Chattels, nor ſhall go to Executors, but ſhall deſcend to his Heir, if no conveyance had been made of the Reverſion, and that for divers cauſes.

1. The Law doth not favour Fractions and Severances of Trees from the Free-hold and Inheritance of the Land, becauſe that by them the Trees were often waſted and deſtroyed: And therefore if a man by Deed indented, bargaineth and ſelleth, give and granteth, his Manor of *D.* and all his Trees growing upon the ſame to another, and the Deed is not enrolled according to the Statute; foraſmuch as the Manor ſhall not paſs, the Trees ſhall not paſs to the bargainee, and ſo ſevered from the Manor, although they are granted by expreſs words; and that the grant of every one ſhall be taken ſtrongly againſt him, as it was reſolved in 9 *Eliz.* And ſo was it holden in 15 *Eliz.* in *Andrews* Caſe, in the *Common Pleas*, which I my ſelf heard. In 23 *Eliz. Dyer* 374. A man demiſeth, granteth, and to Farm letteth a Farm, *&c.* together with all manner of Timber, Underwood and Hedgrows, thereunto appertaining (except all great Oaks growing in one certain Cloſe about the Farm-houſe) to have and to hold the Farm for one and twenty years, rendering Rent; and the doubt was, Whether the Leſſee might cut down and ſell the Timber-Trees, not excepted, without being impeached for the Waſt; and the Lord *Dyer* conceived, that he might by this word (Grant) and by the meaning of the Exception of great Oaks, &c. Alſo the *habendum* which conveyeth the Limitation for years, doth not make mention of Timber, &c. But *Periham*, *Windham*, and *Mead*, gave Judgment again the Defendant, That he could not cut down the Timber, for they were not ſevered from the Inheritance, nor paſſed by the Grant.

The ſecond Reaſon was, That when a man Leaſeth his Land for life or years, the Leſſee hath but a particular intereſt in the Trees; but the general intereſt of the Trees doth remain in the Leſſor; For the Leſſee ſhall have the waſt and fruit of the Trees, and the ſhadow for his Cattle, &c. but the in- [b] tereſt of the body of the Tree is in the Leſſor, as parcel of his Inheritance; and the ſame appeareth in 29 *H.* 8. *Dyer* 46. where it is holden in expreſs words, That it cannot be denied the property of great Trees, *viz.* Timber is reſerved by the Law to the Leſſor, but he cannot grant it without leave of the Termor, for the Termor hath an intereſt in it, *viz.* To have the Waſt and Fruit growing upon it, and the ſhrouds of them for fewel, but the very property of the Tree is in the Leſſor, as annexed to his Inheritance: And all that word by word, appeareth in the ſaid Book. And in 1 *Mar. Dy.* 90. it is alſo holden, That the Leſſee ſhall have the Fruit of the Trees, and the Branches for fewel, and incloſure of Fences. And in 10 *H.* 7. 3. the Leſſee hath not intereſt in the Trees, but to lop them, or for ſhadow for his Cattle; So that there it is ſaid, that the Leſſee hath an intereſt in the Tree, and the Leſſor alſo. See *Herlokendens* Caſe, in the fourth part of my *Reports*. And upon conſideration of theſe and many other Books, it was reſolved, That when no Exception is in the Leaſe of the Trees, the Leſſee hath ſuch a particular intereſt in the Tree, as is aforeſaid, and the Inheritance of the Tree is in the Leſſor: and by this difference all our Books are well reconciled. Which difference alſo appeareth in the Books themſelves; for in Waſt againſt Leſſee for life or years, in caſe of cutting of Trees, it is ſaid in the Writ *Ad exhæredationem* of the Leſſor. And the Leſſor after that he hath made a Leaſe for life, may by Deed grant the Trees or reaſonable Eſtovers out of them, to another and his Heirs, and the ſame ſhall take effect after the death of the Leſſee; and ſuch grant by the Leſſor is good, in reſpect of the Inheritance which he hath in ſuch caſe in the Trees: And the Leſſor may by word, command the Leſſee to cut down the Trees, as it is holden in 18 *Ed.* 3. 54. 2 *H.* 7. 14. But it is true which is ſaid in the ſaid Book of 21 *H.* 6. 46. *b.* That ſuch gift to a ſtranger, is void, during the eſtate for life, for the particular prejudice that may grow to him who hath the eſtate for life. And in 50 *Ed.* 3. 10. in *Frankleys* Caſe, it is ſaid That at the Common Law it was never ſeen that any Tithe ſhould be paid of great Trees, becauſe that, they are parcel of the Inheritance, and the ſame is provided by the Statute of 45 *Ed.* 3. 3. That in ſuch caſe a Prohibition lieth, as before hath been uſed, which proveth, That the Comman Law was ſuch, before the making of the Statute. So it was holden, *Paſchæ*, 42 *Eliz.* between *Sampſon* and *Worthington*, in the *Common Pleas*, That if Timber Trees have been uſually topped and lopped, no Tithes ſhall be paid of them; for as the Law doth priviledge the body of the Tree, being parcel of the Inheritance; ſo it priviledgeth the Branches alſo. And therewith agreeth *Doctor* and *Student* 175. So if a man cut down his Timber Trees, Tithes ſhall not be paid, for the Germins which are growing *ex radicibus ſeu ſtipitibus*, in reſpect that the Root is ſome part of the Inheritance, as it [49] was holden, *Paſchæ*, 29 *Eliz.* in this Court. So if a Timber Tree become *arida, ſicca, & non portans folia nec fructus in æſtate, nec exiſtens maeremium*, and the owner cut it down, no Tithes ſhall be paid thereof, for the Inheritance which was once in him; which priviledge extendeth to it when it becomes

becomes Dotard, as it was adjudged in the *Common Pleas*, *Hill.* 2 *Jac. Rot.* 229. between *Brook* and *Rogers*. So for the Bark of Oaken Timber Trees, no Tithes ſhall be paid for the cauſe aforeſaid, and therewith agreeth *Doctor* and *Student*, 175. But for Acorns; Tithes ſhall be paid becauſe they grow yearly, as appeareth in the *Regiſter*, *fol.* 49. And a man may have an Inheritance in Fee-ſimple in Lands, as long as ſuch a Tree ſhall grow. 27 *H.* 8. 29. becauſe a man may have an Inheritance in the Tree it ſelf. See 46 *Ed.* 3. 1. in *Treſpaſs*, 32 *H.* 6. 2, 20 *H.* 6. 22. 5 *H.* 4. 2. It is enacted by the Statute of *Weſtm.* 2. *cap.* 22. *Cum duo vel tres teneant boſcum, &c.* That if one Tenant in Common in Fee-ſimple doth waſte in Trees, the other ſhall have an Action of Waſte, and the Writ ſhall ſay *ad exhæredationem*, as in 29 *Edw.* 3. *fol.* 19. If one Coparcener before Partition, maketh a Feoffment in Fee to another, and one of them committeth Waſte in the Trees, an Action of Waſte lieth, and that is provided for the preſervation of Trees. And *F.N.B.* 49. If a Parſon of a Church and one *A.* are Tenants in Common of a Wood, and *A.* endeavoreth to do Waſte, the Parſon for the preſervation of the Timber Trees, ſhall have a Prohibition againſt him, that he do no Waſte; and the reaſon thereof (as the Chief Juſtice ſaid) was, That if the Parſon of a Church will waſte the Inheritance of his Church to his private uſe in cutting down of Trees, the Patron may have a Prohibition againſt him; for the Parſon is ſeiſed as in the right of his Church, and his Glebe is the Dower of his Church, for of it he was endowed; and ſo ſpeaketh many ancient Records: And ſo foraſmuch as a Prohibition lieth againſt him, it is reaſon that he have the like remedy againſt him who holdeth in Common with him; And thereupon a notable reſolution holden at *Carliſle*, 35 *Edw.* 1. was cited to this effect; for there upon complaint made (in theſe words) Will our Lord the King underſtand, That Sir *Anthony*, Biſhop of *Durham*, waſtes and deſtroyeth all the Wood appertaining to his Church in the Biſhoprick of *Durham*, by giving, and ſelling, and ill keeping, and of railing of Forges of Iron and Lead, and burning of Coals, &c. whereof if our Lord the King that now is Patron of the Churchgive not remedy, the Church aforeſaid ſhall be diſ-inherited and impoveriſhed, in prejudice of our Lord the King in his Crown, and of the Chapter of *Durham*. *Ita reſponſum eſt: Inhibeatur per breve de Cancellaria Epiſcopo & Miniſtris ſuis ne faciant vaſtum de contentis in petitione.* By which it appeareth. That the Parliament did refer him to the Ordinary remedy of the Common Law by a Writ of Prohibition in ſuch caſe. And *Mich.* 23 *Ed.* 1. *inter adjudicata coram Rege*, Hunt. *fol.* 83. *in Theſaur' Scaccarii ſic adjudicatur, quod Eccleſia eſt infra ætatem & in cuſtodia domini Regis, qui tenetur jura & hæreditates ejuſdem manutenere & defendere. Et Rot' Patent' An.* 14 *H.* 3. *M.* 8. *Archiepiſcopus Dublin fecit finem de* 300 *marcis pro deafforeſtatione foreſtæ Archiepiſcopatus ſui. Vide* 2 *H.* 4. 3. *b.* If a Biſhop or Archdeacon abate and cut down all the Wood that he hath, he ſhall be depoſed as a Delapidator of his houſe. 29 *Ed.* 3. 16. *Accompt. Vide* 27 *Aſſ. pl.* 10. 20 *H.* 6. 46. 10 *Ed.* 4. 19. And the Treatiſe entituled, *Ne rectores proſternant arbores in cœmiterio*, which is but a Declaration the Common Law in theſe words, *Prohibemus ne Eccleſiarum rectores arbores in cœmiterio creſcent' preſumant proſternere indiſcrete, niſi cum Cancellus Eccleſiæ neceſſaria indiget refectione*, &c. And it is regularly true; *Meliorem conditionem Eccleſiæ facere poteſt Prelatus, deteriorem nequaquam.* [b]

As to the ſecond Objection, difference was taken betwixt a Wood which may be demanded in a *Præcipe* by the name of ſo many Acres of Wood, and Trees growing out of any Wood which cannot be demanded in a *Præcipe*, by the name of Land or Paſture, &c. where they grow. For if ſuch a Wood whereof a *Præcipe* lieth, be parcel of my Manor of *C.* and I leaſe my Manor excepting Woods, thereby the Soil it ſelf is excepted, and in a *Præcipe* brought of the Manor, exception ought to be made of ſo many Acres of Wood: But in ſuch caſe, if I except all my Trees which grow out of any Wood, but upon Land or Paſture, thereby the exception of the Trees, the Soil it ſelf is not excepted, but ſufficient nutriment out of the Land is reſerved to ſuſtain the vegetative life of the Trees; for without that the Trees which are excepted, cannot ſubſiſt; but if the Leſſor cut them down, and by Licence of the Leſſee, root them up; in ſuch caſe the Leſſee ſhall have the Soil; for *ceſſante cauſa ceſſat effectus.* And this difference may be gathered out of *Ives* Caſe, in the Eight Part of my *Reports*. *Vide* 14 *Hen.* 8. 1. If I by Deed grant all my Trees within my Manor of *D.* to one and his heirs, the Grantee ſhall have an Inheritance in them, without any Livery or Seiſin. See Sir *Francis Barringtons* Caſe, in the Eight Part of my *Reports*. And in a *Præcipe* brought againſt Leſſee for life where the Trees are excepted, it needeth not in ſuch caſe to make exception of Trees, becauſe that no *Præcipe* lieth of them; but they ſhall be recovered by him who hath righe paramount by the Recovery of the Land: See for the ſaid Rule of exception, 4 *Ed.* 3. 48. 17 *Ed.* 3. 62. 10 *Hen.* 7. 17. *F.N.B.* 201, &c. And by the difference, apparant in our Books they are all well reconciled. And in the ſaid exception, five things were obſerved.

1. That notwithſtanding the exception, they remain as parcel of the Inheritance. [50]
2. That the Soil it ſelf is not excepted, but ſufficient nutriment for the growth of the Tree.
3. That the Leſſee ſhall have the Paſture under the Tree, as in 4 *Edward* 6. *Waſte*, *Br.* 136. Nothing ſhall be recovered in Waſte, but the circuit of the Root, and not the latitude of the Branches.
4. That the Leſſor ſhall have all the benefit of the Trees.

And 5. the Aeries of all Fowl with Aery in the Trees, and the Fruits,

And it was reſolved, That although *fictione juris quoad* the Leſſee the Tree is divided from the Freehold, yet *in facto* and truth, as to all other it is parcel of the Inheritance of the Leſſor: For it was ſaid, That Timber Trees cannot be cut down with a Gooſe-quill; as if Tenant in Tail ſelleth all the Trees to another, the ſame is a Chattel in the Vendee, and his Executors ſhall have them; and in ſuch caſe *fictione juris* they are ſevered from the Land; but if Tenant in Tail dieth before actual ſeverance as to the Iſſue in Tail, they are parcel of his Inheritance, and ſhall go with it, and the Vendee cannot take them; and yet as to the Tenant in Tail himſelf, they were ſevered for a time. 18 *Ed.* 4. 6. 11 *Hen.* 4. 32. *Plo. Com.* 259. & 438. 27 *H.* 8. 5. So in the caſe at Bar, *quoad* the Leſſee *fictione juris* they are divided for a time; but as to the Leſſor, and all others, they remain parcel of the Inheritance.

Alſo it was reſolved, That there is a difference betwixt the caſes which have been put and the caſe at the Bar: For it is true, That if a man make a Leaſe for life of a Manor, to which an Advowſon is appendant, and excepteth one Acre with the Advowſon; in ſuch caſe, if he grant over the Reverſion, the Acre with the Advowſon ſhall not paſs to the Grantee, but they are ſevered and diſunited from the Manor for ever; as an arm or a member is divided from the body: But the Trees notwithſtanding the Exception, are growing out of the Land, and have their nutriment out of it, and are not *rei veritate* divided from it. And therefore if a man maketh a Feoffment in Fee of a Manor, excepting the Trees, and afterwards the Feoffee buyeth the Trees, they are again made parcel of the Inheritance; although they were abſolutely divided for a time, and that appeareth in *Herlakendens* Caſe, in the Fourth part of my *Reports*. But in the ſame Caſe, if one Acre or a Houſe had been excepted, and the Feoffe after purchaſe the Acre or the Houſe, none of them ſhall be parcel of it again. And ſo the difference appeareth *inter partem integralem, ſimilarem, & diſſimilarem, & inter partem diſſimilarem ſolo annexam ſive adhærentem*; as is ſaid in 9 *Ed.* 3. 2. (*Robert de Vanlores* Caſe) *ut domus, & partem diſſimilarem excreſcentem, ut arbor.*

[b] As to the third Objection, it is true. That an integral part, or thing appendant in poſſeſſion, cannot be parcel, &c. of a Reverſion expectant upon an eſtate for life, as hath been ſaid; but the Trees (as hath been often ſaid) are growing out of the Inheritance, and attendant upon it: As by grant of the Reverſion, the Charters and Evidences ſhall paſs as things attendant upon the Inheritance; and in truth they are the ſinews of the Inheritance. So if I have a Manor, in which there is a Park and Fiſh-ponds, and I leaſe the Manor, except the game of Deer, and the Fiſh, and afterwards I grant over the Reverſion, the Grantee ſhall have the Deer, and the Fiſh, as things attendant upon the Inheritance; ſo not onely thoſe which have vegetative life, but alſo thoſe which have ſenſitive life, ſhall go with the Inheritance. And it is reſolved in 14 *Hen.* 8. 25. in *Wiſtows* Caſe of *Grayes Inn*, That if a man have a Horſe-mill, and the Miller taketh the Millſtone out of the Mill, to the intent to pick it to grinde the better, although it be actually ſevered from the Mill, yet it remaineth parcel of the Mill, as if it had been always lying upon the other ſtone, and by conſequence by the Leaſe or conveyance of the Mill it ſhall paſs with it: So of Doors, Windows, &c. the ſame Law of Keys, although they are diſtinct things, yet they ſhall paſs with the Houſe; *à fortiori* in the caſe at the Barr, the Trees which are growing out of the Inheritance ſhall paſs with it. And in the caſe at the Bar, there ſhall be a great inconvenience if the Trees ſhall not paſs with the Inheritance; for in all the Leaſes for life or years made by the King, either of Land within th Survey of the *Exchequer*, or of the *Dutchy*, the Trees are excepted; and if they ſhall be reputed as Chattels, or if they ſhall not paſs with the Reverſion as parcel of the Inheritance, great inconvenience will follow, although that the Trees be particularly granted. *Vide Swains* Caſe, in the Eighth part of my *Reports*, which note well.

As to the Fourth and laſt Objection, it was reſolved, Firſt, That if the Reverſion had been conveyed over by the name of Tenements, or of his reverſion generally, without queſtion the Trees would paſs: And although that he covenanteth to ſtand ſeiſed *de Tenementis præd' cum pertin' ſuperius dimiſſis*, &c. yet thereby the Inheritance of the whole Land paſſeth, and by conſequence the Trees being parcel of the Inheritance, ſhall paſs with it, and the Trees ſhall not paſs as things leaſed, but as things annexed to the Inheritance, notwithſtanding that they are not demiſed. And in the Argument of this point, theſe caſes were cited, *Paſche*, 41 *Eliz.* in this Court, between the Lady *Ruſſel* Plaintiff, and *Gulwell* Defendant, in an Action of Debt upon an Obligation, where the caſe was, That the Plaintiff by Deed indented, leaſed to the Defendant a Farm called *D.* except one Cloſe by name; and the Leſſee by the ſame indenture covenanted with the Leſſor to do divers things concerning the premiſſes, and was bound in the ſaid Bond to perform all the Covenants and Agreements in the ſaid Indenture; and if theſe words (the premiſſes) ſhould extend to the Cloſe
[51] excepted, was the Queſtion, (and *Mountague* in *Dive* and *Manninghams* Caſe, that (the premiſſes) ſhould extend to the thing excepted.) But it was reſolved, That in the principal caſe (*præmiſſa*) ſhall not extend to the thing excepted, but are as much in effect as *prædimiſſa*. And *Paſche*, 10 *El.* one by Deed indented, demiſed certain Lands between *Pond*-Meadow of the one part, and *Todes*-yard of the other part, and the Leſſee covenanted to repair the Hedges between the premiſſes; and it was adjudged, that it did not extend to the Abuttals, but (*præmiſſa*) ſhould be taken in Law for (*prædimiſſa*) ſo in the caſe at Bar, *Tenementa præd'*, & *Tenementa prædict' ſuperius dimiſſa*, and *præmiſſa*, and *prædimiſſa*, or *præconceſſa*, are all one in judgment of Law. But *Paſche*, 36. *Eliz.* in this Court between the Earl of *Pembrook* and *Simons* (Servant of Sir *Henry Barkley*) the caſe was, That the Father of the Plaintiff had granted to Sir *Henry Barkley* the keeping of *Staffordale*-Walk. and of *Brewcomb*-Walk, in the Forreſt of *Fromſelwood*, for term of his life: The Plaintiff by his Deed did confirm the eſtate of the ſaid Sir *Henry* in *Brewcombe*-Walk, and granted *Staffordal*-Walk,

Walk, to him and the Heirs-males of his body, with a Proviſo, That if he cut down any Trees in the premiſſes, that then his eſtate ſhall ceaſe. And afterwards Sir *Henry* cut down Trees in *Brew-comb*-Walk; and it was reſolved that theſe words (the premiſſes) ſhould extend to it, for the Deed hath operation in it by way of Confirmation, and therefore there (*præmiſſa*) ſhall be taken as well for *præconfirmata*, as *præconceſſa*, but ſhall not extend to any other part of the Foreſt; although it was not named before without the Deed hath not any operation. And the Chief Juſtice ſaid, That as to cutting down of Trees, Graſs, Corn, and other things annexed to the Soil, there are great variances of opinions in our Books, not onely againſt whom the Action *Vi & armis* ſhall be brought for the recovery of the damages, but alſo concerning the propriety of them. And therefore if one Diſſeiſe me, and during the Diſſeiſin, he cutteth down the Trees, or Graſs, or the Corn growing upon the Land, and afterwards I re-enter, I ſhall have an Action of Treſpas againſt him *Vi & Armis*, For the Trees, Graſs, Corn, &c. For after my Regreſs, the Law, as the Diſſeiſor, and the Servants doth ſuppoſe that the Freehold hath always continued in me; but if my Diſſeiſor mak th a Feoffment in Fee, Gift in Tail, Leaſe for Life or Years, &c. and afterwards I re-enter, I ſhall not have an Action *Vi & armis* againſt thoſe who came in by Title; for this Fiction of the Law, that the Freehold hath continued always in me, ſhall not have relation to make him who cometh in by Title, to be a wrong doer, *Vi & armis*, for *in fictione juris ſemper æquitas exiſtit*; But in ſuch caſe, I ſhall recover all the mean profits againſt my Diſſeiſor in the ſame manner as the [b] Diſſeiſee in ſuch caſes ſhall recover in an Aſſiſe at the Common Law before the Statute of *Gloceſter*, *cap.* 1. damages onely againſt the Diſſeiſor. Alſo it is to be preſumed, That the Feoffee hath given conſideration or recompence to the Diſſeiſor, and that the Leſſee hath paid Rent to him, or other conſideration; and therefore in reaſon the Diſſeiſor is to be charged with the whole. The ſame Law, if my Diſſeiſor be diſſeiſed, and afterwards I re-enter, I ſhall not have an Action of Treſpas againſt the ſecond Diſſeiſor; and if I ſhould puniſh the ſecond Diſſeiſor, he ſhould be twice charged; and therefore I ſhall recover all the mean profits againſt my Diſſeiſor, his Servants, and others who have done the Treſpaſs by his Commandment, and in his right; and ſo hath the Law been always taken upon conſideration of all thee Books in 9 *Ed.* 3. 2. *Peter de Vanlores* Caſe, 10 *H.* 6. 14. 19 *H.* 6. 27. 22 *H.* 6. 21. 32 *H.* 6. 32. 33 *H.* 6. 46. 34. *H.* 6. 30. 37 *H.* 6. 35. 38 *H.* 6. 28. 2 *Ed.* 4. 18. 9 *Ed.* 4. 39. 11 *Ed.* 4. 4. 20 *Ed.* 4. 18. 21 *Ed.* 4. 5. & 74. 22 *Ed.* 4. 21. 6 *H.* 7. 9. 10 *H.* 7. 27. 12 *H.* 7. 25. 13 *H.* 7. 15. *b.* And all the ſame is true *quoad actionem*; *ſed quoad proprietatem*, the Regreſs of the Diſſeiſee doth reveſt the property in him, as well for the Corn, as for the Graſs and Trees, and as well againſt the Feoffee, Leſſee, &c. and ſecond Diſſeiſor, as againſt the Diſſeiſor himſelf; for the Act of the Diſſeiſor may alter my Action, but his Act cannot take away my Action, Property or Right. And in that alſo is great variety of Opinions in our Books: For ſome as to the Diſſeiſor himſelf, have taken a difference between things which come by the operation of the Diſſeiſor himſelf (as if he ſow the Land, and afterwards cut them and carry them away, the Diſſeiſee after his re-entry cannot take them; for if he had not ſowed the Land, no Corn had been there, and it is for the advancement of Tillage that the Land do not lie freſh) and things which come by the Act of God, as Graſs, Trees, &c,

But upon conſideration of all the Books, it hath been reſolved, That it is all one, and there is no diverſity betwixt them; for the Rule and Reaſon of the Law as it hath been ſaid, That after the Regreſs of the Diſſeiſee, the Law doth adjudge as to the Diſſeiſor himſelf, that the Freehold hath continued in the Diſſeiſee, which Rate and Reaſon doth extend as well to the Corn, as to Trees or Graſs, &c. The ſame Law, if the Feoffee, or Leſſee, or the ſecond Diſſeiſee ſow the Land, or cut down Trees or Graſs, and ſevereth them, and carrieth them away, or ſelleth them to another, yet after the Regreſs of the Diſſeiſee, he may take as well the Corn as the Trees and Graſs, to what place ſoever they be carried; for the Regreſs of the Diſſeiſee hath relation as to the property, to continue the Freehold againſt all in the Diſſeiſee *ab initio*, and the carrying of them from the Land, doth not alter the property; and if the Diſſeiſee taketh them, they ſhall be recooped in damages againſt the [52] Diſſeiſor; and ſo hath it been often reſolved and put in experience upon conſideration of the Books in 27 *H.* 6. 1. 37 *H.* 6. 6. 12 *Ed.* 4. 5. *a.* 14 *Ed.* 4. 6. 15 *Ed.* 4. 31. 2 *H.* 7. 1. 3 *H.* 7. 1 & 6. 5 *H.* 7. 16. 12 *H.* 7. 25. 28 *H.* 8. *Dyer* 31 *b.* 1 *Eliz. Dyer.* 173.

Laſtly, it was reſolved by the whole Court in the Principal caſe, That when the Leſſor excepted the Trees, and afterwards had an intention to ſell them, the Law gave to him and them who would buy, power as incident to the exception, to enter and to ſhew the Trees to thoſe who would have them; for without ſight none would buy, and without entry they could not ſee them; as in 9 *H.* 6. 29. A man ſeiſed of a Houſe in a Borough. &c. deviſeable deviſed the ſame to a Woman in Tail; and if the Woman died without Iſſue, that his Executor might ſell and diſpoſe of it for his Soul: In this caſe the Executor might by the Law enter into the Houſe, to ſee if it were well repaired or not, to the intent to know at what value the Reverſion is to be ſold. *Quod fuit conceſſum per totam curiam*, 43 *Aſſ. pl.* 7. The Law giveth power to him who ought to repair a Bridge to enter into the Land, and to him who hath a Conduit within the Land of another, to enter into the Land to mend it, when cauſe requireth, as it is reſolved in 9 *Ed.* 4. 35. So it is agreed in 2 *R.* 2. *Bar* 237. If I grant to you my Trees in my Wood, you may come with Carts over my Land to carry the Wood. *Temps. E.* 1. *Grants* 41. *Lex eſt, cuicunque aliquis quid concedit, concedere videtur & id ſine quo res ipſa eſſe non potuit*, and that is a maxim in Law. *Vide* 5 *Ed.* 3. *Tranſ.* 13. 20 *Ed.* 3. *Avowry* 124. 8 *Ed.* 4. 5. in *Manxels* Caſe, *fol.* 13. See in my *Reports*, *Lib.* 4. & 5. *Part* 2.

And

And as to the Plea in Bar, it was holden, That it was without form, and without knowledge of Good pleading, and that for four cauſes.

Firſt, The Defendant pleads a Leaſe for life of the Tenements in which, to the Plaintiff, and to *Mary Parker*, by force whereof they entered, and were, and yet are ſeiſed, &c. which is an Averment of the life of *Mary Parker*, which upon the matter is, that the Plaintiff hath nothing in the Tenements in which, &c. but joyntly with *Mary Parker* who is alive, not named in the Writ; and yet he doth not plead the ſame to the Writ, but doth conclude and demandeth Judgment, if he ſhall have Action, which is not well pleaded; for every Plea ought to have apt concluſion, and therewith agreeth 40 *Ed.* 3. 9. 43 *Ed.* 3. 27. 36 *H.* 6. 18. *Vide* 22 *Aſſ. pl.* 53. 14 *H.* 4. 7. 4 *H.* 6. 27. 18 *H.* 6. 32. 9 *H.* 7. 2. So if a man plead an Eſtopple, he ought to relie upon it, and not demand Judgment of Action.

[b] Secondly, The Plea containeth double matter, one to the Writ by Joyntenancy, the other in Bar by the exception in the Covenant.

Thirdly, In pleading of a Leaſe for life which paſſeth by Livery and Seiſin, it is meer ſurpluſage to plead an Entry of the Leſſees.

Fourthly, He doth not add, That the Trees which are ſold, were not Dottards, which are excluded out of the Exception; but he doth add, That they *De jure pertinebant* to *Richard Liford*, which is not formal, for he ought in good pleading to have added, That they were not Dottards. But upon the whole matter, ſufficient matter appeareth to the Court to give Judgment againſt the Plaintiff; for which, by the Rule of the Court, the Plaintiff took nothing by his Bill.

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[53]

Mich. 12. *Jac.*

The Caſe of the Tailors of Habits, &c. of *Ipſwich.*

TRin. 11 *Jac.* in the *Kings Bench*, *Magiſtri, Gardiani, & Communitas Sciſſorum & operatorum pannorum villæ Gipwic'* in the County of *Suffolk*, brought an Action of Debt for Three pound thirteen ſhillings and four pence, againſt *William Shenning*, and declared, That whereas the King by his Letters Patents had incorporated the Plaintiffs by the ſaid name, and granted to them, That they ſhould have full power and authority to make and conſtitute reaſonable Laws, Ordinances, and Conſtitutions in Writing, which to them ſhould ſeem good, wholſome, profitable, honeſt, and neceſſary, according to their diſcretion; for the well ordering and governing, &c. of the Society aforeſaid, &c. and to ſet Fines and Amercements for breach of the ſaid Laws, &c. And recited the Statute of 19 *H.* 7. 7. By which it is enacted, That no Maſter, Wardens, and Society of Craſts and Myſteries, take upon them to make any Acts or Ordinances, nor to execute any Acts or Ordinances, *in exhæredationem ſeu diminutionem prærogativæ vel aliorum aliquorum, nec non contra commune profic' populi niſi iidem actus & ordinationes examinat' & approbat' fuerunt per Cancellar', Theaſaur' Angliæ, Capital', Juſtic', utriuſque Banci, vel tres eorum, vel aliter coram Juſtic' Aſſiſe in eorum itineribus*, &c. *ſub pœna foriſfact'* 40 *l.* *pro quolibet tempore quo ipſi in contr' facerent.* And afterwards the ſaid Corporation, in the fourth year, made divers Conſtitutions, and (amongſt others) that no perſon exerciſing any of the ſaid Trades within the Town of *Ipſwich Præd'* ſhould

[b] keep any Shop or Chamber, or exerciſe the ſaid Faculties, or any of them, or take any Apprentice or Journeyman, till they had preſented them to the ſaid Maſters and Wardens of the ſaid Society, for the time being, or any three of them, and ſhould prove that he had ſerved ſeven years, at the leaſt, as an Apprentice. and before he ſhall be admitted by them to be a ſufficient Workman; and if any offend in any part thereof, That he ſhould forfeit and pay to the ſaid Maſter and Wardens, and Society aforeſaid, for every ſuch offence five marks, and to levy the ſame by Diſtreſs, or Action of Debt, *&c.* The which (amongſt other) was allowed by the Juſtices of Aſſiſe of the ſame County, according to the ſaid Act of 19 *H.* 7. And that the ſaid *William Shening* Tailor, uſing the Trade of a Tailor after the ſaid Orders made and ratified as aforeſaid, *viz.* The tenth of *October* in the tenth year of the King, came to the ſaid Town of *Ipſwich*, and there uſed the Trade of a Tailor by the ſpace of twenty days, before he had preſented himſelf to the ſaid Maſter and Wardens, or any three of them, or had made proof that he had ſerved as Apprentice for ſeven years in the ſaid Trade, and before he was admitted by the ſaid Maſter or Wardens, or any three of them, to be a ſufficient Workman, *Per quod actio accrevit*, to the Maſter, Wardens, and Communalty, to have of the ſaid *Henry* the ſum of Three pound thirteen ſhillings and four pence, &c.

The Defendant pleaded that he was an Apprentice by the ſpace of ſeven years, *viz.* From the firſt of *September*, in the firſt year of the King, till the ſecond of *September* in the eighth year, to one *Henry Backet*, in the art of a Tailor, &c. And that the ninth of *September*, *Anno* 10. *Anthony Penny*, Eſquire, Inhabitant in *Ipſwich*, retained him to be his houſhold-ſervant to ſerve him for one year: And that within the ſame time, he by the Commandment of the ſaid *Anthony* made divers Cloath and Garment for him, his Wife, and Children, as was lawfull for him to do, which is the ſame uſe and exerciſe of the Trade of a Tailor, whereof the Plaintiffs have declared: Upon which the Plaintiffs did demur in Law. And in this caſe upon Argument at the Bar and Bench, divers points were reſolved.

1. That

1. That at the Common Law no man might be forbidden to work in any lawfull Trade, for the Law doth abhor idleneſs, the mother of all evil, *Otium omnium vitiorum mater*, and chiefly in young men, who ought in their youth, (which is the time of their ſowing) to learn lawfull Sciences and Trades which are profitable to the Commonwealth, and whereof they might gather the fruit in their old age, for *jeuneſſe oiſeuſe, vieilleſſe diſetteuſe*; and therefore the Common Law doth abhor all Monopolies, which forbid any one to work in any lawfull Trade; And the ſame appeareth in 2 *H.* 5. *b.* a Dyer was bound that he ſhould not uſe the Dyers craft for two years; and there *Hull* held, that the Obligation was againſt the Common Law, and (by God) if the Plaintiff were here, he ſhould go to priſon, till he pay a fine to the King; So, and for the ſame cauſe, If a Husband be bound that he ſhall not ſow his Land the Obligation is againſt Law. And ſee 7 *Ed.* 3. 65. *b.* If he who taketh upon him to work, be unskilfull, his ignorance is a ſufficient puniſhment to him; for *imperitia eſt maxima mechanicorum pœna, & quilibet quærit in qualibet arte peritos*: [54] And if any one taketh upon him to work, and miſdoeth, an Action upon the Caſe lieth againſt him. And the Statute of 5 *Eliz.* 4. which forbiddeth any perſon to uſe or exerciſe any Craft, Myſtery, or Occupation, if he hath not been an Apprentice by the ſpace of ſeven years, was not enacted onely to the intent that Workmen ſhould be skilfull, but alſo that youth ſhould not be nouriſhed in idleneſs, but trained and brought up in lawful Sciences and Trades: And therefore it appeareth, that without an Act of Parliament, none can be in any wiſe retained to work in any lawful Trade. Alſo the Common Law doth not forbid any perſon to uſe any Arts or Myſteries at his pleaſure, *Nemo prohibetur plures negotiationes ſive artes exercere*, untill it was forbidden by Act of Parliament, 27 *E.* 3. 6. 1. That the Artificers and people of Myſtery, tye every one of them to one Myſtery, and that none uſe other Myſtery then that which he hath choſen; but preſently this reſtraint of Trade and Traffick was found prejudicial to the Commonwealth, and therefore at the next Parliament it was enacted, That all people ſhould be free as they were at any time before the ſaid Ordinance.

2. That the ſaid reſtraint of the Defendant, for more then the ſaid Act of 5 *Eliz.* hath made, was againſt Law: And therefore for as much as the Statute hath not reſtrained him who hath ſerved as an Apprentice for ſeven years, to exerciſe the Trade of a Tailor; the ſaid Ordinance cannot forbid him to exerciſe his Trade, till he be preſented before them, or till he be allowed by them to be a Workman; for theſe are againſt the Freedom and Liberty of the Subject, and are a means of Extortion in drawing moneys to them, either by delay, or ſome other ſubtil device, or of oppreſſion of young Tradſemen, by the old and rich of the Trade, not ſuffering them freely to live in their Trade: And all this thing is againſt Law, and againſt the Commonwealth. But Ordinance for the well ordering and goverment of men of Trade and Myſteries are good, but not to reſtrain any one in his lawfull Myſtery.

3. It was reſolved, That the ſaid branch of the Act of 5 *Eliz.* is intended of publick uſe and exerciſe of a Trade to all who will come, and not to him who is a private Cook, Tailor, Brewer, Baker, &c. in the Houſe of any one for the uſe of a Family: And therefore if the ſaid Ordinance had been good and agreeable to Law, ſuch private exerciſe and uſe had not been within it; for every one may live in ſuch private manner, although he hath never been an Apprentice in the Trade.

4. It was reſolved, That the Statute of 19 *H.* 7. 7. doth not ſtrengthen any of the Ordinances [*b*] made by any Corporation, with one ſo allowed and approved as the Statute ſpeaketh, but leaveth them to be affirmed as good, or diſaffirmed as unlawful by the Law, the onely benefit which the Incorporation getteth by ſuch allowance is, that they ſhall not incur the penalty of forty pound mentioned in the Act, if they put in uſe any Ordinances which are againſt the Kings Prerogative, or the common profit of the people. And afterwards Judgment was given, that the Plaintiffs ſhould take nothing by their Bill.

Micb. 12. *Jac.* [55]

Edward Savels Caſe.

Edward Hamond brought a Writ of *Ejectione firmæ* againſt *Edward Savel*, and *William Bows*; for that, *viz.* That whereas one *James Smith* the firſt day of *April*, in the eleventh year of King *James*, at *Leeds* in the County of *York*, did let to the ſaid *Edward Hamond* one Meſſuage with the appurtenance in *Leeds* aforeſaid, and one Cloſe called *Dovecot* Cloſe, containing three Acres to the ſaid Meſſuage, belonging or appertaining in *Leeds*, for the term of three years, and declared of an Ejectment, &c. the Defendant pleaded not guilty; and the Jury found, as to the Houſe, that the Defendant was not guilty; and as to the ſaid Cloſe called *Dovecot* Cloſe, the Defendant was found guilty.

In Arreſt of Judgment, it was moved, That an *Ejectione firmæ* doth not lie of a Cloſe, although it hath a certain name, but it ought to be of ſo many Acres: And although he ſaith in this caſe, containing three Acres, yet he doth not ſhew of what nature the Acres are, as Land, Meadow, Paſture, Wood, &c. and the certainty ought to be compriſed in the Declaration, becauſe he ſhall recover

cover the poſſeſſion by *Habere fac' poſſeſſionem*, and ſhall follow the form of other Writs of the like nature, as *Droit de Gard*, or *Ejectment de Gard*, or the like, ſhall not be of a Cloſe by certain name,
[b] but ought to be by the certainty of the Acres, containing the quality of the Land, as Land-Meadow, Paſture, Wood, &c. And although that by good Order, the moſt worthy ſhall have the preceeency, and ſhall be preferred before the leſs worthy; and an entire thing preferred before a part, &c. yet if the ſaid Order be not preciſely followed, the Judges will not abate the Writ or Count. *Vide* 6 *Ed.* 3. 42. & 9 *Ed.* 3. 3. And for the aforeſaid exception, Judgment was ſtayed.

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[56] ## *Mich.* 12. *Jac.*

Benthams Caſe.

M*Arſh* brought a Writ of Annuity againſt *Bentham*, and the parties came to Iſſue, which was tryed for the Plaintiff, and found the Arrerages, but the Jury did not aſſeſs any damages or coſts; which Verdict was imperfect, and it cannot be ſupplied by a Writ of Enquiry of Damages; but the Plaintiff releaſed his damages and coſts, and thereupon hath Judgment. Upon which the Defendant brought a Writ of Error, and aſſigned the Error aforeſaid, *viz.* The inſufficiency of the Verdict; but the Judgment was affirmed, becauſe the Plaintiff hath releaſed his damages and coſts, which is for the Defendants benefit. *Vide* 22 *Eliz. Dyer* 369, 370. Who in a Writ of *Ejectione Cuſtodiæ terræ & hæredis*, the Jury aſſeſſed damages entirely, which was inſufficient; For, for the heir it doth not lie, yet he releaſed his damages, and had Judgment for the the Land. Note inſufficient aſſeſſing of damages, and no aſſeſſing is all one.

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[b] ## *Mich.* 12. *Jac.*

Doctor *Foſters* Caſe concerning Recuſants.

W*Illiam Shoyle* did exhibit an Information againſt *Richard Foſter*, Doctor of Phyſick, That the ſaid *Richard Foſter* of the Pariſh of St. *Anthony*, in the Ward of Cordweyner, *London*, 20 *Junii*, *Anno Domini Regis nunc* 11. was of the age of ſixteen years and above, and from the ſaid twentieth day of *June*, till the tenth day of *May* then next following, that is to ſay, By the ſpace of a eleven whole months and more, did not repair to his Pariſh Church aforeſaid, nor to any other Church, Chappel, or uſual place of Common Prayer or Divine Service, but *per totum tempus prædictum voluntariè & obſtinatè abſque aliqua cauſa rationabili abſtinuit ab eiſdem; contra formam ſtatuti in hujuſmodi cauſa editi & proviſi, per quod actio accrevit eidem Domino Regi ac præfato Willielmo Shoyle qui tam pro Domino Rege quam pro ſeipſo ſequitur ad habendum & exigendum de præfato Richardo Foſter* 220 *l. legalis monetæ Angliæ, viz. pro quolibet menſe*, &c. 20 *l.* &c. *unde idem Willielmus Shoyle petit inde tertiam partem, juxta formam ſtatuti prædict.* To which Doctor *Foſter* pleaded, that the ſaid *William Shoyle qui tam*, &c. *pro prædictis* 220 *l. in eadem informatione conten' ſen aliqua inde parcella proſequi non debet.* For he ſaith, That by an Act of Parliament, *Anno* 23 *Eliz.* it was enacted, That every perſon above the age of ſixteen years, which ſhall not repair to any Church, &c. but ſhall abſent himſelf againſt the Statute of 1 *Eliz.* for the uniformity of
[57] Common Prayer; and being thereof lawfully convicted, ſhould forfeit to the late Queen for every month, after the end of the ſaid Seſſion of Parliament, &c. twenty pound, &c. And further, that all the forfeitures of any ſum of moneys limited by the ſaid Act, ſhould be divided in three equal parts, that is to ſay, One third part to the ſaid late Qeen to her own uſe; and an other third part to the ſaid Queen for the relief of the poor of the Pariſh, &c. and the other third part to ſuch perſon who would ſue for the ſame in any Court of Record by Action of Debt, Bill, Plaint, or Information, &c. And afterwards by another Act of Parliament, *Anno* 28. of the ſaid late Queen, it was enacted, That every offender in not repairing to Church to Divine Service, &c. againſt the Form of the ſaid Act, which after ſhall happen to be once convicted in ſuch Terms of *Eaſter* and St. *Michael* the Archangel, which ſhould be next after ſuch conviction, ſhould pay into the Receipt of the Exchequer, according to the rate of twenty pound for every month as ſhould be contained in the Indictment, upon which ſuch conviction was; and alſo for every moneth after ſuch conviction, without any other Indictment, ſhould pay into the Receipt of the Exchequer, &c. And if any default ſhall be in any part of payment, &c. that then, and ſo often the ſaid late Queen might by Proceſs out of the Exchequer, take, ſeiſe, and enjoy all their Goods, and two parts of their Lands, Tenements, and Hereditaments, Leaſes and Farms, &c. And where by the ſaid Act of 3 *Eliz.* a third part of the forfeitures for not coming to Divins Service, was limited to the Poor, &c. By the

the ſaid Act of 28 *Eliz.* it is ordained, That it ſhall be lawfull for the Lord Treaſurer, Chancellor, and chief Baron of the Exchequer, &c. to aſſign and diſpoſe of it, &c. And further, by the Act of 35 *Eliz.* that *pro magis feſtina* (*Anglice*, more ſpeedy) *levatione*, and recovery for and by the ſaid Queen, *omnium & ſingularium pœnarum, debitorum, forisfactur'*, and payments that then after ſhould become payable, by vertue of the ſaid Act of 35 *Eliz.* or the ſaid Statute made in *Anno* 23. (*inter alia*) It was enacted by the Authority of the ſaid Parliament of 35. *Quod omnia & ſingula dicta pœna debit', forisfactur', & ſolutiones forent & potuiſſent eſſe recuperat' & levat' ad uſum dictæ Dominæ Reginæ per actionem debiti, billam, querelam, ſive informationem, vel aliter, in Curia de Banco Regis, Communi Banco, vel Scaccar', in tali modo & in omnibus reſpectibus prout per ordinarium curſum communium legum aliquod aliud debitum ſolubile* (*Anglice*, due) *per aliquam talem perſonam, in aliquo caſu, foret vel potuiſſet eſſe recuperat' ſive levat'*, &c. And further by the [b] ſaid Act of 35. it was enacted, That a third part of the penalties to be recoverd by the ſaid Act ſhould be diſpoſed of to the poor, according to the Act of 28 *Eliz.* aforeſaid. And the ſaid *Richard* further ſaith, That by the ſaid Statute of 35 aforeſaid, it appeareth, That all and ſingular the penalties, debts, forfeitures, and payments, which after the ſaid Act of 35 aforeſaid, ſhould grow or be payable by force of the ſaid Act, or of the ſaid Statute of 23 *Eliz.* concerning Recuſants, ſhould and muſt be recovered and levied to the uſe of the ſaid Queens Majeſty, &c. And that no third part of the penalties, debts, forfeitures, and payments aforeſaid, by the ſaid Act of 35 *Eliz.* *Alicui perſonæ quæ pro eadem ſequi voluerit limitat' vel proviſ. exiſtit. Et hoc idem Richardus paratus eſt verificare, unde petit judicium ſi prædict' William Shoyle, qui tam, &c. pro prædict' 220 l. &c. proſequi debeat.* Upon which Plea, the Attorney general did demur in Law, and ſix objections were made by the Defendants Counſel againſt this Information.

1. That the Defendant is not ſuch a perſon as is within the ſaid Act of 23 *Eliz.*

2. That the Informer is not ſuch a perſon that may exhibte any ſuch Information upon the ſaid Act of 23 *Eliz.*

3. That the Judgment which ſhall be given in this caſe, is not within the ſaid Act of 23 *Eliz.*

4. Admitting all theſe payments againſt the Defendant, it was further objected, That by the ſaid Act of 28 *Eliz.* the branch which giveth a Popular Action, istaken away.

5. If the ſaid Act of 28 *Eliz.* doth not take it away, that the Statute of 35 *Eliz.* hath abrogated the ſame.

6. That if the Defendant ſhall be charged at the Suit of the Informer, he might be charged again at the Kings Suit, and ſo twice charged.

To the firſt, The perſon-Delinquent is deſcribed by the Act, by an attribute which the Defendant wanteth; for the words of the ſaid Act of 23 *Eliz.* are, Every perſon above the age of ſixteen years, which ſhall not repair to ſome Church, Chappel, or uſual place of Common Prayer, but forbear the ſame contrary to the tenor of a Statute made in the firſt year of her Majeſties Reign for Uniformity of Common Prayer: and being thereof lawfully convicted, ſhall forfeit to the Queens Majeſty for every moneth, &c. twenty pound, &c. By which it appeareth, That no perſon ſhall incur this forfeiture, if not that he be before lawfully convicted; ſo that a Recuſant convicted is onely within the purview of this Act: And it doth not appear in the whole Record, that the ſaid *Richard Foſter* hath been convicted; and for that cauſe he is not a perſon within this Act. And penal Statutes are to be followed (chiefly in Informations) ſtrictly, and *in terminis*, according to [58] the purview of the Act. And therefore *Poſche*, 20 *Eliz.* a caſe was adjudged in the *Exchequer*, That where an Information was exhibited and ſhewed the Uſurious contract in certain, upon which it appeared, that the ſum of ten pounds was reſerved, and received for the loan of one hundred pound, againſt the form of the Statute, &c. And although it appeared that the ſame was corrupt, and that he concluded *contra formam ſtatuti*, ye becauſe he did not expreſly ſay, that the ſame was *per corruptam accommodationem*, according to the words of the penal Statute, the Information was adjudged inſufficient: See in the caſe at Bar, foraſmuch as the Statute ſaith, That every perſon, &c. being lawfully convicted, ſhall forfeit; he ought of neceſſity to have ſhewed, That the ſaid Doctor *Foſter* was lawfully convicted. *Vide* 3 *Ma. Dyer* 131. 2 *Eliz. Dyer* 183. 20 *Eliz. Dy.* 367.

2. None can inform upon the Statute of 23. but for the King alone; for in the former part of that Act it is provided, That every perſon that ſhall ſay or ſing Maſs, &c. ſhall forfeit the ſum of two hundred marks, and that every perſon that ſhall willingly hear Maſs, ſhall forfeit the ſum of one hundred marks, and afterwards cometh in the ſaid Act the clauſe of forfeiture of twenty pound by the month to the Quen, and afterwards inflicteth ten pound by the moneth for him who keepeth a School-Maſter, and then followeth the clauſe of diſtribution of the forfeitures: And that all forfeitures of any ſums of money limited by this Act, ſhall be divided into three equal parts, &c. And it was objected, that this clauſe doth extend onely to the ſaid forfeitures of two hundred marks, and one hundred marks, &c. Which penalties were not given to any perſon certain, but indefinitely and general, that they ſhall be forfeited; and therefore this clauſe of diſtribution doth extend to them; but the forfeiture of twenty pound by the month for Recuſancy, was expreſly given to the Queen, and ſo was not any of the other forfeitures; and therefore this clauſe of diſtribution ſhall not extend to that which was before to the Queen, but to thoſe penalties which were left indefinitely, and given to no body.

cover the poſſeſſion by *Habere fac' poſſeſſionem*, and ſhall follow the form of other Writs of the like nature, as *Droit de Gard*, or *Ejectment de Gard*, or the like, ſhall not be of a Cloſe by certain name,
[b] but ought to be by the certainty of the Acres, containing the quality of the Land, as Land-Meadow, Paſture, Wood, &c. And although that by good Order, the moſt worthy ſhall have the preceeency, and ſhall be preferred before the leſs worthy; and an entire thing preferred before a part, &c. yet if the ſaid Order be not preciſely followed, the Judges will not abate the Writ or Count. *Vide* 6 *Ed.* 3. 42. & 9 *Ed.* 3. 3. And for the aforeſaid exception, Judgment was ſtayed.

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[56]

Mich. 12. *Jac.*

Benthams Caſe.

Marſh brought a Writ of Annuity againſt *Bentham*, and the parties came to Iſſue, which was tryed for the Plaintiff, and found the Arrerages, but the Jury did not aſſeſs any damages or coſts; which Verdict was imperfect, and it cannot be ſupplied by a Writ of Enquiry of Damages; but the Plaintiff releaſed his damages and coſts, and thereupon hath Judgment. Upon which the Defendant brought a Writ of Error, and aſſigned the Error aforeſaid, *viz.* The inſufficiency of the Verdict; but the Judgment was affirmed, becauſe the Plaintiff hath releaſed his damages and coſts, which is for the Defendants benefit. *Vide* 22 *Eliz. Dyer* 369, 370. Who in a Writ of *Ejectione Cuſtodiæ terræ & hæredis*, the Jury aſſeſſed damages entirely, which was inſufficient; For, for the heir it doth not lie, yet he releaſed his damages, and had Judgment for the the Land. Note inſufficient aſſeſſing of damages, and no aſſeſſing is all one.

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3. That the Judgment which ſhall be given in this caſe, is not within the ſaid Act of 23 *Eliz.*

4. Admitting all theſe payments againſt the Defendant, it was further objected, That by the ſaid Act of 28 *Eliz.* the branch which giveth a Popular Action, is taken away.

5. If the ſaid Act of 28 *Eliz.* doth not take it away, that the Statute of 35 *Eliz.* hath abrogated the ſame.

6. That if the Defendant ſhall be charged at the Suit of the Informer, he might be charged again at the Kings Suit, and ſo twice charged.

To the firſt, The perſon-Delinquent is deſcribed by the Act, by an attribute which the Defendant wanteth; for the words of the ſaid Act of 23 *Eliz.* are, Every perſon above the age of ſixteen years, which ſhall not repair to ſome Church, Chappel, or uſual place of Common Prayer, but forbear the ſame contrary to the tenor of a Statute made in the firſt year of her Majeſties Reign for Uniformity of Common Prayer: and being thereof lawfully convicted, ſhall forfeit to the Queens Majeſty for every moneth, &c. twenty pound, &c. By which it appeareth, That no perſon ſhall incur this forfeiture, if not that he be before lawfully convicted; ſo that a Recuſant convicted is onely within the purview of this Act: And it doth not appear in the whole Record, that the ſaid *Richard Foſter* hath been convicted; and for that cauſe he is not a perſon within this Act. And penal Statutes are to be followed (chiefly in Informations) ſtrictly, and *in terminis*, according to [58] the purview of the Act. And therefore *Poſebe*, 20 *Eliz.* a caſe was adjudged in the *Exchequer*, That where an Information was exhibited and ſhewed the Uſurious contract in certain, upon which it appeared, that the ſum of ten pounds was reſerved, and received for the loan of one hundred pound, againſt the form of the Statute, &c. And although it appeared that the ſame was corrupt, and that he concluded *contra formam ſtatuti*, ye becauſe he did not expreſly ſay, that the ſame was *per corruptam accommodationem*, according to the words of the penal Statute, the Information was adjudged inſufficient: See in the caſe at Bar, foraſmuch as the Statute ſaith, That every perſon, &c. being lawfully convicted, ſhall forfeit; he ought of neceſſity to have ſhewed, That the ſaid Doctor *Foſter* was lawfully convicted. *Vide* 3 *Ma. Dyer* 131. 2 *Eliz. Dyer* 183. 20 *Eliz. Dy.* 367.

2. None can inform upon the Statute of 23. but for the King alone; for in the former part of that Act it is provided, That every perſon that ſhall ſay or ſing Maſs, &c. ſhall forfeit the ſum of two hundred marks, and that every perſon that ſhall willingly hear Maſs, ſhall forfeit the ſum of one hundred marks, and afterwards cometh in the ſaid Act the clauſe of forfeiture of twenty pound by the month to the Quen, and afterwards inflicteth ten pound by the moneth for him who keepeth a School-Maſter, and then followeth the clauſe of diſtribution of the forfeitures: And that all forfeitures of any ſums of money limited by this Act, ſhall be divided into three equal parts, &c. And it was objected, that this clauſe doth extend onely to the ſaid forfeitures of two hundred marks, and one hundred marks, &c. Which penalties were not given to any perſon certain, but indefinitely and general, that they ſhall be forfeited; and therefore this clauſe of diſtribution doth extend to them; but the forfeiture of twenty pound by the month for Recuſancy, was expreſly given to the [57] Queen, and ſo was not any of the other forfeitures, and therefore this clauſe of diſtribution ſhall not extend to that which was before to the Queen, but to thoſe penalties which were left indefinitely, and given to no body.

3. The words of the Act of 23 *Eliz.* are, (being thereof lawfully convicted) and Conviction ought to be either by Verdict or Confeſſion, and cannot extend to a Judgment upon a Demurrer as in our Caſe, for there is not any Conviction, for always Conviction ought to precede Judgment. And therefore the difference between a Clerk-Convict, and Attaint, is, That he who is convicted by Verdict or Confeſſion, &c. and hath his Clergy before Judgment, is called a Clerk Convict; and he who hath his Clergy after Judgment, is a Clerk-attainted; and therewith agreeth *Stanford fol.* 138. *C.* who holdeth, That there are two manner of Clerks, *viz.* A Clerk-Convict, and a Clerk-attainted: A Clerk-Convicted, is he who prayeth his Clergy before Judgment given againſt him of the Felony, and hath his Clergy allowed to him, &c. A Clerk-attainted, is he who prayeth his Clergy after Judgment upon him for the Felony: But in the Caſe at Bar, Doctor *Foſter* is a Recuſant (if Judgment ſhall be given againſt him) Attaint, and not Convict. And *Stanford, fol.* 1. 85. *B.* ſaith, So it is clear in my judgment, that he cannot be called Clerk Convict, till he hath a Verdict paſſed againſt him: And upon that it was ſaid, That if the Defendant will not anſwer to the Indictment, ſo that he is condemned by *Nihil dicit*, the ſame is out of this Statute which ſpeaketh onely of Conviction. And therefore upon the Statute of 1 *Ed.* 6. 12. which taketh away Clergy in divers caſes, the words of which are, No perſon or perſons that ſhall be hereafter in due form of Law, Attaint, or Convict; that theſe words ſhall not extend to him who will not anſwer. *Vide Stanford fol.* 126. *a.* So that the Caſe at Bar is *caſus omiſſus* out of the ſaid Act, for here upon the Demurrer upon the Defendants Plea, no Conviction can be, before Judgment; but if the Law ſhall ſerve for the Informer, Judgment ſhall be given without any Conviction, whereof the Statute ſpeaketh: And ſuch Penal Act ſhall not be taken by Intendment or Equity.

[b]

4. But admit it ſhall be a Conviction within the Statute, then by the ſaid Act of 28 *Eliz.* all the penalty of twenty pound by the month is given unto the Queen, for the words are, That every ſuch offender in not repairing to Divine Service, &c. as hereafter ſhall fortune to be once convicted, ſhall in ſuch of the Terms of *Eaſter* or *Michaelmas*, as ſhall next happen after ſuch Conviction, pay into the Receipt of the Exchequer, after the rate of twenty pound for every month, which ſhall be contained in the Indictment, whereupon ſuch Conviction ſhall be; and ſhall for every month after ſuch Conviction, without any other Indictment or Conviction, pay into the Receipt of the Exchequer, &c. after the rate of twenty pound the month, &c. and default be made, &c. The Queens Majeſty ſhall and may by Proces out of the Exchequer, ſeiſe all the Goods and two parts of the Land, &c. By which it appeareth, That the whole Penalty for Recuſancy is given to the Queen, and by conſequence the Informer is excluded.

[59]

5. The Statute of 35 *Eliz.* is ſtronger; for that by expreſs terms giveth the whole penalty given by the ſaid Act of 23 *Eliz.* for Recuſancy to the Queen; the letter of which Act is, And for the more ſpeedy levying, and recovering for, and by the Queens Majeſty, of all and ſingular the pains, duties, forfeitures, and payments, which at any time hereafter ſhall accrue, grow, or be payable, by vertue of this Act, or of the Statute of the three and twentieth year, &c. Be it enacted, That all and every the ſaid pains, duties, forfeitures, and payments, ſhall and may be recovered and levied to her Majeſties uſe, by Action of Debt, Bill, Plaint, Information, or otherwiſe, in any of the Courts commonly called the *Kings Bench*, *Common Pleas*, or *Exchequer*, in ſuch ſort, and in all reſpects, as by the ordinary courſe of the Common Laws of this Realm, any other debt due by any ſuch perſon in any other cauſe, ſhould or may be recovered or levied: In which, theſe words in the Preamble are to be obſerved.

First, for the more ſpeedy recovering and levying for and by the Queens Majeſty; here is the perſon expreſſed who ſhall recover.

Secondly, Of all and ſingular the pains; which words contain what things the Queen ſhall recover, *viz.* All and ſingular the pains, &c. and *generale dictum generaliter eſt intelligendum.*

Thirdly, The body of the Act, Be it enacted that all and every the ſaid pains, &c. ſhall and may be recovered and levied to her Majeſties uſe: And if all the pains and every of them ſhall be recovered to the Queens uſe, then it followeth, That the Informer ſhall recover nothing. And many Caſes were put where a latter Act ſhall take away a former, and the ground was taken, that *leges poſteriores priores contrarias abrogant.* But more particularly, and more to the purpoſe, two Caſes were alledged, Why the later Statutes of 28 & 35 *Eliz.* did abrogate the diſtribution of the Act of 23 *El.* &c.

The firſt, That when an Act of Parliament giveth power or intereſt to a perſon certain, by that expreſs deſignation to one, all others are excluded, although that ſuch Statute be in the Affirmative and ſo it is holden in *Plo. Com.* in *Stradlings* caſe, 100. *b.* That where the Statute of 31 *Ed.* 3. 12. enacteth, That Error in the Exchequer ſhall be corrected and amended before the Chancellor and Treaſurer, it cannot be corrected before any other; and there a general rule is put, That when a thing is to be done before one perſon certain, it cannot be done before another; and yet the Statute of 31 *Ed.* 3. is in the Affirmative: So in the caſe at Bar, the certain deſignation of the Queen, is an abſolute excluſion of all others, *Quia exclusio unius eſt exclusio alterius*: And a caſe was cited out of Juſtice *Dalliſons Reports*, in *An.* 3 *Eliz.* That for as much as the Statute of 8 *H.* 6. *cap.* 9. of Forcible Entry, deſigneth Juſtices of Peace to make reſtitution thereby (although the Statute was in the Affirmative) others are excluded, and therefore neither Juſtices of *Oyer* and *Terminer*, or Goal-delivery, ſhall do it. *Vide* 27 *H.* 8. 13. in *Weſt*, 23 *Aſſ.* 17. in *Rediſſeiſin*, 4 *Eliz. Dyer* 211. *Commiſſion*, upon 28 *H.* 8. of the *Admiralty*, &c.

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The second cause was, in respect of the generality of the words, *viz.* All and singular the pains, &c. and all and every the pains, &c. which words imply a Negative: For if the Queen shall recover all and singular, and all and every the pains, &c. then no other person shall recover any of them, *Et qui omne dicit nihil excludit, & generale tantum valet in omnibus, quantum singulare in singulis.* And thereupon they cited the case in 33 *H.* 8. 50. where the words of 27 *H.* 8. 27. are, That all Grants by Letters Patents, to be made for terme of life or years, of any Office concerning the Lands within the Survey of the Court of *Augmentation*, &c. shall be sealed with the Great seal of that Court; and it is conceived there, that the same implieth a Negative. So that if the Grant be under the Great Seal of *England*, it shall be void; as *Amy Townsends* Case, *Plo. Com.* 113. Many other Cases were put to such effect, which I here purposely omit.

6. It was objected, That if the Defendant shall be charged at the Suit of the Informer, he may be by force of the said two Statutes, and chiefly of the Statute of 35 *Eliz.* charged again, and so hence charged; and *Nemo debet bis puniri pro uno delicto*; and the case hath the greater mischief, because that by the Statute of 3 *Jac. cap.* 4. That no Traverse to any Indictment of Recusancy shall be allowed, but to the direct point of not coming to Church, or that the party hath conformed himself: So that he cannot plead, that another Information is depending, or that he is *auter foits convict*, &c. at the Suit of the Informer.

As to the first Objection, it was answered, and resolved by the whole Court, That he may be convicted in the same Indictment or Information, preferred or exhibited against him; and so was it holden by all the Judges of *England* assembled at *Russel-house*, where Sir *John Puckering*, then Keeper of the great Seal, dwelt. *Vide* 10 *Ed.* 4. 11. & 7 *Rich.* 2. *Bar.* 241. And that stands well with the words of the Statute, for he shall forfeit nothing before Conviction; and so hath the Law always been taken upon the Statute of 3 *H.* 6. 3. which enacteth, That if a Customer, &c. be duly attainted or convicted, &c. he shall forfeit to the King, &c. and all other Statutes which have such form of Penning; and it is not possible that he can be convicted without Suit: and Convict in this case shall be taken for Attaint; for he shall forfeit nothing till Judgment. *Vide F. N. B.* 73. *d.* 30 *Ed.* 3. 1. *b.* In Attaint, and many Books, where Convict is taken for Attaint. See before in the case of *Alexander Powlter* of Clergy. [60]

As to the second point, it was answered and resolved, That the said branch of 23 *Eliz.* of Distribution, shall extend as well to the clause of penalty for Recusancy, as to the clause of saying and hearing Mass, &c. First, because it is all one to say, shall forfeit generally, and shall forfeit to the Queen; for the Queen shall have them in both cases without any more, *Et expressio eorum que tacite insunt nihil operatur.* Secondly, Divers Acts of Parliaments giveth the penalty forfeited to the King, and yet afterwards makes distribution of the penalty to another, *viz.* To him who will sue, as the Statute of 3 *H.* 6. 3. 3 *H.* 7. 7. &c. Thirdly, By two Judgments in Parliament, *viz.* In the said Acts of 28 & 35 *Eliz.* For by the same Acts, the Distribution made by the Act of 23 *Eliz.* of the penalty of twenty pound by the month for Recusancy, is *quodam modo* altered, which proveth, That the said Clause of Distribution in 23 *Eliz.* extendeth to Recusancy, &c.

As to the third, it was resolved, That he against whom any Judgment is given, either upon *Nihil dicit*, or insufficient Plea pleaded, and a Demurrer upon it, is convicted within the Purview of this Act; for it is true that *non sequitur*, that one is convicted, *ergo.* he is attainted or adjudged, but it is a good consequence; one is attainted or adjudged, *ergo.* he is convicted; for he who is attainted or adjudged, is convicted and more. And *ex vi termini* (that) extendeth to him who is condemned, as *Cicero* 7. *Verr'*, *Convincere adversum testibus. Idem in Catilinam, Conscientia convictus reticuit.* And where by the Statute of 8 *H.* 6. 9. it is provided, That if the party grieved shall recover by Assise, or by Action of Trespass, &c. and it be found by Verdict, or in other manner in due form of Law, that the party Defendant entreth with force in Land and Tenements, &c. That the party shall recover his damages treble against the Defendant.

And in 6 *H.* 8. the case was, That in such Action brought by the party grieved, if the Attorney for the Defendant plead *Non sum informatus*, the Plaintiff shall recover his treble damages; for this word (*found*) hath two significations, *viz.* Either by Jurors, or by the Judges; and the finding of the Judges, *viz.* Their Judgment upon *Non sum informatus*, or upon *Nihil dicit*, is within the said Act. And so was it adjudged in a Writ of Error, 4 & 5 *P.* & *M.* All which is reported by *Bendloes*, Serjeant at Law. So I my self heard the Lord *Dyer*, *Mich.* 14 & 15 *Eliz.* say, in the Court of *Common Pleas*, That so Judgment was given in such case for the treble damages upon the Defendants defaults, *Quia fatetur facinus qui judicium fugit.* And the same Law is he said, If the Defendant plead an Insufficient Bar, which upon Demurrer is adjudged against him. [b]

As to the fourth point, it was resolved, That the Act of 28 *Eliz.* hath not taken away the Liberty which the informer hath by the Statute of 23 *Eliz.* for divers causes. 1. The title is, For the speedy execution of certain Branches of the Statute made in the three and twentieth year, &c. So that the makers of the Act of the eight and twentieth, do not intend any abrogation, but the more speedy execution of divers Branches of the Act of 23 *Eliz.* 2. The Act of 28 giveth more speedy execution onely, at the Queens Suit, *viz.* Upon Indictment: For the Queen for the whole penalty, had not remedy by the Statute of 23 but onely by Indictment; for the Statute maketh the same inquirable, &c. before divers Justices named in the Statute; and such inquiry is always by Indictment. Also in the same Act there is a Proviso, That every person guilty of any offence against this Statute, which shall, before he be thereof Indicted, or at his arraignment or trial before Judgment, submit and conform himself before the Bishop of the Dioces, &c. or before the Justices, where he shall be indicted, arraigned, or tryed, &c. shall be discharged, &c. By which it appeareth, That in this

new case of Forfeiture, the Parliament gave not to the Queen other remedy for the Recovery of the whole penalty, but by way of Indictment. And the Statute of 28 *Eliz.* doth extend onely to the Queens Suit by way of Indictment, as it appeareth by the words of the same Act, *viz.* After the rate of twenty pound for every month, contained in the Indictment, and by divers Branches in the Act; and namely, that Proclamation shall be made upon the Indictment, &c. to appear, &c. So that this Act doth not give to the Queen, any other remedy then they had before, by way of Indictment; but the more speedy proceeding upon the Fundamental remedy: But gave not to the Informer more speedy proceeding, but left him to his former proceeding. 3. This Act of 28 *El.* giveth not the penalty to any new person, to whom it was not given before; for the Act of 23 *El.* gave the forfeiture to the Queen, &c. 4. The words of this Act, are, Every offender that shall hereafter fortune to be once convicted, shall, &c. pay twenty pound for every moneth, contained in the Indictment: So that the sense is, Every offender that shall fortune to be once convicted upon any Indictment, &c. shall pay twenty pound for every moneth, contained in such Indictment: And therefore it appeareth, That the same doth extend onely to the Case of Indictment for the Queen,
[61] and not to the Action Popular, or Information. 5. Upon these words, the Defendant shall not take the benefit of this clause, if he do not add, That he was convicted at the Queens Suit; for the words are. That shall hereafter fortune to be convicted: So that if his fortune be not to be convicted at the Queens Suit, he is not within this Act, but left to the Informer, 6. The Statute is in the Affirmative, and Regularly Statutes in the Affirmative, do not take away precedent Acts Affirmative, if it be not in certain cases, as shall be after said: But the Statute of 28 *Eliz.* (as was well observed) hath altered the Statute of 23 *Eliz.* in one material Point, *viz.* As to the Jurisdiction in these words; That every Conviction hereafter for any offence before mentioned, shall be in the Court commonly called the *Kings Bench*, or at the Assises, or Goal delivery, and not elsewhere, &c. Which clause without Question, being general, extendeth not onely to the Queens Suit, but also to the Suit of the Informer. And the said Act of 35 *Eliz.* doth extend onely to the Queens Suit, but giveth to her no nother remedy then by Indictment, *viz.* By Action of Debt, Bill, Plaint, Information, and in other Courts, as in the *Common Pleas*, and *Exchequer*; and so as to the Queens Suit in other Courts, the Statute of 28 *Eliz.* is altered, but doth not touch the Popular Suit of the Informer, nor alter the Statute of 28 *Eliz.* concerning the Restriction to Courts, as to the Informer: nor the Act of 3 *Jac.* 4. which giveth Jurisdiction to the other Justices; as Justices of Peace doth not alter the same as to the Informer: For this Act doth extend onely to the Kings Suit by way of Indictment, *viz.* By enquiry onely, and doth not make any mention of the Suit of the Informer, but leaveth the same as it was before: So that this Act of 28 *Eliz.* doth confine the Informer onely to the Court of *Kings Bench*; or of Justices of Assise or General Goal-delivery, and with Negative words, *viz.* and not elsewhere.

As to the fifth Objection, The Act of 35 *Eliz.* doth not abrogate the Statute of 23 *Eliz.* as to the Popular Action, for four causes.

1. Before this Act (as hath been said before) remedy was given to the Queen, by way of Indictment; and to the Informer, by Bill, Plaint, or Information: Now this Act doth intend to give more speedy remedy to the Qeen onely, and not to the Informer; and so are the words of the Preamble, For the more speedy recovering for and by the Queens Majesty, of all and singular, the pains, &c. So that the purpose of this Act was not to ouste the Statute of 23 *Eliz.* but to put away
[b] delay, and to give to the Queen a more speedy recovery then she had before.

2. The words of the Body of the Act, are, That every of the said pains, &c. shall and may be recovered to her Majesties use, &c. This Act hath made three alterations. First, In the manner of her Remedy, *viz.* where the remedy was by Indictment: Now the Queen may have an Action of Debt, Bill, Plaint, Information, or otherwise. The second alteration is concerning Courts; the Queen is not now confined to the *Kings Bench*, or to Justices of Assise, or Goal-delivery; but now may sue in the *Common Pleas*, or the *Exchequer*, at her pleasure. The third alteration was, concerning the charging of one person at the Queens Suit, who was not charged before: For at the said Assembly in *Russels* House, *Hil.* 35. *Eliz.* three points were resolved by all the Judges. 1. That a Feme-Covert was within the Act of 1 *Eliz. cap.* 2. and shall forfeit twelve pence for not repairing to the Church every Sunday and Holiday. 2. That the Act of 23 *Eliz.* although it is more penal, and doth inflict imprisonment for that not Feasance to him that is not able to pay; yet that a Feme-Covert was within this Statute of 23 *Eliz.* First, Because that this Act doth refer to the said Act of 1 *Eliz.* And without question she was within the Act of 23 *Eliz.* Secondly, Women-Covert were a great part of the Realm, and very dangerous, because they had the education of their children, and the governance of their servants.

3. That forasmuch as the Remedy of the Queen, was by Indictment, and the Feme-Covert was onely Indicted, and the Husband was not party to it, he was not subject to the Wives forfeiture of twenty pound by the month: For the Husband shall never be charged for the act or default of his Wife, but where he is made a party to the Action, and Judgment is given against him and his Wife; as for the debt of the Wife, or for Trespass done by her &c. the Action of Debt upon the Case, Trespass, &c. shall be brought against the Husband and Wife, and the Husband shall plead, &c. and shall be party to the Judgment: But if a Feme-Covert be indicted of Trespass, Ryot, or any other wrong, there the Wife shall answer, and shall be party to the Judgment onely: And therefore the fine set upon the Wife in such cases, shall not be levied upon the Husband; and therefore the Informer was as to a Woman-Covert, in better case then the Queen: For as much as Remedy was given to him for the said Forfeiture, by Action of Debt, Bill, Plaint, or Information, the Informer

former for the said Forfeiture of the Feme-Covert, might have an Action of Debt, Bill, Plaint, or Information, against the Husband and Wife, for the recovery thereof, and so make the Husband a party; but so could not the Queen alone by way of Indictment: And therefore the Preamble of [62] the Act was true, That for the more speedy levying and recovering for and by the Queens Majesty, of all and singular the pains, forfeitures, &c. by vertue of the Statute of 23 *Eliz.* &c. The Act gave remedy to the Queen by Action of Debt, Bill, Plaint, or Information. So that where the Queen for the said Forfeiture of Women-Coverts, ought before this Act to have stayed till the death of the Husband, to levy or recover the same against the Wife; and if the Wife had died before her Husband, in many cases the forfeiture was in danger to be lost: Now this Act in adding remedy for the Queen, by Action of Debt, Bill, &c. hath given to the Queen present remedy to recover the same against the Husband and Wife; and to this purpose were the subsequent words added, *viz.* In such sort, and in all respects, as by the ordinary course of the Common Laws any other Debt, due by any such person in any other cause, shall or may be recovered. But for the Debt, or duty due by a Feme-Covert in an Action of Debt, &c. brought against the Husband and Wife, the Husband shall be charged for the same: And thereupon many Informations upon this Statute for the Queen, were exhibited against Husbands and Wives, for the Wives forfeitures upon the Statute of 23 *Eliz.* in the *Kings Bench*, &c. And that was the chief intention of this Statute of 35 *Eliz.* to make the Husbands of Feme-Coverts, Recusants, to be charged at the Kings Suit for the forfeitures of their Wives. So that now the Husbands and Wives may be charged in that case, as well at the Queens Suit by Action of Debt, Bill, Plaint, &c. as at the Informers Suit. But if the King taketh his remedy by Action of Debt, Bill, Plaint, or Information, then no Proclamation can be made thereupon; for that is onely upon Indictment, and onely upon Indictment before the Justices of Assise, or general Goal-delivery by the Act of 28 *Eliz.* and now before Justices of Peace; also by the Statute of 3 *Jac. cap.* 4. But the King in case where he proceedeth by Action of Debt, Bill, Plaint, or Information, shall have execution according to the Common Law, as he should have upon the said Statute of 23 *Eliz.* The words of which Act of 35 *Eliz.* are not penned *simpliciter*, *viz:* That all and singular the pains shall be recovered to her Majesties use: For as hath been said, the same was not the intent of the makers, but *secundum quid & sub modo*, *viz.* In such sort, and in all respects, as by the ordinary course of the Common Laws, any other Debt due to such person, should or might be recovered or levied. By which it appeareth, that this Act doth alter the remedy one- [b] ly at the Queens Suit; that where before she proceeded upon Indictment onely, according to the Statute (in which case the Husband of the Wife, Recusant, was not charged;) now she shall proceed by Action, &c. as any other debt may be recovered at the Common Law; in which case, for the Debt of the Wife at the Common Law, the Husband was charged. And in other Statutes which have the like reference, no alteration is made of the Law before, but onely as to the point to which the reference is made, as it is holden in 14 *H.* 7. 17, 18. in *Everard Digbies* Case; Where it is enacted by the Statute of 1 *H.* 7. *cap.* 1. That the Demandant may maintain a Formedon in the Discender or Remainder against the Pernor of the profits, and the same Pernors to vouch, &c. as if they were Tenants indeed: The case was, That *Everard Digby* brought a *Scire facias* against the Pernor of the profits. And it is there holden, That the Pernor shall not vouch in a *Scire facias*; for it shall be intended in such Action, in which he may vouch. And the said words do not alter the Law of Voucher in any other point, then in that to which the reference is made. *viz.* That notwithstanding that he is not Tenant of the Land, but Pernor of the profits, that yet he shall vouch, but gave him no new Voucher to other respects; and therefore he shall not vouch in an Action brought against him, in which no Voucher lay before. So in the case at Bar, the Act of the five and thirtieth year of Queen *Eliz.* shall be intended to extend to that onely to which the same is referred, and shall not alter or abrogate any Law before. So the Statute of *Westm.* 2. *cap.* 4. which giveth the *quod ei deforceat*, &c. to him who hath lost by default; and giveth also to the Demandant to vouch in it, but not *simpliciter*, but *secundum quid*, *viz.* *Ac si esset tenens in priori brevi si warantum habuit*, the same extends onely to the point to which it is referred, *viz.* Notwithstanding that he be Demandant, but the same doth not alter or abrogate the Law in other cases: And therefore if the Tenant plead another Bar, and doth not maintain the first Recovery, he shall not vouch at all; also he shall not vouch another, then him in the Reversion; also he shall not vouch in any Action, in which no Voucher lyeth. *Vide* 9 *Ed.* 3. 22. 23 *Ed.* 3. *Counter plea de Voucher*, 101. 33 *H.* 6. 16. 14. *H.* 7. 18.

4. This Act of 35 *Eliz.* is all in the Affirmative; and therefore shall not repeal or abrogate a Precedent Affirmative Law: And the said Rule, that *Leges posteriores priores contrarias abrogant*, was agreed; but as to this purpose, *Contrarium est multiplex.* First, In quality, *viz.* If one be [63] an expres and material Negative, and the last is an expres and material Affirmative; or if the first be Affirmative, and the latter Negative. Secondly, In matter, although that both be Affirmative; as by the Statute of 33 *H.* 8. *cap.* 23. it is enacted, That if any person being examined before the Kings Council, or any three of them, shall confess any Treason, Misprision, or Murder, or be of them vehemently suspected, he shall by tryed in any County where the King pleaseth, by his Commission, &c. And afterwards another Law was made, 1 & 2 *P.* & *M. cap.* 10. in these words, That all tryals hereafter to be had for any Treason, shall be had according to the course of the Common Law, and not otherwise: This latter Act (although that the latter words had not been) hath abrogated the first, because they were contrary in matter: But the same doth not abrogate the Statute of 35 *H.* 8. *cap.* 2. of Tryal of Treasons beyond the Seas, notwithstanding the Negative words, because it was not contrary in matter, for that was not tryable by the Common Law.

Vide

Vide 3 Mary, Dyer 132. *Acc' Vide Stanford, fol.* 89, 90. So the Statute of 1 *Ed.* 6. of *Chauntries*, being in the Affirmative, hath abrogated the Statute of *Westm.* 2. *cap.* 41. which gave the *Cessavit de Cantaria* also in the Affirmative; for the one is contrary to the other in matter. Thirdly, Contrariety in respect of prescript, form, as in *Amy Townsends* case in *Plo. Com.* And many other Contrarieties there are, which are not necessary to be recited: Onely it is to know, That for asmuch as Acts of Parliaments are established with such gravity, wisdom, and universal consent of the whole Realm, for the advancement of the Commonwealth, they ought not by any constrained construction out of general and doubtful words of a subsequent Act, be abrogated. *Sed hujusmodi statuta tanta solennitate & prudentia edita* (as *Fortescue* speaketh, *cap.* 18. *fol.* 21.) ought to be maintained and supported with a being and favourable construction: For *Fortescue* there saith. *Quod Angliæ Statuta non Principis voluntate, sed totius Regni assensu conduntur, quo populi læsuram illa facere nequeunt, vel non eorum commodum procurare, prudentia enim & sapientia ipsa esse referta putandum est, dum non unius, aut centum solum consultorum virorum prudentia, sed plusquam trecentorum electorum hominum, quali numero olim Senatus Romanorum regebatur, edita sunt.* And therewith agreeth the case in 4 *Ed.* 4.. 3, 4. & 12. And the case of *Chester Mills* in the Tenth Part
[b] of my *Reports*. 6 *Ed.* 6. *Dyer* 72. *pl.* 3. And where the Statute of 16 *Rich.* 2. *cap.* 5. doth enact, That all the Lands and Tenements of one Attainted in a Premunire, shall be forfeited to the King, the case in *Paschæ.* 21 *Eliz.* was, That one *Trudging* being Tenant in Tail of certain Lands and Tenements, was attainted in a Premunire: and the question before all the Judges of *England* was, If the Estate Tail were were barred or not, and it was resolved by all the Judges, That those general words have not repealed the Statute of *Donis Conditionalibus*, but that he should forfeit onely for his life, and the Issue in Tail should inherite. And for the same reason it was resolved in this Case.

1. That this Statute of 23 *Eliz.* which hath inflicted the penalty of twenty pound by the month, hath not taken away the Statute of 1 *Eliz.* which hath given the forfeiture of twelve pence for every Sunday and Holiday, but that both shall be paid; for the one may well stand with the other: For the forfeiture of twelve pence is forfeited as soon as the Sunday or Holiday passeth, but the twenty pound is not forfeited till the end of the month; so that the twelve pence is forfeit by way of prevention: Also the forfeiture of the twelve pence is given onely to the poor, and the twenty pound to the Queen, &c. And the neglect of Divine Service in the Sabbath and Holidays, is worthy of greater punishment. And the Statute of 23 *Eliz.* hath not taken away the Statute of 1 *El.* as to the said forfeiture of twelve pence, as appeareth by the Statute of 3 *Jac. cap.* 4. For by the same Act, a more speedy remedy is given for the said forfeiture upon the Sabbath.

2. The said Branch of the Act of 28. *Eliz. viz.* That every Conviction hereafter shall be in the Court commonly called the *Kings Beneh*, or before the Justices of Assise, &c. and not elsewhere, doth not abrogate the whole power of Justices of the Peace, to whom Authority was given by 23 *Eliz.* For yet any of them may take an Indictment, and the same by benign Interpretation, to abrogate as little as may be: For asmuch as the said Act of 23 *Eliz.* doth restrain onely the Conviction, so that the power to take the Indictment, doth remain as it was holden by all the Judges and Barons of the *Exchequer* in *Edward Plowdens* Case. Also in the same case it was holden by them, That whereas the said *Edward* was indicted before Justices of Peace, and proclaimed before the Justices of Assise, the same was (as to the Proclamation) against the expres letter of the Act: But such Indictment ought to have been removed into the Court of *Kings Bench*, and upon that Process to be made, &c.

3. That the Statute of 7 *Jac. cap.* 6. doth provide, That if a Feme-Covert be convicted, that
[64] she shall be committed to prison, until, &c. And this Affirmative Law doth not take away the remedy which was given to the King, for the forfeiture of a Feme-Covert, by the Statute of 35 *El.* Or to the Informer, by the Statute of 35 *Eliz.* because all the said Acts are Affirmative; but she shall be punished but upon one of them.

Also the the Negative clause in the Act of 3 *Jac. viz.* That no person shall be charged for his Wives offence, &c. doth not extend to a Feme-Covert to be charged either upon the Statute of 35 *Eliz.* at the Queens Suit, or upon the Act of 23 *Eliz.* at the Informers Suit; for the words are expresly penned, That no person shall be charged for his Wives offence, by force of the Act, *viz.* of the Act of 3 *Jac.*

And where it is objected, That the expres designation of one person, is the exclusion of all other, the same is true in all Acts which are introductive of a new Law, as the said Acts of 31 *Ed.* 3. & 8 *H.* 6. But here are two Acts of Parliament, and the Act of 35 *Eliz.* doth not give it to a new person, but to the same person, 23 *Eliz.* hath given it, *viz.* to the Queen; and it is but an Act of Addition to give a more speedy remedy, then was given by the Act of 23 *Eliz.* As in a Writ of Mesn, the Proces by the Common Law was Distres infinite; and although that the Statute of *Westm.* 2. *cap.* 9. giveth more speedy Proces, and in the end fore judges; yet the Plaintiff may take what Proces he will, either at the Common Law, or upon the said Statute, because both are in the Affirmative. And therewith agreeth *F.N.B.* 137. 14 *H.* 7. 10. 36 *H.* 6. 3. 3 *Ed.* 4. 27. 48 *Ed.* 3. 14. 15 *H.* 7. 16. *Stradlings* Case, *Plo. Com.* 207. 17 *Eliz. Dyer* 243. 46 *Ed.* 3, 4. 21 *Ed.* 3. 11. 30 *Ed.* 3. 11. 20 *H.* 6. 11. 29 *Ass. pl.* 35. 29 *Ed.* 3. 24. 8 *Ed.* 3. 52. 22 *Rich.* 2. *Damages* 130.

And it was observed, That in many cases the designation of a new person in a latter Act of Parliament, shall not exclude another person who was authorised to do the same thing by a precedent Act. It is enacted by the Statute of 8 *H.* 6. *cap.* 16. That after Office found, &c. he who findeth himself

ſelf grieved, may within one month traverſe, and to take the Lands and Tenements to Farm, and that then the Chancellor, Treaſurer, and other Officer, ſhall let them to him to Farm, until, *&c. Vide* 13 *Edw.* 4. 8. And now by the Statute of 1 *Hen.* 8. 16. he hath liberty by the ſpace of three months; and afterwards by the Statute of 32 *H.* 8. *cap.* 40. the Statute gave authority to the Maſter of the Wards, with the advice of one of the Council, to make a Leaſe of the Wards, Lands, or of an Ideot, during the time, they ſhall remain in the Kings hands: Although that the later Act, deſign another perſon, yet the ſame doth not utterly take away the firſt: For if before any Leaſe made by the Maſter of the Wards, the Chancellor and Treaſurer make one according to the Statute of 8 *H.* 6. then the ſaid Maſter cannot demiſe it. And ſo if the Maſter make it firſt to another, [b] the Chancellor and Treaſurer cannot Leaſe the ſame to the party grieved, as *Stanford* holdeth, *Prerogat. Regis, fol.* 60. *a, b.* Where he mentioneth the Rule, *Quod leges priores contrarias poſteriores abrogant*, 43. *Aſſ. pl.* 9. the Statute of 13 *Ed.* 3. *de Mercatoribus*, which giveth the Aſſiſe to Tenant by Statute Merchant, ſhall not take away the Aſſiſe which the Tenant of the Freehold hath before, but both well ſtand together. So in 33 *Hen.* 8. *Dyer* 50. If it were enacted, the younger Son ſhould have an Appeal of the death of his Father, the ſame ſhould not exclude the eldeſt of his Suit, becauſe there are not any words of Reſtraint.

As to the other Objection, That the generality of the words, All and every, *&c.* imply a Negative, becauſe *qui omne dicit nihil excludit.*

To that it was anſwered and reſolved. 1. That the ſaid words are not *ſimpliciter* general, but *ſecundum quid*, as hath been ſaid; which is a full anſwer to this Objection.

2. That in the Principal caſe in 33 *H.* 8. *Dyer* 50. the Leaſe made under the Great Seal of Lands, within the Survey of the Court of *Augmentation*, by the authority of the ſame Book, is not void. *Vide Porters* caſe, in the Firſt Part of my *Reports*, and *Gregories* caſe in the Sixth Part of my *Reports*; and the Statute of 23 *H.* 8. 1. enacted generally, That all Attaints hereafter to be taken, ſhall be in the *Kings Bench* or *Common Pleas* (but the makers of the Act do not ſtay there, but add theſe words) and in none other Court. *Vide Dyer* 202. *b.* So it was enacted by the Statute of 6 *Ed.* 6. That the Quarter Seſſions in the Counties of *Angleſey &c.* ſhall be always holden at *Beaumorris* only, *Et non alibi infra Comitat' Angleſey, &c.* And a Seſſions were holden at *Newburgh* in the ſame County, and divers perſons there indicted, *&c.* And 4 & 5 *Phil.* & *Mary*, it was reſolved by all the Judges of *England*. That all was *Coram non judice*, and void, by reaſon of the ſaid Negative prohibition: By which it appeareth, That the General and Affirmative words was not the cauſe of the Reſolution.

And the Chief Juſtice ſaid, That although there be Negative words in an Act of Parliament, yet in many caſes the ſame ſhall not bind the *Kings Bench*, becauſe the Pleas there are *Coram ipſo Rege*. And thereupon he put the caſe of 21 *Ed.* 3. 55. & 21 *Aſſ. pl.* 12. the Abbot of *Weſtminſters* caſe, That where it is enacted by the Statute of *Weſtm.* 1. *cap.* 3. That from henceforth nothing be demanded, nor taken, nor levied by the Sheriff, nor by other, for the eſcape of a Thief or Felon, till the eſcape be adjudged before Juſtices errants; the caſe was, That it was preſented in the *Kings Bench*, that the Abbot of *Weſtminſter* had ſuffered certain Clerks attainted before the King, which were in the Abbots priſon, delivered to him out of the *Marſhalſey*, to eſcape; and there *Pole* who was of Council with the Abbot, moved the Court, That by force of that Statute, till the Eſte, the Abbot ought not to be impeached; or, that he ſhould be put to anſwer, and it was not allowed; for which cauſe *Pole* pleaded, that they did not eſcape. So when a Statute doth create a new Law, and aſſigneth certain Juſtices to execute it; although the Juſtices of the *Kings Bench* are not by expreſs words authoriſed by the Act, yet they may execute the ſame. As the ſaid Statue of 8 *H.* 6. 9. gave power to Juſtices of Peace to make reſtitution; and thereby Juſtices of *Oyer* and *Terminer*, or Gaol-delivery, &c. ſhall not make reſtitution; and ſo it was reſolved, as hath been ſaid. Yet if the Indictment were removed into the *Kings Bench*, *Coram Rege*, they ſhall Award reſtitution; and ſo upon Argument it was reſolved in the *Kings Bench*, in 4 *H.* 7. 18. and thereupon a Writ of Reſtitution was awarded; and therewith agreeth 15 *H.* 7. 5. *b.* & 7 *Ed.* 4. 18. And the Chief Juſtice cited a Reſolution of the Judges, *Mich.* 37 & 38 *Eliz.* in this caſe, in the General Pardon of 35 *Eliz.* That is an Exception of all penalties or forfeitures converted to a debt by Judgment, Order, Decree, or Agreement. [65]

Now the queſtion moved to the Juſtices, was, If a Recuſant convicted upon Proclamation made according to the Stat. of 28 *El.* ſhould be within this Exception? and it was reſolved, not; for the words of the Stat. are, Shall be convicted, as if he had been found guilty by Verdict, and doth not ſpeak of any Judgment: Alſo, although the Parl. upon ſuch Conviction ordain, (which is in the nature of a Judgment) That he ſhall pay the forfeitures, &c. Yet the ſame is not ſuch a Judgment as is meant within the ſaid General Pardon. But it was reſolved, That if he had been convicted, and Judgment given thereupon according to the Statute of 23 *Eliz.* that ſuch Judgment is within the Exception; and it was well obſerved, that the Statute of 1 *Jac. cap.* 4. doth enact, That all Statutes made againſt Recuſants in the Reign of Queen *Eliz.* ſhall be put in due and exact execution.

As to the laſt Objection, it was reſolved, That no ſuch double charge can accrue to him, but that he may plead, That he was *autre foits* Convict, &c. and ſo by Plea avoid the double charge. And where by the Statute of 3 *Jac. cap.* 4. it is enacted, That no Indictment, &c. nor any Proclamation, Outlawry, or other proceeding thereupon, ſhall be avoided, by reaſon of any default of Form, or lack of Form, or other defect whatſoever, (other than by direct Traverſe to the point of not coming to Church, or not receiving the Sacrament, whereof ſuch perſon ſhall be indicted) but that the ſame Indictment ſhall ſtand in force; any ſuch default in form, or other defect whatſoever, notwithſtand-

ſtanding; the Recuſant may well plead any Collateral Bar, as Pardon, Submiſſion, *auter foits* Convict or other Bar; for this Act doth extend only to defects within the Indictment, or other proceedings.

And that the Informer cannot charge any who is convicted before, at the Queens Suit, upon the Statutes of 23 & 35 *Eliz.* or 3 *Jac. Regis.* But thoſe who are concealed, and not charged at the Kings ſuit. The Informer may exhibit Informations againſt them, upon the Statute of 23 *Eliz.* into the *Kings Bench*, or before Juſtices of Aſſiſe, or General Gaol-delivery, and ſo charge them, who peradventure, otherwiſe, ſhall never be charged; for by the Statute of 23 *Eliz.* he ought to be charged within a year and a day: So that for any forfeiture before the year and the day, no remedy can be taken, either by the King, or by the Informer, becauſe the time is limited certain by the Act of 23 *El.* &c. And therefore it was ſaid, That in this caſe the Informer was *neque falcator, neque meſſor*, but *ſpicelegus, viz.* a Gleaner. And theſe Recuſants, Feme-Coverts, or others, who have not been convicted at the Kings Suit; that the Informer may find them, and charge them, otherwiſe they might eſcape unpuniſhed. And in the Principal caſe, for a great part of the time, If the Informer had not exhibited his Information, the King ſhould have loſt all for ſo much of the time as was part before the year; whereas in this caſe he ſhall have two parts, whereof one ſhall be for the poor; And afterwards Judgment was againſt the Defendant.

Note Reader, *Trin.* 31 *El.* in this Court between *Stretton qui tam, &c.* and *Taylor*, it was adjudged, That after a Popular Action brought, although the Kings Attorney will enter *ulterius non vult proſequi*; or if the Defendant pleadeth a ſpecial Plea, although the uſe is, that the Attorney reply generally only; yet if he will not reply, or proſecute for the King, the Informer may proſecute for his part; for by the Suit of the Informer brought, he hath made the Popular Action his private
[66] Action, which the King nor any other can releaſe, as to his intereſt; and the condemnation or acquittal of the party at his Suit, is a Bar againſt all others, and againſt the King: And yet the King in all caſes, before any Action brought by an Informer, may pardon or releaſe it, and the ſame ſhall be a Bar againſt all people; and this difference was granted, and denied by none, 1 *Hen.* 7. 3. and therewith agreeth 37 *H.* 6. 4. *a.* 5 *Ed.* 4. 3. 2 *R.* 3. 12. *Mich.* 39 & 40 *El.* It was adjudged in this Court, That if depending an Information, the Informer *qui tam, &c.* dieth, That yet the Kings Attorney may proſecute the Suit for the King, for the Information by the party, ſhall ſerve the King after his death.

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[b] # *Paſch*, 13. *Jac.*

The Caſe of the Maſter and Fellows of *Magdalen* Colledge in *Cambridge*.

John Warren brought an *Ejectione firmæ* againſt *John Smith*, Maſter of Arts, which began in the *Kings Bench*, *Paſchæ*, 9 *Jac. Rot.* 288. and declared of a Leaſe made by *Francis Caſtillion* Knight, 20 *Decemb.* 8 *Jac.* As of a Houſe in *London*, in the Pariſh of St. *Buttolph* without *Algate*, in the Ward of *Algate*, from the Feaſt of St. *Michael* the Archangel, then laſt paſt; by force of which the Plaintiff entred, and was poſſeſſed until he was ejected by the Defendant. The Defendant pleaded Not guilty; and the Jury gave a ſpecial Verdict, *viz.* That long time before the Treſpaſs and Ejectment, *Roger Kelk*, Doctor in Divinity, Maſter, and the Fellows of the Colledge of St. *Mary Magdalen*, in the Univerſity of *Cambridge*, was ſeiſed of the ſaid Meſſuage, with the Appurtenances, in his Demeſn as of Fee, in the right of the ſaid Colledge. And ſo being ſeiſed the thirteenth day of *December*, in the 17 *Eliz.* by their Deed in Engliſh, between the ſaid Queen, of the one part; and the ſaid Maſter and Fellows of the Colledge, of the other part, and enrolled in the *Chancery*: The ſaid Maſter and Fellows for divers conſiderations, them thereunto eſpecially moving, did give and grant to our Soveraign Lady the Queen, All that their Meſſuage (which was the Meſſuage mentioned in the Declaration) with the Appurtenances lying in the Pariſh of St. *Buttolph* without *Algate*, *London*, To have and to hold the ſaid Meſſuage, with the Appurtenances to our ſaid Soveraign Lady the Queen, her Heirs and Succeſſors for ever;
[65] yielding and paying therefore yearly to the ſaid Maſter and Fellows, and their Succeſſors, at the Feaſt of St. *Michael* the Archangel, 15 *l.* with Clauſe of Diſtreſs, and under this Condition or Proviſo following, *viz.* Provided nevertheleſs, That if our ſaid Soveraign Lady the Queen, her Heirs and Succeſſors, ſhall not ſufficiently convey, and aſſure by Letters Patents under the Great Seal of *England*, the ſaid Meſſuage with the Appurtenances to one *Benedict Spinilo*, Merchant of *Genoa*, and his Heirs, before the firſt day of *April* next enſuing, That then this preſent Indenture, and every Gift, Grant, and Article therein contained, ſhall ceaſe and be utterly void, and of none effect; as by the ſaid Indenture, whereof one part was ſealed with the Seal of the ſaid Maſter and Fellows, and the other with the Great Seal of *England*, appeareth.

And further they found the Act of 13 *Eliz. cap.* 10. by which it is enacted by Authority of Parliament, That from thenceforth, all Leaſes, Gifts, Grants, Feoffments, Conveyances, or Eſtates, to be made, had, or ſuffered by any Maſter and Fellows of any Colledge, Dean and Chapter of any Cathedral or Collegiate Church, Maſter or Warden of any Hoſpital, Parſon or Vicar, or any having

any

any Spiritual or Eccleſiaſtical Living, or any Houſes Lands Tithes, Tenements, or other Hereditaments, being parcel of any Colledge, Church, Cathedral, Hoſpital, Rectory, Vicarage, or any other Spiritual Living, *&c.* to any other perſon or perſons, Bodies Politick or Corporate, other than for the term of 21 years, or 3 lives, ſhall be utterly void and of none effect, to all intents, conſtructions and purpoſes, &c.

And further they found the Act of Confirmations of Letters Patents made 18 *Eliz. cap.* 2. by which it is recited, That where after the 18 day of *November*, in the firſt year of the Reign of the ſaid Queen, divers and ſeveral Honors, Caſtles, Lands, Tenements, Rents, Reverſions, Services, and other Hereditaments, were conveyed and aſſured to the ſaid late Queen, her Heirs and Succeſſors, by divers and ſundry perſons, and Bodies Politick, as well for the diſcharging and ſatisfaction of great Debts and ſumms of money, as for other good Conſiderations; for the perfect aſſurance, Confirmation, and further ſurety of which, it was Enacted by Authority of Parliament, That all Feoffments, Fines, Surrenders, Aſſurances, Conveyances and Eſtates in any manner conveyed, had or made, or to be made at any time within ſeven years after the end and Seſſion of the ſame Parliament, To or for our Soveraign Lady the Queens Majeſty, by or from any perſon or perſons, Bodies Politick or Corporate, of any Honours, Caſtles, Mannors, Lands, Tenements, &c. for any debt, ſum or ſums of money, or other conſideration whatſoever, ſhall remain [b] and be good and available in Law to all intents conſtructions and purpoſes, according to the true meaning, intent and purpoſe of the ſame, Saving to all and every perſon and perſons, &c. And further it was enacted, That all Letters, Patents, Indentures and other Writings, ſealed with the Great Seal of *England*, or the ſeal of the Dutchy of *Lancaſter*, or the Seal of the County Palatine of *Lancaſter* then made or granted by the ſaid Queen for any ſum of money, or for any other conſideration, ſhould be good perfect and effectual in Law, &c. againſt the ſaid Queen her Heirs and Succeſſors, according to the tenor and effect of the ſaid Letters Patent, &c. And further found, That the ſaid Queen *Eliz.* 29 *Jan.* in the 17 year of her Reign, by her Letters Patent under the Great Seal, did grant unto the ſaid *Benedict Spinola* (who was then a Free Denizen) the ſaid Meſſuage with the appurtenances, to have and to hold to him his Heirs and Aſſigns for ever: The which *Benedict Spinola*, 15 *Junii* 22 *Eliz.* by his Deed indented and Inrolled within 6 months in the Chancery, for money, did bargain and ſell the ſaid Meſſuage, with the appurtenances to *Edward* Earl of *Oxford*, and his Heirs; by force whereof the ſaid Earl entred, and was thereof ſeiſed in his Demeſne of Fee, *prout lex poſtulat.* and he being ſo ſeized *Rowland Broughton* Gentleman and *Elizabeth* his wife, *Craſt. Trin.* 24 *Eliz.* levied a Fine of the ſaid houſe with the appurtenances to the ſaid Earl of *Oxford* and his heirs with Proclamations, which were found at large according to the Statute. And afterwards 9 *Maii* 25 *Eliz.* the ſaid Earl did Leaſe the ſaid Houſe to *Edward Hamon* for 51 years, who 9 *N.* 26 *Eliz.* aſſigned all his intereſt and term for years in the ſaid houſe to *William Maſhaw*, who 4 *Oct.* 2 *Jac.* died thereof poſſeſſed inteſtate; after whoſe death *Alice* his wife took Adminiſtration of his goods, &c. and 1 *Feb.* 4. *Jac.* took to Husband the ſaid *Francis Caſtilion* Knight: And that the ſaid *Roger Kelke* Maſter of the ſaid Colledge 8 *Jan.* 1602 (which was in 44 *Eliz.*) died; and after his death *Barnaby Gooche* Doctor of the Civil Law was Maſter of the ſaid Colledge elect; and that the ſaid *Edward Hamon* in the name and ſtead of the ſaid Earl then Tenant of the ſaid Houſe, did pay to the ſaid *Barnaby Gooche* Maſter of the ſaid Colledge 15 *l.* of the rent aforeſaid, due to the Maſter and Fellows of the ſaid Colledge at the Feaſt of St. *Michael* 1606; which 15 *l.* the ſaid *Barnaby Gooche* then Maſter received, and by writing under his hand without a Seal acknowledged that he had received it: and that the ſaid *Barnaby Gooche* within five years after he [68] was choſen Maſter and Prefect and after the receipt of the ſaid rent, *viz.* 5 *Feb.* 4 *Jac.* into the ſaid houſe with the appurtenances, upon the poſſeſſion of the ſaid *Francis Caſtillon* and his wife did enter in the right of the ſaid Colledge. And the ſaid Maſter and fellows of the ſaid Colledge 5 *Feb.* 4 *Jac.* by their Indenture under their common Seal, did demiſe the ſaid houſe, with the appurtenances, to the ſaid *J. Smith* the Defendant for ſix years; And that the ſaid *Francis Caſtillon* Knight did re-enter upon the poſſeſſion of the ſaid *John Smith*, and made the Leaſe to *Warren*, as in the Declaration, who was ejected by the ſaid *J. Smith*, as in the Declaration. And the Queſtion which the Jury referred to the Court was, Whether upon the whole matter the entry of the ſaid *J. Smith* were lawful or not?

And this Caſe was argued at the Bar by *Hobart* then Attorney General, *Mountague* the Kings Serjeant and *George Croke* for the Plaintiff. And *Yelverton* the Kings Sollicitor, and *Thomas Crew* for the Defendant.

And in this Caſe four points were moved and argued at the Bar.

1. If the ſaid Conveyance made to Queen *Elizabeth* by the Maſter and Fellows of the ſaid Colledge, of the ſaid houſe, parcel of the poſſeſſions of the ſaid Colledge after the Act of 13 *Eliz.* were reſtrained by the ſaid Act?

2. Admitting that the ſaid conveyance were reſtrained by the ſaid Act, If the ſaid Act of 18 *Eliz.* hath ſupplied the defect thereof, and hath made the ſame perfect and effectual?

3. Admitting alſo, That the Act of 18 *Eliz.* doth not extend, nor give any force unto it, If the ſaid Fine levied, and five years paſſed, ſhall bind the right of the Maſter and Fellows of the ſaid Colledge for ever?

4. If the ſaid acceptance of the Rent by the ſaid Maſter of the ſaid Colledge ſhall diſable or conclude him to enter into the ſaid houſe? And if any of theſe two Points ſhall be adjudged againſt the Defendant, then his entry is not lawful, and by conſequence Judgment ſhall be given for the Plaintiff, *Bonum defendentis ex integra cauſa, malum ex quolibet defectu.*

As to the first it was objected, That by the Rule of Law, The King not being named in the Act, is by Law exempted out of the Act: for the Law giveth to the King this Prerogative, That for the
[b] dignity of his Royal Person, he is not by construction of Law within these common words, Person or Persons, Bodies Politick or Corporate. And be the Statute in the Affirmative, or be it in the Negative, which is stronger, it shall not bind the King, if he be not specially named, but he shall take benefit of a Statute, although he be not named; as the Statute of *West.* 1. *cap.* 35. which setteth reasonable aid (as well to make the eldest Son Knight, as to marry the eldest Daughter) in service: It is enacted, That from henceforth of every whole Knights Fee only there be given twenty shillings, and of twenty pound land holden in soccage twenty shillings, and of more, more, and of less, less: But it was holden, That for as much as the King was not named, he was not boun den by that Law; and to set that same certain, was the Act of 25 E. 3. *cap.* 10. made, in which Act the King was specially named. *Vide Fit. Nat. B.* 82 *f. acc.* Also the Statute of Limitations, *s.* of *Merton, ca.* 8. *West.* 1. *cap.* 3 & 32. *H.* 8. *cap.* 2. have never bound the King. So the Stat. of *West.* 2. *cap.* 5. which giveth the plea of Plenarty by 6 months, doth not bind the King, because the Act is general, and doth not name the King. The Statute of 27 E. 1. which giveth Tryal in the Country by *Nisi prius*, shall not bind the King, *Fitz. Nat. B.* 241. *b.* 24 E. 3. 23, &c. So the Statute of 18 E. 1. of *Quia emptores terrarum*, doth not bind the King, as it is holden in 10 *H.* 7. 23, &c. The Statute of *Magna Charta cap.* 11. enacteth in the Negative, *Quod communia placita non sequuntur curiam nostram, sed teneantur in aliquo loco certo*; but the same doth not bind the King, as was adjudged in 23 *H.* 3. *Bre.* & 31 E. 1. *Prerogative* 28. for he may have a *Quare Impedit* in the Kings Bench. And many other Cases upon this large and common ground, which you may find in our Books, and chiefly in *Plow. Com.* 240. in the Lord *Berkleys Case*. *Vide* 11 *H.* 4. *Quare Impedit* 120. 11 *H.* 4. 87. *B. Prerogative* 57. 12 *H.* 7. 21. *in Stoners Case*, 4 E. 3. 34. 30 E. 3. 5. 7 *H.* 4. 32. 4 *Mar. Dyer* 145. So in the Case at Bar, for as much as the Queen was not named in the said Act of 13 *Eliz.* she was not bound thereby, but was at Liberty to take the grant as she was before the said Act of 13 *Eliz.*

Also it was urged, That alwaies after the said Act of 13 *Eliz.* divers Masters and Fellows of Colledges, Deans and Chapters, Masters and Wardens of Hospitals, and others having Spiritual and Ecclesiastical Livings, have made any Estates and Leases to the Queen *Elizabeth*, and to the King that now is, which are granted and transferred over to many persons; and all these were made by the advice of men Learned in the Law, and of the Councel Learned of the late Qu. and of the King that now is, and the change of so common and constant opinion, upon which the Estates and intents of so many men doth depend, shall be a great cause of trouble, Suits of Law, and the undoing of
[69] many persons, who have not only spent their substance, or the greatest part of it upon such Estates and Leases, but also have spent much upon Buildings and other charges upon them, all which shall be utterly lost by the change of the said continual practice; and in such changes, *Rerum progressus ostendunt multa quæ initio præcaveri aut provideri non possunt:* And another saith, *Quod in ædificiis lapis male positus non est removendus*; And the Law saith, *Interest Reipublicæ quod sit finis litium.*

As to the second Point, It was argued by the Plaintiffs Councel, That admit the Queen were bound by the Act of 13 *Eliz.* yet the said Act of 18 *Eliz.* hath made the grant of the Queen good and effectual: for admit the said grant to the Queen were voidable afterwards, or presently void and of none effect, yet the said Act hath made it unavoidable, good and effectual: for the words are, For the perfect assurance confirmation, and further security of such assurances, conveyances and estates, &c. It is enacted, That they shall stand, remain and be good and effectual in Law to all intents, constructions and purposes, according to the true meaning and purport of the same. So that it appeareth by the words of the Act, that the full intent of the makers of it, was to make that perfect which was imperfect, and to make that assured which was not sure, and to add greater force to that (by addition of further security) which was defective before. And to this purpose the makers of the Act, not only in the said precedent words, but in those which are subsequent, are very provident and in a manner curious to take away all evasion which might be made out of it, and therefore first it is enacted, That they stand, remain, and shall be good and available in Law. And to answer a secret Objection which may be made upon words of the Act, *s.* All Feoffments, Fines, Assurances, Conveyances, Estates, &c. and that they ought to be sufficient, for an insufficient thing in Law is reputed as nothing; and to oust the same, these words are added, To all intents, constructions and purposes, according to the true meaning, intent and purpose thereof. So that the Act doth not say, That they shall be good and availeable according to the strict construction and operation of the Law (for if they were good and availeable in Law, then there needed not any Act to make them perfect or sure, or to add further security) but the words are, According to the true meaning, intent and purpose of them. And without question in the Case at Bar, the true intent and meaning of the Master and Fellows, and of Queen *Elizabeth*, and the purpose of the Indenture, was to convey the said house to the Queen, her Heirs and Successors, for so much the Indenture doth purport, although it be not of force to convey it. And it was said, That if a Bishop had made an Estate or Lease to the Queen *Eliz.* and afterwards the Act of 18 *Eliz.* were made, the same had been a good Estate or Lease to the Queen, although it was never confirmed by the Dean or Chapter. So if any Infant had levied a Fine to the Queen, or to others for the Queens behoose, that after the Act of 18 *Eliz.* the Infant should never reverse the said Fine for nonage. And many other Cases were put out of their own invention, which I purposely omit.

As to the third Point they argued, That the said Master and Fellows of the said Colledge were a Corporation aggregate of many, and have the entire Fee in them, and by the Stat. of 4 *H.* 7. shall be bound by Fine or non-claim by five years, as it is adjudged in *Croft and Howels Case*, *Plow. Com.* 538.

and

and in *Stowels Caſe*, *Plow. Com.* 376. *Vide* 7 E. 6. 83. *Dyer*, *Vide* 24 E. 3. 58. And that the Statute of 13 *Eliz.* doth not aid them in this caſe, becauſe the ſame doth extend only to Leaſes, Gifts, Grants, or other Aſſurances or Conveyances done or ſuffered, and notwithſtanding the word (*Suffered*) yet there ought to be an aſſurance made or ſuffered to which they ſhall be party, by a common recovery of Lands had againſt them, as the common recovery of an annuity by conſent againſt them, as it appeareth in *Eytrenes Caſe*, 14 *El.* in the Fifth Part of my Reports. But this Caſe of Fine levied between ſtrangers and non-claim by five years, was never queſtioned or doubted. And it ſhall be a great weakning to the general Aſſurance of the Realm, if this Act ſhall be conſtrued againſt the letter to exempt all thoſe named in the Act, ſo that they ſhall notbe bounden by any Fine or Non-claim.

As to the fourth point, Foraſmuch as the Maſter, who is the head of the Corporation, hath accepted of the Rent, and made an Acquittance under his hand, he hath concluded himſelf to enter during the time that he is Maſter; And foraſmuch as he is concluded, the Fellows without their Head, cannot enter, and ſo they are concluded. And upon this they concluded, That for all theſe four points, or for ſome of them, for if any of them ſhall be adjudged for the Plaintiff, Judgment ought to be given againſt the Defendant. Againſt which it was argued by the Defendants Councel and they concluded that Judgment ſhould be given for the Defendant.

And as to the firſt, which was the principal part of the Caſe, it was argued by the Defendants Council and reſolved by the Juſtices, *ſ. Coke* chief Juſtice, Sir *John Croke*, Sir *John Dodderidge*, and Sir *Robert Houghton* Juſtices, upon ſolemn Argument in Court, that the ſaid Act of 13 *Eliz.* did [70] extend to retein the Maſter and Fellows of the ſaid Colledge, to convey the ſaid Houſe, parcel of the Poſſeſſions of the ſaid Colledge to the Queen, although the Queen were not expreſly named in the ſaid Act.

And firſt, it was reſolved, That the general words of the Act do extend to the Queen, for the words are, To any perſon or perſons, body politick or corporate, and without queſtion the Queen was a perſon, as it is ſaid in 10 *H.* 7. 18. *Rex eſt perſona mixta.* And that ſhe was a body politick appeareth in *Plow. Com.* in the caſe of the *Dutchy* of *Lancaſter*, 213. and in the Lord *Berkleys* caſe, 234. and in many other Books. Then if the Act be general, and the Queen be clearly included within the words, if ſhe ſhall be exempt out of the Act, the ſame ought to be by conſtruction of Law; and as this caſe is, the Law ſhall not make ſuch conſtruction for the reaſons apparent in the Act it ſelf, *ſ.* 1. The Queen, Lords Spiritual and Temporal, and the Commons who made the ſaid Act, have adjudged, as in the preamble appeareth, long Leaſes made by Colledges, &c. to be unreaſonable, and againſt reaſon (*a fortiori*, an Eſtate in Fee ſimple, &c.) And the Law which is the perfection of reaſon, will never expound the words of the Act againſt reaſon. 2. The Parliament hath adjudged them cauſes of Dilapidation. 3. To be the decay of all ſpiritual livings. 4. The decay of Hoſpitality. And 5. The utter impoveriſhing of ſucceſſors incumbents in the ſame.

And upon all theſe followeth a conſequent fearful and dangerous *ſ.* decay of the true Religion and Spiritual worſhip of God: For it is recorded in Hiſtory, that there were amonſt others two grievous perſecutions, the one under *Dioceſian*, the other under *Julian*, ſurnamed the *Apoſtate*, one of them intending to have extirpated all the Profeſſors and Preachers of the Word of God; and therefore the Record ſaith, *Occidit omnes Presbyteros*, but notwithſtanding thatReligion did flouriſh, for, *ſanguis Martyrum eſt ſemen Eccleſiæ*, and yet that was a heavy and grievous perſecution: But the perſecution under the other was more grievous and dangerous, for (as the Hiſtory ſaith) *occidit Presbyterium*, for it robbed the Church, and ſpoiled ſpiritual perſons of the revenues, and bereft them of that whereby they ſhould live; and thereupon in ſhort time followed great ignorance of the true Religion and Service of God, and thereby great decay of the Chriſtian profeſſion; for none would apply himſelf, or his ſons, or any other he had under his charge to the ſtudy of Divinity, when they ſhould have, after a long and painful ſtudy, nothing to live upon. See all this word by word in the Biſhop of *Winchesters* caſe, in the Second Part of my Reports.

And therefore it was unanimouſly reſolved, That general Statutes, which provide neceſſary and [*b*] profitable remedy for the maintenance of Religion, the advancement of good Learning, and for the relief of the Poor, ſhall be extended generally according to their words; And God forbid that by any conſtruction the Queen who made the ſaid Act, with the aſſent of the Lords and Commons, ſhoud be exempted out of this Act of 31 *Eliz.* which provideth neceſſary and profitable remedy for the maintenance of Religion, the advancement of good Literature, and the relief of the poor. And out of theſe Colledges, Deans and Chapters, &c. as well the Church is furniſhed with grave and learned Divines, as the Common-wealth with learned men for the better adminiſtration of Juſtice as well Temporal as Eccleſiaſtical; which (*ſ.* Religion and Juſtice) are the main Pillars which ſupport the Kings Crown.

And therefore of all others the King, as hath been ſaid, is *perſona mixta*, *Medicus Regni*, *Pater Patriæ*, *& Sponſus Regni*: Who by a Ring is wedded to the Realm at his Coronation, ſhall not be exempted out of this Act by conſtruction of Law, which ſhall be againſt reaſon, and cauſe of Dilapidations, decay of ſpiritual livings, and hoſpitality, and utter impoveriſhing of ſucceſſors, and by conſequence the decay of Religion, and Juſtice ſhall follow. And therefore it is true, *quod ſumma ratio eſt quæ pro Religione facit*: And *Weſt.* 1. *cap. ult. ſumma Charitas eſt facere Juſtitiam ſingulis*, *& omni tempore quando neceſſe fuerit.* And it is to know, That the Law will never preſume that any one will do a thing againſt reaſon, or any Religious duty.

And therefore it is reſolved in *Chomeleys* caſe, in the Second Part of my Reports, Whereas a Reverſion expectant upon an Eſtate in tail is granted to one for the life of the Tenant in tail and it was ſaid, That by poſſibility this grant might take effect, for the Tenant in tail having no iſſue, might become Monk and enter into Religion, and then the Grantee might have it during his natural life: But there it is reſolved, That ſuch ſuperſtitious and irreligious profeſſion ſhall not be preſumed in Law. 1*M.*10. *H.*6.8. *John S.* brought an action of debt againſt *Johan Rect. de T. in Com. B.* The Defendant ſaid that he was before the Writ brought, dwelling at *B.* in the County of *N.* and it was not allowed; for a Parſon ſhall be intended in Law to be reſident upon his Benefice, for the cure of Souls which he had there. For a Parſon who hath cure of Souls, and is non reſident, *non eſt diſpenſator ſed diſſipator, non ſpeculator ſed ſpiculator*, and therefore no ſuch thing ſhall be preſumed.

[71] So in the caſe at Bar, the Law ſhall never make conſtruction againſt the maintenance of Religion, advancement of Learning, and ſuſtenance of the Poor. It is enacted by the Statute of 1 & 2 *Ph. & Ma. cap.* 8. That it ſhall be lawful, &c. to give Lands, Tenements, &c. by feoffment, grant, or other aſſurance, or by his laſt Will and Teſtament in writing, to any ſpiritual body politick or corporate, notwithſtanding the Statute of *Mortmain*. One *Allaine Clarke* ſeized of certain lands in *London* in Fee, 4. & 5. *Phil. & Mar.* by his laſt Will in writing deviſed them to the Maſter, Fellows and Scholars of *Trinity* Colledge in *Cambridge*, and to their ſucceſſors for ever, for the finding of certain Grammar Scholars, &c. And *Mich.*8.9.*Eliz.* A great queſtion was moved.

1. Although the ſaid Colledge conſiſted not only of Divines, but of others alſo.

2. That the intent was to find Grammar Scholars, &c.

3. That in the Statute of 34. & 35. *H.*8. of Explanation of Wills, bodies politick and corporate are exempted out of it.

Yet by the opinion of all the Juſtices of both Benches, and the chief Baron of the Exchequer, the deviſe was holden to be good; and the Statute of 1. & 2. *Phil. & Mary* (being made for the maintenance of Religion, advancement of Learning, and the exhibition of poor Scholars) ought to be favourably expounded; and although the lands were holden of the King, yet in ſuch caſes the Act was expounded to bind the King. See the words of the Stat. 4. *H.*7. of fines are general. Yet the ſucceſſor of a Biſhop, Parſon, Vicar, or any other ſole Corporation, ſhall not be bound by conſtruction of Law as a corporation aggregate of many ſhall be; for there the Biſhop without the Dean and Chapter, the Parſon and Vicar, without the Patron and Ordinary, &c. might by their ſufferance bind their ſucceſſors, which ſhould be cauſe of Dilapidations, and diminution of ſpiritual livings. And therefore by conſtruction of the general law ſhall be excepted, as it is holden in *Stowels* caſe, in *Plow. Com.* 376. and *Howels* caſe *Plow. Com.* 538.. By the Statute of 23*H.*8.*cap.*10. It is enacted,, That all conveyances made to the uſe of Pariſh Churches, Church-wardens, Guilds, Companies erected of devotion, or common aſſent, &c. and all other like uſes and intents, ſhould be void.

And one *Nicholas Guibſon* being ſeized of a houſe and Wharf in *London*, after the ſaid Act deviſed them to *Avis* his Wife, upon condition to found a Free-School, and for the ſuſtenance of certain poor men and women, and it was queſtioned if this condition were againſt the ſaid Act of 23.*H.*8. *Mich.* 34. & 35. *Eliz.* as it appeareth in the Firſt Part of my Reports.

[b] And it is there adjudged, that the ſaid general words of the Act of 23.*H.*8. do not extend to take away the ſaid good and charitable uſes, for inſtruction of youth in good Literature, and for ſuſtenance of the poor; for there it is ſaid, That no time was ſo barbarous to take away learning and knowledge, nor no time ſo uncharitable, to take away the ſuſtenance of poor people: So that it appeareth by theſe caſes, That by conſtruction of Law, lands conveyed for the advancement of Learning, or Suſtenance of the poor, have been preſerved and maintained by the general words of the ſaid Act.

But it was never ſeen, That a general Act, made for the maintenance of Religion, advancement of Learning, and maintenance of the Poor, ſhould be by the conſtruction of Law ſo expounded, that a by-way ſhould be left open, by which the ſaid great and dangerous miſchiefs ſhould remain, and the neceſſary and profitable remedy depreſſed. For the Office of Judges is, to make conſtructions which ſhall repreſs the miſchief, and advance the remedy, and to ſuppreſs all evaſions for the continuance of the miſchiefs, and ſuch by-way ſhall never be erected by conſtruction, although it be for the Kings benefit: And that appeareth by the Act of 1.*El.* By which Archbiſhops and Biſhops are reſtrained to make any conveyance, &c. other then for 3 lives, or 21 years, to any perſon or perſons, bodies politick or corporate, other than to the Queen, her Heirs and Succeſſors; out of which there are three material things to be obſerved.

1. That the Queen had been included within the ſaid words, Perſon and perſons, body politick, &c. if the ſaid excluſion or exception had not been made.

2. That if the ſaid by-way had not been contained in the ſame Act, the ſame had never been raiſed by a conſtruction in Law.

3. That foraſmuch as the ſame words are uſed in the ſaid Act of 13. *Eliz. 1.* to any perſon or perſons, bodies politick or corporate, and no exception or excluſion made of the Queen; by conſequence it appeareth, that it was the meaning of the makers of the ſaid Act, that the Queen ſhould be bound thereby, and ſo much the rather, becauſe they had ſo good a pattern before them as the Act of 1. *Eliz.* was, for the ſupportation of the Crown; and although the true intent of the ſaid Act of 1 *Eliz.* was for the ſupportation of the Crown, yet by importunity of Suitors many Eſtates and Leaſes were made to the Queen by Arch Biſhops and Biſhops with intent to grant them over to Subjects to private uſes; which the King that is now perceiving, of his pious and religious care, That the Poſſeſſions of the Archb. and Biſhops ſhould not be diminiſhed by the ſaid by-way, by an Act of Parliament in the firſt year of his Reign, in the firſt Seſſion thereof *cap.* 3. reciting, That where Archbiſhops

biſhops and Biſhops by the Law could not convey any of their Poſſeſſions to other Subjects, His moſt Excellent Majeſty knowing, That divers with great ſuit had endeavoured to fruſtrate the true intent of the Law, of his Chriſtian and Princely piety and care intending to protect the ſaid poſſeſſion from alienation or diminution, for the better maintenance of Gods true Religion and Hoſpitality, and for avoiding of Dilapidations, and thereby for ever after to avoid all Suits and importunities concerning the ſaid Poſſeſſions hath of his meer and pious motion vouchſafed, that it ſhall be enacted, that every Arch-biſhop and Biſhop and their Succeſſors ſhall be after the end of the ſame Seſſion of Parliament, utterly diſabled in Law, to make, levy or ſuffer any alienation, aſſurance, demiſe, charge or conveyance of their poſſeſſions to the King his Heirs or ſucceſſors: And that every ſuch alienation, &c. ſhall be utterly void and of none effect to all intents, conſtructions and purpoſes. The ſecond reaſon is, That the King ſhall not be exempt by conſtruction of Law, out of the general words of acts made to ſuppreſs wrong, becauſe he is the Fountain of Juſtice and common Right; and the King, being Gods Lieutenant, cannot do wrong, *Solum Rex hoc hon poteſt facere, quod non poteſt injuſte agere*; and therewith agreeth 13 E.4.8. and the caſe of *Alton* woods, in the firſt part of my *Reports* &c. And although that a right was remedileſs, yet the Act which provideth neceſſary and profitable remedy for the preſervation of it, and to ſuppreſs wrong, ſhall bind the King, as it appeareth in the Lord *Berkelyes* Caſe, *Pl. Com.* 246. If tenant in tail before the ſtatute of *Donis*, had alienᵈ either before Iſſue to bar the Iſſue in tail, or after Iſſue, to bar as well the Donor as the Iſſue in tail, it was tortious, but no remedy was given for the ſame, till the ſtatute of *Donis conditionalibus*, made 13 E.1. which Act ſaith *Dominus Rex perpendens, quod neceſſarium & utile eſt in præd. caſibus apponere remedium, &c. ſtatuit, quod non habeant illi, quibus tenementum ſic fuit datum ſub conditione poteſtatem alienandi, &c.* And the Lord *Berkelyes* Caſe was, That Land was given to King *H.*7. and to the Heirs males of his body; and the queſtion was, Whether the King, foraſmuch as he was not expreſly reſtrained in the Act *poſt prolem maſculum ſuſcitatum*, might alien or not? and it was adjudged, That he could not alien, but that he is reſtrained by the ſaid Act, for three cauſes.

1. Becauſe that ſuch alienation before the ſtatute was wrongfull, although that ſuch wrong wanted remedy; for there it is ſaid, It ſhall be a hard argument to grant that the Statute which reſtraineth men to do wrong and ill; ſhould permit the King ſo to do.

2. Foraſmuch as the ſaid Act is, *ſtatutum remediale*, and provideth a remedy for this remedileſs wrong, and that it was neceſſary and profitable to provide ſuch remedy, it was adjudged, That it ſhould bind the King. [b]

3. Becauſe it was an Act for the preſervation of the poſſeſſions of Noble men, Gentlemen and others, the ſame alſo ſhould bind the King; and the ſame Act ſhall not bind the King onely when he taketh an eſtate in his natural capacity, as to him, and the Heirs males of his body, but alſo when he claimeth an Inheritance as King by his prerogative: And therefore if Tenant in tail, after the ſaid Act, be attainted of Treaſon, although the King claim the forfeiture as King by his prerogative. Yet the King is bound by the ſaid Act, for there ſhall be no forfeiture to bar the Iſſue in tail; as it was at the common Law, as it is holden in 7 *H.*4.31. 8 *H.*4.9.7. *R.*2. *Aide del Roy*. So in the caſe at Bar, the ſaid Act of 13 *Eliz.* hath all the ſaid three qualities. For,

1. It was to ſuppreſs wrong: For Dilapidations and diminution of ſpiritual livings or wrongs, and ſuch wrongs as are *quodam modo*, puniſhed by the Law, for the Maſter, Dean, &c. for Dilapidations or waſting, or diminution of the Revenues of their houſe, might be deprived, as appeareth in 29 E. 3. 16. 2 *H.*4.3. 11 *H.*6.20. *H.*6.46.9 *E.*4.34.35 *E.*1. Reſolved in a Parliament holden at *Carliſle*, which ſee before in *Richard Liſords* Caſe, and a notable preſident in 19 *E.*3. *Rex amovit cuſtodem hoſpitalis de ſuo Patronatu, quia malo diſpendit profiua domus*, &c. becauſe it is againſt the office and duty to waſte the poſſeſſions of their houſes, which are committed to them *pro bono publico*.

2. This Act of 13 *El.* is, *actus remedialis*, and was neceſſary and profitable to provide ſuch remedy for the publick good of the whole Eccleſiaſtical eſtate, &c. [c]

3. This Act is an Act of preſervation, to preſerve the poſſeſſions of Colledges, Deans and Chapters, Hoſpitals; and therefore for theſe three cauſes it ſhall bind the Queen.

And where it is enacted by the Statute of *Weſt.*2. *cap.*5. *Quod quotieſcunque aliquis jus non habens tempore hujuſmodi cuſtodiar' præſentaverit*, &c. It was reſolved by *Coke*, Chief Juſtice, *Dodderige* and *Houghton* Juſtices, That that Act made to ſuppreſs wrong, ſhould bind the King, and to the Law is well reſolved in a caſe which was left doubtfull in 35 *H.*6.60. *Rateliffes* Caſe.

And to conclude this reaſon, it is notably ſaid in 24 *E.*3.41. That the Law is reaſon and equity, to do right to all, and to keep men from wrong and miſchief, and therefore the Law ſhall never make any conſtruction againſt Law, Equity, and Right.

The third Reaſon is, That the general words of Statutes, which tend to perform the will of the Founder or Donor, ſhall bind the King, although he be not named. And the ſame appeareth in the Statute of Templers, 17 *E.*2. where it is ſaid, *Ita ſemper quod pia & celeberrima voluntas Donator' in omnibus teneatur & expleatur, & perpetuo ſanctiſſime perſeveret*. And the ſaid Act of *Donis*, &c. is notable to this purpoſe, for there it appeareth, that it was neceſſary and profitable that the will of the Donor ſhould be kept; the words of which Act to this purpoſe, are; *Propter quod Dominus Rex perpendens quod neceſſarium & utile eſt*, &c. *apponere remedium* (and what was ſuch remedy) *ſtatuit quod voluntas donatoris in carta doni ſui manifeſte expreſſa de cætero obſervetur*; which bound the King, as it is adjudged in the ſaid Lord *Berkleys* Caſe; where *f.*247. it is ſaid, That men ought to obſerve the intent and will of other men, and to break that which is ill. And in the Caſe at Bar, the intent of the Founder of the ſaid Colledge was for the maintenance of Divines, the advancement of Liberal Arts and Sciences, and the bringing up of Youth in Vertue and Learning, which God forbid ſhould not be [73]

perfor-

performed; and therefore it is a ſtronger caſe, and in a more Godly and publick Degree then the ſaid Act *De Donis*, &c. which was enacted for the preſervation of private Eſtate tailes to particular Families.

The fourth Reaſon is, That the Maſter and Fellowes of the ſaid Colledge are by the Act diſabled to grant; and then if they be diſabled to grant, the Queen cannot take from thoſe who are ſo diſabled: The words of the Act are, All Leaſes, Gifts, Grants, &c. to be made, &c. or ſuffered by any Maſter or Fellows of any Colledge, &c. ſhall be utterly void and of none effect, to all intents, conſtructions and purpoſes, any Law, Cuſtome or uſage to the contrary notwithſtanding; which is as much as to ſay, That every Maſter and Fellows of a Colledge ſhall be diſabled to make any Leaſe, Gift, Grant, &c. but that every ſuch Leaſe, Gift, Grant, &c. ſhall be utterly void to every intent and purpoſe; for when by Authority of Parliament the Grants to be made by any Maſter or Fellows of a Colledge are made utterly void to all intents, &c. thereby the Maſter and Fellows are diſabled by Parliament to make any Grant; for in every Grant there ought to be Grantor, Grantee, and thing granted; and when the Grant of a thing is made void thereby, the Grantor is diſabled to grant it. But this diſability is not *ſimpliciter*, but *ſecundum quid*, for if the Maſter and Fellowes of a Colledge make ſuch a Grant, it ſhall not be avoided by the Maſter himſelf, but by the Succeſſor, as it was reſolved in this Caſe, and often times has been reſolved before.

[b] The fifth Reaſon is. In Acts of Parliament, which are to be conſtrued according to the intent and meaning of the makers of them, the original intent and meaning is to be obſerved; and it appeareth that the intent and meaning of the Maſter and Fellows was, That they would convey the ſaid houſe to *Benedict Spinola* and his Heirs, and becauſe they could not do it *de directo*, they attempted to do it *ex obliquo*, to grant the ſame to the Queen and her Succeſſors, but upon condition contained in the ſame Grant, That the Queen within three months after ſhould grant the ſaid Houſe to the ſaid *Benedict Spinola* and his Heirs: So that it was endeavoured, That the Queen who was the Fountain of Juſtice, ſhould thereby be made the Inſtrument of Injury and wrong; and of the breaking of a pious and excellent Law which ſhe her ſelf had made for the maintenance of Religion, advancement of the Liberal Arts and Sciences, and for ſuſtenance of the poor. And where the Maſter and Fellows were ſeiſed of the ſaid Houſe to them and their ſucceſſors for ever, *in jure Collegii pro bono publico*, and to godly and charitable uſes, now the ſame ſhould be converted for the private uſe of *Spinola* and his Heirs for ever; and ſo (as the Statute of *Carliſle An.* 35 E. 1. ſpeaketh) *Quod olim in uſus pios ad divini cultus augmentum & cætera opera pietatis charitatiſve fuit erogatum, nunc in ſenſum reprobum eſt converſum*. And the Poet doth well reprehend that.

——— Fuit hæc ſapientia quondam,
Publica privatis ſecernere, ſacra profanis.

And it was reſolved, That the Law will never make an interpretation to advance a private and to deſtroy the publick, but always to advance the publick, and to prevent every private, which is odious in Law in ſuch caſes, And therefore it is well ſaid in *Heydons* Caſe, in the Third Part of my *Reports*, The Office of Judges is always to make ſuch conſtruction to repreſs the miſchief and to advance the remedy; and to repreſs ſubtill evaſions and inventions for the continuance of the miſchief, *& pro privato Commodo*, and to add force and life to the cure and remedy, according to the true intention and meaning of the makers of the Act, *pro bono publico*. And if it ſhall be lawfull for Maſters and Fellows of Colledges, Deans and Chapters, &c. to convey to the Queen with ſuch Conditions to grant to a ſubject; without queſtion ſuch conſtruction ſhall tend to the continuance of the miſchief, *& pro privato commodo*: And therefore in 17 *Ed.* 3. 59. The Friers Carmelites, who [74] then had not any place of habitation, obtained of one *John Merite* who was ſeiſed of ten Acres of Meadow, holden of the Biſhop of *Winchester*, to have the ſaid Land for a place of habitation, for them; and becauſe the ſaid *John Merite*, could not grant the ſaid ten Acres to them by reaſon of the Statute of Mortmain, by covin betwixt the ſaid *John Merite*, and the Friers Carmelites to take away the Biſhops Seignorie, which was the impediment; The ſaid *John Merite*, to take an evaſion out of the Statute of Mortmain, granted the ſaid ten Acres to the King, his Heirs and Succeſſors, whereby the Biſhops Seigniorie ſhould be extinct, to the intent that the King ſhould grant over the ſame to the Friers Carmelites, which he did accordingly; And becauſe it was by Covin betwixt them, as aforeſaid, to take away the Biſhops Seigniory, It was adjudged that the ſaid Charter ſhould be repealed, and that the Fries Carmelites ſhould be diſtrained to deliver the Charter to be Cancelled. Out of which Caſe, five things were obſerved.

1. That he who maketh the King, who is the Fountain of Juſtice to be the Inſtrument of fraud [63] and covin, and thereupon obtaineth Letter. Patents, that they are void, *quia dolus circuitu non tollitur*.

2. If the King be endeavoured to be made an Inſtrument to take away the right of another, and to that end a man attaineth Letters Patents, that ſuch Letters Patents ſhall be repealed.

3. That although ſuch Covin and Fraud was not contained in the grant made to the King, but appeareth onely by advancement, yet the Patent ſhall be repealed.

4. Although the Friers Carmelites were of a profeſſion of Religion, and had not any Houſe of habitation before, ſo that the ſame ſeemed to be a work of piety and charity to provide for the habitation of them; yet, *Non facias malum, ut inde fiat bonum.*

5. That ſuch Charter, ſo obtained, was adjudged to be repealed by the Common Law, and the like caſe was, 21 E. 46. *b.* The Maſter and Scholars of *Mertons* Caſe. See in *Bracton*, in the beginning

ginning of his ſecond Book. *Nihil aliud poteſt Rex in terris, cum ſit Dei Miniſter & Vicarius, quam quod de jure poteſt.* And a little after, *Itaque poteſtas juris ſua eſt, non injuriæ,* (and obſerve well) *cum ſit author juris, non debet inde injuriarum naſci occaſio, unde jura naſcuntur.* And the Chief Juſtice ſaid, That if one who intendeth to ſell his Land, had by fraud conveyed the ſame by Deed indented to the Queen, to the intent to deceive the purchaſor, and afterwards he ſelleth the Land to another for valuable conſideration, and maketh conveyance accordingly: in this caſe the purchaſor ſhall enjoy the Land againſt the Queen, by the Statute of 27 *Eliz.* 4. for although the Queen is not excepted, yet the Act being general, and made to ſuppreſs fraud, it ſhall bind the Queen.

So if Tenant in Tail be ſeiſed of Land, the Remainder over in Tail or in Fee, and he in the remainder knowing that the Tenant in Tail will alien the Land, and by recovery bar the remainder to the intent to debar the Tenant in tail of his Birth-right and power which the Law giveth him to [b] bar the remainder, and of purpoſe and intent to deceive the purchaſor granteth his remainder to the Queen by Deed inrolled, and afterwards Tenant in tail for valuable conſideration alieneth the Land by a common Recovery, and dieth without Iſſue, the purchaſor ſhall enjoy the Land againſt the Queen, by the ſaid Statute of 23 *Eliz.* the words of which are, That every conveyance, &c. made, &c. ſhall be deemed onely againſt ſuch purchaſor, &c. to be utterly void; In which words it is to be obſerved. That ſuch former fraudulent conveyance made by the ſeller himſelf, is not onely reſtrained, but generally, That every conveyance made of purpoſe and intent to deceive a purchaſor, ſhall be void; And therefore the conveyance of the remainder to the Queen, of purpoſe and intent to deceive a purchaſor is directly within the words and purview of the Act.

And of ſuch opinion was *Popham*, Chief Juſtice, openly in the Exchequer Chamber. And the ſaid Caſes of 17 E. 3. 59 & 21 E. 3. 46. are ſtronger then this is, where the party grieved was relieved by the Common Law, foraſmuch as the King cannot be an inſtrument of fraud and deceit; *& cum ſit author juris, non debet inde injuriarum naſci occaſio, unde jura naſcuntur.* See *Cholmeley's* Caſe in the Second Part of my *Reports*.

And it was ſaid, That the Law hath given to the King a great prerogative above his Subjects, that where by fraud or falſe ſuggeſtion he is deceived, that he himſelf in ſuch caſes ſhall avoid his own Grant, *jure Regio*, and the ſame appeareth, 21 E. 3. 47. in the Earl of *Kents* Caſe, and *Stamford* prerogative. 84. *a.*

The ſixth reaſon, That the Statute hath made void all Leaſes, Grants, &c. other then for 21 years, or 3 lives, whereupon the accuſtomed Rent or more is reſerved, which expreſs and demonſtrate of theſe two particular caſes, do exclude all others. And as to all the Caſes which have been put on the other ſide, It was reſolved,

1. That none of them do impugne any of theſe Reaſons or Grounds.

2. That where the King hath any Prerogative, Eſtate, Right, Title or Intereſt, that by general words of an Act he ſhall not be barred of them, as in the ſaid caſe of reaſonable aid, the King hath an Eſtate and intereſt in it, and therefore the general words of the Act of *Weſt.* 1. *cap.* 46. ſhall not extend to it.

Alſo the King hath a prerogative *quod nullum tempus occurrit Regi*, and therefore the general Acts of Limitations, or of Plenarty do not extend to him.

So the King by his Prerogative may ſue in what County he pleaſe, and of this Prerogative he is [75] not barred by the general purview of the Act of *Magna Charta, cap.* 11. And ſo of the reſt.

But in the Caſe at Bar, the King is not excluded of any Right, Eſtate, Title, Intereſt or Prerogative that he had before the Act in the ſame Houſe; and therefore for all theſe Reaſons it was concluded, That this Act of 13 *Eliz.* ſhould bind the Queen.

Note Reader, That the general Statute of 32 *H.* 8. *cap.* 36. of Fines for avoiding of controverſies ſhall bind the King, as it appeareth in the Seventh part of my *Reports*. As to the number of the Leaſes which have been made after the Statute of 13 *Eliz.* by Maſters and Fellows of Colledges, Deans and Chapters, Maſters of Hoſpitals, &c. To that it was anſwered.

1. That the ſame was more *ex conſuetudine Clericorum*, who imitated preſidents of Leaſes made before 13 *El.* then of any grave advice of men learned in the Law.

2. *Multitudo errantium non parit errori patrocinium.*

3. The inconvenience is greater and doth concern more perſons, and in a more high degree in this part then on the other; for in the famous Univerſities of *Cambridge* and *Oxford* there are 42 Colledges, beſides the Colledges of *Weſtminſter*, *Wincheſter*, of *Eaton*, and *Greſham*. Dignities and Prebends in Cathedral Churches 400. 24 Deans and Chapters, Archdeacons, Parſonages and Vicarages 8803, Hoſpitals an exceeding great number; ſo as to give to all theſe power from time to time for ever by a mean, or by way to alien the poſſeſſors of the Colleges, Deans and Chapters, Archdeacons, Prebends, Parſonages and Vicarages, Hoſpitals, &c. which were given to Religious Pious, Charitable and publick uſes, ſhall be of greater inconvenience and conſequence then the overthrowing of certain Eſtates and Leaſes made after the Act of 13 *Eliz.* of the poſſeſſions either of Eccleſiaſtical perſons, or of the poor, originally given for the maintenance of works of piety and charity, and now transferred to private perſons, and converted to private uſes, and the reſtoring of thoſe poſſeſſors to their original foundation or indowment. 1. for the maintenance of Religion, the advancement of the Liberal Arts and Sciences, ſuſtenance of the poor, and other works of charity, *pro bono publico.*

4. The ſame ſhall tend to the great prejudice of Arch-biſhops and Biſhops, for if Deans and [b] Chapters ſhall have power to alien; not onely their poſſeſſions, but their Cathedral Churches; where ſhall then be *Cathedra Epiſcopi?* or where ſhall be his Prebends? *qui præberent auxilium Epiſcopo,*

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in consultation for the suppressing of Heresies or Errors, and the true instruction of men in Religion and the spiritual worship of God committed to their charge, and in the celebration of Divine Service, &c. So of Arch-deacons, &c.

5. There never was any judicial opinion in any Court, That the Queen was not bound by the Act of 13 *Eliz.* but on the other side, it was resolved in the highest Court of Justice, That Queen *Elizabeth* was bound by the said Act, and therefore it was resolved in Parliament, holden in 43 *El.* by *Popham* and *Anderson*, Chief Justices assistants to the Lords in Parliament: That the Queen was bound by the said Act of 13 *El.* which I have reported in my Fifth Book, in the case of Ecclesiastical persons, which resolution of the Judges, the Lords and Commons in Parliament allowed of. And therefore in the Act of Confirmations at the same Parliament of Grants, &c. made to the Queen, and of Grants made by the Queen, *s.* 43 *Eliz. cap.* 1. in the clause of Grants made to the Queen, there is an exception in these words (other then Conveyances and Estates heretofore had or made by any Ecclesiastical person or persons, bodies politick or corporate, not having power or ability by the Laws of the Realm to make the same) by which words the whole Parliament did well approve of the said resolution of the Judges as to this point.

Also at the Parliament holden 1 *Jacobi* when the Bishops Will was read to restrain them to convey to the King, &c. It was moved by the most Reverend Arch-bishop *Whitgift*, That Deans and Chapters, and others having Ecclesiastical livings, should be restrained and inserted in the said Bill also, as well as Arch-bishops and Bishops.

And it was again resolved by the Justices assistants at the same time, That they were restrained by the Statute of 13 *Eliz.* to make any Conveyance to the King of any part of their possessions; and so it was said, It had been resolved before that time and for that cause they were left out of the said Bill, concerning the disability of Arch-bishops and Bishops at the same Parliament of 1 *Jac.* And of what Authority the resolution of the Judges assistants in Parliament is, appeareth in 39 *E.* 3. 1 *b.* The Duke of *Lancaster* and *Blanch* his Wife brought a *Scire facias* against the Lady *Latimer*, and question was moved concerning the abatement of the said Judicial Writ. And there *Thorp* Chief Justice did relate to the Court, That he was in Parliament when such question was debated, and there it was resolved, That the Writ shoul not abate.

To which *Chavendish* Serjeant said, My Lords, you are Judges, and we have not other Judges then you in this place; also that which was resolved in Parliament is not of Record, and if you shall
[76] adjudge that we shall answer, we will answer.

To which *Thorp* Chief Justice (who gave the rule) said, We who are Judges may record it so soon at it was in writing, and that it was adjudged there, we will not judge the contrary, wherefore answer; upon which Book the Chief Justice did strongly rely, as well for the Authority of the resolution of the Judges in Parliament, as for the credit of the Report of the Judges.

Note Reader, As it is observed in the Case of 43 *Eliz. f.* 14. the said Act of 13 *Eliz.* hath been always construed beneficially to prevent all inventions or evasions against the true intention of the same Act as it appeareth by the divers resolutions there reported. And also, That oftentimes it hath been holden, That where the Statute saith Master and Fellows of any Colledge, be the Colledge, incorporate by the same name, or by the name of Warden and Fellows, or Warden and Scholars, or Warden Fellows and Scholars, or by the name of Master, Fellows and Scholars, or Master and Scholars, or Provost, Fellows and Scholars, or by any other name of Corporation; and be the Colledge temporal for the advancement of the Liberal Arts and Sciences, or meer Ecclesiastical, or mixt, every such Colledge is within the provision of this Act; the same Law where the Statute saith, Master or Warden of any Hospital, be the Hospital incorporated by any other name or be a sole Corporation, or a Corporation agregate of many persons, the Statute doth extend to all manner of Hospitals, *& sic de cæteris*, for this Act hath been always taken in a favourable construction.

As to the second Point, it was resolved, That the Statute of 18 *Eliz.* hath not given any force or effect to the said Grant made by the Queen, but that after this Act the Grant doth remain of the same force as it was before this Act; and that for three causes.

1. This conveyance to the Queen is out of the words of the Act of 18 *Eliz.* for two causes.

1. Because the words of the Statute are, Where since the 18 day of *November*, in the first year of her Majesties Reign, divers and sundry Manors, Lands, Tenements, &c, have been conveyed and assured to her Highness, her Heirs and Successors, by and from divers and sundry persons and bodies politick, as well for satisfaction of great debts and sums of money, as for the other good considera-
[b] tions; for the perfect assurance, confirmation, and further surety whereof, Be it enacted, That all feoffments, Fines, Surrenders, Assurances, Conveyances and Estates, to or from our Sovereign Lady the Queen her Heirs and Successors, by or from any person or persons, bodies Politick or Corporate of any Manors, Lands, Tenements, for any debt, sum or sums of money, or other consideration whatsoever shall stand, &c. good, &c. So that it appeareth, That onely such conveyances are established by this, Act, which are for satisfaction of debts and sums of money, or other good consideration; which words in the Preamble are joyned to the body of the Act, for presently after the same words, the Statute saith For the perfect assurance, &c. whereof, Be it enacted. And therefore although the words are in the body of the Act (For any debt, sum of money, or other consideration whatsoever) leaving out (Good) before consideration; yet it is necessarily implied, not only by the said connexion of the Preamble to the purview, but also is implied in the word (Consideration) For *An.* 16. *Eliz. Dyer* 336 *b.* Consideration is described to be a cause or occasion meritorious, requiring a mutual recompence in Fact or in Law: And in asmuch as the said Grant to Queen *Elizabeth* was not for any debt, sum of money,

nor

nor other good consideration, for this cause the said grant was out of the words of the said Act: And it was observed, that the Queen should never pay the said Rent reserved upon the said Grant, for the rent is payable only at the Feast of St. *Michael* the Archangel, and by force of the said condition which is *compulsariè*, the Queen ought to grant the same over before the first day of *April*, or forfeit her Estate.

2. There was not only omission of good consideration, but also an addition of an ill and fraudulent practice, to make the Queen who was the Fountain of Justice, to be an instrument, and that compulsarily by condition (which in truth was against the honour and dignity of the Queen) to convey the same unto a Subject, the said *Benedict Spinola*, and all the same to make an evasion (if it might be) out of the said Act of 13 *Eliz.*

3. Admitting that the said Grant had been for satisfaction of debt, or other good consideration, yet the said Act of 18 *Eliz*, shall not be extended to this case; for the better apprehension of which, and for the true understanding and construction of the said Act, it is to know, That as to this purpose there are five kinds of disabilities or imperfections whereby deeds or other instruments or conveyances to the Queen may be impeached.

1. In respect of the disabilities of the person of the Grantor.
2. By reason of the nature of the thing.
3. Of the estate of the Grantee.
4. Of the manner of the Grant, that it hath not legal Foundation.
5. In respect of the omission of any circumstance required by Law, but having a firm commencement or foundation.

As for the first. Persons are disabled either by Common-Law, or by Act of Parliament; by the Common-Law, as by reason of Infancy, profession, ideocy, *non sanæ memoriæ*, coverture, *&c.* Also of [77] these disabilities by Common-Law, some are absolute, as Infants or Monks, who cannot do any thing shall bind them, but that by the Law the same may be in time avoided: And some disabilities are *secundum quid* and not *simpliciter*; and therefore, If an Ideot, *non compos mentis*, feme covert, make any conveyance, if it be not by fine or recovery they are avoidable. So a Bishop without the Dean and Chapter, a Parson or Vicar without the Patron and Ordinary, a Prebend without the Bishop, Dean and Chapter, *&c.* and other the like, have power to dispose of their possessions during their incumbency, but not to prejudice their Successors. Disability by Parliament, as Masters and Fellows of Colledges, Deans and Chapters, and others named in the Act of 13 *Eliz.* and now Archbishops and Bishops by the Statute of 1 *Jac. cap.* 3. all which are disabled to do any thing in prejudice of their Successors.

As to the second. In respect of the nature of the thing granted, As if the Donee in Tail holdeth of his donor by Fealty, and the donor by deed enrolled granteth Fealty to the King, this Grant is meerly void, because it is an incident inseperable to the reversion, as it is holden in 26 *Ass. p.* 66. So if a Founder of a Colledge, *&c.* will grant his Foundership to the King, the Grant is void; although it be by deed inrolled, for that it is inseparable to the blood, as it is holden in *tempr. H.* 8. *Brook.*

As to the third, in respect of the Estate; as if Tenant in Tail of Land by deed inrolled granteth the Land to the Queen in Fee, it shall not bind the issue in Tail in respect of his estate.

4. As to the manner of the Grant, which hath not a legal foundation; as if a man seised of Lands in Fee, granteth the Land after his death to the Queen, and her heirs and successors, or such like, which are against the Rules of Law.

5. As to the omission of some circumstances: As if a man seised of Lands in Fee, by deed, in satisfaction of a debt or sum of money, or other good consideration, granteth the same to the Queen, her Heirs and Successors, and this Deed were never inrolled, here was a good beginning, but it wanted inrollment.

For the first. It is to know, That the general words of the Act of 18 *Eliz.* shall not enable any person to make any conveyance, who was disabled by the Common-Law: As if an Infant had conveyed Land to the Queen by deed enrolled, the same is not established by the said Act, because that the person of the Infant, during the time of his minority was utterly disabled: So if an Infant levy a fine to the Queen before the said Act of 18 *Eliz.* and afterwards the said Act was made, yet the Infant notwithstanding the Statute may reverse the fine by Writ of Error; and so was it resolved *M.* 32. *&* [b] 33 *Eliz.* in *B. R.* by *Wray* Chief Justice, and the whole Court in *Vaughan*'s Case. And the reason thereof is proved by the Rule of our old Books, 5 in 22 *E.* 3. *Crown* 276. It is enacted by the Statute of *West.* *cap.* 12. *Quod si appellatus de felonia, &c. se acquietaverit, &c. restituant hujusmodi appellatores damna appellatis.* And the Case was, That an appeal of death was brought against a Monk, who was acquitted, and thereupon he prayed his damages according to the said Act, but (because that the Monk was a person disabled by the Common-Law to recover any damages, and the general words of the Act do not enable any person who is disabled by the Common-Law) for this cause it is there holden, That he shall not have any damages: the same Law is there holden, If an appeal be brought against a feme covert and she be acquit, she shall not have damages, for that she is disabled by the Law to sue alone.

It is enacted by the Statute of *Marlebridg cap.* 6. That the Lord by Knights service shall not lose the Wardship by Feoffment made by collusion, *Verumtamen non licet eis hujusmodi feoffatos sine judicio disseisire, sed brevia habeant de hujusmodi Custodia sibi reddenda*; yet if the tenant infeoffeth the Villain of the Lord upon collusion, the Lord may enter and expel him, and shall not be put to an Action, as it is holden 33 *H.* 6. 16. for the general words of the Act shall not enable the Villain who is disabled against his Lord by the Common-Law; and therefore if the Lord bringeth an Action against him, according to the words of the Law, he shall be Enfranchized: *à fortiori* in the Case at Bar,

when the Maſter and Fellows of the ſaid Colledge are diſabled by the Act of Parliament of 13 *Eliz.* to make a Grant to bind their ſucceſſors, the general words of the Act of 18 *Eliz.* ſhall not enable them to make any Eſtate againſt the ſaid Act of 13 *Eliz.* So if a Biſhop without the aſſent of the Dean and Chapter, by Deed inrolled, had granted Lands to the Queen her heirs and ſucceſſors, and afterwards the Stat. of 18 *Eliz.* is made, this grant is not made good againſt the ſucceſſor: for the perſon of the Biſhop is diſabled to grant the ſame without the aſſent of the Dean and Chapter to bind his ſucceſſor. And ſo it was reſolved, 23 *Eliz.* as the Lord *Dyer* reporteth, which I have under his hand, but the ſame is left out of the Printed Book: the ſame Law of a Prebend, Parſon, *&c.*

But know Reader, That there is a difference between a general Act, *ſ.* by or from any perſon or perſons, bodies Politick or Corporate, as the ſaid Act of 18 *Eliz.* and an Act which doth ſpecifie and mention particular kinds of Bodies politick and corporate, as the Statute of 1 E. 6. *cap.* 4. of
[78] Chantries towards the end, by which it is enacted, That every Gift and Grant heretofere made to the late King and his heirs, or to our Soveraign Lord the King that now is, and to his heirs, by any Archbiſhop, Dean, Archdeacon, Treaſurer, Prebendary, *&c.* of any Mannors, Lands, Tenements, *&c.* to any of the ſaid Benefices, Prebends, *&c.* belonging, ſhall be good and effectual in the Law to all intents and purpoſes.

And in *Paſch.* 7 *Eliz.* between *Wharton* and *Morley* in the Exchequer, the Caſe was, That a Prebend of *York* by Deed Indented granted parcel of the poſſeſſions of his Prebend to *Hen.* 8. his heirs and ſucceſſors, and although that the Deed was inrolled, and that the grant was made without aſſent of the Biſhop, Dean and Chapter, That yet the ſaid grant was adjudged good, becauſe that the Prebendary was expreſly named in the Act.

2. If a grant hath been made to the Queen of an inſeparable incident, as of a Founder ſhip, or of the ſaid ſervices of the Donee in Tail, the Act of 18 *Eliz.* ſhall never make ſuch a grant good, becauſe that ſuch things are not grantable.

3. If Tenant in Tail by Deed granteth his Land to the Queen ſuch grant is made good againſt the iſſue in tail by the Act of 18 *Eliz.* for the perſon of Tenant in Tail is able, and he hath power over the Land; and ſo was it holden in *Vaughan*'s Caſe. But if the husband and wife by deed grant the Land of the wife to the Queen, it is not made good by the ſaid Act to bind the wife after the covertute or her heirs, for there the perſon of a feme covert is diſabled to convey the Land, if it be not by fine, upon due examination; and ſo alſo was it holden in *Vaughan*'s Caſe.

4. When the manner and compoſition of the Deed is void in Law; as in the caſe which hath been put, If a man ſeiſed of Lands in Fee by deed, for good conſideration granteth the Land after his death to the Queen her heirs and ſucceſſors, ſuch grant is not made good by the general words of the Act of 18 *Eliz.* and therewith agreeth 38 *H.* 6. 33. the Abbeſs of *Syons* Caſe: and the Earl of *Leiceſter*'s Caſe, *Plow. Com.* 400. A ſtronger Caſe than this, is, *Quæ malo ſunt inchoata principio, vix eſt ut bono peragantur exitu. Vide* 4 E. 4. 31. 12 *H.* 4. *Formedon* 15.

5. When the perſon is able, and hath power over the Land, and the Deed is good and legal, but wanteth circumſtance, as inrollment or the like, there ſuch Deed is eſtabliſhed, and ſuch omiſſion is ſupplied by the Act of 18 *Eliz.* for the Act maketh the conveyance good, according to the intent and purport thereof; and in ſuch Caſe the purport of the Deed is ſufficient enough, although it was not of any effect to paſs the thing.

[b] 3. The ſaid Act of 18 *Eliz.* may have ſome operation as this Caſe is upon the ſaid Grant to the Queen, inſomuch as the ſaid Dr. *Kelke* the Maſter of the ſaid Colledge was then alive, and the Act of 13 *Eliz.* hath diſabled the Maſters and Fellows as to the ſucceſſors of the ſaid Maſter. And this Point was ſo concluded, *Quod ubi quid generaliter conceditur, ineſt hæc exceptio, ſi non aliquid ſit contra jus faſque.* And the ſaid Act of 43 *Eliz. cap.* 1. hath explained and expounded this Act of 18 *Eliz.* as it appeareth before.

And note Reader; That if the Act of 18 *Eliz.* ſhall make good conveyances by perſons diſabled, the ſame ſhall not make Eſtates effectual made before the Act, but ſhall give liberty within ſeven years after to make them, which the Statute never intended, for thereupon great prejudice and miſchief ſhould follow.

As to the third general point it was reſolved, That the ſaid fine and non-claim by five years ſhould not have barred the right of the ſaid Colledge for two cauſes.

1. The words of the Act of 13 *Eliz.* are, That all Leaſes, Giſts, *&c.* conveyances and ſtates, had, made, done or ſuffered by any Maſter and Fellows, *&c.* So that in the Caſe at Bar, there is a conveyance and eſtate permitted or ſuffered by the Maſter and Fellows of the ſaid Colledge; and that theſe words ſhall not be extended only when the Maſter and Fellows ſuffer a recovery, *&c.* againſt themſelves, as party thereunto; but generally according to the Letter, when they ſuffer others to levy a Fine with Proclamation, and ſuffer alſo 5 years to paſs without claim; and although that the concluſion of the purview of the Act is, ſhall be utterly void and of none effect to all intents, conſtructions and purpoſes, yet by conſtruction it ſhall be ſo taken, that the ſaid fine levied with Proclamation, *&c.* ſhall be void and of none effect to bind the right of the Maſter and Fellows of the ſaid houſe: and it ſhould have been to no purpoſe to have prohibited them to bar the right of their Colledges by conveyances made by the Maſter and Fellows themſelves; and to have left them power by their permiſſion, or ſufferance, or non-claim to bar it, and to that purpoſe theſe words, (Permitted to ſuffered) were added.

The ſecond Reaſon was, That for as much as the ſaid eſtate conveyed to the Queen was of force during the life of Dr. *Kelke*, then Maſter, and that he was alive at the time of the Fine levied, and all the Proclamations paſſed in his time, ſo that none could have made an entry or claim during his life; And that Dr. *Gooche* within five years after his death did enter into the ſaid houſe claiming the ſame to be the right of him and his Fellows of the ſaid Colledge; for theſe cauſes it was alſo reſolved,

That

That this entry hath avoided the fine. *Vide* 19 H. 8, 6. *Stowel's Caſe Plow. Com.* 374, 376. *Crofts & Howel's Caſe Plow. Com.* 538.

As to the fourth General point, The ſame was not thought worthy of any queſtion, for in as much as the ſaid Body Politick, in this Caſe is a body aggregate of many; the Maſter alone cannot by his acceptance deveſt any right or intereſt, which is in him and the Fellows, or conclude him (chiefly the ſame being without deed) to enter into the ſaid Houſe. *Vide* 7 H. 7, 9. 9 E. 4, 39. 18 E. 4, 9. *Plow. Com.* 91. And according to theſe Reſolutions, Judgment was given, That the Plaintiff ſhould recover nothing by his Bill.

Paſch. 13. *Jac.*

[b]

Lewis Bowles Caſe.

Lewis Bowles, Eſq; brought an Action upon the Caſe upon Trover againſt *Haſeldine Bury* the younger, which began in the King's Bench, *Hill.* 10 *Rot.* 1319. and declared, That he was poſſeſſed of 30 Cart-loads of Timber and loſt them, and that they came to the Defendant and that he 20 *Feb.* 9 *Jac.* at *Norton*, in the County of *Hertford* did convert them to his own uſe; and upon Not guilty pleaded, the Jury gave a Special Verdict to this effect.

Thomas Bowles, Eſquire, Grandfather of the ſaid *Lewis*, was ſeized of the Mannor of *Nortonbury* in the ſaid County in Fee, and 1 *Sept. an.* 12. by Indenture, betwixt him on the one part, and *William Hide* and *Leonard Hide* of the other part, in conſideration of a Marriage to be had betwixt the ſaid *Tho. Bowles*, and *Anne* daughter of the ſaid *William Hide*, &c. did Covenant that after the ſaid marriage had and ſolemnized, That he the ſaid *Thomas*, his Heirs and Aſſigns would ſtand ſeized of the Mannor of *Norton*, to the uſe of the ſaid *Thomas* and *Anne* for the term of their lives without impeachment of waſt, and after their deceaſe to the uſe of their firſt iſſue Male, and to the Heirs Males of ſuch iſſue lawfully begotten, and ſo over to the 2, 3, and 4. iſſue Male, *&c.* and for want of ſuch iſſue, To the uſe of the Heirs Males of the Body of the ſaid *Thomas* and *Anne* lawfully begotten; and for want of ſuch iſſue, to the uſe of *Thomas Bowles* ſon and heir apparent of *Tho. Bowles* the Grandfather, and to the heirs males of his body begotten; and for want of ſuch iſſue, to the uſe of the heirs of the body of the ſaid *Thomas* and *Anne* lawfully begotten. Which marriage was ſolemnized accordingly, and the ſaid *Thomas* the Grandfather, and *Anne* had iſſue *John*; and afterwards the ſaid *Thomas* the Grandfather died without iſſue on the body of *Anne*, but the ſaid *John*; after whoſe death the ſaid *Anne* entred into the ſaid Mannor and was thereof ſeized, with the ſaid remainder over as aforeſaid, and afterwards the ſaid *John Bowles* died, and afterwards the ſaid *Thomas* the ſon conveyed by fine his remainder to the uſe of *Lewis Bowles* the Defendant, and *Diana* his wife, and the heirs males of his body; and the ſaid *Anne* ſo being ſeized of the ſaid Mannor, with the remainder over as aforeſaid; *viz.* 20 *Feb.* 9 *Jac.* a Barn parcel of the ſaid Mannor *per vim ventorum & Tempeſtat' pœnitus ſubverſ. & ad terram deject. fuit.* And that the ſaid 30 Cart-loads of Timber named in the Declaration, were parcel of the ſaid Barn, and that the ſaid Timber was ſound and fit for building, for which the Defendant as ſervant of the ſaid *Anne*, and by her Commandment, took the ſaid Timber and carried the ſame out of the bounds of the Mannor to *Radial* in the ſame County; and afterwards the ſaid *Anne*, 25 *Feb.* 9 *Jac.* made her laſt Will, and made *Rob. Osborne* and *Leon. Hide*, Knights, her Executors, and died, after whoſe death the Plaintiff ſeized the ſaid Timber, and afteward the Defendant by the command of the ſaid Executors, converted the ſame to his uſe, and if upon the whole matter the Defendant were guilty or not, the Jury pray the Opinion of the Court. And in the Caſe two queſtions were moved.

[78]

1. If upon the whole matter the wife ſhall be Tenant in tail after poſſibility of iſſue extinct, or that ſhe ſhould have the priviledge of a Tenant in tail after poſſibility, *i.* to do waſt, *&c.*

2. Admit that ſhe ſhall not have the priviledge, *&c.* If the Clauſe, without impeachment of waſt, giveth to her property in the Timber ſo caſt down by the Wind. And in this Caſe eight points were reſolved by the whole Court.

1. That till iſſue *Thomas*, the Grandfather and *Anne* were ſeized of an eſtate tail executed, *ſub modo*, s. till the birth of the iſſue male, and then by the operation of Law the eſtates are divided, *i. Thomas* and *Anne* become Tenants for life, the remainder to the iſſue Male in Tail, the Reverſion to the heirs males of *Thomas* and *Anne*, the remainder over as aforeſaid; for the eſtate is not abſolutely drowned, but with this implied limitation till they have iſſue male. See *Chudleigh's* Caſe in the firſt part of my Reports, and *Archer's* Caſe there.

[b]

2. That Tenant in Tail after poſſibility of iſſue, hath a greater preheminence and priviledge in reſpect of the quality of his eſtate, then Tenant for life; but he hath not a greater quantity of eſtate than Tenant for life; in reſpect of the quality of his eſtate, it taſteth much of the quality of an eſtate in Tail out of which it is derived, and therefore,

1. She ſhall not be puniſhed for Waſt.
2. She ſhall not be driven to Atturn.
3. She ſhall not have any Aid.
4. Upon the Alienation no Writ of *Conſimili caſu* lieth.
5. After her death no Writ of Intruſion lieth.

6. She may joyn the miſe into a Writ of Right in ſpecial manner. *Temps* E.1. *Waſt.* 125. 39 E.3. 16. 31 E.3. *Aid.* 35. 43 E.3. 1. 45 E.3. 22. 46 E.3. 13. 27. 11 H.4. 15. 7 H.4. 10 2 H.4. 17. 42 E.3. 22. 3 E.4. 11. 21 H. 6. 56. 10 H.6. 1. 13 E.2. *Entre Congeable* 56. 28. E.3. 96. 26 H.6. *Aid* 77. F.N.B. 203.

7. In an Action brought by her ſhe ſhall not name her ſelf Tenant for life, 18 E.3. 27. a Woman brought a *Cui in vita, quod clamat tenere ad vitam*, and maintained the ſame in her Count by a gift in ſpecial tail to her and her husband, and that the Husband is dead without iſſue, and the Writ for the contrariouſneſs of the Title did abate.

8. In an Action brought againſt her, ſhe ſhall not be named Tenant for life, *ſ. Quoad tenet ad terminum vitæ. Mic.* 39. & 40. *El. Rot.* 33 16. in the Common Pleas, between *Veals* and other plaintiffs, and *Read* defendant, in a *Quid juris clamat*, and the note of the fine doth ſuppoſe that the def. *tenet ad terminum vitæ*, and the def. demanded Oyer of the Writ, and of the note of the fine, and had it. The Defendant pleaded that he was ſeized in Fee, *Abſque hoc*, that at the day of the note levied *tenuit pro termino vitæ*, and the Jury found that he held as Tenant in tail after poſſibility of Iſſue extinct, and it was adjudged for the Defendant; for Tenant in tail after poſſibility ſhall not be in Judgment of Law included within a Writ or Fine, &c. within the general allegation of a Tenant for life *vide* 19 E.3. 1. *b.*

But as to the quantity, he hath but an Eſtate for life, and therefore, If he make a Feofment in Fee, it is a forfeiture of his Eſtate, 13 E.2. *Entre Cong.* 56. 45 E.3. 22. 28 E.3. 96. *b.* 27 *Aſſ.* 60. F.N.B. 159. So if Fee or Tail general deſcend or remain to Tenant in tail after poſſibility, &c. the Fee or Eſtate tail is executed, 32 E.3. *age* 55. 50 E.3. 4. 9 E.4. 17. And by the Statute of *Weſt.* 2. he in the reverſion ſhall be received upon his default, 2 R.2. *Reſceit* 147. 41 E.3. 12. 20 E.3. *Reſceit* 38 *Ed* 3. 33. See 28 E.3. 96. 39 E.3. 16. And an exchange betwixt Tenant for life, and Tenant in tail, after poſſibility is good, for their eſtates are equal.

3. It was reſolved, That the Eſtate of a Tenant in tail after poſſibility, ought to be a remain and reſidue of an Eſtate tail, and that by the Act of God, and not by the limitation of the party, *ex diſpoſitione legis*, and not *ex proviſione hominis*: And therefore if a man who hath a gift in tail upon condition, That if he do ſuch an Act, that he ſhall have but for life, he is not Tenant in tail after poſſibility of Iſſue extinct; for the ſame is *ex proviſione hominis*, and not *ex diſpoſitione legis*; but it ought to be the
[81] remain and reſidue of an Eſtate tail, and that by the Act of God and of the Law *ſ.* that by the death of the Donee without Iſſue, *Lit.* 6. *Doct. & Stud.* 61 2. *H.* 4. 17. 26. *H.* 6. *Aid.* 77. If Tenants in ſpecial tail recover in Aſſiſe, and afterwards one dieth without Iſſue, and afterwards he who ſurviveth (who is Tenant in tail after poſſibility) is diſſeiſed again, he ſhall have a rediſſeiſin, for it is the ſame Free-hold he had before, for the ſame is parcel of the Eſtate tail. And becauſe the Wife in the caſe at Bar had the Eſtate for life by limitation of the party, and the Eſtate which ſhe hath in the remainder, *ſ.* of the Tenant in tail after poſſeſſion, was not a larger Eſtate in quantity, and becauſe it cannot drown the Eſtate for life, as hath been ſaid before, for this cauſe the Wife was not Tenant in tail after poſſibility.

[82] 4. It was reſolved, That in this caſe the Wife ſhould have the priviledge of a Tenant in tail after poſſibility; for the inheritance which was once in her: For now when *John* the Iſſue male is dead, the priviledge which ſhe hath in reſpect of the Inheritance which was in her in remainder ſhall not be loſt. And there is no queſtion but that a Woman may be Tenant in tail after poſſibility, as well of a remainder as of a poſſeſſion; and therefore if a Leaſe be made for life, the remainder to Husband and Wife in ſpecial tail, the Husband dyeth without Iſſue, now is the Wife Tenant in tail after poſſibility of this remainder; and if the Tenant for life ſurrendreth to her, as he may (for the life of him in the remainder is higher then the life of another) now is ſhe Tenant in tail after poſſibility in poſſeſſion. And like to this caſe, if the Father be enfeoffed to him and his Heirs with warranty, and the Father enfeoffeth the Son, &c. and dieth, in this caſe the Son although he hath the Land by purchaſe, yet he ſhall take the warranty as Heir, for he cannot vouch as aſſignee, and the warranty betwixt the Father and him is loſt, as it is adjudged in 43 E.3. 23. So here, although the Wife cannot claim the Eſtate of a tenant in tail after poſſibility, yet ſhe may claim the priviledge and benefit of it.

And it was reſolved, That Tenant in ſpecial tail at the Common Law had a limited Fee-ſimple; and when their Eſtate was charged by the Statute of *Donis*, &c. yet there was not any change of their intereſt in doing of Waſt. So when by the death of the one Donee without Iſſue the Eſtate is changed yet the power to commit waſte, and to convert the ſame to his own uſe, is not altered nor changed for the inheritance which was once in him, Vide *Hil.* 2. *Jacobi Rot.* 229. *inter Brooke & Rogers* in the Common Pleas. If a Timber Tree become *arida, ſicca, non portans fructus nec folia in æſtate, nec exiſtens indeleminum*, yet becauſe it was once an inheritance, no Tithes ſhall be paid of it; ſo that the quality doth remain, although the ſtate of the Tree be altered.

5. That if Tenant for life or years, cutteth Timber, or pulleth down the Houſes, the Leſſor ſhall
[b] have the Timber; and becauſe that this point was reſolved in this Court; upon a ſolemn argument in *Liford*'s caſe, I will make the ſhorter report of it.

1. It is apparent in reaſon, That the Leſſee had them but as things annexed to the Soil, and therefore it ſhall be abſurd in reaſon, that when by this Act and wrong he ſevereth them from the Land, that he ſhall gain a greater property in them, then he had by the Leaſe.

2. It is without queſtion (as it is reſolved in the ſaid caſe) That the Leſſor hath the general owner-ſhip and right of inheritance in the Houſes and Timber-Trees; and that the Leſſee hath but a particular intereſt, and therefore if they be overthrown by the Leſſee or any other, or by Wind or Tempeſt, or by any other means diſjoyned from the Inheritance. The Leſſor ſhall have them in reſpect of his general ownerſhip, and becauſe they were his Inheritance.

And

And as to the reſolutions in *Herlakendens* Caſe in the fourth part of my *Reports*, they were affirmed for good Law, and *Pagets* Caſe in the fifth part of my *Reports*. For although he cannot puniſh them in an Action of Waſt at the Common Law becauſe it was his own Act, and in his Leaſe he hath not made proviſion by Covenant or Condition; yet the Inheritance and general ownerſhip doth remain in the Leſſor, and the Leſſee (as hath been ſaid) hath but a ſpecial intereſt in the Houſes and Timber-Trees ſo long as they be annexed to the Land; and the ſame appeareth by the Statute of *Marlebridge*, *c.*23. *Item firmarii vaſtum, &c. non faciunt, neſi ſpecialem inde habuerint conceſſionem per ſcriptum conventionis, mentionem faciens quod hoc facere poſſint.* By which it appeareth, That the Leſſees for lives or years, could not rightfully cut down Trees, or overturn the Houſes if not by grant of the Leſſor made to them. In which it was alſo obſerved, That at the time of the making of the ſame Act, the ſaid Clauſe of (without impeachment of Waſt) was in uſe, which proveth that the ſame was to ſuch purpoſe that the Leſſee might commit Waſt, and diſpoſe it to his own uſe, which he could not do without ſuch a Clauſe.

3. Every Leſſee for life and years ought by the Law do fealty upon Oath, and it ſhall be againſt his Oath to waſt the Houſes and Timber-Trees.

And note Reader, upon this Statute of *Marlebridge* lieth properly a prohibition of Waſt againſt the Leſſee for life, and Leſſee for years, to prohibite them that they did not waſt before any waſt was done, as it was againſt Tenant in Dower, and Tenant by the courteſie at the Common Law. *Vide Bract.* 316. the Jugdment in Waſt at the Common Law. Tenant in Dower, or by the Curteſie had as high an Eſtate as Leſſee for Life; and it appeareth that it was not lawfull for Tenant by the Courteſie or in Dower to do waſt; *Ergo* no more for Tenant for life: The onely difference was, That a Prohibition of waſt lay againſt Tenant in Dower, and by the courteſie at the Common Law, and not againſt the Leſſees till the ſaid Statute of *Marl.* And to prove what intereſt the Leſſee for life hath in the Trees at the Common Law, it appeareth by *Bracton* (who wrote before the Statute of *Gloc'*) *lib.*4. *tract. de aſſiſa nova diſc.*4.217. *Si quis vaſtum fecerit, vel deſtructionem in tenemento quod tenet ad vitam ſuam, in eo quod modum excedit, & rationem, cum tantum conceditur ei rationabile eſtovium, facit tranſgreſſionem, & ſi talis impediatur, ille teneus aſſiſam non habebit, intentio talis liberabit a diſſeiſina, quia in eo quod tenens abutitur male utendo, & debitum uſum & modum debitum excedendo, non poteſt dicere quod diſſeiſitus eſt, quia tantum rationabilis uſus ei conceditur*; which proveth directly, That it was a wrong in the Leſſee for life to do Waſt, or deſtruction at the Common Law. [82]

And it was reſolved, That if a Houſe fall down by Wind in the time of the Leſſee for life or years, or in the time of the Tenant in Dower, or by the Courteſie, &c. that ſuch particular Tenants have a ſpecial property in the Timber to build again the like Houſe as the other was for his habitation: As if they cut down a Tree for reparations, they have a ſpecial property to that purpoſe in it, and therewith agreeth 44*E.*3. 5. 44*E.*3. 44. 29*E.*3. 3. 10*E.*4. 3. But the ſaid particular Tenants cannot give away or ſell the Tree ſo cut down; And therefore *Lit.* 15. holdeth. That if I baile goods to another to manure his Land, he hath a ſpecial property in them to that purpoſe; and in ſuch caſe, if he kill them, a general Action of treſpaſs lyeth againſt him. See 11*H.*4. 17 & 33.

6. The preheminence and priviledge which the Law giveth to Houſes which are for mens habitation was obſerved.

1. A Houſe ought to have the priority and precedency in a *præcipe quod reddat* before Meadow, Paſture, Wood, &c. *F.N.B.*2. &c. for his houſe is his Caſtle, *& domus ſua eſt unicuique tutiſſimum refugium.*

2. The Houſe of a man hath a priviledge to protect him againſt arreſts by proceſs of Law at the ſuit of a Subject, See *Semaines* Caſe in the fifth part of my *Reports*.

3. Priviledges againſt the Kings Prerogative, For it was reſolved by all the Judges *M.* 4. *Jacob.* That thoſe who digg for Salt-peter, ſhall not digg in a mans dwelling Houſe without his aſſent, for then he, his Wife and Children cannot be in ſafety in the night, nor his goods in his houſe kept from Thieves and other miſ-doers. [b]

4. For he who killeth one *ſe defendendo*, or a Thief who would rob one in the Highway, by the Common Law ſhall forfeit his goods, but he who would rob him and ſpoil him in his Houſe, ſhall forfeit nothing, 3*E.*3. *Corone* 230. *& 26. Aſſ.* 23. *&c.*

5. If there be two joynt Tenants of a Wood, or Arrable Land, the one hath no remedy againſt the other to encloſe, or for reparations for ſafegard of the Wood, or corn, but if there be two joynt tenants of a Houſe the one ſhall have a Writ *de reparatione facienda*, againſt the other, and the words of the Writ are *ad reparationem & ſuſtentationem ejuſdem domus tenetur*, *F.N.B.*127. *a.* 6. If a man be in his Houſe, and heareth that others will come to his Houſe to beat him, he may call together his friends, &c. into his Houſe to aid him, in ſafety of his perſon; for as it hath been ſaid, A mans Houſe is his Caſtle and his defence, and where he properly ought to remain: but if a man be threatned that if he cometh to ſuch a fair or market that he ſhall be beaten, in that caſe he cannot make ſuch Aſſembly, but he ought to have his remedy by ſurety of the Peace, 21 *H.*7. 39. *b.*

7. The clauſe of (without impeachment of waſt) giveth power to the Leſſee which ſhall produce an Intereſt in himſelf if he execute his power during the privity of his Eſtate, and therefore to examine the ſame in reaſon.

1. Theſe words *abſque impetitione vaſti*, are as much as to ſay, without any demand for the waſt, for *impetitio* is derived from *in* and *peto*, and *petere* is to demand, and *petitio* is a demand, and *ſine impetitione* is without any manner of demand or impeachment; Then this word (demand) is of a large extent, for if a man diſſeiſe me of my Land, or taketh my goods, if I releaſe to him all actions, yet I may enter into the Land, or take my goods, as *Lit.* holdeth, 119. and therewith agreeth 19 *Aſſ.* 3. 19. *b.* 6. 4. 21 *H.*7. 23. 30 *J.*3. 19. for by the releaſe of the Action, the right or intereſt is not releaſed, but if in ſuch caſe

caſe I releaſe all demands, it ſhall barr me, not only of my Action, but alſo of my entry and ſeiſure, and of the right of my Land, and of the property of my Goods as it was reſolved in *Chanceys* Caſe 34 *H.*8 *Br. Releaſes* 90. 2 *H.*7. 6. The King maketh one Sheriff *ſine computo*, thereby he ſhall have the revenues which belong to his Office to Collect to his own uſe. But if the word had been *abſque impetitione vaſti per aliquod devaſto*, then the Action onely ſhall be diſcharged, and not the property in the
[83] Trees, but that the Leſſor after the cutting of them might ſeiſe them. And this difference appeareth in 3 *E.*44. in *Walter Idles* Caſe, where a Leaſe was made without to be impeached, or impleaded for Waſt, upon which it was collected that theſe words (without to be impleaded) without theſe words (without to be impleaded for Waſt) were not ſufficient to bar the Leſſor of his property; and that if the Leſſor had granted that the Leſſee might do Waſt, he thereby hath power not only to do Waſt, but alſo to convert the ſame to his own uſe, and the words of the ſaid Act of *Marlebridge*, and the Statute of *prærogativa Regis c.*16 prove the ſame, where it is ſaid, That the King ſhall have *annum diem, & vaſtum, s.* which is as much as to ſay, that the ſhall have the Trees, &c. at his own diſpoſition.

2. It was ſaid, that the continual and conſtant opinion of all ages are, That theſe words gave power to the Leſſee to do Waſt to his own uſe, and it ſhall be dangerous now to recede from it; and as it is ſaid in 38 *E.*3. 1. by the Judges (ſo we ſay in this Caſe) we will not change the Law which hath been always uſed; and it is well ſaid in 2 *H.*4. 18. It is better that there ſhould be a defect, then that the Law ſhould be changed; and the opinion of *Wray* Chief Juſtice, and *Manwood* in *Herlakendens* Caſe was not Judicial but *prima facie* upon an arbitrement without any argument, and perhaps upon ſight of the book of 27 *H.*6. *Waſte* 8. And therefore although the Chief Juſtice argued in this Caſe, againſt their opinions, yet it was with great reverence to them, ſaying with *Ariſtotle* in the like caſe, *Amicus Plato, amicus Socrates, ſed magis amica veritas.* And *Qui non libere veritatem pronunciat, proditor veritatis eſt.* And the truth of this Caſe appeareth by *Littleton* in his Chapter of *Conditions*, 82. where he putteth this Caſe, If a Feoffment be made upon condition, That the Feoffee ſhall give the Land to the Feoffor, and to the Wife of the Feoffor, To have and to hold to them and to their Heirs of their two bodies begotten, the remainder to the right Heirs of the Feoffor; in that caſe if the Husband dieth having the Wife before any Eſtate in tail made to them, *s.* to Leaſe the Land to the Wife for term of her life, without impeachment of Waſt, the remainder to the Heirs of her body; or her and her Husbands begotten, the remainder to the right Heirs of the Husband; and the cauſe where fore the Leaſe ſhall be made in this caſe to the Wife without impeachment of Waſt, is (as *Lit.* there ſaith)
[*b*] becauſe that the condition is, That the Eſtate ſhall be to the Husband and his Wife in tail, and if ſuch Eſtate had been made, then after the death of the Husband ſhe had had an Eſtate in tail, which Eſtate was without impeachment of Waſt, and ſo it is reaſon that as near as a man can do, an Eſtate be made according to the intents of the Condition, which Caſe directly in the point proveth, That Tenant for life without impeachment of Waſt, hath as great a power to do Waſt and to convert the ſame at his own pleaſure, as the Tenant in tail had.

That theſe word, Without impeachment of Waſt, are ſufficient words to give the Tenant for life ſuch a power. See 2 *H.*4. 5. And the Lord *Cromwels* Caſe in the ſecond part of my *Reports*.

And for this Clauſe, (without impeachment of Waſt) 3 *E.*3. 44. 8 *E.*3. 34. 39. 24 *E.*3. 32. 43 *E.* 3. 5. 5 *H.*5. 8. 27 *H.*6. *Waſt.* 8. 4 *E.*4. 36. 20 *H.*7. 10. 28 *H.*8. *Dyer* 10. And ſo the Queen in the ſaid Book of 27 *H.*6. well reſolved. And ſee the opinion of *Statham* in abridging the ſaid book againſt it.

But the ſaid priviledge of (without impeachment of Waſt) is annexed to the privity of Eſtate, 3 *E.*44. by *Shard* and *Stone*.

If one who hath a particular Eſtate without impeachment of Waſt, change his Eſtate, he looſeth his advantage, 5 *H.*59. If a man make a Leaſe for years, without impeachment of Waſt, and afterwards he conferreth the Land to him for life, now he ſhall be charged in Waſt, 28 *H.*8. *Dyer* 10.

If a Leaſe be made for the term of anothers life, without impeachment of Waſt, the remainder to himſelf for his own life, he is puniſhable for Waſt, for the firſt Eſtate is gone and drowned. So of a Confirmation.

It was adjudged in *Ewens* Caſe *Mich.*29. *Eliz.* That where Tenant in tail, after poſſibility of Iſſue granted over his Eſtate, that the Grantee was driven in a *Quid juris clamat* to atturn, for by the Aſſignment the priviledge is loſt; and that Judgment was given in the *Kings Bench*, in a Writ of Error And therewith agreeth 27 *H.*6. *Aid* in *Statham. Vide* 29 *E.*3. 1. *b.* The Heir at the Common Law had a prohibition of Waſt againſt Tenant in Dower, but if the Heir grant over the reverſion, his Grantee ſhall not have a prohibition of Waſt; for it appeareth in the Regiſter 72 that ſuch Aſſignee in an action of Waſt againſt Tenant in Dower ſhall recite the Statute of *Glouceſt*. *Ergo*, he ſhall not have a prohibition of Waſt at the Common Law, for then he ſhould not recite the Statute. See *F.N.B.* 14 *H.* 4. 3. 5 *H.*5. 17. *b.*

Laſtly it was reſolved, That the ſaid Woman by force of the ſaid Clauſe of (without impeach-
[84] ment of Waſt) had ſuch a power and priviledge, That though in the Caſe at Bar no Waſt be done, becauſe the Houſe was overthrown by force of Wind without her fault; yet ſhe ſhall have the Timber which was parcel of the Houſe, and alſo the Timber Trees which are blown down with the Wind and when they are ſevered from the Inheritance either by the Act of the party, or of the Law, and become Chattels, the whole property of them is in the Tenant for life, by force of the ſaid Clauſe of, without impeachment of Waſt. And for this cauſe Judgment was given by all the Juſtices, That the Plaintiff *nihil caperet per billam*.

Trinit.

Trinit. 44. *Eliz.*

The Case of the *Monopolies*.

Edward Darcy Esquire, a Groom of the Chamber to Queen *El.* brought an Action upon the Case against *Tho. Allen* Haberdasher of *London*, and declared, That Queen *Eliz.* 13 *Junii*, *An.* 30. intending that her subjects being able men to exercise Husbandry, should apply themselves thereunto, and that they should not imploy themselves to the making of playing Cards, which had not been any antient manual Occupation within this Realm; and that the making of such a multitude of Cards, Card playing was become very frequent and chiefly amongst Servants and Apprentices and poor Artificers, and to the end her Subjects might apply themselves to more faithfull and necessary Trades, by her Letters Patents und the Great Seal of the same did grant unto *Ralph Bowes* Esquire, full power, license and authority by himself, his Servants, factors and Deputies to provide and buy in any parts beyond the Sea, all such playing Cards as he thought good, and to bring them within this Realm, and to sell and utter them within the same, and that he, his Servants, Factors and Deputies, should have and enjoy the whole Trade, Traffick and Merchandize of all playing Cards: And by the said Letters Patents further granted to the said *Ralph Bowes*, That the said *Ralph Bowes* [85] his Servants, Factors and Deputies and no other should have the making of playing Cards within the Realm, to have and to hold for twelve years; and by the said Letters Patents, the Queen charged and commanded, That no person or persons besides the said *Ralph*, &c. should bring any Cards within the Realm during those twelve years; nor should buy, sell or offer to be sold within the said Realm, within the said term any playing Cards, nor should make, or cause to be made any playing Cards within the said Realm, upon pain of the Queens gracious displeasure, and of such fine and punishment as Offendors in the case of voluntary contempt deserve. And afterwards the Queen 11 *Ang.* *An.* 40 by her Letters Patents reciting the former grants made to *Ralph Bowes*, granted the Plaintiff, his Executors, Administrators and their Deputies, the same Priviledges, Authorities, and other the said premisses for one and twenty years after the end of the former time, rendring to the Queen one hundred marks *per annum*; and further granted to him a Seal for to mark the Cards. And further declared, That after the end of twelve years, *s.* 30 *Junii* 40 *Eliz.* the Plaintiff caused to be made four hundred Grosses of Cards for the necessary uses of the Subjects, to be sold within this Realm, and had spent in the making of them 5000 *l.* and that the Defendant knowing the said Grant and Prohibition in the Plaintiffs Letters Patents, and others the premisses, 15 *Martii* 44 *Eliz.* without the Queens License or the Plaintiffs, &c. at *Westminster*, did cause eighty Grosses of playing Cards to be made, and as well those, as one hundred other Grosses of playing Cards, of which many were made within the Realm, or brought within the Realm by the Plaintiff, or his Servants, Factors or Deputies, &c. not marked with his Seal, he had imported within the Realm, and had sold and uttered them to sundry persons unknown, and shewed some in certain, for which the Plaintiff could not utter his playing Cards, &c. *Contra formam prædict' literar' patentium, & in contemptum dictæ Dominæ Reginæ*, whereby the Plaintiff was disabled to pay the Farm Rent, to the Plaintiffs damages.

The Defendant, besides to one half Gross, pleaded, Not Guilty; and as to that he pleaded, That the City of *London*, is an antient City, and within the same, time out of mind, there hath been a Society of Haberdashers; and that within the said City there was a Custom, *Quod qualibet persona de Societate illa, usus fuit & consuevit emere, vendere, & libere merchandizare omnem rem & omnes res merchandizabiles infra hoc Regnum Angliæ de quocunque, vel quibuscunque personis*, &c. [b] And pleaded, That he was a Free-man of the City, and of that Society, and sold the said half Gross of playing Cards; being made within the Realm, &c. as it was lawfull for him to do; upon which the Plaintiff did demur in Law.

And this Case was argued at the Bar by *Dodderidge*, *Fuller*, *Fleming*, Solicitor, and *Coke* Atturney General for the Plaintiff. And by *George Crook*, *Altham* and *Tanfield* for the Defendant. And in this Case two general questions were moved and argued at the Bar, arising upon two distinct Grants in the said Letters Patents.

1. If the said Grant to the Plaintiff of the sole making of Cards within the Realm were good or not.

2. If the License or dispensation to have the sole importation of Forreign Cards granted to the Plaintiff, were available or not in Law. To the bar, no regard was had, because it was no more then the Common Law would have said, and then no such particular Custom ought to have been alledged, for *In his quæ de jure communi de omnibus conceduntur, consuetudo alicujus patriæ vel loci non est alleganda*, and therewith agreeth 9 *E.* 4. 5. &c. And although the bar was holden superfluous, yet it shall not turn the Defendant to any prejudice, but that he may well take the advantage of the insufficiency of the Count.

As to the first question it was argued on the Plaintiffs side, That the said Grant of the sole making of playing Cards within the Realm was good for three causes.

1. Because

1. Because the said playing Cards were not any merchandize, or thing concerning Trade of any necessary use, but things of vanity, and the occasion of expence of time, wasting of Patrimonies, and of the livings of many, the loss of the service and work of Servants, causes of want, which is the mother of wo and perdition, and therefore it belongeth to the Queen (who is *Parens patriæ, & paterfamilias totius regni*, and as it is said in 20 *H.7. fol.4. Capitalis Justiciarius Angliæ*) to take away the great abuse, and to take order for the moderate and convenient use of them.

2. In matters of recreation and pleasure the Queen hath a Prerogative given her by the Law to take such order for such moderate use of them as shall seem good to her.

3. The Queen in regard of the great abuse of them, and in regard of the deceit of the subjects by
[86] reason of them might utterly suppress them, and therefore by consequence without injury to any one, she might moderate and suffer them at her pleasure. And the reason of the Law which giveth to the King these Prerogatives in matters of recreation and pleasure was, because the greatest part of men are ready to exceed in them. And upon these grounds divers Cases were put; 1. That no Subject can make a Park, Chase or Warren within his own Land for his recreation or his pleasure without the King Grant or License; and if he do it of his own head in a *Quo warranto*, they shall be seised into the Kings hands, as it is holden in 3 *E.2. Action sur le Statute Br.* 48 & 30 *E.3. Rot. Pat.* The King granted to another all the wild Swans betwixt *London* Bridge and *Oxford*.

As to the second. It was argued, and strongly urged, That the Queen by her Prerogative may dispense with a penal Law, when the forfeiture is popular, or given to the King. And the forfeiture given by the Statute of 3 *E.4.cap.5.* in case of bringing in of Cards is popular, 2 *H.7.6.6.* 11 *H.7.11.* 13 *H.7.8.* 2 *R.3.12. Plow.Com.*402.6 *Eliz. Dyer* 225.13 *El.* 393. 18 *Eliz. Dyer* 352. 33 *H.8. Dyer* 52.11 *H.4.76.* 13 *E.3. Release* 36.43 *Ass. Pl.*19. 5 *E.3.29.* 2 *E.3.6.* & 7. *F.N.B.* 211.*b*.

As to the first, it was argued by the Defendants Counsel, and resolved by *Popham* Chief Justice, and the whole Court, That the said Grant to the Plaintiff of the sole making of Cards within the Realm was void; and that for two causes.

1. The same is a Monopoly, and against the Common Law.
2. That it is against divers Acts of Parliament.

Against the Common Law, for four Causes,

1. All Trades, as well Mechanical, as others, which avoid idleness (the bane of the Commonwealth) and exercise men and youths in labour for the maintenance of them and their Families, and for the increase of their livings, to serve the Queen if need be, were profitable for the Commonwealth: And therefore the Grant to the Plaintiff to have the sole making of them is against the Common Law, and the benefit and liberty of the Subjects; and therewith agreeth *Foreseue in laudibus Legum Angliæ cap. 26.* And a Case was adjudged in this Court in an Action of Trespass, between *Davenant* and *Hurdis Trin.* 41 *Eliz. Rot.* 92. where the Case was, That the Company of Merchant Taylors in *London* having power by Charter to make Ordinances for the better rule and goverment of the Company, made an Ordinance, That every Brother of the same Society who should put any Cloth to be dressed by any Cloth-worker not being a Brother of the same Society, should expose one half of his Cloths to any Brother of the same Society, who exercised the
[b] Art of a Cloth-worker, upon pain of forfeiting ten shillings, &c. and to distrein for it; and it was adjudged, That that Ordinance, although it had the countenance of a Charter, was against the Common Law, because it was against the liberty of the Subject; for every Subject by the Law hath freedom and liberty to put his Cloth to be dressed by what Cloth-worker he pleaseth, and cannot be restrained to certain persons, for that in effect shall be a Monopoly; and therefore such Ordinance by colour of a Charter, or any grant by Charter to such effect shall be void.

2. The sole Trade of any Mechanical Artifice, or any other Monopoly is not only a damage and prejudice to those who exercise the same Trade, but also to all other Subjects, for the end of all these Monopolies is for the private gain of the Patentees; and although provisions and cautions be added to moderate them, yet *res profecto stulta est nequitiæ modus*; it is meer folly to think that there is any measure in mischief or wickedness. And therefore there are three inseperable incidents to every Monopoly against the Commonwealth.

1. That the price of the said Commodity shall be raised, for he who hath the sole selling of any Commodity may make the price as he pleaseth. And this word, Monopoly is said, *Cum unus solus aliquod genus mercaturæ universum emit, pretium ad sunum libitum statuens.* And the Poet saith.

Omnia Castor emit, sic fit ut omnia vendat.

And it appeareth by the Writ of *Ad quod damnum. F.N.B.*222. That if every Gift or Grant of the King hath this Condition, either expresly or tacitely annexed to it, *Ita quod patria per donationem illam magis solito non onoretur seu gravetur.* And therefore every Grant made in grievance and prejudice of the Subject is void; and 13 *A.4.14.* the Kings Grant which tendeth to the charge and prejudice of the Subject is void.

The second incident to a Monopoly is, That after a Monopoly granted, the Commodity is not so good and merchantable as it was before; for the Patentee having the sole trade, regardeth only his private, and not the publick Weal.

3. This same leadeth to the impoverishing of divers Artificers and other, who before by labor of their hands in their Art or Trade had kept themselves and their Families, who now of necessity shall be constrained to live in idleness and beggary *Vide Forteseue ubi supra.* And the Common Law in this Point agreeth with the equity of the Law of God, as it appeareth in *Deut. Cap. 24. ver. 6. Non*

accipiet

accipies loco pignoris inferiorem & superiorem molam, quia animam suam apposuit sibi; You shall not take in pledg the neather and upper Mill-stone, for the same is his life; by which it appeareth, That every Mans Trade doth maintain his life, and therefore he ought not to be deprived or dispossessed of it, no more then of his life. And the same also agreeth with the Civil Law, For we read in *Justiniam*, *Monopolia non esse intermittenda, quoniam non ad commodum Reipublicæ sed ad labem detrimentaque pertinent. Monopolia interdixerunt leges Civiles cap. de Monopoliis lege unica. Zeno imperator statuit, ut exercentes Monopolia bonis omnibus spoliarentur. Adjecit Zeno, Ipsa rescripta imperialia non esse audienda, si cuiquam Monopolia concedant.*

3. The Queen was deceived in her grant, for the Queen as by the preamble appeareth, intended the same to be for the weal publick, and it shall be imployed for the private good of the Patentee; also the Queen meant that the abuse should be taken away, which shall never be by this Patent, but rather shall the abuse of it be encreased for the private benefit of the Patentee, and therefore, as it is said in 21 *E.* 3. 46. in the Earl of *Kents* Case this grant is void *jure Regio*.

4. This grant is of this first impression, for no such was ever seen to pass under the great Seal of *England* before the time, and therefore it is a dangerous innovation as well without any president or example as without authority of Law, or reason. And it was observed that this grant to the Plaintiff was made for twenty one years, so that his Executor, Administrators, Wife or Children, or others inexpert in the Art and Trade should have this Monopoly. And it cannot be intended, that *Edward Darcy* Esquire, and Groom of the Queens Privy Chamber hath any skill in this Mechanical trade in making of Cards, and then it was said, that the Patent made to him was void, for to forbid others to make Cards who have the art and skill, and to give him the only making of them who hath no skil to make them, shall make the Patent utterly void. *Vide* 9 *E.* 4. 5. And although the grant doth extend to his Deputies, and it may be said, he may appoint Deputies who shall be expert; yet if the Grantee himself be unexpert, and the grant be void as to him, he cannot make any Deputy to supply his room, *quia quod per me non possum, nec per alium.* And as to that which hath been said, that playing Cards is a vanity, it is true, if it be abused, but the making of them is [b] no pleasure, but labour and pains. And it is true that none can make a Park, Chase or Warren, without the Kings licence, for that were *quodam modo* to appropriate those which are *feræ naturæ, & nullius in bonis* to himself, and to restrain them of their natural liberty, which he cannot do without the Kings license; but for hawking, hunting, &c. which are matters of pastime, pleasure, and recreation, there needeth not any license, but every one may in his own Land use them at his pleasure without any restraint to be made, if not by Parliament, as appeareth by the Statutes of 11 *H.* 7. *cap.* 17. 23 *Eliz. cap.* 10. 3 *Jacobi cap.* 13. And it is evident by the preamble of the said Act of 3 *E.* 4. That the bringing in of forreign Cards was forbidden at the grievous complaint of the poor Artificers Cardmakers, who were not able to live of their Trades, if forreign Cards should be brought in, as appeareth by the preamble; By which it appeareth, That the said Act provideth remedy for the maintenance of the Trade of making of Cards, for asmuch as the same doth maintain divers families by their labour and industry. And the like Act is made 1 *H.* 3. *cap.* 12. And therefore it was resolved, that the Queen could not suppress the making of Cards within the Realm, no more then the making of Dice, Bowles, Balls, Hawks-hoods, Bells, Lewers, Dog-couples and other like, which are works of labour and art, although they shall be for pleasure, recreation and pastime and they cannot be suppressed, if not by Parliament, nor a man restrained to use any trade but by Parliament. 37 *E.* 3. *cap.* 16. 5. *Eliz. cap.* 4. And the playing at Dice and Cards is not forbidden by the Common Law, as appeareth *M.* 9. *El. Dyer* 154. (If not that some be deceived by false Dice or Cards, and there he who is deceived, shall have an Action upon his Case to the deceit) and playing at Cards, Dice, &c. is not *malum in se*, for then the Queen should not suffer, nor license the same to be done. And where King *E.* 3. in the 39 year of his reign commandeth the exercise of shooting and artillery, and forbiddeth the exercise of casting of stones and barrs, and the hand and foot-balls, cock-fighting, *& alios ludos vanos*, as appeareth *indorsat. claus. de An.* 39 *E.* 3. *nu.* 23. yet no effect thereof followed, till divers of them were forbidden upon a penalty by divers Acts of Parliament *Vide* 12 *R.* 2. *cap.* 6. 11 *H.* 4. *cap.* 4. 17 *E.* 4. *cap.* 3 33 *H.* 8. *cap.* 9.

Also such charter of a Monopoly against the freedom of Trade and Traffick, is against divers Acts of Parliament, *s.* 9. *E.* 3. *c.* 1. & 2. Which for the advancement of the freedom of Trade of Traffick doth [88] extend to all vendible things, notwithstanding any charter of franchise granted to the contrary, or usage, or custom, or judgment given thereupon; which charters are adjudged by the same Parliament to be of no force, or effect, and made at the request of Prelates, Counts, Barons, and Grandees of the Realm, to the oppression of the Commons. And by the Statute of 25 *E.* 3, *cap.* 2. It is enacted, that the Act of 9 *E.* 3. shall be kept, holden, and maintained in all points. And it is further thereby enacted, That if any Statute, Charter, Letters Patents, proclamation, Command, Usage, Allowance, or judgment be made to the contrary, that the same be utterly void, *Vide Magna Charta cap.* 18. 27 *E.* 3. *cap.* 11, &c.

As to the second question, It was resolved, that the dispensation or licence to have the sole importation and merchandizing of goods (without any limitation or stint) notwithstanding the said Act of 3 *E.* 4. is utterly against law: For it is true, That for as much as an Act of Parliament which generally forbiddeth a thing upon penalty which is popular, or only given to the King, may be inconvenient to divers particular persons, in respect of person, place, time, &c. And for this cause the Law hath given power to the King, to dispense with particular persons; *Dispensatione mali prohibiti est de jure Domino Regi concessa, propter impossibilitatem prævidendi de omnibus particularibus:* and *dispensatio est mali prohibiti provida relaxatio, utilitate seu necessitate pensata.* But when the wisdom of the

Parliament hath made an Act to reſtrain *pro bono publico* the bringing in of many foreign manufactures, to the intent that the Subjects of the Realm might apply themſelves to the making of the ſaid manufactures, &c. And thereby maintain themſelves and their family with their handy labour. Now for a private gain to grant the ſole importation of them to one, or diverſe (without any limitation) notwithſtanding the ſaid Act is a Monopoly againſt the Common Law, and againſt the end and ſcope of the ſame Act, for the ſame is not to maintin and encreaſe the labours of the Card-makers within the Realm, at whoſe petition the Act was made, but utterly to take away and overthrow their Trade and labours, and that without any reaſon of neceſſity, or inconveniency in reſpect, of place or time, and ſo much the rather, becauſe it was granted in reverſion for years, as hath been ſaid, only for the benefit of a private man, his Executors and Adminiſtrators for his particular commodity, and in prejudice of the Common-wealth. And King E. 3. by his Letters Patents granted to one *John Peche* the ſole importation of Sweet-wine into *London*, and at a Parliament holden 50 E. 3. this grant
[b] was adjudged void, as appeareth *in Rot. Parl. An.* 50 E. 3. *M.* 33. Alſo admit that ſuch grant or diſpenſation were good, yet the Parliament cannot maintain an Action upon the Caſe againſt thoſe who bring in any foreign Cards, but the remedy which the Act of 3 E. 4. in ſuch caſe giveth ought to be purſued. And judgment was given and entred, *quod querens nihil caperet per billam.*

And note Reader, and well obſerve the glorious preamble and pretence of this odious Monopoly. And it is true *quod Privilegia quæ revera ſunt in prejudicium Reipublicæ, magis tamen ſpecioſa habent frontiſpicia, & boni publici prætextum, quam bonæ & legales conceſſiones, ſed prætextu liciti non debet admitti illicitum.* And our Lord the King that now is in a book which he in zeal to the Law & Juſtice commanded to be printed *An.* 1610. intituled *A Declaration of his Majeſties pleaſure*, &c. hath publiſhed, That Monopolies are things againſt the Laws of this Realm, and therefore expreſly commands that no Suitor preſume to move him to grant any of them.

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[89]

Hill. 4. *Jacob.*

The Earl of *Devonſhires* Caſe.

Charles Earl of *Devonſhire*, Maſter of the Ordinance general obtained of the King a Privy Seal bearing date the laſt of *October*, *An.* 2. in theſe words, *James* by the Grace of God, &c. To our truſty and right well beloved Couſin and Counſellor *Charles* Earl of *Devonſhire*, Our Lieutenant of our Realm of *Ireland*, and Maſter of the Ordinance general, greeting, &c. For as much as we are given to underſtand, that ſuch munitions as are utterly decayed and unſerviceable, have been heretofore claimed, taken, and enjoyed by the Maſter of the Ordinance for the time being, as fees and waiſes to them, by reaſon or in reſpect of the ſaid Office, belonging; Our will and pleaſure therefore is, and we do hereby give unto you full power and authority, that you may at your pleaſure receive and take out of the Store within the Tower of *London*, all ſuch broken and other unſerviceable Iron, Ordinance Shot, and other munitions whatſoever as are particularly expreſſed, mentioned, and ſet down in a book, &c. and the ſame to retain, imploy, and convert to your own uſe, &c. By force of which the ſaid Earl took out of the Store, within the Tower, diverſe pieces of Iron, Ordinance, Shot, and other
[b] Munition mentioned in the ſaid book, and ſold them to divers perſons for money, and ſo converted them to his uſe, and afterwards made his Will, and thereof made an Executor, and died. Now the queſtion was, If the Executor of the ſaid Earl might be charged to the King, for the ſaid converſion of the ſaid Ordinance and Munition: And the King referred the examination and conſideration of this Caſe to the two Chief Juſtices and Chief Baron; And the Counſel of the ſaid Executor objected, That the Executor ſhould not be charged in this Caſe for three cauſes.

1. Becauſe in truth, broken, caſt, and unſerviceable Iron, Ordinance, Shot, and other Munition doth belong to the Maſter of the Ordinance as fees and avails belonging to his Office, and offered to produce divers witneſſes to prove, that the Maſters of the Ordinance for the time being, have taken the broken, caſt, and unſerviceable Iron, Ordinance, Shot, and other Munition, as their fees and avails due to their Offices.

2. Admitting that they were not fees belonging to their Offices, yet the King by his Privy Seal, hath given thoſe eſpecially expreſſed in the ſaid book to the ſaid Earl, by force of which he may lawfully take them, and convert them to his own uſe, although they were not due to him as fees and availes in reſpect of his Office.

3. It was objected, That in this Caſe the Executor cannot be charged in Detinue, for none of the ſaid Kings goods came to his hands, nor in accompt, for the Teſtator was never bound to render accompt to the King neither as Baily, nor as Receiver; for no man ſhall be charged in accompt as Guardian in Socage Baily, or Receiver: And there are not other Original Writs in the Regiſter to charge any in accompt in the ſaid three Caſes. *Vide Regiſter* 135. 19 *H.* 6. 5. 29 *H.* 6. *Accompt* 6. And that is the cauſe that an Apprentice by the name of an Apprentice is not chargeable in accompt, 8 *E.* 3. 46. *F. N. B.* 119. & 7 *H.* 4. 14. And although the King hath the prerogative to charge the Executors of an Accomptant, yet he ought to charge the Executor where the Teſtator was chargeable in Law,

Law, in one of the ſaid three Caſes; alſo when any one is charged as Baily, or Receiver, there ought to be privity to charge him, but when one claimeth any thing to his own uſe, there he ſhall be never charged in accompt, becauſe he may plead, never his Baily, never his Receiver, to render accompt, and therewith agreeth 2 *Mariæ Br. Accompt* 89. 2 *H.* 4. 12. 39 *E.* 3. 27. So in the Caſe at Bar, the Earl claimeth them to his own uſe, for which no accompt lieth againſt him, but the perſonal wrong if there was any, dieth with his perſon.

As to the firſt, It was anſwered and reſolved, That the Earl could not claim the ſaid Iron Ordnance as Fees or Avails belonging to his Office, for the ſaid Office was erected of late time: for King *H.* 8. *An.* 35. of his Reign, by his Letters Patents did newly erect the ſaid Office of Maſter of the Ordnance, and granted the ſame to *Thomas* Lord *Seimor*, and after his death in *Ed.* 6. time, it was granted to Sir *Philip Hobby*, and after his death 1. *Mariæ* it was granted to Sir *Richard Southwell*, and after his death it was granted to *Ambroſe* Lord *Dudley*, ſo that the ſaid Earl without queſtion, cannot claim them as antient fees by preſcription to a new Office. [90]

As to the ſecond it was reſolved, That the ſaid Privy Seal was made upon a falſe ſuggeſtion, and that the King was therein deceived. For in the Kings Caſe theſe words (heretofore claimed, taken and enjoyed by the Maſters of the Ordnance for the time being) ſhall be intended to be lawfully claimed, taken, and enjoyed, and not by wrong, or uſurpation. And alſo this word (belonging) doth imply a right to take them, and therefore the ſaid Privy Seal being founded upon a falſe ſuggeſtion contained in the Privy Seal, and ſo the King deceived by matter apparent in the ſame privy Seal, by conſequence the Privy Seal is utterly void.

And as to the third Objection, It was anſwered and reſolved by the Court, That although the ſaid Earl claimeth them to his own uſe, yet he ſhall be bound to the King to accompt becauſe that in the Kings Caſe the Law doth make a privity; for if any one taketh the Kings Goods, or entreth into his Lands wrongfully, yet the King may charge him in accompt, 33 *H.* 6. 2. 4 *H.* 7. 6. 7 *H.* 7. 10. 15 *H.* 7. 17. 8 *El. Dy.* 249. *Brereton's* Caſe, and 40 *Aſſ. p.* 75 If Goods be diviſed to the King in whoſe hands ſoever they come, the poſſeſſor ſhall be charged in accompt to the King, and the King is not driven to his action of Treſpaſs, for then by the death of the party, the King ſhall be without remedy; but the King may by his Prerogative have an Action of Accompt againſt the Executors of the party, as appeareth by *Littleton* 28. And the King is not bound to charge the Defendant as Baily or Receiver, as a common perſon ought, but the King may alledge in his information generally, that he *ad compotum Domino Regi reddend. tempore mortis ſuæ tenebatur*, in ſo many ſums of money due to the King, &c. as appeareth by many Preſidents in the Exchequer, and in the Kings Bench, and therefore if upon evidence it appeareth that he is accomptable to the King in any manner, he ſhall be charged; as if one by Letters Patents, or by virtue of his Office hath power to ſet Fines upon Grants or admittances made to Copy-holders within ſuch of the Kings Manors, and he ſets ſmall Fines for the King, and underhand taketh great ſums or other rewards of the Copy-holders to his own uſe, in deceit and prejudice of the King, in this Caſe he may be charged to the King in accompt for the whole, for in truth the whole was due to the King: And the King who is Gods Lieutenant, ſhall ſay to ſuch falſe Stewards, *Redde rationem villicationis & vellicationis tuæ*: And if he dieth, his Executors in the Kings Caſe ſhall be charged, for as Sir *William Herle* Chief Juſtice of the Kings Bench in 3 *E.* 3. 10. ſaith, accompt ought to be by equity and truth. *Vide* 2 *R.* 2. *Tit. Account.* 47. & 3 *E.* 3. 10. and in 39 *Aſſ. pl.* 18. it is holden, That the Kings Officers or Miniſters can do nothing to the Kings diſadvantage, but all to his advantage: But it was ſaid that it was without preſident, That the Executors of any ſuch great Officer ſhould be charged after his death, becauſe he himſelf could have better diſcharged himſelf, then his Executors, who are ſtrangers to his accompts and buſineſs, and it ſhall be convenient, that as his Office doth ceaſe by his death, ſo the charge in reſpect of any deceit or wrong concerning his Office whereof he was not detected in his life ſhould ceaſe alſo by his death as a perſonal wrong. [b]

To which it was ſaid and reſolved, That that reaſon maketh againſt the Prerogative which the law giveth the King, *i.* that he ſhall charge the Executors of his accomptant, and therefore it is not worth any anſwer. But it is not without many preſidents, One of which was adjudged in the Exchequer *M.* 38. *El. Rot.* 312. In an information preferred by the Attorney General for the Queen againſt *Edward Cary* and *William Doddington* Eſquires, Executors of Sir *Walter Mildmay* Knight, late Chancellor of the Exchequer, becauſe the ſaid Sir *Walter* was bound to the Queen the day of his death to render accompt of divers ſums of money amounting together to 1525 *l.* of the Queens Treaſure in the Receipt of the Exchequer at *Weſtminſter*, *inter Feſtum Natalis Domini Anno* 1 *Eliz. & idem Feſtum Anno Regni ſui* 20. received, to render thereof accompt to the Queen, *& quod nemo prædictum compotum adhuc reddidit, nec reddere conatus eſt*, and that the ſaid Sir *Walter Mildmay* did appoint the Defendants his Executors. The Defendants pleaded, *quod prædictus Walterus Mildmay non recepit præd.* 1525 *l. aut aliquam inde parcell', ad inde Dominæ Reginæ computandum, nec die quo obiit tenebatur, eidem Dominæ Reginæ in compoto inde, aut alicujus inde parcellæ reddend' modo & forma, &c. & de hoc pon' ſe ſuper patriam, &c.* Note a good Iſſue by the rule of the Court, and the Jury found for the Def. ſaving for 1160 *l.* parcel, &c. for which they gave a ſpecial Verdict, 1. That 1 *Eliz.* The Queen by Letters Patents, did appoint the Marquiſs of *Wincheſter* Treaſurer *Scaccarii* during pleaſure (and made him Treaſurer of *England*, by giving to him the Staff) and afterwards in the ſame firſt year, ſhe appointed the ſaid Sir *Walter Mildmay* Chancellor of the Exchequer, for the terme of his life; and afterwards the firſt year ſhe made by her Letters Patents *Richard Sackvil* under Treaſurer of the Exchequer for the term of his life, and that the ſaid Treaſurer and under Treaſurer of the Exchequer 10 *Julii* 1596. made a [91]

Warrant in writing under their hands for the payment to the ſaid Sir *Walter Mildmay* Chancellor of the Exchequer of the Queens Treaſure being in the Receipt one hundred pound yearly for his Diet, and forty pound for his attendance at *London* in the vacation time during the Queens pleaſure, becauſe the Chancellor of the Court of Firſt Fruits and Tenths (which Court is now annexed to the Exchequer) had allowance in the ſame Court for his Travel and attendance in the ſame Office; and by reaſon of the annexation of the ſaid Court of Firſt Fruits, and alſo of the Court of Augmentation, the ſaid Chancellor of the Exchequer was charged with much buſines and attendance, as well in term as out of term, more then any Chancellor of the Exchequer before had been. And theſe were the cauſes which moved the Treaſurer and under Treaſurer to make the ſaid Grant, and were expreſs in it, and directed to four ordinary Tellers of the Exchequer, or to any of them.

And afterwards Queen *Eliz.* 19 *Martii anno ſui regni ſecundo*, directed her Warrant to the Treaſurer, Chamberlaines, and under Treaſurer under her Privy Seal, by which, amongſt other Articles concerning the Privy Councel, and payment of Fees of ſome Officers, &c. due and accuſtomed, the ſaid Queen willed and commanded them, That they or any one of them from time to time ſhould pay of the Queens Treaſure for the pain, coſts and expences of every perſon who had been, or ſhould be aſſigned or appointed by our commiſſion or commandment to enquire for us, or for us and our Coun-
[b] cil, or for you, or any of you commanded, or that ſhall be put to labour, travel, ride or write for or in our cauſes, matters and affairs, thing or things whatſoever, according to their deſerts, in as large manner and form as in any time before had been done or rewarded in our ſaid Exchequer by any Treaſurer, Chamberlaines, or under Treaſurer, and more large by their diſcretions; (and that was the cauſe upon which the Defendants Counſel did rely.)

And the Jury further found, That the ſaid 1160 *l.* was paid to the ſaid Sir *Walter Mildmay*, after the ſaid Warrant under the ſaid Privy Seal, for his Diet, and attendance in the Vacation time at *Lon.* and that the ſaid monies were paid of the Queens Treaſure by *Richard Stanley* one of the Tellers of the Receipt to the ſaid Sir *Walter*, and by the ſaid Sir *Walter* received to his own uſe, by force or colour of the ſaid Warrant of the ſaid Treaſurer or under Treaſurer; and that the ſaid Sir *Walter* did exerciſe his Office aforeſaid, and diſcharged the duty thereof during his life; and that the ſaid *Stanley* did account yearly before the Treaſurer and under Treaſurer and other Officers to whom it did appertain to hear the ſaid Accompt, and had allowance for the ſeveral points aforeſaid, and full diſcharge for them. And if upon the whole matter the Court ſhall adjudg, That the ſaid Sir *Walter Mildmay*, hath received the ſaid money to render accompt to the Queen, then they found for the Queen, and if not, for the defendant.

And in that Caſe three Points were moved.

1. If the Lord Treaſurer by himſelf, or with any other of the Kings Officers could for the ſame, or for any other reaſonable cauſe *ex officio* allow any fee or reward for the neceſſary ſervice of the Queen.

2. Admitting that he had not power *ex officio*, if he have power in this Caſe by vertue of the ſaid Privy Seal, to make the ſame allowance, or not?

3. For as much as Sir *Walter* received them to his own uſe; if he ſhould be charged to render accompt for them upon the ſaid Iſſue joyned, as is aforeſaid?

As to the firſt two Points, it was reſolved.

1. That no Officer that the King hath, nor they altogether, can iſſue or diſpoſe of the Kings Treaſure *ex officio*, although it be for the the honour and profit of the King himſelf, but it ought to be by Warrant from the King himſelf; for it is true, that it is for the honour and profit of the King, that good ſervice done to the King ſhould be rewarded, but it ought to be rewarded by the King himſelf, or by his Warrant, and by no other; for the Kings Treaſury being the bond of Peace, and the ſinews of War, is of ſo high eſtimation in Law in reſpect of the neceſſity of it, that the imbeſelling of
[92] Treaſure Trove, although it was not in the Kings Coffers, was Treaſon; and Treaſure and other valuable Chattels are ſo neceſſary and incident to the Crown, that in the Kings Caſe they ſhall go with the Crown to the Succeſſor, and not to the Executors, as in the caſe of common perſons, as appeareth 7 *H* 4. 43, & 44. *Ed.* 3. 42. And therefore without the Kings Warrant no Treaſure ſhall iſſue forth, for any cauſe whatſoever by any Officer *ex officio*.

2. It was reſolved, That every Warrant of the Queen her ſelf to Iſſue her Treaſure, is not ſufficient; for the Queens Warrant by word of mouth, or her Warrant (which is more) under the Privy Signet is not ſufficient to iſſue forth her Treaſure. And that appeareth by a Judgment in the Exchequer in *Petitians caſe Hil.* 1 E. 4. *Rot.* 14. *in dorſo*, where ſuch a Warrant under the Privy Signet to iſſue forth the Kings Treaſure was diſallowed. *Vide* 14 E. 4. 2. And yet in ſome caſe the Law taketh notice of the Privy Signet. And therefore, if the King under his Privy Signet doth prohibit any to paſs out of the Realm; it is ſufficient. *Fitz. Nat. Brev.* 85. But the Warrant which is ſufficient in Law to iſſue forth the King's Treaſure, ought to be under the Great Seal or Privy Seal.

As to the ſecond queſtion, it was reſolved, That the ſaid clauſe did extend to Commiſſioners and other inferiour perſons which ſhould travel about the Queens buſineſs, and not to the Chancellor of the Exchequer, for whom (amongſt others) an expreſs clauſe was before in the ſame Privy Seal. Alſo this clauſe is, according to their deſerts, &c. So that by the Privy Seal, the merit ought to precede the reward, and in this caſe, the Warrant was made before any merit or deſerving. Alſo the Privy Seal is, in as large and ample manner and form as in any time before hath been done or rewarded, &c. And is is not found that before any allowance had been made to the Chancellor of the Exchequer of any Fee or Reward. Alſo ti was touched (but not reſolved) That where the Privy Seal giveth authority to four or to one of them, and two make the Warrant, that they have not purſued their authority.

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As to the third point, it was resolved, That although the said Sir *Walter* received the Kings Treasure to his own use; yet forasmuch as he received the same without a lawful Warrant, he knowing that it was the Kings Treasure, the Law makes a privity in the Kings Case; and therefore they may charge him as an Accomptant. And so was it adjudged in the Exchequer, *Pasc.* 31 *El. Rot.* 150 *Jurdens* Case.

And in the Kings Case it is not needful that the monies or goods come to the hands of the Testator, but if he be a means and instrument by which the King is put to loss or damage, he shall be charged for so much as the King is endamaged, and he shall be compelled at the Kings suit to give an account thereof. And therefore there is a notable President in the Exchequer, *Mich.* 30 *E.* 3, *Rot.* 6. where the case was, That *William Porter* being Master of the Mint, &c. Covenanted with the King by Indenture inrolled, That all the Bullion which should be delivered *ad Cambium Regis pro moneta facienda*, that money should be delivered for the same within 8 daies, which Covenant the said *William Porter* brake, for he did not deliver to divers Subjects their money due to them for the Bullion which they brought *ad Cambium*, according to his Covenant. Upon which (upon shewing the same in the Exchequer) the King paid to them all the money due for the Bullion. And because that *John Walweyn* and *Henry Picard*, *duxerunt & præsentaverunt dictum* William Porter *in Officium illud tanquam sufficientem*; (and that they offered to be sureties for him, but were not accepted of, which matters the said *John Walweyn* and *Henry Picard* confessed) *ideo consideratum est quod dicti John Walweyn* and *Henry Picard*, *onerentur versus Dominum Regem*, &c. and were charged to satisfie the King all the monies which the King had paid for the said *William Porter*. [b]

And althongh that none of the Kings Treasure came to their hands, nor they had any ptivate benefit by any matter that appeared in the said Case, yet because they were means and causes of the Kings loss and damage, they were by Judgment charged. And forasmuch as they were chargeable by the Law, in that case if they had died before Judgment against them, without question the Executors shall be charged, for where the Testator is by Law chargeable to satisfie the King for his loss and damage done to him, his death shall not dispence with it, but that his Executors, &c. shall be charged to the King.

And it was resolved, That in that case the Queen either might charge the Executors of the said Sir *Walter*, or those who made such unlawfull Warrant at her election. And a Judgment was cited in the Argument of this case of *Trin.* 24 *E.* 3. *Rot.* 4. in the Exchequer.

One *Walter Chirton* the Kings Customer had purchased certain Lands with the Kings money, and by covin had caused the vendor to enfeoff his friends in Fee to defraud the King, and nevertheless took the issues and profits of the Lands to his own use, and those Lands by Inquisition were returned with the values in the Exchequer, and there by Judgment were seised into the Kings hands *quousque*, &c, and yet the Estate of the Land was never in him. But he who intendeth to deceive the King of that which belongeth to him, will in the end deceive himself. See Reader where and how the King shall levy the sum of which any one is chargeable to him by the Law, not only against the party himself, his Lands and Goods in his own hands, but in the hands of his Heirs, Executors or Administrators; and if he hath not Executors or Administrators, then in the hands of the possessors of the Goods of the deceased to render an account to the King. And therefore see a notable Record in the Exchequer *Mich.* 24 *E.* 3. *Rot.* 13. *ex parte Rememoratoris Regis*. *Thomas Faules* Case, which was an Exchequer Chamber Case, by all the Justices, and Barons, and vouched by the Lord *Dyer*, 4 & 5 *Phil.* & *Mar.* 160. *Pasc.* 2 *Eliz. Rot.* 111. Sir *William Cavendishes* Case, and Reported by the Lord *Dyer*, 5 *Eliz.* 225. *Plow. Com.* in the case of Mines, 321. *a.* & *b.* See 50 *Assi. p.* 5. [93]

And afterwards the Executors of the Earl of *Devonshire* did satisfie the King for all the said Iron Ordinance, Shot or Munition, which he without Warrant had converted to his use.

Trin 13 *Jacobi*, in the Kings Bench. [b]

James Baggs Case.

'JAcobus Dei gratia Angliæ, Scotiæ, Franciæ, & Hiberniæ Rex, Fidei defensor, &c. Majori & Communitati Burgi de Plymonth in com' Devon' salut': Cum Jacobus Bagge unus duodecim 'Capit. Burgen' sive Magistrat' burgi præd', secundum consuetud' in burgo prædicto hactenus usi-'tat', debitè electus & præfectus fuerit, Cumq; idem Jacobus in officio unus duodecim Capital' bur-'gen' sive magistrat' burgi præd' diù se benè gesserit & gubernaverit, Vos tamen Major & Commu-'nitas burgi prædicti præmiss. parvi pendent', prædictum Jacobum indebitè & absq; causa rationabili 'ab officio unius duodecim Capital' burgens. & magistrat' burgi præd' minus justè amovistis, in no-'stri contempt', & ipsius Jacobi dampn' non modicum & gravamen, & status sui læsione, sicut ex que-'rela sua accepimus: Nos igitur præfato Jacobo debit' & festinam Justitiam in hac parte fieri volentes, 'ut est justum, Vobis & cuilibet vestrum mandamus, sicut alias vobis mandaverimus, firmiter injun-'gent', quod immediatè post receptionem hujus brevis prædictum Jacobum in prædictum officium 'unius duodecim Capital' Burgen' sive magistrat' burgi prædicti restituat' cum omnibus libertatibus, privilegiis,

[94] 'privilegiis, & commoditatibus ad officium præd ſpectan' & pertinen', vel cauſam nobis inde ſig-
'nificar' ne in veſtr' defectu querela ad nos inde perveniat iterat': Et qualiter hoc breve noſtrum
'fuerit executum, nobis à die ſanctæ Trinitatis in tres ſeptimanas, ubicunque tunc fuerimus in Angl',
'conſtare fac' ſub pœna quadragint. librarum, hoc breve noſtrum nobis tunc' remitten', T. *E. Coke*
'apud Weſtm. duodecimo die Junii Anno Regni noſtri Angliæ, Franciæ, & Hiberniæ, tertio decimo,
'& Scotiæ, quadrageſſimo octavo, per Tr. de Anno 13. Jacobi Regis Rot. 13. Executio illius brevis
'patet in quadam ſchedula huic brevi annexa, Johan. Clement Major. Reſponſio Majoris & Commu-
'nitatis burgi de Plymouth ac breve huic ſchedul. annexat'. Secundum exigentiam brevis prædicti,
'Domino Regi humilimè Certificamus, quod Domina Elizabetha nuper Regina Angliæ per literas
'ſuas patentes, magno ſigillo ſuo Angl. ſigillat', gerendat apud Weſtm. viceſim' octavo die Februarii
'anno regni ſui quadrageſſimo tertio, pro ſe, hæredibus & ſucceſſoribus ſuis conceſſit Majori & Com-
'munitat' burgi de Plymouth præd. & ſucceſſ. ſuis inter alia, quod Major & Recordator burgi præ-
'dicti pro tempore exiſten. duran. tempore quo ipſi in officiis ſuis fore contigerint, Et ulterius præ-
'deceſſ. præf. Majoris ad tunc ſuperſtes & pro tempore exiſten. & ſucceſſ. ſui forent Juſticiarii ejuſd'
'nuper reginæ & hæredum & ſucceſſ. ſuorum ad pacem in eodem burgo & infra limites præcinct. &
'libertates ejuſdem conſervand. & cuſtodiend', & conſervari & cuſtodiri faciend abſq; alio mandat',
'commiſſione, ſive warranto proinde habend. ſive obtinend': Et ulterius dicto Domino Regi Certi-
'ficamus, * quod infra burgum prædictum talis habetur, de tempore cujus contrarii memoria homi-
'num non exiſtit, habebatur uſus & conſuetudo, quod Major & †duodecim Capitales burgenſ.
'burgi illius extiterunt & fuerunt de privato conſilio burgi præd. & viginti quatuor de aliis diſcre-
'tioribus burgenſibus burgi præd. pro tempore exiſten' ad hoc electi & jurati extiterunt & fuerunt
'ſimul cum prædict. Majore & duodecim Capitalibus burgenſibus de communi conſilio burgi præd',
'pro meliori regimine & gubernatione ejuſdem burgi, * Et quod quilibet talis burgenſis qui in ſocie-
'tatem prædict. viginti. quatuor burgenſium de communi conſilio prædict. electus fuerit, antequam
'ad eandem ſocietatem admiſſus fuerit, † Sacramentum præſtaret corporale coram Majori burgi illius
'pro tempore exiſten', quod ipsè bene & honeſtè ſe gereret tam erga Majorem burgi pred. pro tem-
'pore exiſten', quam erga præf. duodecim Capitales burgenſes burgi illius pro tempore exiſten', eis
'de tempore in tempus reverentiam præſtaret, & quod manu teneret & ſuſtentaret libertates & com-
'munem utilitatem burgi prædict. optimo conſilio & adviſamento ſuo: Et ulterius Certificamus
'quod quilibet prædictorum duodecim Capital. burgenſium de tempore in tempus electus & præfect'
'fuerit per Major' burgi præd. & reſiduos præd. duodecim Capital. burgenſium vel per majorem par-
'tem eorundem pro tempor' exiſt. tantum ſine conſenſu vel aſſenſu prædictorum viginti quatuor ali-
'orum burgenſ. qui ſunt ut præfertur de communi conſilio burgi præd. ad hoc requiſit': Et ulterius
'certificamus, quod præd. Jacobus Bagge primo die Maii anno Regni Dominæ Elizabethæ nuper
'Reginæ Angliæ triceſſimo ſecundo, apud Plymouth præd. ritè elect. & præfect. fuit unus prædict-
'orum vigenti quatuor burgenſium de communi conſilio burgi prædicti tunc exiſten', & eodem pri-
'mo die Maii an. triceſimo ſecundo ſupradicto apud Plymouth prædictam Sacramentum præſtitit
'corporale coram tunc Majo' burgi præd. juxta antiquam conſuetudinem præd. quod ipſe idem Ja-
'cobus benè & honeſtè ſe gereret tam erga Majorem burgi præd. pro tempore exiſten. quam erga cæ-
'teros duodecim Capitales burgenſ. burgi illius pro tempore exiſten', & eis de tempore in tempus
'reverentiam præſtaret & libertates & communem utilitatem burgi prædict. optimo conſilio & advi-
'ſamento ſuo manuteneret & ſuſtentaret: Et ulterius Domino Regi Certificamus, quod præd. bur-
'gus de Plymouth tam prope littus & Coſteras maris ſcituat' exiſtit, quod ratione inde, & ratione
'quotidiani concurſus navium & battellorum ibidem applicantium tam à partibus tranſmarinis quam
'alibi, multi homines malevoli tam alienigeni quam indigeni malæ & perverſæ converſationis, bo-
'ni regiminis contemptores, & pacis perturbatores, in navibus & battellis prædictis ibidem confluen'
'in burgo prædicto & infra limites & præcinct' ejuſdem commorantes & reſidentes indies inveniun-
'tur, qui ad boni regiminis & gubernationis obedienc' haud facilè ibidem reduci queant, niſi autho-
'ritas Majoris illius burgi pro tempore exiſten' & aliorum Capital. burgenſium præd. debita re-
'verentia aliorum comburgenſium & inhabitantium burgi illius muniatur, & perſonæ eorundem Ca-
'pital. burgenſ. & Majoris à contemptu apud vulgus præſervetur: Et ulterius dicto domino Regi cer-
'tificamus, quod prædictus Jacobus Bagge, præmiſſorum non ignarus, Sacramentum ſuum præd'
'parvi pend', & authoritatem tam Majoris burgi præd. pro tempore exiſten. & ultimi prædeceſſoris
'ſui præd. quam aliorum Capital. burgenſ. burgi præd. vilependens, ipſamque authoritatem in con-
'temptum inducere laborans & intendens, primo die Maii An. Regni dicti domini Regis nunc ſexto,
'eodem Jacobo ad tunc exiſten. de Communi conſilio burgi prædict, & uno Capitalium burgenſium
'burgi illius in præſentia cujuſdam Robert Trelawny tunc Majoris burgi præd. exiſten. & quam plu-
'rimorum aliorum inhabitantium burgi prædicti, apud Plymouth prædict' infra burgum prædictum
'contemptuosè & ſcurriliter tam geſtura quam verbis erga præfat. Majo' ſe geſſit, ac ad tunc & ibi-
'dem præfat' Robert' Trelawny contemptuosè & ſcurriliter & ſine aliqua cauſa rationabili hæc Ang-
'licana verba ſequentia palam & publicè dixit & propalavit, viz. * **You** (præfatum Robert Trelaw-
'ny innuendo) **are ſome Prince, are you not?** Et ulterius dicto Domino Regi Certificamus,
'quod poſtea, ſcilicet primo die Februarii an. Regni dicti Domini Regis nunc ſeptimo, Prædictus Ja-
'cobus Bagg, malevolam ſuam diſpoſitionem & intentionem antedictam continuendo, apud Ply-
'mouth præd in præſentia & auditu dict' Ro. Trelawny tunc exiſten' Juſtic' pacis dicti Domini Regis
'infra burgum prædict' conſervand' ratione Majoratus ſui burgi prædicti anno tunc prox. præceden'
'virtute literarum patentium præd. ac in præſentia & auditu quamplurimorum alio' inhabitantium
'burgi præd. palam, publicè, & alta voce ſine aliqua cauſa rationabili hæc Anglicana verba ſequent'
'de præf. Rob. Trelawny contemptuosè, falſo & ſcandaloſè dixit & propalavit; viz. * **You**
(præf.

* He ought to have firſt preſcribed that there had been an Incorporation of a Major, &c. time out of mind., &c. *Vide* 22 H. 6. *preſcription* 47. 6 E. 6. *Dyer* 71. &c.

† Twelve chief Burgeſſes, *de privato conſilio Burgi*; it ſhould be more aptly ſaid, *de privato conſilio Majoris & Burgenſium.*

* They do not preſcribe nor alledg any charter that they may diſfranchiſe any of the Corporation.

† The oath of a chief Burgeſs. They do not preſcribe in this and yet it is againſt common right. 1 *Maii* 32 *El. James Baggs* choſe one of the 24.

* Theſe words are to be reprehended, but are no cauſe to diſfranchize him.

* Theſe words are ſcornful and worthy of puniſhment, *s.* to bind him to his good behavior, if they were publiſhed when the Mayor was ſitting in execution of his Office, but are no cauſe to diſfranchize the delinquent.

'(præf. Rob. Trelawny innuendo) **are a cozening knave**, ubi revera prædictus Rob. Trelawny 'tota vita ſua honeſtè & ab omni ſuſpitione alicujus tallitatis, fraudis, vel doli penitus inſuſpectus vixit, '& in officiis tam Majoratus quam Capitalis burgenſ. burgi illius laudabiliter ſe geſſerit & guberna- 'verit: Et ulterius dicto Domino Regi Certificamus, quod viceſſimo die Novemb' an. Regni dicti 'Domini Regis nunc ſeptimo, prædictus Jacobus Bagg, continuando malevolam diſpoſitionem & 'intentionem ſuam prædictam, apud Plymouth prædict. ſeditioſè & malitioſè incitabat & perſua- 'debat quendam Thom. Sherwil ad tunc unum Capital. burgenſ. burgi prædicti exiſten', quod ipſe 'idem Thomas ſeipſ. cum præfat. Jacobo Bagg in conſideratione conjungerat ad amovend' & de- 'ponend' quendam Johannem Battersby tunc Majorem burgi prædicti exiſten', ab officio Majoratus 'ſui præd. ſine aliqua cauſa rationabili aut legali, Et ad tunc & ibidem maliciosè & contemptuosè 'dixit præfato Tho. Sherwill de præfat. Johan Battersby hæc falſa, opprobrioſa, & ſcandaloſa Angli- 'cana verba ſequentia, viz. *Maſter Major (præfat. Joh. Battersby innuendo) **carrieth him- 'ſelf fooliſhly in his place; and if you will joyn with me, we will turn him out of his 'Majoralty, and chuſe a wiſer man in his place**, ubi revera præfatus Joh. Battersby durant' 'toto tempore Majoratus ſui prædict. ſeipſum in exercendo officio ſuo prædicto bene & diſcretè ſum- 'maque cum integritate quam gravitate ſe geſſerit: Et ulterius dicto Domino Regi Certificamus, 'quod poſtea, ſcilicet die Februarii Anno Regni Dicti Domini Regis nunc octavo, præd. Jacobus Bagg 'malovelam ſuam diſpoſitionem & intentionem antedict. continuando, apud Plymouth præd. in 'Guyldhalda burgi præd. in præſentia cujuſdam Tho. Fownes adtunc Majoris burgi præd. exiſten', 'ac in præſentia & auditu diverſorum tam Capitalium burgenſium, quam aliorum inhabitantium 'burgi præd. contemptuosè, contumeliosè, & ſine aliqua cauſa rationabili dixit præfato Tho. Fownes 'hæc falſa & opprobrioſa Anglicana verba ſequentia, viz. **Thou** (præfat' Tho. Fowens tunc Ma- 'jorem innuendo) **art an inſolent fellow**, ubi revera prædictus Tho. toto vitæ ſuæ curſu ſeipſum 'erga omnes homines honeſtè, civiliter, & laudabiliter geſſit & gubernaverit: Et ulterius dicto 'Domino Regi Certificamus, quod poſtea ſcilicit primo die Auguſti Anno Regni dicti Domini Re- 'gis nunc nono, apud Plymouth prædict. in præſentia & auditu præfat' Tho. Fowens & quam plu- 'rimor' aliorum burgenſium & inhabitantium burgi prædicti in Guyhalda burgi prædicti congregat' 'exiſten' prædictus Jacobus Bagg, continuand' malevolam diſpoſitionem & intentionem ſuam ante- 'dictam, diverſa contemptuoſa verba de præfato Tho. Fowens tunc Majore burgi prædicti exiſten' 'dixit & alta voce propalavit, ſuper quo præfat' Tho. Fowens ad tunc & ibidim mitiſſimis verbis ad- 'monens præf. Jacobum Bagg, quod ipſe deliſteret à verbis contemptuoſis prædictis propalandis, 'præfatus Jacobus Bagg ſuperinde adtunc & ibidem ſcilicet decimo die Auguſti an. nono ſupradicto 'apud Plymouth prædict. ac in præſentia & auditu prædict. Tho. Fowens tunc Majoris burgi præ- 'dicti, & quam plurimorum aliorum burgenſium & inhabitantium burgi prædicti, & in contemp- 'tum & opprobrium ipſius Tho. Fowens, tunc Majoris, convertens poſteriorem partem corporis ſui 'more inhumano, & incivili, verſus præfat. Tho Fowens ſcurriliter, contemptuosè, inciviliter, & 'alta voce dixit præf. Tho. Fowens hæc Anglicana verba ſequentia, viz. (**come and kiſs.**) Et 'ulterius dicto Domino Regi Certificamus, quod poſtea, ſcil. viceſſimo die Auguſti an. Regni dicti 'Domini Regis nunc nono apud Plymouth præd. præfatus Jacobus Bagg inſolentiſſimis verbis præfat. 'Tho. Fowens tunc Major' burgi præd. exiſten' abſque aliqua rationabili cauſa maliciosè minatus 'ſuit & adtunc & ibidem præf. Tho. Fowens minaciter & maliciosè hæc Anglicana verba ſequentia 'dixit, viz. **I will make thy neck crack**: Et ulterius dicto Domino Regi Certificamus, quod po- 'ſtea ſcilicet tertio die Maii an. regni dicti Domini Regis nunc duodecimo quædam ordinatio & ami- 'cabilis admonitionis inſtitutum fact' ſuit per Johannem Scobbe tunc Majorem burgi prædicti & 'majorem partem Capital. burgenſ. burgi illius in hæc verba, viz. Nono die Maii Anno Domini 1614. '**The day and year above written it was agreed by John Scobbe Major, and ſuch other 'of the Maſters hereunder written, being aſſembled in the Councel-Chamber at Ply- 'mouth, That if Maſter James Bagge the elder, do not before the next Seſſions to be 'holden within the Borough of Plymouth, reconcile himſelf to the ſaid Major and his 'brethren for ſuch wrongs as he hath committed againſt them, and withal faithfully 'promiſe to demean himſelf more orderly and temperately for the time to come, that then 'he ſhall be clean removed from the bench and a new Maſter choſen in his room**: Quæ 'quidem ordinatio ſive inſtitutum factum & ſubſcriptum fuit per dictum Majorem & novem aliorũ 'Capital burgenſ. burgi prædict': Et ulterius dicto Domino Regi Certificamus, quod prædictus 'Jacobus Bagge ante prædictam proximam Seſſionem in ordinatione prædicta mentionat. non fecit 'aliquam talem reconciliationem ſive promiſſionem confirmationis qual. in ordinatione illa ſpecificat' 'licet plena notitia ordinationis prædicti immediatè poſt confectionem inde, & ante prædictam 'proximam ſeſſionem ei dat' fuit, viz. apud Plymouth prædict': Et ulterius dicto Domino Regi 'Certificamus, quod poſtea ſcilicet viceſimo tertio die Februarii Anno Regni dicti Domini Regis nunc 'duodecimo prædictus Jacobus Bagge, continuando malevolam diſpoſitionem & intentionem ſuam 'prædictam, apud Plymouth prædict' in Guyhalda burgi prædict, in præſentia & auditu Joh. Scobbe 'unius Capital. burgenſium burgi prædict' & tunc exiſten' Juſticiar. dicti Domini Regis ad pacem 'infra burgum prædictum conſervand', virtute Literarum Patentium Prædictarum ratione Majo- 'ratus ſui burgi prædicti Anno tunc proxim' præcedent', ac in præſentia & auditu tunc Majoris bur- 'gi prædicti & diverſorum aliorum burgenſium & inhabitantium burgi illius, contumeliosè hæc 'Anglicana verba ſequen' de pref. Joh. Scobbe palam & publicè falsè & ſcandaloſè dixit & propa- 'lavit, viz. **You** (prædictum Joh. Scobbe innuendo) **are a knave**, ubi revera prædictus Joh. 'Scobbe tota vita ſua honeſtè & laudabiliter ſe geſſerit & gubernaverit: Et ulterius dicto Domino 'Regi Certificamus, quod poſtea ſcilicet decimo ſeptimo die Decembr. jam ultimo præterit. tunc

Majore

* Theſe words are no cauſe to diſfranchize him, 1. Becauſe that nothing was done, and it might be that there was juſt cauſe to remove him; and the cauſe certified ought to be ſuch that it may appear to the Court, that the ſame is a juſt cauſe to diſfranchize him; for the party grieved cannot have an anſwer to it. As above.

The ſame is againſt good manners, and worthy of puniſhment, as aforeſaid, but is no cauſe of diſfranchiſement. As above. This is repugnant, 3 *Mail.* and 9 *Mail.*

Here it appeareth, That he ſhould be removed by the Major & nine of the Maſters, and in the end of the Return, it is alledged, that he was removed by the Major & Communalty which is repugnant.

As above.

[b]

'Majore dicti burgi & diversis Capital. burgensibus burgi præd. apud Plymouth præd. in domo Elemozinar' burgi prædicti ibidem congregat. existen. ad exigend. & recipiend. compotum gardanorum 'pauperum burgi prædicti sicut temporibus ante-actis de tempore cujus contrarii memoria homin' 'non existit usitat. fuerit, prædictus Jacobus Bagge ad tunc & ibidem in præsentia & auditu dicti 'Majoris & aliorum Capital. burgens. prædict' sine aliqua causa rationabili palam & publicè dixit 'cuidam Thomæ Sherwill ibidem tunc præsenti & uni duodecim Capital. burgens. burgi præd. adtunc '& per spacium decem annorum præantea exist' hæc falsa & scandalosa verba sequen', viz. **You** '(prædictum Tho. Sherwill innuendo) **are a seditious fellow**, ubi revera prædictus Thomas As above. 'Sherwell de quocunq; tali crimine seditionis semper insuspectus vixit, & seipsum de tempore in 'tempus tam in officio Majoratus burgi prædicti, quam in loco & officio Capitalis burgens. burgi 'illius honestè, discretè summaq; integritate se gesserit & gubernaverit: Et ulterius dicto Domin' 'Regi Certificamus, quod cum idem Dominus Rex die Januarii anno Regni sui duodecimo su-'pradicto, apud Westm' in Com' Midd', de advisamento Dominor' de privato consilio suo hujus Reg. 'Angl' ordinaverat & mandaverat per publicam proclamationem suam & per literas propriis manibus diversorum Dominor' de privato consilio suo signatas, quod nullus nec alia persona quæcunq; 'mactaret aut venditioni exponeret aliquam carnem pro victualibus tempore quadrages. tunc prox. 'futur' contra leges aut statuta hujus regni Angl', Et quod omnes Majores & alii Capital. officiarii in 'burgis & villis incorporat. infra hoc regnum Angl. in initio prædicti temporis quadragesimæ tunc 'prox. futur. vel antea, causarent omnes Caupones, Victualar' Hospites, Anglicè **Inkeepers**, Cau-'ponar', Anglicè **keepers of Ordinary tables**, & Tabernarios, Anglicè **Ale-house-keepers**, 'infra præcinctum jurisdictionis suæ obligari dict. Domino Regi per scriptum obligatorium, quod 'ipsi non ubsonarent, Anglice **should not dress** aliquam carnem pro victualibus durante dicto tempore quadragesimæ tunc prox. futur': Cumque etiam postea scilicet vicesimo die Februarii Anno 'duodecimo supradicto quidam Joh. Clement adtunc & adhuc Major burgi de Plymouth prædict. juxta officii sui debitum & inobedientia dict. ordinationis & mandati dicti Domini Regis mandaverat [97] 'omnibus victualariis, Cauponibus, Hospitibus, Cauponariis, & tabernariis prædictis infra præ-'cinctum burgi prædicti, quod ipsi devenirent obligat' per script' suum obligator' ad usum dicti 'Domini Regis secundum tenorem & exigentiam prædictæ ordinationis & mandati dicti Domini 'Regis, & debitam executionem ordinationis prædictæ in ea parte requirebat & efficere conatus fuit 'infra burgum præd' præfatus Jacobus Bagge præmissorum satis sciens, & malevolam dispositionem '& intentionem suam prædictam continuando, prædict' vicesimo die Februarii Anno duodecimo 'supradict', apud Plymouth prædict', debitam executionem ordinationis prædict' & præd. mandati dicti Domini Regis impediri & evacuare conatus fuit & attemptabat, & ea intentione eodem 'vicesimo die Februarii apud Plymouth prædictam, diversis inhabitantibus burgi prædict. & aliis 'ligeis dicti Domini Regis ibidem existen', & communicationem cum præf. Jacobo Bagge de & su-'per negotio illo adtunc & ibidem habentibus, palam & publicè dixit & propalavit hæc Anglicana 'verba sequent' viz. **Master Major** (prætatum Joh. Clement innuendo) **doth more herein** The same is no cause of disfranchisement without question, also the *innuendo* is idle and vain. 'than he need, and more then he can well answer, innuendo quod dictus Joh. Clement in re-'quirendo prædictos Caupones, Victualarios, Hospites, Cauponarios, & tabernarios devenire ob-'ligat. ad usum dicti Dom. Regis secundum prædictam ordinationem & mandatum dicti Dom. Reg. 'fecerat plus quam facere opus fuit & plus quam bene respondere potuit, ratione cujus quidam pro-'palation. diversi Caupones, Victularii, Hospites, Cauponar. & Tabernarii, infra burgum prædict' 'inhabitantes, penitus recusabant obligari dicto Domino Regi secundum prædictam ordinationem '& mandatum dicti Domin Regis: Et ulterius Certificamus, quod prædictus Major & communi-They have not alledged, That there was a Corporation time out of mind, &c. 'tas burgi de Plymouth & prædecessores sui de tempore cujus contrarii memoria hominum non exi-'stit, haberent & habere consueverunt infra burgum prædict. quandam custumam vini communiter 'vocat. wyne weight, al's wine wite, solubil' per quemcunq; tabernarium vinum vendentem infra 'burgum prædictum de qua quidem custuma vini prædictus Major & communitas de toto tempore 'supradicto quiete & pacifice seisit. fuer. quousque prædictus Jacobus Bagge vicesim. nono die No-'vem. An' regni dicti Dom. Reg. nunc Angl. quarto apud Plymouth præd. perfide & malicioše practisabat cum quodam Will' Bently & Tho. Lyde tabernariis & vini venditorib. infra burg. prædictum 'existen', eis perfide revelando diversa secreta consilia, concernentia Communem utilitat' burgi 'præd', & ipsos Will' & Tho. adtunc & ibidem persuadebat, quod ipsi non amplius solverent præ-'dictam Custumam vini vocat' wyne weight alias wyne wyte, nec aliquam firmam aut denariorum 'summam proinde præf. Majori & Communitati, quo quidem vicesimo nono die Novem. An. quarto 'supradicto prædictus Jacobus Bagge tunc existens unus duodecim Capital. Burgens. de communi The same was but his opinion which although it be false, yet it is no cause of disfranchisement and his opinion cannot be a prejudice to the right; the *innuendo* is vain and idle 'consilio burgi prædicti, apud Plymouth prædict. perfide & malicioše* dixit prætat. Will' Bently '& Tho. Lyde hæc Anglicana verba sequen', viz. **You need not to pay the money** (innuendo 'quandam firmam per ipsos Tho. & Will' pro custuma prædict. antetunc præt. Majori & Communi-'tat. solut.) **for the wyne weight any longer except you list, for it is not due unto them**, * 'ratione quorum quidem perfidiosorum & malitiosorum verborum prædicti Will' Bently & Tho. 'Lyde firmam prædict. solvere penitus recusabant & adhuc recusant, Et ratione inde diversæ lites & 'controversiæ ortæ sunt & post hac oriri verisimiles sunt int' præf. Will' Bently & Thom. Lyde & 'præf. Majorem & Communitatem pro custumis vini prædict. & firma prædicta ad damnum & mag-'num præjudicium præf. Majoris & Communitatis: Et ulterius dicto Domini Regi certificamus, 'quod præd. Jacobus Bagge primo die Maii Anno Regni Domini nunc Angl' duodecimo, & diversis 'aliis diebus & vicibus tunc præantea apud Plymouth præd. perfidiosè dixit diversis inhabitantibus 'burgi prædicti & aliis ligeis dicti Dom. Regis super communicationem inter eos & præfatum Jac' 'tunc præhabit. de & concernen' libertatibus & privilegiis burgi præd. quod ipse idem Jac' Bagge

* Yet remedy lieth for this duty if they have right to it by the Law.

* sub-

'* ſubverteret & evacueret Chartam Anglice the Charter burgi prædicti, innuendo Chartam 'prædictam per præf. nuper reginam Elizabetham præfat' Majori & communitati ut præfertur con 'ceſſam, Et quod ipſe idem Jacobus libertates & privilegia burgi præd. altercaret: Angl. would call 'in queſtion, & eadem privilegia & libertates ſubverteret: Et ulterius dicto Domino Regi certi- 'camus, quod poſtea ſcilicet decimo ſeptimo die Aprilis jàm ultimo prætertio præd. Jacobus Bagge 'in dicto brevi nominatus ex cauſis prædictis per Majorem & Communit' burgi præd. ab officio uni- 'us Capital. Burgenſium & Magiſtratuum burgi præd. amotus fuit. *Johannes Clement* Major.

Upon the matter aforeſaid, and for the cauſes aforeſaid, it was reſolved by the Court, That there was not any juſt cauſe to remove him; and therefore the Court awarded a Writ directed to the Major and Commonalty to reſtore him. And in this Caſe,

1. It was reſolved, That Authority doth belong to the *Kings Bench*, not only to correct errors in judicial proceedings, but other errors and miſdemeanors extrajudicial tending to the breach of peace, or the oppreſſion of the ſubjects, or to the raiſing of faction, controverſies or debate, or to any manner of miſgovernment; ſo that no wrong or injury, either publick or private can be done, but that the ſame ſhall be reformed or puniſhed be due courſe of Law.

For the general clearing this and other the like caſes, all which was ſaid in the Argument of this caſe, was divided into three Queſtions.

1. What were ſufficient cauſes to diſfranchiſe a Citizen, Free-man or Burgeſs of any City or Borough Incorporate, and to diſcharge him of his freedom and liberty and what not?

2. How and by whom, and in what manner ſuch Citzen and Buegeſs ſhall be diſfranchiſed?

3. If the return of his removing and diſfranchiſement doth not carry a ſufficient matter, but the ſame is falſe; what remedy ſhall be for the party grieved in ſuch caſe?

As to the firſt it was reſolved, That the cauſe of diſfranchiſement ought to be grounded upon an Act done againſt the duty of a Citizen or Burgeſs, and to the prejudice of the publick good of the City or Burrough whereof he is a Citizen or Burgeſs, and againſt his oath which he took when he was ſworn a Free-man of the City or Borough; for although that one ſhall not be charged in any Judicial Court for the breach of a general Oath, which he took when he became Officer, Miniſter, Citizen, Burgeſs, &c. yet if the thing which he doth be againſt the duty and truſt of his Freedome, and to the prejudice of the City or Borough, and alſo againſt his Oath, the ſame doth much enforce the cauſe of his removing; and it is a condition in Law *tacitè* annexed to his Freedom and Liberty; which if he breaketh, he may be diſfranchiſed; but words of Contempt, or againſt good manners, although they be againſt the Chief Officer, or his brethren, are good cauſes to puniſh him, as to commit him till he hath found good Sureties of his Good Behaviour, but not to diſfranchiſe him. So if he intend [b] or endeavour of himſelf, or conſpire with others, to do a thing againſt the duty or truſt of his Freedom, and to the prejudice of the publick good of the City or Borough, but he doth not execute it, it is a good cauſe to puniſh him, as is aforeſaid, but not to diſfranchiſe him, for *Non ſufficit conatus niſi ſequatur effectus*; and *Non ſufficit effectus, niſi ſequatur effectus.* And the reaſon and cauſe thereof is, That when a man is a Free-man of a City or Borough, he hath a Freehold in his Freedom for life; and with others in their publick capacity hath an inheritance in the Lands of the ſaid Corporation, and intereſt in their Goods and perhaps the ſame doth concern his trade and means of living, credit and eſtimation; and therefore the matter which ſhall be a cauſe of his diſfranchiſement, ought to be an Act or a Deeed, and not a Conation, or an indeavour which he may repent of before the execution of it, and whereof no prejudice doth follow. And thoſe who have Offices of truſt and confidence ſhall not forfeit them by endeavours or intentions to do Acts, although they declare them by expreſs words, if the thing it ſelf doth not follow. As if one who has the keeping of a Park ſay, that he will kill all the Deer, or he will cut down ſo many trees within the Park, but doth not kill the Deer, nor cut down any Trees, it is not any forfeiture, and ſo of the like; for in all ſuch caſes, either there ought to be an Act, or ſuch a negligence, as doth amount to ſo much, *ſ.* to the Deſtruction of the game, &c. If a Biſhop, Arch Deacon, Parſon, &c. cut down all the Trees, the ſame is a good cauſe of deprivation, 2 *H.* 4. 3. So if a Prior alieneth the Land which he hath in the right of his houſe, it is a cauſe of deprivation, as appeareth in 9 E. 4. 34. If a Prior doth delapidate, it is a good cauſe to deprive him as it is holden in 29 E. 3. 16. 28 *H.* 6. 36. But if it be but a Conation or endeavour without an Act done, in none of thoſe caſes is it a cauſe of deprivation, for in thoſe caſes *voluntas non reputatur pro facto* [99] And if contempt (be it of omiſſion or commiſſion) ſhould be a good cauſe to diſfranchiſe, the beſt Citizen or Burgeſs may be at one time or other diſfranchiſed, which ſhould be a great cauſe of faction or contention in Cities or Burroughs.

As to the ſecond it was reſolved, That no Free-man of any Corporation can be diſfranchiſed by the Corporation if they have not authority ſo to do either by expreſs words of Charter or Preſcription, but if they have not authority neither by Charter or by Preſcription, then he ought to be convicted by courſe of Law before that he can be removed, as appeareth by *Magna Charta*, *cap.* 29 *Nullus liber homo capiatur, vel impriſonetur, aut diſſeiſietur de libero tenemento ſuo, vel libertatibus, vel liberis conſuetudinibus ſuis*, &c. *niſi per legale judicium parium ſuorum, vel per legem terræ.* And if the Corporation have power by Charter or Preſcription to remove him for a reaſonable cauſe, it ſhall be *per legem terræ*, but if they have no ſuch power, he ought to be convicted *per judicium parium ſuorum*, &c. As if a Citizen or Free-man be attainted of Forgery or Perjury, or conſpiracy at the Kings ſuit, &c. of any other crime for which he is become infamous, upon ſuch attainder they cannot remove him: So if he be convicted of any offence which is againſt the duty and truſt of his Freedom, and to the publick prejudice of the City or Burrough whereof he is free, and againſt his Oath; as if he hath

Nonſ... ...ſ ...ſeas; and may be the Charter was void in Law, or that it was procured by the leſſer number of the Burgeſſes and then it might be removed, and ſo he may juſtifie theſe words.

burnt or defaced the Charters or evidences of the City or Borough, or raſed or corrupted them, and thereof be convicted and attainted, theſe and the like are good cauſes for to remove him. And although they have lawfull authority either by Charter or Preſcription to put any one from his Freedom, and that they have juſt cauſe to remove him; yet if it appeareth by the return, that they have proceeded againſt him without hearing him to anſwer what was objected, or that he was not reaſonably warned, ſuch removing of him is void, and ſhall not bind the party becauſe *quia quicunque aliquid ſtatuerit parte inaudita altera, æquum licet ſtatuerit, haud æquus fuerit*, and ſuch removing is againſt Juſtice and Right.

[b] As to the third queſtion, If they have power either by Charter or Preſcription to disfranchiſe one and afterwards the Judges of the Kings Bench do award a Writ to them to reſtore him, or ſignifie the cauſe, and they certifie a ſufficient cauſe for to remove him, but the ſame is falſe; then the Court cannot award a Writ to reſtore him, nor any iſſue can be taken thereupon, becauſe the parties are ſtrangers and have no day in Court; but the party grieved may have an Action upon the ſpecial matter againſt thoſe who made the Certificate, and aver the ſame to be falſe, ſo that it may appear to the Juſtices that the cauſes of the Return are falſe, then they ſhall award a Writ of Reſtitution, and the ſame is proved by the reaſon of the book of 9*H*.6 44. where it is holden, that upon a *Corpus cum cauſa* if the cauſe returned be ſufficient, but in truth is falſe, the Coure ought to ſend back the Priſoner, and he is at no miſchief, for if they have not authority, or the cauſe be falſe, he may have a Writ of falſe impriſonment, *vid. Corpus cum cauſa, p.* 2. where the ſaid caſe of 5*H*.6.44. is well abridged So in the other part upon ſuch falſe return the party grieved may have a ſpecial Action upon the caſe as is aforeſaid.

Alſo if the party grieved, who is ſo disfranchiſed, be for the cauſe of his disfranchiſement committed to priſon, or if his Shop be ſhut up, or if with force he be removed out of their Aſſembly, &c. in theſe and the like caſes he may have an Action of falſe impriſonment, or an Action of Treſpaſs *quare domum fregit*, or of aſſault and battery, and in thoſe Actions the cauſes of disfranchiſement ought to be pleaded, and ſhall be decided according to Law, 8*E*.3.437.8 *Aſſ*.29.31. If a Lay-man be Patron of an Hoſpital, he may viſit the ſame and depoſe or deprive the Maſter for good cauſe, but if he be deprived without juſt cauſe, and by colour thereof be put out, he ſhall have an Aſſiſe becauſe he hath not other remedy; but if the Ordinary depriveth a Maſter who is Eccleſiaſtical without cauſe, he ſhall not have an Aſſiſe, for he hath other remedy by appeal. See 6*H*.7.14. *F.N.B*.4*E*.27.*E*.3.85.10. *Eliz. Dyer*.273.

Alſo it was reſolved, That ſuch return of disfranchiſement ought to be certain, ſo that ſufficient matter may appear to the Court to disfranchiſe the party, and ſo much the rather, becauſe the party cannot have anſwer to it, as is ſaid before.

Laſtly, It was reſolved, That for none of the cauſes contained in the Certificate, the ſaid *James Bagg* by Law ought to be removed; and therefore by the whole Court a Writ was awarded to reſtore him to his Franchiſe and Freedom, and ſo it was done.

[100] Note Reader, in the Argument of this Caſe much was ſaid to exhort Citizens and Burgeſſes to yeild obedience and reverence to Magiſtrates in their Cities and Boroughs, becauſe they derive their authority from the King, and *Obedientia eſt Legis eſſentia*, and therefore it appeareth before how they ſhall be puniſhed who commit any contempt againſt them. But the principal queſtion of this caſe was, What Acts were ſufficient cauſes in Law for the Disfranchiſement of any Citizen or Burgeſs, &c.

Leges poſteriores priores contrarias abrogant.

FINIS.

THE CASES IN THIS BOOK.

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Auditor Curles Case	*Hill.* 7 *Jacobi*
Sir John Heydens Case	*Trin.* 10 *Jacobi*
Priddle and Nappers Case	*Mich.* 10 *Jacobi*
Dr. Grants Case	*Pasch.* 11 *Jacobi*
Sir Henry Nevils Case	*Mich.* 11 *Jacobi*
Dr. Arayes Case	*Hill.* 11 *Jacobi*
Henry Harpers Case	*Trin.* 12 *Jacobi*
Henry Pigots Case	*Trin.* 12 *Jacobi*
Alexander Powlters Case	*Trin.* 12 *Jacobi*
Metcalfs Case	*Mich.* 12 *Jacobi*
Richard Godfreys Case	*Mich.* 12 *Jacobi*
Richard Lifords Case	*Mich.* 12 *Jacobi*
The Case of the Taylors of *Ipswich*	*Mich.* 12 *Jacobi*
Edward Savels Case	*Mich.* 12 *Jacobi*
Benthams Case	*Mich.* 12 *Jacobi*
Dr. Fosters Case	*Mich.* 12 *Jacobi*
Magdalen Colledge Case	*Pasch.* 13 *Jacobi*
Lewis Bowles Case	*Pasch.* 13 *Jacobi*
The Case of Monopolies	*Trin.* 44 *Eliz.*
The Earle of Devonshires Case	*Hill.* 4 *Jacobi*
James Baggs Case	*Trin.* 13 *Jacobi*

THE

The Names of the Justices of both Benches, and Barons of the Exchequer, and Serjeants at Law at the time of the Edition of this Eleventh Book.

Of the Kings Bench.

Edward Coke,
John Crook,
John Doderidge,
Robert Houghton, } Knights.

Of the Common-Pleas.

Henry Hobart,
Peter Warburton,
Humphrey Winch,
Auguſtine Nichols, } Knights.

Of the Exchequer.

Laurence Tanfield,
George Snigge,
James Altham,
Edward Bromley, } Knights.

Serjeants at Law.

Henry Montague, Knight.
John Sherley,
Thomas Harris,
Robert Barker,
Richard Hutton,
John Davis, Knight.
Randolph Crew, Knight.
Robert Hitcham, Knight.
George Wilde,
William Towſe.
Leonard Bawtree,
Henry Finch,
Thomas Chamberlain,
Francis Moore,
Richard Athow,
Francis Harvey,
Charles Chiborne,
Thomas Richardſon.

FINIS.

The Catalogue Alphabatical of all the principal Cases contained in the several Books of Reports of the late most reverend Judge Sir *Edward Coke*.

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Doughties case		26	Eliz.	3	8
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Downe and Hopkins case		36	Eliz.	4	39
Drywoods case		42	Eliz.	5 2. part.	48
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Foxton and Colstons case		35	Eliz.	4	23
Francis case		7	Jac.	8	89
Franklins case		36	Eliz.	5 2. part.	47
Freemans case		41	Eliz.	5 2. part.	45
Frenches case		19	Eliz.	4	31
Frosts case		41	Eliz.	5 2. part.	89
Fulwoods case		33	Eliz.	4	64

G

Gages case	Year	41	Eliz.	5 2. part.	45
Gardiner and Davies case		35	Eliz.	4	16
Gardiners case		21	Eliz.	5 2. part.	57
Garnons case		40	Eliz.	5 2. part.	89
Gascoigne and Pigots case		40	Eliz.	5 2. part.	29
Gatewards case		4	Jac.	6	59
Gee and Snags case		39	Eliz.	4	16
Sir Gilbert Gerrards case		33	Eliz.	4	18
Godfries case		12	Jac.	11	42
Gooches case		33	Eliz.	5 2. part.	60
Goffe and Bibiths case		39	Eliz.	4	43
Goddards case		26	Eliz.	2	5
Goodals case		40	Eliz.	5 2. part.	95
Goodals and Butlers case		40	Eliz.	6	21
Gores case	Year	9	Jac.	9	81
Gorges case		41	Eliz.	6	22
Gravenor and Tedes case		36	Eliz.	4	23
Grayes case		37	Eliz.	5 2. part.	78
Greeneleyes case		6	Jac.	8	72
Graise case		5	Jac.	10	76
Greenes case		44	Eliz.	6	29
Greisleis case		36	Eliz.	8	38
Gregories case		38	Eliz.	6	19

H

Hamond and Huberds case	Year	43	Eliz.	4	27
Haidons case		20	Eliz.	3	7
Haidons case		28	Eliz.	4	42
Hals case		2	Jac.	5 2. part.	51
Hall and Stanleies case		10	Jac.	10	68
Hals case		31	Eliz.	7	25
Hals case		8	Jac.	8	172
Hallings case		38	Eliz.	5 2. part.	22
Hargraves case		42	Eliz.	5 2. part.	31
Harlakendens case		31	Eliz.	4	62
Harpurs case		12	Jac.	11	23
Harris and Jayes case		41	Eliz.	4	30
Harrisons case		40	Eliz.	5 2. part.	28
Helliers case		41	Eliz.	6	24
Hembline and Forces case		31	Eliz.	4	60
Hensloes case		43	Eliz.	9	37
Henry Finches case		3	Jac.	6	39
Henstead case		37	Eliz.	5 2. part.	10
Hexe and Yeomans case		27	Eliz.	4	15
Hickmots case		8	Jac.	9	52
Higgens case		3	Jac.	6	44
Higgenbottomes case		35	Eliz.	5 2. part.	19
Hoes case		34	Eliz.	5 2. part.	70
Hoes case		42	Eliz.	5 2. part.	89
Hoe and Tailours case		37	Eliz.	4	31
Hollands case		39	Eliz.	4	75
Holts case		9	Jac.	9	132
Hopkins and Downs case		36	Eliz.	4	29
Hubbert and Hammonds case		43	Eliz.	4	27
Huckley and Fitches case		36	Eliz.	4	23
Hudson and Lees case		31	Eliz.	4	43
Hungates case		43	Eliz.	5 2. part.	103
Hunne and Oglies case		33	Eliz.	4	42
Hynds case		34	Eliz.	4	68

I

Jackson and Neals case	Year	37	Eliz.	4	27
Jay and Harris case		41	Eliz.	4	30
James and Rutletch case		42	Eliz.	4	17
Jeffryes case		32	Eliz.	5 2. part.	64
Jennings case		38	Eliz.	10	44
Jentlemans case		25	Eliz.	6	11
Jewels case		30	Eliz.	5 2. part.	3
Isle of Elie and case thence		7	Jac.	10	141
Jues case		40	Eliz.	5 2. part.	11
Justice Windhams case		32	Eliz.	5 2. part.	7

K

Keightleyes case	Year	7	Jac.	10	139
Keite and Queintons case		31	Eliz.	4	25
Kennes case		4	Jac.	7	42
Knights case		31	Eliz.	5 2. part.	44

L

Lampets case		10	Jac.	19	47
Lambes case		41	Eliz.	5 2. part.	23
Lambes case		8	Jac.	9	59
Lanes case		29	Eliz.	2	16
Laughters case		37	Eliz.	5 2. part.	21
Lee and Hudsons case		31	Eliz.	4	43
Legates case		10	Jac.	10	109
Lepingwel and Buntings case		28	Eliz.	4	29
Libellus famosus & casus inde		3	Jac.	5 2. part.	125
Lifords case		12	Jac.	11	46
Lillingstons case		5	Jac.	7	38
Lincolne Colledge case		38	Eliz.	3	53
Littletons case		39	Eliz.	5 2. part.	47
Lofields case		10	Jac.	10	100
Longs case		2	Jac.	5 2. part.	120
London and case thence		7	Jac.	8	121
Lovedayes case		6	Jac.	8	66
Lowes case		7	Jac.	9	122
Luter and Melwich case		30	Eliz.	4	26
Lutrels case		43	Eliz.	4	84

Madam

M

Madam Yongs case — Year 34 Eliz. 7 — 15
Mayoes case — 35 Eliz. 1 — 141
Magdalens Colledge case — 13 Jac. 11 — 66
Mallories case — 43 Eliz. 5 2. part. — 111
Mannings case — 7 Jac. 2 — 95
Mansores case — 26 Eliz. 9 — 1
Marcis case — 10 Jac. — 111
Marsh &c. and Lambs case — 8 Jac. 9 — 59
Market open and case thence — 38 Eliz. 5 2. part. — 83
Markales case — 35 Eliz. 6 — 3
Markham and Count. of Rutl. case — 23 Eliz. 10 — 113
Marquess of Wincheſt. case — 25 Eliz. 3 — 1
Marquess of Wincheſt. case — 41 Eliz. 6 — 23
Maunds case — 43 Eliz. 7 — 28
Mathewsons case — 39 Eliz. 5 2. part. — 23
Melwich and Luters case — 30 Eliz. 4 — 26
Mones case — 9 Jac. 1 — 133
Metcalfes case — 12 Jac. 11 — 38
Michilbornes case — 38 Eliz. 6 — 20
Middletons case — 1 Jac. 5 2. part. — 28
Misbornes case — 29 Eliz. 7 — 6
Mights case — 8 Jac. 8 — 163
Middleton and Bakers case — 42 Eliz. 5 2. part. — 104
Middleton and Osborns case — 11 Jac. 10 — 130
Mildmaies case — 26 Eliz. 1 — 175
Mittons case — 26 Eliz. 4 — 32
Monopolies case — 44 Eliz. 11 — 84
Mollyneus case and Cliftons — 28 Eliz. 4 — 27
More and Hussies case — 9 Jac. 9 — 71
Motrices case — 27 Eliz. 6 — 12
Murrel and Smithes case — 34 Eliz. 4 — 24

N

Neal and Jacksons case — Year 37 Eliz. 4 — 26
Nevils case — 2 Jac. 7 — 83
Nichols case — 38 Eliz. 5 2. part. — 43
Nokes case — 41 Eliz. 4 — 80

O

Ognels case — Year 29 Eliz. 4 — 48
Ogle and Hunnes case — 33 Eliz. 4 — 42
Olands case — 44 Eliz. 5 2. part. — 116
Orphanes of Londons case — 35 Eliz. 5 2. part. — 73
Osborne and Middletons case — 11 Jac. 10 — 130
Oxford and Crosses case — 41 Eliz. 4 — 18
Oxenbridge and Hickmots case — 8 Jac. 9 — 52

P

Pages case — Year 30 Eliz. 5 2. part. — 52
Pagets case — 36 Eliz. 5 2. part. — 76
Packmans case — 37 Eliz. 6 — 18
Paines case — 29 Eliz. 8 — 34
Palmers case — 37 Eliz. 4 — 76
Palmers case — 3 Jac. 5 2. part. — 126
Palmers and Thorps case — 25 Eliz. 4 — 20
Peacocks case — 9 Jac. 9 — 70
Pease and Clunnes case — 37 Eliz. 4 — 23
Penal Statutes and case thence — 2 Jac. 7 — 36
Penants case — 38 Eliz. 3 — 64
Penifathers and Clarkes case — 26 Eliz. 4 — 23
Perinns case — 38 Eliz. 5 2. part. — 85
Penrudducks case — 40 Eliz. 5 2. part. — 100
Perymans case — 41 Eliz. 5 2. part. — 84
Perdons and cases thence — 29 Eliz. 6 — 13
Peytois case — 9 Jac. 9 — 78
Petifers case — 45 Eliz. 5 2. part. — 32
Philips and Badbies case — 14 Eliz. 4 — 19
Piggots case — 40 Eliz. 5 2. part. — 29
Piggots case — 12 Jac. 11 — 29
Pilkingtons case — 43 Eliz. 5 2. part. — 76
Pinchons case — 9 Jac. 9 — 87
Pynnels case — 44 Eliz. 5 2. part. — 117
Playters case — 26 Eliz. 5 2. part. — 34
Podgers case — 10 Jac. 9 — 104
Porters case — 34 Eliz. 1 — 16
Portingtons and Rogers case — 11 Jac. 10 — 36
Portemans case — 30 Eliz. 4 — 23
The Powlters case — 8 Jac. 9 — 56
Poulters case — 12 Jac. 11 — 29
Priddle and Nappers case — 1 Jac. 11 — 8
Princes case — 42 Eliz. 5 2. part. — 29
Prince Henries case — 3 Jac. 8 — 1

Q

Quare imp. & case thence — Year 31 Eliz. 7 — 25
Queinton and Keits case — 31 Eliz. 4 — 25
Quickes case — 9 Jac. 9 — 129

R

Ratcliffes case — Year 34 Eliz. 3 — 37
Rawlins case — 30 Eliz. 4 — 52
Reads case — 2 Jac. 5 2. part. — 33
Reads case — 42 Eliz 6 — 24
Read and Redmans case — 10 Jac. 10 — 134
Rector of Cheddingtons case — 39 Eliz. 1 — 148
Ridgewayes case — 36 Eliz. 3 — 52
Rivets case — 24 Eliz. 4 — 22
Robberies and cases thence — 27 Eliz. 7 — 26
Robinsons case — 1 Jac. 5 2. part. — 32
Rogers and Portingtons case — 11 Jac. 10 — 36
Rookes case — 40 Eliz. 5 2. part. — 99
Rosewels case — 35 Eliz. 5 2. part. — 19
Rosses case — 42 Eliz. 5 2. part. — 13
Rouse and Arthures case — 29 Eliz. 4 — 34
Rowlands case. — 36 Eliz. 5 2. part. — 41
Ruddocks case — 41 Eliz. 6 — 25
Rudleigh and James case — 42 Eliz. 4 — 11
Russels case — 26 Eliz. 5 2. part. — 87

S

Sadlers and their case — Year 30 Eliz. 4 — 54
Saffines case — 3 Jac. 5 2. part. — 123
Salmond and Beadshawes case — 10 Jac. 9 — 60
Sammonds case — 36 Eliz. 5 2. part. — 77
Sampson and Bacons case — 8 Jac. 9 — 53
Savels case — 12 Jac. 11 — 55
Sanders case — 41 Eliz. 5 2. part. — 12
Scamblers case — 45 Eliz. 10 — 61
Scroopes case — 10 Jac. 10 — 144
Semaines case — 2 Jac. 5 2. part. — 91
Sendils case — 27 Eliz. 7 — 6
Sewers and case upon com. of them — 7 Jac. 10 — 138
Saint Johns case — 34 Eliz. 5 2. part. — 71
Serjeant of Londons case — 9 Eliz. 9 — 161
Sharps case — 42 Eliz. 6 — 26
Shaw and Tompsons case — 37 Eliz. 4 — 30
Shelleyes case — 23 Eliz. 1 — 88
Shypleis case — 8 Jac. 8 — 133
Sir Francis Barringtons case — 8 Jac. 8 — 137
Sir George Brownes case — 36 Eliz. 3 — 42
Sir Richard Buckleys case — 34 Eliz. 4 — 14
Sir George Reynels case — 9 Jac. 9 — 95
Sir Thomas Cicils case — 40 Eliz. 7 — 18
Sir Hugh Chomleyes case — 39 Eliz. 2 — 50
Sir Edward Cleers case — 42 Eliz. 6 — 17
Sir Henry Constables case — 43 Eliz. 5 2. part. — 106
Sir Andrew Corbets case — 42 Eliz. 4 — 81
Sir Miles Corbets case — 27 Eliz. 7 — 5
Sir George Cursons case — 5 Jac. 6 — 75
Sir Drue Druries case — 5 Jac. 6 — 73
Sir Francis Englifields case — 34 Eliz. 7 — 11
Sir Molle Finches case — 4 Jac. 6 — 62
Sir Gerard Fleetwoods case — 8 Jac. 8 — 171
Sir William Fosters case — 6 Jac. 8 — 65
Sir Gilbert Gerrards case — 33 Eliz. 4 — 18
Sir William Harberts case — 27 Eliz. 3 — 11
Sir Rowland Hawards case — 37 Eliz. 2 — 35
Sir John Heydons case — 10 Jac. 11 — 5
Sir Henry Knevets case — 38 Eliz. 5 2. part. — 85
Sir Richard Lechfords case — 7 Jac. 8 — 98
Sir Anthony Maines case — 38 Eliz. 5 2. part. — 21
Sir Anthony Mildmaies case — 3 Jac. 6 — 43
Sir John Mollins case — 40 Eliz. 6 — 5
Sir John Needhams case — 8 Jac. 8 — 135
Sir Henry Nevils case — 11 Jac. 11 — 17
Sir Thomas Palmers case — 43 Eliz. 5 2. part. — 24
Sir William Pelhams case — 31 Eliz. 1 — 3
Sir William Pexhals case — 7 Jac. 8 — 84
Sir Edward Phittons case — 5 Jac. 6 — 79
Sir Hugh Portmains case — 40 Eliz. 7 — 27
Sir Edward Seimers case — 10 Jac. 10 — 95
Slades case — 38 Eliz. 4 — 91
Slingesbies case — 30 Eliz. 5 2. part. — 18
Smith and Murrels case — 34 Eliz. 4 — 24
Smithes case — 10 Jac. 10 — 135
Snagge and Gees case — 39 Eliz. 4 — 10
Snellings case — 37 Eliz. 5 2. part. — 82
Sondayes case — 8 Jac. 9 — 127
Souldiers and case thence — 43 Eliz. 6 — 27
Southcots case — 43 Eliz. 4 — 83

Sparries

The general Table.

Sparries case	Year	33	Eliz.	5	2. part.	61
Specots case		32	Eliz.	5	2. part.	57
Spensers case		25	Eliz.	5	2. part.	16
Spencers case		45	Eliz.	6		9
Stanhop and Bliths case		27	Eliz.	4		15
Stanley and Hals case		10	Jac.	10		68
Stiles case		38	Eliz.	5	2. part.	20
Stoughters case		7	Jac.	8		168
Stone and the Poulters case		8	Jac.	9		58
Studely and Bulheads case		45	Eliz.	4		16
Suttons case		10	Jac.	10		1
Swans and case thence		34	Eliz.	7		15
Swains case		6	Jac.	8		63
Syers case		32	Eliz.	4		43
Symmes case		6	Jac.	8		51

T

Tailour and Hoes case	Year	37	Eliz.	4		31
The Tailors of Ipsw. case		12	Jac.	11		53
Talbots case		7	Jac.	8		102
Tavernour and Cromwels case		26	Eliz.	4		27
Teed and Gravernors case		36	Eliz.	4		23
Teyes case		34	Eliz.	5	2. part.	38
The Bishop of Bath and Wels case		3	Jac.	6		32
The Bishop of Canterburies case		38	Eliz.	2		46
The Bishop of Winchesters case		37	Eliz.	2		38
The Lord Aburgavenies case		5	Jac.	6		78
The Lord Aburgavenies case		10	Jac.	10		117
The Lord Andersons case		41	Eliz.	7		21
The Lord Buckhursts case		40	Eliz.	1		
The L. Cromw. and Anders. case		43	Eliz.	2		70
The L. Cromw. and Dennis case		20	Eliz.	4		12
The L. Chieneis case		34	Eliz.	5	2. part.	68
The L. Darcies case		4	Jac.	6		
The L. Montjoyes case		31	Eliz.	5	2. part.	3
The L. Shandos case		4	Jac.	6		52
The L. Staffords case		7	Jac.	8		74
The L. Sanchers case		10	Jac.	9		114
The L. de la Wares case		39	Eliz.	11		
Thoroughgoods case		24	Eliz.	2		5
Thoroughgoods case		9	Jac.	9		136
Thorp and Palmers case		25	Eliz.	4		20
Tirringhams case		27	Eliz.	4		36
Tompson and Shawes case		37	Eliz.	4		30
Tookers case		37	Eliz.	2		62
Toursons case		8	Jac.	8		170
Tresham case		10	Jac.	9		108
Treports case		36	Eliz.	6		14
Trollops case		6	Jac.	8		
Turnours case	Year	8	Jac.	8		132
Twynes case		44	Eliz.	3		80
Thetford School case		8	Jac.	8		130

V

Vavasor and Dowmans c.	Year	26	Eliz.	9		1
Vaughans case		40	Eliz.	5	2. part.	49
Vauxes case		33	Eliz.	3		44
Vauxe and Brooks case		28	Eliz.	4		39
Vernons case		15	Eliz.	4		1
Vicount Mountagues case		43	Eliz.	6		27
Vyniorscase		7	Jac.	8		80
Virgils case		8	Jac.	8		173
Ughtreads case.		33	Eliz.	7		19

W

Wades case	Year	43	Eliz.	5	2. part.	114
Waites case		45	Eliz.	4		47
Walcots case		30	Eliz.	5	2. part.	36
Warden and &c. of Sadlers case		30	Eliz.	4		55
Walkers case		39	Eliz.	3		12
Walkers case		41	Eliz.	4		41
Wethrels and Darleyes case		35	Eliz.	4		40
Weaver and Cardens case		37	Eliz.	4		16
Webbes case		6	Jac.	8		45
Westbies case		34	Eliz.	3		67
Westwicke and Wires case		33	Eliz.	4		28
Wheelers case		43	Eliz.	6		6
Whelpdales case		2	Jac.	5	2. part.	119
Whistlers case		10	Jac.	10		63
Whitlocks case.		6	Jac.	8		70
Whittinghams case		45	Eliz.	8		42
Wildes case		41	Eliz.	6		16
Wields case		7	Jac.	8		78
Williams case		35	Eliz.	5	2. part.	72
Winingtons case		41	Eliz.	2		59
Winsores case		41	Eliz.	5	2. part.	102
Wirrels case		41	Eliz.	5	2. part.	49
Wilcots case		41	Eliz.	2		60
Wifemains case		27	Eliz.	2		16
Wright and Portmans case		30	Eliz.	4		23
Wroth and Wigs case		34	Eliz.	4		45
Wymarks case		36	Eliz.	5	2. part.	44
Windams case		32	Eliz.	5	2. part.	7

Y

Yeoman and Hexe case	Year	27	Eliz.	4		40
Yongs case		28	Eliz.	4		7
Dame Yongs case		34	Eliz.	7		15

The

The general Titles naturally rising out of the Books of Sir *Edward Coke* Knight, in which he that is ready may more easily find any thing in them contained.

A

Abatement of writ, see title writ.
Abbot and Prior.
Abeyance.
Abettors.
Ability, see Capacity.
Abjuration.
Abridgement.
Absence, see Presence.
Acceptance.
Action upon the case.
Action upon the statute.
Actions popular.
Account.
Accord.
Accusation.
Acquittance.
Ad quod damnum.
Addition.
Adjournment.
Ameasurement.
Admiral.
Administration.
Admission.
Affray.
Agent and patient.
Agreement and, &c.
Aid.
Aid of the King.
Aid to make his son Knight &c.
Alien born.
Ail and besail.
Alienation without &c.
Amendment.
Amercement.
Annuity.
Answering.
Appeals.
Appearance.
Appendant.
Apportionment.
Appropriation.
Approvement.
Approver.
Arbitrement.
Arraignment.
Arrests.
Arrerages.
Arts and Artizans.
Assets.
Assignee.
Assent and Consent.
Assise.
Assurance.
Attachment.
Attachment upon prohibition.
Attainder.
Attendance.
Attournment.
Attourney and Gardian.
Ancient demean.
Audita querela.
Auditors.
Averments.
Avowry.
Avowson.
Authority.

B

Baily.
Bankrupts.
Bank.
Bargain &c.
Bagain and sale.
Baron and fem.
Bar.
Barretor.
Bastardy.
Battail.
Benches.
Bench of the King.
Bilaws.
Bill.
Bishop.
Blets.
Burglary.
Burning &c.

C

Capacity.
Capias and Exigent.
Castles.
Causa matrimonii.
Certificat.
Cessavit.
Chalenge.
Champerty.
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Charge.
Charter of the K:
Charters.
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Chimin.
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Clerks.
Colledge.
Colours.
Collusion.
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Commission.
Common.
Common Law.
Common-wealth.
Composition.
Computation.
Concealment.
Conditions.
Confederacy.
Confession.
Confirmation.
Consanguinity.
Conscience.
Consideration.
Conspiracy.
Constables.
Constat.
Consultation.
Contempt.
Continuance.
Continual claim.
Cont. form. collat.
Contra form. stoff.
Contract.
Contribution.
Conusance.
Copyhold.
Corody.
Coroners.
Corporation.
Corpus cum causa.
Corruption of blood.
Costs.
Coverture.
Covenant.
Count.
Countermand.
Counterplee of aid.
Of Voucher.
Of warranty.
County Palatine.
Courts.
County Court.
Crown.
Cui in vita.
Courtesie.
Custom.

D

Damages.
Day, see Jour.
Darrein presentment.
Death and life.
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Deeds.
Default and appearance
Defamation.
Defeasance.
Degrees.
Delay.
Demand.
Demurrer.
Deodands:
Departure in despight.
Departure in pleading.
Denizen.
Deposition.
Deprivation:
Deputy.
Detainer, see Ret.
Debt.
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Devastavit.
Devest, see Vest.
Devenerunt.
Devises.
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Disability.
Discent.
Disclaim.
Discont. of process.
Of lands.
Discretion.
Dispensations.
Disfranchisement.
Disseisin.
Distress.
Double plet.
Doves, and Pigeons.
Dower.
Dum fuit infra &c.
Dum non compos ment.
Duresse.

E

Eating and drinking, see Manger, and Boyer.
Ejectione firma.
Of ward.
Eir.
Election.
Elegit.
Elopement.
Emblements.
Emparlance.
Encumbent.
Endenture.
Enditement.
Enfant.
Enfranchisement.
Enformation.
Enheritance.
Enquests.
Envolement.
Entendment.
Enterpleader.
Entre and writs of Entre.
Entre lawful.
Entre of plets.
Equipollent.
Error.
Escape.
Escheator.
Escheat.
Eschequer.
Escuage.
Esplets.
Essoin.
Estates.
Estoppel.
Estovers.
Estranger.
Estreats.
Eviction.
Evidence to the inquest.
Evidence and charters.
Examination.
Exception.
Exactiom, see Extortion.
Exchange.
Excommunication.
Execution.
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Exemplification.
Exigent.
Exposition.
Ex post facto.
Extent.
Extinguishment.
Extortion.

F

Failing of Records.
Fair, and Market.
False imprisonment.
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False Latine.
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Fealty, see Hom.
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Fee simple, see Estates.
Feoffments.
Feoffments to uses.
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Fines of lands.
Fold and foldage.
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Forfeiture.
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Frankmarriage.
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Fraudulent gifts.
Fresh suit.
Fugitives.

G

Gail, Gailour.
Gavil kind.
God.
Grand serjeanty.
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Grants of the King.
Gifts.

H

Habeas Corpus, & Corpora.
Habere facias seis.
Harriots.
Heir.
Hereset.
Homage.
Hors de fee.
Hostelour.
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Hundred.
Husband and wife, see Baron, and Fem.
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I

Ideots and Lunaticks.
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Imparlance.
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Impossibility.
Imprisonment.
Incertainty.
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Indicavit.
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Inholders.
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Instance.
Intrusion.
Joining in action.
Joining in aid.
Jointures.
Journies accounts.
Ipso facto.
Ireland and Scotland.
Issues join.
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Court of Pipowders is incident to a Fair or Market, and of what contracts or &c. ſhall this Court have cogniſance and juriſdiction. b. 6.12. b. 10.73.

Where a Corody is incident to the founder upon every foundation of Religious Houſe, b.9.129. b. 10.33. ſee tit. Corody.

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Where a Curtelage, Garden or Land, ſhall be parcel of an houſe, or not, b. 2. 32. b. 6. 64.

Where a reverſion ſhall be parcel of a Mannor, or &c. notwithſtanding the poſſeſſion be ſevered for a time by Leaſe, b. 5.2. p. 11. b.6.66. b.11.47.50 b.8.99.

Where no remitter ſhall be to the thing appendant, before the principal be recontinued, b.1.112. b 3.3. ſee tit. Remitter.

Where an advowſon, or &c. append. may be append. for part and in groſs for the other part, or for a time diſappend. and after append. again, b. 8.79. b.9.27. b.11.47.50.

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By feoffment of a meſſuage with the appurtenances, what thing will paſs, what not, b.2.32. b.6.64.

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Where and what things append. or &c. paſs by grant, or feoffment, without the word with the appurtenances, and what not, b.1.122. b.2.32. b.3.32. b.10.64.

Where by partition of a Mannor amongſt Parcenors, the advowſon remains append. ſee tit. Partition.

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Where one Mannor may be parcel, or append. to another, ſee tit Mannor.

Court Baron is incident to a Mannor, ſee tit. Mannor and incident.

Where by grant of a reverſion rent paſſes as incident, ſee tit. grant and aſſignee.

Where Common of eſtovers, may be append. to land or not, ſee tit. Common.

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Where iſſue in *Quare impedit* ſhall be taken upon the appendancy, ſee tit. Iſſue joyned.

Where by grant of one thing, another ſhall paſs as incident to that, ſee tit. Grants.

Where common appendant, or appurtenant ſhall be apportioned, ſee tit Apportionment.

Where a thing append. or appurt. is extinguiſhed, by change and alteration of the principal, or not, ſee tit. Extinguiſhment.

Where thoſe words (with the appurtenances) ſhall be put into a Plaint, ſee tit. Plaint.

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Where rent charge, or ſec. ſhall be apportioned, or not, b. 4.38. b. 9.135.

Office of the Sheriff cannot be apportioned, b.4.33,34. ſee tit. Sheriff.

Where ſuit ſervice intire, ſuit real, or ſervice intire ſhall be apportioned, or not, b. 61.2. b.8.105,106.

Where Heriot ſhall be apportioned and divided, or not, b. 6.1,2. b. 8.105,106. ſee tit. Heriot.

Where debt ſhall be apportioned and divided, where not, b.3.22. b.8.79.153. ſee tit. Debt.

Where a contract ſhall be apportioned, or not, b. 3.22,23. b.4.3. b.8.79.153.

Where a condition ſhall be apport. or divided, or not, b. 1.97. 174. b. 2. 57. b 4.52. 120. b.5.2. p.55. b.8.7.

Where authority given to two or more may be apportioned and divided, or not, b. 1.173,174. 164. to 167. b.3.34. b.5.2. p. 90. 93, 94.

Where common ſhall be apportioned, or not, b.4.37. b 8.79. b. 9.135. ſee tit. Extinguiſhment Dun. nom. pæn. r. 8.79.

Where Damages ſhall be apportioned, and ſevered againſt the defendants. b. 10. 117. b. 11. 5,6,7.

Where a verdict ought to apportion and ſever the damages, which the plaint. ought to recover againſt one ten. or def. b.10.130. to 133.

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Where a man may apportion and divide his execution againſt the defend. or not, but muſt ſue all. b.5.86.b.11.43. ſee tit. Execution.

Where rent, ſuit, or ſervices, or other thing iſſuing out of Lands, in ſeveral Counties ſhall be apportioned, and ſeveral actions maintained on them. b. 4. 4. b. 7. 3. ſee tit. Aſſets, and writ.

Where warranty ſhall be apportioned, and determined, in part, and ſtand in another part or not. b.8.51.52. ſee tit. Warranty.

Where debt ſhall be apportioned, and action maintained for parcel of a debt, upon an Obligation, Contract or &c. and the form of the Count. b.3.22. b.4.94. b.5.1. p.81. b.10. 128. ſee tit. Debt.

Where a deed may be apportion. and void in part, or void againſt one of the parties, and good againſt another, or not. b.2.24.58. b.5.23.119.b.10.86,87.b.11.27. ſee tit. Deeds.

Where a power to revoke uſes &c. and revocation may be apportioned, and done at ſeveral times, or not. b.1.173. r.5. ſee tit. Revocation.

Where apportionment ſhall be of the joynture of a woman or not. b.4.3. ſee tit. ſtat. and 27 H.8.c.10.

Where amercements ſhall be apportioned, or divided, where not. ſee tit. Amercements.

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Of an Exchange and how it ſhall be void in part, and hold in the other part. ſee tit. Exchange.

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Of a Church and how it ſhall be made, or conſolidation of a Parſonage and Vicarage, and how that is to be done, to whom, by whom and without the aſſent of whom not, and what time. b.3.54. b.5.2. p.10.56. b.7,8. b.11.9.b. 108.107.

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What things are requiſite to be obſerved in every arbitrement. b.5.2. p.77,78.8.103. b. 8. 89.

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Where a man ſhall be arraigned upon an indictment, hanging an appeal againſt him for the ſame felony &c. within a year or not. ſee tit. Appeals.

Where a man acquitted of felony, ſhall be again arraigned or not. ſee tit. Appeals.

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Where &c. the acceſſary in felony &c. ſhall be arraigned. ſee tit. Crown.

Where the enqueſt (upon acquittal of one arraigned) ſhall be charged to inquire if he fled ſee tit. Forfeiture.

Where a man ſhall have his Clergy or not. ſee tit. Clergy.

Where a man arraigned ſhall abjure, and where arraigned, and put to death after abjuration, ſee tit. Abjuration.

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Arreſts.

Where arreſts is lawful and juſtifiable, becauſe he is vagrant, and a night-walker. b. 9. 68. ſee falſe impriſonment.

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Where an Arreſt by a Juſtice of the Peace or Sheriff for ſurety of the Peace, or by others by their precept, be lawful and juſtifiable or not. b.5.2.p.59.b.6.54.b.9.68.

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Where an Arreſt ſhall be juſtifiable by force of a warrant, though that were inſufficient, or not. b.10.70.76.b.9.68.

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Where and in what caſes arreſts of men are forbiddon by the Law in general, and in what places and caſes arreſts of any perſons in ſpecial are not juſtifiable or lawful. b.9.66. b.6 53,54.b.11.82.b 3.12.b.8.141,142.b.5.2.p 87, 88.90.107.

Where an Arreſt for debt before the day it is payable, is lawful. b. 8 126. ſee tit. London.

Where an Arreſt ſhall be lawful and juſtifiable by cuſtom. b. 8. 126.

Where an Arreſt of a Baron, Baroneſs, Earl, Counteſs, Abbot, Prior, Knight, is not lawful and contrar. b.6.53,54. b.7.15.33,34. b.9.49. 68.b 10.76. ſee tit. Exigent.

Where Arreſt of a man by force of a By-law ſhall be good or not. b.5.2.p.64. ſee tit. By-laws.

Where Arreſt of a man juſtifiable, becauſe he is an advowterer and entertains a whore. b.8.126.

Where upon the Arreſt it ſhall be in the choice of the Officer to lead the party to what Juſtice of Peace he pleaſes, to find ſurety of the peace. b.5.2.p.59.

Where an Arreſt and impriſonment by a Juſtice of Peace, Sheriff, Conſtable, or other Officer, ſhall be lawful and juſtifiable by themſelves, or others, by their command or not. b.8.60.126.b.5.2.p.27,28.59,64. b.8.120.127. b.54.6. b.8.38. b.10.70.76,77. b.9.69. b.11. 99. ſee tit. Falſe impriſonment, and Authority.

Where cuſtom which concerns the body of a man and his liberty by arreſt and impriſonment, ſhall be good or not, b.5.2.p.64.b.9.68 b.11.99.

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Of the rent where the executor ſhall have them, where the heir, and where neither. b. 8.118. ſee tit. Statutes, and 32 H.8.c.37. there.

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Where the Plaint. ſhall recover arrerages incurred hanging the writ as well as before, in what actions, and in what not. b 7.29.b.10. 117. b.7.11. ſee tit. Annuity, and Damages. ſee tit. ſtat. Gloc. c. 1.

Debt for arrears of annuity, Count in it, where the action lies or not. b.2.36. b.4.48, 49.b.6.41.b.7.39. ſee tit. Annuity.

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Where debt is maintainable for arrerages of rent after entry for not payment of rent, or after ſurrender or not. b.3.22,23.65,66.

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Where acceptanee, or acquitrance or &c. of rent or &c. the laſt day bars all the arrears incurred the other days before. b.3.65,66. ſee tit. Acceptance.

Where a wife ſhall have the arrerages of rent, or &c. after the death of her huſband and contrar. or not. b.4.51.

Where the Joynt-tenant that ſurvives ſhall have all the arrerages of rent incurred during the life of the other. b.1.96.

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Where debt is maintainable againſt Leſſee for years, for arrerages incurred after aſſignment of his eſtate, ſee tit. Aſſignee.

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Where and when annuities granted to men of arts for their counſel ſhall determine. b. 7. 10.28.b.9.50. ſee tit. Annuity.

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What lands of the heir ſhall charge him to his Fathers debt or barr him in Formedon. b.1.121. b.3.31.78. b.4.22. b.6.42.58. b.8.52. b.10.98.

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Where iſſue in tail ſhall be reſtored to his firſt action upon eviction, or not, b.10.38. ſee reſtored to the 1 action.

How the heir ſhall be charged upon execution awarded againſt him for his Fathers debt, and where his own land ſhall be put in execution in default of aſſets. b.3.12,13.b.8 52.

Where execution ſhall be of aſſets deſcended to the heir, or of the goods aſſigned to the executors of late time after barr or recovery in the 1 action. b.8 53.134. ſee tit. *Scire facias*.

Where and what thing in the hands of the executors ſhall be accounted aſſets. b.1.87.98. 121 b.5.2.p 31.34.b.6 46. b.8.95,96.132,133. b 9.97.

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Where warranty in law with aſſets, ſhall bar the iſſue in tail or not. b.2.96.

Where two coparcenors heirs at the Common Law, or by cuſtom of Gavel kind, or heir of the part of the father, and heir of the part of the mother, ſhall be equally charged for the debt of the anceſtor by aſſets to them deſcended b.3.12,13. ſee tit. Contribution.

Where warranty collateral ſhall not bar in Formedon without aſſets. b.5 2.p.80. b.1.76. 140. b.3 59.62. b.8.51. to 54. b.9.11.26.106. b.10.96,97. ſee tit. Stat.11 H.7.c.20.

Form to plead aſſets by diſcent, or in the hands of execurors in Formedon or debt, and. form of replication. b.5.2.p.60. b.6.46. ſee tit Pleadings.

What ſhall be good evidence in debt againſt the heir or executor, upon iſſue of aſſets by diſcent, or in hands, what not. b.5.2.p.60. b. 6 46.47.

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Where and what perſon ſhall be ſaid an aſſignee in deed, and what not. b.1.1,2.136. b. 3.22.62,63. b.5.2.p.17.96,97.

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Where an annuity granted for counſel given, and to be given, may be aſſigned over. b. 7.28,29.

Where and what appendants and incidents cannot be aſſigned over by any means. b.11. 77,-8. ſee tit. Appendant.

Where a grantee of an office may make a Deputy or Aſſignee, and where not. b.1.24. b.3.83. b.9.49.97. ſee tit. Deputy.

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Where a man ſhall vouch as aſſignee of aſſignee, or as heir of the aſſignee or not. B. 5. 2.p.17.

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Where the aſſignee ſhall vouch, or rebut, without ſhowing the Deed or not. See tit. Monſtrance of Deeds. B.3.62,63. b.4.121.

Where a writ of Covenant lies for or againſt an aſſignee, or not. B.3.63. b.4.80. b.5 2.p.16, 17.24. b.6.43. See Statutes 32 H.8.c.34.

Where an aſſignee by parol ſhall have an action of Covenant, without ſhowing the Deed B.3.63. See tit. Monſtrance of Deeds.

Where debt lies, and ſhall be maintained againſt executors or &c. of aſſignee Leſſee for rent, or not. B.3.23,24. See tit. Debt.

Where an action of Waſt lies againſt tenant in dower or curteſie after aſſignment of their eſtate, for whom, and for whom not. B.3.23. b.9.142.

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Where aſſignee or he that comes in by the Poſt, ſhall rebate by the warranty or not. B.1. 128.136. b.3.62,63. b.5.2.p.17. b.9.96,97.

Where aſſignee of a reverſion upon leaſe for years or &c. ſhall have the rent reſerved, and action of debt for it or not. B.2.68. b.3. 22,23,24. b.4.73. b.5.p.2.17. See tit. Debtor & Atturnement.

Where and what aſſignee of a reverſion ſhall enter for a condition broke, or not. B. 3. 62. b.4.120. b.5.2. p. 112,113. b.7.12. b.8.95. See Statutes 32 H.8.c.34. tit. Condition.

Where action of waſt lies for the aſſignee of a reverſion, without any privity or atturnment. B.2.35. b.4.70. b.5.p.2.113. b.6.68. ſee tit. Atturnment, Waſt, Privity.

Where and what things may be granted over, and the aſſignee ſhall have that advantage (which the grantor had not) to him and his aſſigns, and what not. B. 4. 37. 88. b.7.12. 28,29.

Where a grant and aſſignment of a reverſion or remainder or &c. by ſuch name ſhall be void. 61. 67. 91. E.4.4,5.66. 84. ſee tit. Grants.

Where a Swan mark may be granted and aſſigned over. B.7.17.

Where a *Ne injuſte vexes* lies not for or againſt an aſſignee. ſee tit. *Ne injuſte vexes*.

Where a writ of *Entre in Conſimili caſu* lies for the aſſignee of a reverſion. ſee tit. Entry and writ of Entry.

Where aſſignee of a Cogniſor ſhall have a writ of *Scire facias* to have back the land, put in execution. ſee tit. *Scire fac*.

Where the aſſignee ſhall rebut the avowant, and eſtop him to claim others rents, or ſervices then ſuch as the deed imports. ſee tit. Avowry.

Where the aſſignee ſhall have a writ of Error. ſee tit. Error.

Of tenant in tail after poſſibility of iſſue extinct, he ſhall be compelled to atturn. ſee tit. Tail after &c.

Where aſſignee ſhall ſhow a deed made to a ſtranger, becauſe he conveys his title by him. ſee tit. Monſtrance of deeds.

Where and what thing in action, debt, duty, or right may be aſſigned and granted over by a common perſon and what not. ſee tit. Thing in action.

Grant of ſo many loads of wood, to be taken by aſſignment of the grantor, how to be conſtrued. ſee tit. Expoſition and Grants.

Where the aſſignee of him that takes land in exchange, ſhall not enter for the condition implied in the exchange. ſee tit. Exchange and Condition.

Where aſſignment of an office ſhall be void, and of what office, and what not. ſee tit. Office and Offices.

Aſſignment of dower how to be, what and by whom ſhall be good. ſee tit. Dower.

Where preſcription by a *Que eſtate* is not good without ſhowing the deed of aſſignment. ſee tit. Preſcription.

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Where courſe of trial in cauſes may be changed by aſſent of parties. B.5.2.p.36.40.

Where amendment in proces or &c. by aſſent of parties, ſhall be good, which otherwiſe would not be. B.6.62. b.5.2.p.36.

Where another day then the common day in a plea of Land, may be given by aſſent of parties. B.5.2.p.40. ſee tit. Stat. Marlb. c.12.

Where the pl. or demandant ſhall not have judgment, notwithſtanding the tenant or defendant of aſſent confeſs the action. B.8.120. 133.

Where a recovery ſhall be falſified, becauſe it was covinous by aſſent of partles, and by whom &c. and by whom not. B.3.61.78. b.6. 5. b.8.132,133. b.9.109. b. 10. 39.44,45. ſee tit. Colluſion.

Where entry ſhall be lawful, and by whom in lands becauſe of aſſent to raviſhment, and what ſhall be ſuch aſſent. B.1.95.98.137. b.3. 39,40.61,62. ſee tit. Rape.

Where the entry of him in reverſion, or of his heir or &c. ſhall not be lawful upon a recovery or &c. againſt tenant for life, becauſe they aſſent, and what ſhall be ſuch aſſent to barr, and what not, b.3.60. ſee tit. Entry congeable.

Where a man ſhall plead the aſſent of another without ſhowing a deed of it, b.2.6.57. ſee tit. Commandment, licence, and monſtrance of Deeds.

Where a man ſhall be acceſſary, or principal in caſes of felony by aſſent, ſee tit. Crown.

Where a man ſhall take goods or enter into lands deviſed to him without aſſent of executors, or not, b.2.39. b.4.28.66. b.5.2. p.12. 29. b.10.47.49. ſee tit. Executors.

What aſſent of Lords and Commons, with the King, makes an Act of Parliament, ſee tit. Parliament.

Where a leaſe, grant. feoffment, or &c. by an Abbot, Prior, Biſhop or &c. ſhall be good, and bind the ſucceſſor by agreement, and confirmation of the chapter or covent, and what ſhall be a ſufficient agreement or confirmation, and what not, ſee tit. Confirmation and Abbot.

Where a leaſe, grant or &c. by a Parſon of a Church or Præbend, ſhall be good, and bind the ſucceſſor by confirmation, or aſſent of the Patron, &c. and what ſhall be good and ſufficient agreement or confirmation, what not, ſee tit. Confirmation.

Where a leaſe, grant or &c. by a Dean, is not good to bind a ſucceſſor without aſſent, agreement, or confirmation of others, and of whom, ſee tit. Confirmation.

Where dower, of aſſent of father, mother, or ſiſter, &c. ſhall be good, ſee tit. Dower.

Where tenants or inhabitants ſhall be bound though they aſſent not to the thing done, ſee tit. By-laws.

Where a gift of goods, or eſtate in lands, made to a man abſent, ſhall be good till he diſagrees, ſee tit. Gifts and Feoffments.

Where eſpouſals under the years of marriage, ſhall be made good or diſſolved, by aſſent or diſagreement, ſee tit. Ward.

Where outlary ſhall not be taken away and avoided, without a charter and *Scire facias* upon it, though the plaintiff aſſent to acknowledge, that the party outlawed hath agreed with him, ſee Outlary and Charter.

Of appropriation, the aſſent of what perſon is required to it, ſee tit. Appropriation.

Where the tenure ſhall be altered and changed by aſſent of the Lord and tenant, and in what manner, in what not, ſee tit. Confirmation and Tenure.

Where appearance by aſſent of parties (in caſe where the party ought to appear in perſon) is not error, ſee tit. Attorney and Error.

Where the text [Conſent takes away Error] is true and verified, b.2.62.64. b.5.p.2. 36.40. b.8.58,59.

Aſſiſe.

Where Aſſiſe lies of offices, or of profits of an office, and how it ſhall be by plaint, in the title of it, b.4.45,46,47.49.55. ſee tit. Statutes W.2.c.25. there.

Where an aſſiſe lies of a Church-yard, or of Tythes by a Parſon of a Church, and the form of Plaint in it, b.2.44. b.11.23. ſee tit. Statutes. 32 H.8.

Of a Corody, or parcel of a Corody, and the form of the plaint. b.8.46,47.

Of toll and where it lies, or not. b.8.46,47. ſee tit. Toll.

Of a way, and where it lies, or not. b. 8. 47.

Of profits apprender in a certain place, and of which not. b.8.46,47. b.9.112.

Where aſſiſe lies upon deprivation, for whom, and for whom not. ſee b.11.99.

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by whose not. b.4.9. b.5.2. p.98. and 100. b.6. 57,58. b.7.20. see tit. Seisin.

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Where assise lies of a common, or parcel of a common, and what shall be sufficient to have an assise, and what not. b.4.37. b.6.57. b.8.48. b.9.112. see tit. Common, and Seisin and Common.

Where assise lies, where one man feeds the several of another, the title and barr in it. b. 6.56. W.2.c.26. tit. statutes. b.8.48.

Where assise lies of a turbary, and the plaint in it. b.8. 47. 50. see tit. stat. and W.2. c.25. there.

Where assise lies upon often distress, title, barr, and judgment. b.4.8,9.11. b.8.50. b.11. 44.

Where assise lies in the Confine of the County, and how it shall be taken. b. 4.4. b.7.3.

Where in assise of rent, common, &c. it is necessary that all the Land-tenants be named in it. b.4.37. b.6.58. b.7.3.24.

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Where uses of land upon assurances shall be declared and directed by an Indenture bearing date before, although the assurance subsequent vary in time, quantity of Land, in the persons or &c. or by deed bearing date after the assurance. see tit. Use.

Where intent of the parties shall direct the assurance of lands, and the uses upon them. see tit. Entendment and Uses.

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Where a man another time convict, and attaint, shall be again arraigned, see tit. Appeals, and Arraignment and Coroner.

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Where Copy-hold land may be ſurrendred by Attorny, ſee tit. Copy-hold.
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The Authority of Auditors aſſigned upon account, ſee tit. Account.

Barr in account before the Auditors, and what ſhall be good, what not. ſee tit. Account.

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Where Averment ſhall be made in the concluſion of a plea, upon ſaying, The which matter he is ready to averr. b.8.161.

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Where and what averment he in the remainder ſhall have againſt a fine, what not, but where he ſhall be eſtopped. b.10.96. ſee tit. continual Claim.

Where and what averment a woman and her heirs ſhall have againſt a fine levied by her and her huſband, or to them, and what not. b.1.76. b.2.74,75.77.

Where a ſtranger to a fine ſhall take averment againſt it, or not. b.4.71. b.9.140,141. b. 10. 96. 99. ſee tit. continual claim, and eſtopp.

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Where a man may aver that the feoffment, recovery &c. was by covin, without ſhewing ſpecial cauſe of the covin or not. b.8.133. b. 9.109,110. ſee tit. Colluſion.

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Where a Que eſtate of tenant in tail may be pleaded with averment of the life of &c. or not. b.1.32.44.46.

Where a man in Count counting, in a plea pleading, muſt take averment of the life of him by whom he claims or makes his title, or not. b.1.32.44.45,46.55.69. b.5.2.p.9. b 6.78. b.7.12.38. b.8.70. ſee tit. Pleading.

Where in pleading a man muſt aver that he is the ſame perſon or not. b.1.28.69.

Where in pleading a man muſt take averment, that that was the ſame treſpaſs, &c. and where it ſhall be good or not. b.4.43. b. 5.2 p.61.

Of averments of uſes upon fines, recoveries, or &c. ſee tit. Uſes and Aſſurances.

Where in pleading a general pardon with exception &c. the party muſt alledge and aver that he is not excepted. b 6.79,80. b.8.68. ſee tit. Parliament and Pleading.

Where a Grant, deed or fine incertain in eſtates or perſons, may be made good by averment or not. ſee tit. Deeds.

Where the intent of the Deviſor may be averred and proved by matter without, or not. ſee tit. Deviſe.

Where a man ſhall have a general averment, without anſwering to the ſpecial matter alledged by the other party or not. ſee tit. Ancient Demean, Iſſues joyned, Pleadings and Replication.

Avowry.

Where one perſon ſhall make ſeveral avowries of one intire thing, and two perſons avowry upon the taking of one intire thing or not. b.5.2.p.19.38.

What ſeiſin, and by whoſe hands ſhall be ſufficient to make avowry for rents or ſervices, what and by whoſe not. b.2.67. b.4.8,9. b.8. 65. b.6.57,58. b.9.33,34. b.10.108.

Where ſeiſin of parcel or of one thing ſhall be ſeiſin of all, or of another thing, and ſufficient to make avowry for the whole, or not. b.4.8,9. b.9.35. ſee tit. Seiſin.

Where in avowry or conuſans the avowant ought to alledge ſeiſin by the hands of a perſon certain or not. b.8.65. b.9.36. ſee tit. ſtat. 21 H.8.19.

Where a man ſhall make avowry for rent without alledging any ſeiſin. b.8.65. b.10.108.

Where ſeiſin alledged in avowry ſhall be traverſed, and make a good iſſue or not. b.4.12. b.8.65. b.9.33,34,35. b.10.107,108.

Who may plead at any time ſeiſed of ſervices generally, or after limitation of time, &c. b.9.34,35,36.

Where tenure ſhall be traverſed, and traverſable in avowry, and by whom. b.9.20.33.35

Where avowry ſhall abate, and for what cauſe, and who ſhall plead in abatement of avowry, who not.

What pleas a ſtranger to the avowry ſhall have, what not. b.9.20,21,22. ſee tit. Aid, and joyning in aid.

What perſon ſhall plead nothing behind in avowry, what not. b.9.20.

The form of avowry for rents and ſervices, which ſhall be good, which not, and where if it be not, it ſhall be made good by plea of the other party in barr or not. b.7.23.25.

Where avowry in Court, for another cauſe then that for which he took the diſtreſs in the Country, good. b.3.26.

Where it may be by Donor upon the donor in tail, notwithſtanding the diſceht. b.3.29,30. b.6.58.

Where a ſtranger to the avowry or party ſhall conclude and eſtopp the avowant by his deed to claim other rents or ſervices, &c. then ſuch as the deed imports, or not. b.5.2.p.101. b.9.34.33.

Where notice muſt be given upon change of the tenant in avowry, and that ſhall be material, and what ſhall be ſufficient notice to change the avowry, and what not. b.3.23,24. 30.35.66. b.5.2.p.57,58. b.6.57,58. ſee tit. Arrerages.

Where avowry ſhall be upon a perſon certain, where, and what not; the concluſion of the avowry ſhall be upon the tenant, or tenant by the matter or upon the matter. b.9. 134,135. ſee tit. ſtat. 21 H.8.19.

Where avowry ſhall be good becauſe of Intendment or not. b.3.1,2. b.7.23.25.

Where avowry ſhall be for a parcel, and what tenants ſhall cauſe the Lord to change his avowry, what not. b.3.24. ſee tit. ſtat. Weſt. 3.c.1. & 2. there.

Where encroachment of a rent ſhall be avoided in an avowry, how and when. b.4.11. b.5.2. p.100. b.8.65. ſee tit. Seiſin and Encroachment.

For amercement, and what ſhall be good or not. ſee tit. Amercements.

Barr in avowry for acceptance of rent at the laſt day. ſee tit. Acceptance.

For avowry for aid to marry his daughter, &c. and what ſhall be good. ſee tit. Aid to make his ſon Knight, &c.

Of aid in Replev. and avowry, where and when it ſhall be granted. ſee tit. Aid.

Of joyning in aid in avowry, and how and by whom ſee tit. Joyning in aid.

Of avowry for relief, ſee tit. Relief.

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Of avowry for Homage and fealty. ſee tit. Homage and fealty.

Of avowry for eſcuage, ſee tit. Eſcuage.

Of avowry upon tenant in dower, and for what ſervices, and for whom. ſee tit. Attendant and Dower.

Where avowry ſhall be for ſuits to the Court, Mill, &c. ſee tit. Amercement, Mill & ſuit.

Where avowry ſhall not be good, becauſe the diſtreſs was exceſſive and outragious. ſee tit. Diſtreſs.

Where avowry ſhall be upon diſtreſs taken for the rents, ſervices, or debts of the King, and what ſhall be good. ſee tit. Averment and Diſtreſs.

Of the plea (Out of his fee) in avowry, and who ſhall have this plea. ſee tit. Hors de fee.

Where avowry ſhall be made by Grantee of a ſeigniory or reverſion for rents or ſervices, without attornment or not. ſee tit. Attornment.

What things are diſtrainable for ſervices, or &c. and in what places, and when a diſtreſs may be taken and avowable, in what, and when not. ſee tit. Diſtreſs.

Of avowry for arrerages of rent by executors. ſee tit. ſtat. & 42 H.8.c 37.

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Avowſon.

Appendant to a mannor. b.1.22. b.4.37. b.8.79.

Append. to an acre of land. b.1.122. b.4. 37. b.8.79.

Where *Præcipe quod reddat* lies, and ſhall be maintained of an avowſon, as Formedon, or &c. b.1. 56.91. b.2.74. b.5.2.p.40. b.11.25. 45. ſee tit. Demand.

Where an avowſon append. ſhall become for the time diſappendant, and after append. again, or append. in part and in groſs for another part. b.8.79. b.9.27. b.11.47.50. ſee tit. Appendant.

Where a common recovery of an avowſon in a Writ of Entry ſhall be good. b.1.56.91. b.2.72. b.5.2.p.40.

Where a fine ſhall be levied of an avowſon. b.8.145.

Of appropriation of an avowſon, and how and when, and by whom to be made. ſee tit. Appropriation.

Where a man ſhall not preſent an avowſon appendant, unleſs he have poſſeſſion of the mannor, or &c. to which, &c. ſee tit. Preſent. to a Church.

Where the Writ or Count in Right of avowſon or Quare Impedit ſhall be of a moity, or two parts of an avowſon, or &c. or of an avowſon of the moity of two parts, &c. b.4. 75. b. 5.2. p. 102. b.10.136. ſee tit. Quare Impedit.

Where, how, and when a man may be put out of poſſeſſion of an avowſon. ſee tit. Quare Impedit.

Expoſition of the grant of the next avowſon, or &c. ſee tit. Expoſition.

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Where upon Partition of a mannor, the avowſon remains in common as appendant, &c. ſee tit. Partition.

Where an avowſon append. paſſes by feoffment, or grant of a mannor, or to which, &c. by the words with the appurtances, or without them, ſee tit. Append.

Authority.

The Authority of the Marſhal, and juriſdiction of the Court of the Marſhalſie, b. 4. 46,47. b.6.20,21. b.7.15. b.68. to 78. ſee tit. Marſhalſie.

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The authority of Conſtables in things of the publick weal, and their office, b. 9.68. b. 11. 44.

The authority of a Baily, and what things he may do by vertue of his office general, what not; without Commandment ſpecial, b.4.30.72. b.5.2. p. 86.88.87. b. 8. 142. b. 9. 68.98. ſee tit. Eſcape and Debt.

The authority and office of a Sheriff, and how he ſhall make execution of writs of execution, and where he ſhall be charged of an eſcape, b.3.12.72.80. ſee tit. Sheriff. b.4. 65.67.74.82. b. 5.87.88,89,90,91,92. 115. b. 6.78. b 7.39. b. 8.96.171. ſee tit. Eſcape and Execution.

Power given to make leaſes of lands, or &c. for years, for life, or &c. and what deeds under ſuch authority ſhall be good, what not, b.1.134.139.176. b. 6.33. b.8.70.

Where a gift or two, or more, executed by any one of them ſhall be good or not, b. 4.41.45.46. b. 5.2. p. 9.19.91.94. 120, 121. ſee tit. Feoffments.

A gift to feoffees, or executors to ſell the land of the Teſtator, what ſale by them ſhall be good or not, b.1.111.173. b. 2.53. b.4.55. b.8.76. b.9.76,77.

Where authority or power may be apportioned, and how and by what means, b.1. 164. to 167. 174. b. 3.34. b.5.2. p.91.94.

To revoke uſes, what revocation is good, what not, b. 109. 111. 174. 164, 165, 166, 167. b.3.82, 83. b. 6.28.32,33.64.67. ſee tit. Revocation.

Where a man may have election to do a thing, and execute an eſtate in lands by authority to him reſerved, or as owner of the land, b.6.18. ſee tit. Election.

Where it ſhall determine by death of one, being given during three or four lives, or not, b. 5.2. p.9. ſee tit. Limitation.

Where authority given to two or more, ſhall determine by the death of one of them or not, b. 3. p.2.9. b.11.4.

Authority of Auditors upon account, ſee tit. Auditors and Account, ſee tit. ſtat. W.2. c.11. there.

The authority of the Admiral and juriſdiction of his Court of Admiralty, ſee tit. Admiral.

Authority of Attornies to make livery and ſeiſin upon feoffments, and what livery and ſeiſin by them, is good or not, ſee tit. feoffment.

Authority of a Steward or Lord of a Leet, ſee tit. Leet.

Authority of Juſtices, ſee tit. Juſtices.

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Authority of a Coronor, ſee tit. Coronor.

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Authority of an Adminiſtrator, during minority of an Infant Executor, ſee tit. Adminiſtrat.

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Authority of the Court of Chancery and the decrees there, ſee tit. Court.

Authority countermanded, and by what acts, or accidents, ſee tit. Countermand.

Where a Recovery ſhall be void as not before a Judge, for want of authority and juriſdiction, ſee tit. Falſifying a recovery.

Where the Kings Grant ſhall be void becauſe he had not power to grant, and what things.

The authority of perſons to arreſt, and who may arreſt or give authority to others to arreſt, who not, ſee tit. Falſe impriſonments, and arreſts.

B

Baily.

THE Authority of a Baily, and what things he may do by his general, what not without command ſpecial, b. 4. 30. 127. b.5.2. p.76. b.6.57.59. ſee tit. Authority.

Where tender or making amends for damage feaſant to his Lord and Maſter is not good, b.5.2. p.76.

Where he cannot change the avowry of his Maſter, b.5.2. p.76. ſee tit. Avowry.

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Where ſeiſin of rent, &c. by the hands of a Baily ſhall be ſufficient to make avowry, or &c. or not, b.6.57.59. ſee tit. Seiſin.

Where retaining of a Baily by word without writing ſhall be good, b.4.30.

Where it ſhall be in the choice of a Baily, who arreſts a man upon a warrant of a Juſtice of Peace, to lead the party arreſted to what Juſtice he pleaſes, b.2. p.59. ſee tit. Arreſt and Election.

Writ of account againſt a Baily, and where a man ſhall be charged, Baily or no, b. 2.68. b.10.113,114. b.11.89,90. ſee Account.

Where Homage or fealty may be made, or received, by a Baily Seneſchal Attorny, b. 9. 76. ſee tit. Homage, or &c.

Bench of the King.

Of the Kings Bench, and of what pleas this Court ſhall have juriſdiction, and the authority of the Juſtices of the Kings Bench, and of what not, b. 4.46,47. b.9.99.118. b. 10.73. 118. b. 11.64,65.98. ſee tit. Courts and Juſtices, and ſtat. Magna Chart. c.11. there.

When the Kings Bench comes and removes in any County or Country, it ſuſpends all other Courts and their authorities, b.9.118.

The form of entre and titling the Records in the Kings Bench, b. 99. ſee Entre of pleas.

Where iſſue joyned in the Chancery, ſhall put into the Kings Bench to be tried, and the Court of the Kings Bench ſhall proceed upon it, b.9.99.

Where and when the Kings Bench awards execution upon judgment reverſed by error, ſee tit. Error.

Where the Juſtices of the Kings Bench ſhall award reſtitution upon the ſtat. 8 H. 6. of forcible entre, ſee tit. Forcible entre.

Where the Kings Bench ſhall hold plea in Formedon, or other action real, notwithſtanding the ſtatute of Mag. Chart. c. 11. ſee tit. Statutes, and Mag. Chart. c.11. there.

Where a Record may be removed and certified into the Kings Bench out of another Court by the hands of the Juſtice without proceſs, ſee tit. Records.

Of the diverſity and difference between the Courts of the Kings Bench, common Bench, and Exchequer, in award of proceſs in caſes, ſee tit. Court.

Where office found before an eſcheator ſhall be traverſed in the Court of the Kings Bench, ſee tit. Traverſe.

Bankrupts.

Where commiſſion upon the 13 El. c.7. of Bankrupts ſhall be awarded, and what perſon ſhall be ſaid a Bankrupt, and the authority of the Commiſſioners upon it. b. 2.25. b. 8.98.121. ſee tit. Commiſſions.

Where bargains and ſales, feoffments, grants, leaſes, or &c. made by the Commiſſioners upon the ſtatute of Bankrupts ſhall be good againſt the owners of the lands and their heirs, or &c. and what not, b.2.25.

Where a certificate of the Commiſſioners that a man is Bankrupt, is no eſtoppel to the party, but that he may have his averment againſt it, and traverſe that he is no Bankrupt, b.8.121. ſee tit. Averment.

Where and what decrees ſhall have equal contributions upon this ſtatute, and how contributions or diſtributions of the lands and goods of a Bankrupt ſhall be made, b. 2.25. b. 8. 98.

Banks.

Where an action of the caſe lies, for not repairing of banks, ſee tit. Action upon the caſe.

Where Commiſſions ſhall be awarded to enquire of the decay of banks or other nuſances upon the ſtatutes of ſewers, and the authority of the Commiſſioners upon it. b. 10.138, 139. to 143. ſee tit. Commiſſions of ſewers.

Bargain and ſale of goods, ſee tit. *Contract.*

Bargain and ſale of Lands.

What ſhall be ſaid a bargain and ſale of lands, what ſhall be a ſufficient and good conſideration, within the deed upon bargain and ſale, to raiſe an uſe, to the bargainee, and what not. b.1. 176. b. 8.94. b.2.15.

Where averment without, ſhall be good and ſufficient to enforce the conſideration of a bargain and ſale to uſe, or not, b. 1. 176. b. 2.15.75.77. b.4.3.4. b.5.2. p.26.68. b.7.40. b. 8.155. ſee tit. Averments and Uſes.

Of enrollments of deeds upon bargain and ſale of lands, according to the ſtatute, 27 H.8. and the expoſition of the ſtatute, B.2.36.45. b.4.71. b. 7.10. b. 8.6.93,94. b. 9.106. b.11. 24.58. ſee tit. Enrolments.

Where reſervation of rent upon a bargain of ſale enrolled ſhall be good. b.2.54.

Where a man ſhall have a feeſimple upon bargain or ſale of land, or uſe, without the word Heirs or not.

Where a reverſion or ſeigniory ſhall paſs by bargain and ſale without attornment, ſee tit. Attornment.

Of enrollment of bargains and ſale of lands, and all the matter which concerns enrollments, ſee tit. Enrollments.

Barretor.

Who ſhall be ſaid a Barretor, and what act Barretry, b. 8.37.

Baron and Feme, Husband and Wife.

Capacity of a wife, which ſhall be, and how ſhe ſhall take an eſtate in lands, &c. and how, or not, b. 1. 101. 114.120.130.134. and 136. ſee tit. Capacity.

Where huſband and wife ſhall take eſtates in lands, or &c. by moities, or not, b. 1. 76. 101. b.2.68. b. 3.5.14.25.30. b.8.72,73.171.

Where huſband and wife ſhall be join-tenants, yet ſhall take eſtates at ſeveral times, b.1.101. ſee tit. join-tenants.

Where the lands of the wife, or the land ſhe has purchaſed jointly with her huſband, ſhall be charged with rent granted by the huſband, after his death, or not, b. 1.76. b.2. 77. b.8.271.

What debts, chattels, or things of a wife, which come to the huſband by intermarriage, ſhall the huſband have after the death of the wife, what not, b. 1.39. b.4.51. b. 5. 18. 36.

What debts, chattels, or things which come to the huſband by intermarriage, or accrue to them jointly, during the Coverture, ſhall the wife have after the death of her huſband, b. 10.46.51.

Where and what things of a wife which come to the huſband by intermarriage, ſhall ſhe have again after divorce betwixt them, where and what not, b. 8. thrice.

Where an eſtate in lands, or &c. made to the huſband and wife during the Coverture, ſhall be good; and where and when the wife may diſagree, and what ſhall be a diſagreement, where and what not, b. 1.76. b. 2.61. 57, 58. 77. b.3 21.28. b.10 43.46. b.4.23.30. b.8.63.

Where

Where a grant, contract, or other act by a woman alone during Coverture, ſhall be good. and bind her and her huſband, and her ſelf after the death of her huſband, or not. b.5.57. b.4.23. b.5 2.p.27.b.10.43. ſee tit. Acquittance and Adminiſtrat. and Teſtament.

Where and what act by the huſband ſhall bind the wife executrix, and prejudice her after the death of her huſband, where and what not. b.5.2.p.27.

Where in action againſt huſband and wife def. of the wife ſhall be taken and adjudged the default of the huſband and contrar. b.5.2. p. 57. ſee tit. Default.

Where the wife ſhall plead and anſwer without her huſband, or not. b.11.73.77. 61, 62. b.4.23.

Where huſband and wife acknowledge a plea, or yield an action, b.10.43.

Where a woman Covert ſhall be impriſoned or not. b.9.72. b.11.61.

Where entry or claim of an husband ſhall veſt an eſtate in land, or &c. in the wife, and make a remitter to the wife or not. b.8.44.

Where and what actions ſhall be ſued by the huſband and wife jointly, and in what they cannot join, and what the husband may have alone, or joyntly with his wife at his Election and what not. b.5.2.p.16.18.51.97.59.

Where a grant, releaſe or confirmation, or &c. made to an huſband alone, ſhall enure to the wife or no. b.2.24. b.8.54 ſee tit. Releaſes.

Where a man may give or grant a thing to his wife during the Coverture and contrar' or not. b.4.23.29.1,2,3. b.5.2.p.25,26. ſee Uſes and Copy-hold.

Where a deviſe or Teſtament made by a woman Covert ſhall be good or not. b.4.61.51. ſee tit. Agreement.

Where a deviſe by the husband to his wife ſhall be good. b.4.3.4. b.5.2.p.52.

Where a Conuſee of the husband and wife of a fine levied by them of the land of the wife ſhall hold it diſcharged after the death of the Husband, of rent granted by the Husband alone.

Where husband and wife levy a fine of the land of the wife, and declare ſeveral uſes, and one declares uſes without another, how the uſe ſhall be, and what declaration good. b.2.57,58.

Where a leaſe made by the huſband and wife of the land of the wife, ſhall be ſaid and accounted the leaſe of both of them or not. b.2. 61. b.3.19.21.28. b.5.2.p.26. ſee tit. *Ejectione firmæ.*

Where a warranty collateral deſcends upon a woman Covert, ſhall it barr or bind her for ever, or not. b.1.67.140. ſee tit. Warranty.

Where the King may grant or give lands to the Queen his wife. b.4.23.

Where the huſband may ſurrender Copy-hold land to the uſe of his wife, and good. b.4.29. b.8.63.

Where an huſband ſhall have the arrerages of rent which he has in right of his wife, after her death, or the wife after the death of her huſband or not. b.4.51. ſee tit. Arrerages and Statutes. 32 H.8.c.37. there.

Where the wife ſhall be bound by non-claim, within a year and a day, upon waif and eſtray. b.5.2.p.108.

Where Huſband & Wife ſhall be jointly ſued of a thing during the coverture, or not. b.5.2. p.75. b.11.62. ſee tit. joining in an Action.

Where an Huſband ſhall not be puniſhed after the death of his wife for waſt done during the Coverture. b.5.2.p.75. ſee tit. Waſt.

Where a Copy-hold granted by Huſband and Wife Lady of a Mannor ſhall bind the wife after the death of her huſband. b.4.23.30. b.8.63.

Where and when Homage ſhall be done by the huſband for the lands of the wife. b.6.57. ſee tit. Homage and fealty.

Where the wife ſhall be bound by conditions in deed, or in law, not performed and broken during Coverture or no. b.8.44.

Where a wife ſhall be bound by ceſſing during the Coverture. b.8.44. ſee Ceſſavit.

Where a wife ſhall be bound by waſt done during the Coverture. b.8.44. ſee tit. Waſt.

Where debt ſhall be extinguiſhed by intermarriage betwixt the obligor and obligee, or not. b.8.136,137. ſee tit. Extinguiſhing.

Of Appeal by the wife concerning the death of her huſband, and matter touching it, ſee tit. Appeals.

Where uſurpation of a Church of the wives during the Coverture, ſhall bind the wife or not. ſee tit. Statutes, and W.2.c.5. there.

Where a releaſe of a woman Covert, adminiſtratrix or executrix, is not good. ſee tit. Acquittance and Releaſe.

How the warranty ſhall run upon a fine levied by the huſband and wife of the lands of the wife. ſee tit. Fines of Lands.

How and within what time, and when a wife ought to make her claim upon a fine levied during the Coverture, or &c. how the time ſhall be accounted. ſee cont. claim. and ſtatutes, and 4 H.7.c.14. there.

Where things done by a woman ſhall be countermanded by inter-marriage of the woman after, or not. ſee tit. Countermand.

Where huſband and wife ſhall join in falſe impriſonment. ſee tit. falſe Impriſonment.

Where the wife ſhall be received upon default, and ſaint pleading of the huſband. ſee tit. Reſceit.

Where confirmation to the huſband and wife ſhall give an eſtate to him or her who had nothing before, or not. ſee tit. Confirmat'.

Where and what ſhall be diſcontinuance by the huſband of the wives lands, or &c. or not. ſee tit. Diſcontinuance.

Where the wife ſhall be barred of dower by the fine levied by her and her huſband or by recovery againſt them or not. ſee tit. Dower, or Falſifying.

Where aſſignment of Dower to the wife by the huſband alone, ſhall bind his wife. ſee tit. Dower.

Where and what averment the wife ſhall have againſt a fine levied by her and her huſband, what not. ſee tit. Averments.

Where the wife and her heirs ſhall be eſtopped by act done by her and her huſband during the Coverture or not. ſee tit. Eſtoppel.

Where the Enrollment of a deed indented by a woman Covert ſhall be void, and contrar. ſee tit. Enrollment.

Where upon a fine to the huſband and wife, or by them the wife ſhall be examined. ſee tit. Examination.

Where a woman ſhall be fined to the King, ſee tit. fine to the King and Impriſonment.

Where a fine upon Conuſance *de droit come ceo*, &c. or upon grant or render, and releaſe ſhall be accepted by the huſband and wife, and bind them and their heirs for ever, or not. ſee tit. Fines of lands and averments, and examination.

Where partition by huſband and wife, or the huſband alone ſhall bind the wife after the death of her huſband or not. ſee tit. Partition.

Where a woman ſhall be bound by her acceptance of rent, or &c. and ſhall not avoid the eſtate in land which otherwiſe ſhe might. ſee tit. Acceptance.

Where a woman may diſagree to a joynture made by her huſband, and &c. be endowed of the third part, or not: ſee tit. Agreement and Dower.

Where a woman may diſagree to her dower aſſigned, and be a new endowed or not. ſee tit. Dower.

Where a woman ſhall have the crop upon the lands after the death of the huſband.

Baron and Baroneſs, and Barony.

Deſcription of an Earl, &c. b.9.49. b.7.34. a name of dignity, &c. where the writ ſhall abate for omiſſion of it, not named Baron or Baroneſs, or &c. ſee tit. Writ and Name.

Where the name or dignity of a French-man or Scot, or &c. ſhall be loſt and gone if they come into *England*, or not. ſee tit. Name and *Ireland*.

Where Barons of *Scotland* or *Ireland* may be ſummoned to come to the Parliament held in *England* or not. ſee tit. *Ireland* and *Scotland*.

Where *Capias* or *Exigent* ſhall be awarded againſt a Baron, Earl, &c. or not. ſee Exigent and Execution.

Every Barony held by Grand-ſerjeanty. ſee tit. Grand-ſerjeanty not to be granted for years b.9.97.

When the names of Duke, Marqueſſe or Vicount began. b.9.49.129.97. b.7.24.

The ancient revenue of a Baron, Earl or Duke. b.9.124.

Where a Baron and Peer of Parliament ſhall have trial by his Peers in caſes of Felony or Treaſon, or not. ſee tit. Coron. and Trial.

Amercement of an Earl or Baron, of what value it ſhall be, and how offered. ſee tit. Amercement and Statutes. *Mag. Chart.* c.14.

Where a Baron and Peer of the Realm ſhall have priviledge to be exempt of Juries, and empannel'd upon enqueſts. ſee tit. Jurors and Exempt.

Where day of grace ſhall be given to a Peer of the Realm. ſee tit. Day.

Trial and Iſſue Baron or not Baron, and how it ſhall be tried. ſee tit. Trial.

How many Chaplains of the Church, an Earl, Baron, or &c. may have and retain. ſee tit. Diſpenſations and Statutes. 21 H.8.c.13. there.

A Barony, &c. may be intailed, and within the ſtatute W.2.c.1. of gifts conditional. ſee tit. Statutes. W.2.c.1. there.

Where the King ſhall have primer ſeiſin of lands held of an Honour, or &c. or not. ſee tit. Tenure & Prerog.

Barr.

Barr good at firſt ſight, and where if good by common intendment it ſhall be good and ſufficient enough, and what ſhall be common intendment, and what not. b.3.1,2. b.5.2.p. 121. b8.57. b.10.59.

Barr upon Preſentments or Indictments to repair bridges, ſcour ditches, or make ways, &c. and where a man may traverſe them or not. b.8.46,47. b.9.112,113.118.

Where the Defend. may juſtifie in another place then the Plaint. hath ſuppoſed in treſpaſs, or &c. and the Plaint. ſhall aſſign a place in certain, and the Def. plead in barr, and what Barr and anſwer he ſhall have to it, what not. b.2.6.18. ſee tit. Pleadings.

By acceptance. ſee tit. Acceptance.

Where a man ought to alledge a place and country, or &c. in his plea in barr to the action. ſee tit. Pleadings.

Where a man may make two traverſes in his Barr. ſee tit. Traverſe and Traverſable.

Barr to avoid circuit of action, and what plea ſhall be allowed for this cauſe, where, and what not. ſee tit. Circuit of Action.

Barr good becauſe of a bilaw, and where. ſee tit. Bilaws.

What plea in Barr the diſſeiſor ſhall have, what not. ſee tit. Diſſeiſor.

Where he that is not tenant of the franktenement at the time of pleading, ſhall plead to the writ, or in barr. ſee tit. Pleas.

Where partition ſhall be a barr in action brought by one Coparcener againſt another. ſee tit. Partition.

Wher a man ſhall plead a deed of Feoffment, Grant, or &c. by Name within the deed, though in truth he be otherwiſe named in barr, or &c. or not. ſee tit. Deeds, Miſnaming and Feoffment.

Bar in attachment upon prohibition, and what ſhall be good, what not: ſee Attachment upon Prohibition.

Bar in Formedon in deſcender, what ſhall be good, what not; ſee tit. Formedon.

Bar in action upon the caſe: ſee tit. Action upon the caſe, and below.

Bar in action of account; ſee tit. Account, b. 6.7.

Bar in writ of annuity; ſee tit. Annuity, b.1.112. b.3.65. b.8.145.

Bar in appeals of &c. ſee tit. Appeals.

Bar in Attaint, and what ſhall be good in the mouth of the party, &c. what in the mouth of the pety Jury: ſee tit. Attaint.

Bar in *Audita querela*: ſee tit. *Audita querela.*

Bar in debt upon leaſe for, and what ſhall be good, and what not: ſee tit. Debt.

Bar in debt brought by or againſt Executors, and what ſhall be good, and what not: ſee tit. Executors.

Bar in treſpaſs of Aſſault and Battery: ſee tit. Treſpaſs.

Bar in treſpaſs or falſe Impriſonment againſt a Sheriff or other Officer: ſee tit. Falſe Impriſonment. Juſtification.

Bar in treſpaſs and falſe impriſonment, and where and what ſhall be good, what not: ſee tit. Commandment.

Bar in actions upon ſtatutes, &c. ſee tit. Action upon ſtatutes.

Bar in Ceſſavit: ſee tit. Ceſſavit.

Bar in writ of Covenant, and what ſhall be good, what not: ſee tit. Covenant.

Bar in writ of Dower, and what ſhall be good, what not: b.1.112. b. 4.1. b. 2.74.78. 93. b. 3 25.27. b. 5.2. p. 74,75. b. 8. 150. to 155. ſee tit. Dower.

Bar in Actions perſonals by warranty, and where, and when, and in what: ſee tit. Warranty and Aſſets.

Bar in Detinue of goods, or charters: ſee tit. Detinue.

Bar of acquittal in a writ of a meſne, and what ſhall be good: ſee tit. Meſne.

Bar in Mortdanceſtor, and where it ſhall be good, without traverſing the dying ſeiſed: ſee tit. Mortdanceſtor.

Bar in *Quare impedit*, and &c. ſee tit. *Quare impedit.*

Bar in *Quid juris clamat*, to out the Plaintiff from attornment for ever: ſee tit. *Quid juris clamat.*

Bar in *Quod ei deforceat*: ſee tit. *Quod ei deforceat.*

Bar in Replevy or Avowry: ſee tit. Replevy.

Bar in writ of *Reſcous*: ſee tit. *Reſcous.*

Bar in *Scire facias* to execute a fine, or upon recovery: ſee tit. *Scire facias.*

Bar upon *Scire facias*, ſued by the King upon office found for him: ſee tit. *Scire facias.*

Bar in writ of waſte, and what ſhall be good, what not: b. 2.92. b. 5.2. p. 76.119. b. 3.23. b.6.43,44. ſee tit. Waſte.

Bar in writ of error. ſee tit. Error.

Bar in *Cui in vita*: ſee tit. *Cui in vita.*

Bar in writ of right: ſee tit. Right.

Bar in writ of Ail, Beſail or Couſinage: ſee tit. Ail and Beſail.

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Bar by acceptance: ſee tit. Acceptance.

Bar by acquittance, or releaſe: ſee tit. Acquittance and Releaſe.

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Bar in action becauſe of a Bilaw: ſee tit. Bilaws.

Bar by recovery, or another time barred in another action, and where, and what actions, where, and what not: b. 4.5.43.94. b. 5. 2. p. 33.85. b. 6.7,8.40.45.46. b.8.72. ſee tit. Extinguiſhment, and Election, b.11.65.

Baſtardy.

Whence comes Baſtard, b. 8. 102.

Where the iſſue born before, and out of eſpouſals, ſhall be a baſtard by the Common-law, though he be *Mulier* by the Civil, or Church-Law, b. 5.2. p. 11,12. b.6.65. ſee tit. ſtatutes, and Mag. Chart. c. 9. there.

Where the iſſue ſhall be a baſtard, though born during the eſpouſals, becauſe the wife had another huſband alive, or the huſband another wife, b.4.29. b.5.2. p.98. b.7.43.

Where the iſſue ſhall become Baſtard by a Divorce, though born in lawful eſpouſals, or not, b.5.2. p.98. b.6.66. b. 7.43,44.

Where baſtardy ſhall be tried by certificate of the Biſhop, and where the Court ſhall write to the Biſhop, or not. b.5.2. p.9.11. b.7. 43. 44.

Where the Baſtard is not intended (a child) within the ſtatute, 32 H.8.c.1.

Of wills, &c. b. 6.77. b. 10.83. ſee tit. ſtatutes, and the ſtat. there.

Where poſſeſſion of the eldeſt daughter which is a baſtard, and dying ſeiſed, ſhall make her ſon heir; although the younger occupied the land with the elder in coparcenery, or not, b.8.101.

Where poſſeſſion of the baſtard, and her dying ſeiſed, ſhall make her ſon heir; to the prejudice of the tenant in tail, or them in remainder, or not, b.8.101.

Where poſſeſſion of the baſtard, and her dying ſeiſed, ſhall prejudice the infant who hath right and bind him, or not, b.8.101.

Where poſſeſſion of the baſtard, and continuance of poſſeſſion of thoſe who claim by him, and a deſcent in them, ſhall prejudice and bind the right heir, or not, b. 8.101.

Where poſſeſſion and ſeiſin of the baſtard, of a reverſion, rent or Seigniory, and his dying ſeiſed, ſhall make his ſon heir, and what poſſeſſion ſhall be ſufficient to a dying ſeiſed, and what not, b.8.161.

Where poſſeſſion of the baſtard, and his dying ſeiſed, ſhall prejudice the Lord of whom the land is held in eſcheat, or &c. or not, b.8. 101. ſee tit. Eſcheat.

Where poſſeſſion and dying ſeiſed of a baſtard, muſt be without entre or claim, of the *mulier*, and right heir, and what ſhall be ſufficient entre or claim, to avoid a deſcent, or not, b.8.101. ſee tit. contin. claim.

Where Baſtardy ſhall be alledged in a man after his death, and of what force, and effect it ſhall be, and of what not, b.8.101.

Where a baſtard is not capable of a ſpiritual promotion, but the Biſhop may refuſe him, upon preſenting of him to a Church, b. 5.2. p.28.58. ſee tit. *Quare Imp.* and preſentment to a Church.

Where Action ſhall be maintained for calling one baſtard or not, b. 4.17. ſee tit. Action upon the caſe.

Where a baſtard, by reputation of a ſon, may take an eſtate in lands, or &c. or not, b. 6.65.67. ſee tit. Reputation, and Remainder.

Where the diſpenſation of a Biſhop to a baſtard to be Prieſt, ſhall be good or not, b. 5.28. ſee tit. Diſpenſation.

Where the certificate of a Biſhop, of Baſtardy, or Mulierty, ſhall eſtoppe the parties or ſtrangers, b.7.14.43. ſee tit. Certificate of the Biſhop.

Where age ſhall be granted to the baſtard who claims as heir, ſee tit. Age.

Where a baſtard ſhall vouch as heir, or ſhall be vouched as heir, and how, ſee tit. Voucher and Counterplea of Vouch.

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Bar in treſpaſs, or &c. by reaſon of a Bilaw, or Ordinance, made amongſt tenants, Commoners, or Pariſhioners, and what ſhall be good, what not, b.5.2. p. 63,64.67,68. b. 8.122,123. 125. to 130.

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Where debt lies upon breach of a Bilaw, for the penalty aſſeſſed or not, b. 8.123. ſee Debt and Penalty.

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In which Courts ſuit ſhall be by Bill, and not by original, and in what by original, and not by Bill, b. 10.73. b.6.19. b.1.3.

Againſt a Sheriff upon the ſtat. 23 of H. 6. c. 10. in what Court to be ſued, in what not, b.6.19.

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Bill in the Court of Exchequer, in nature of a *Quo minus*, &c. for the Kings debtor, in account to the King, where, and for whom; ſee tit. *Quo minus.*

Bill of exception of error upon it, and the order of proſecuting it: ſee tit. Error.

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Certificate of the Biſhop in caſes, in which good, which not: ſee tit. Certificate of the Biſhop.

Trial by the Biſhop, which iſſues ſhall be tried by him, which not: ſee tit. Trial.

Where the Biſhops certificate eſtops the parties, where ſtrangers: ſee tit. Certificate of the Biſhop.

Where the writ to the Biſhop ſhall be directed to the Biſhop of the Dioceſs, where to the Metropolitane, &c. ſee tit. *Writ to the* Biſhop.

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Before what Biſhop as Ordinary Teſtaments ſhall be proved, before what not: ſee tit. Teſtament.

Where the Biſhop ought to give notice to the Patron, before he can collate to the Church, or not, ſee tit. Notice.

Where Collation of the Biſhop puts not the Patron out of poſſeſſion: ſee tit. *Q. Impedit*, and Preſent. to a Church.

What pleas in *Q. Impedit*, the Biſhop who claims as Ordinary, ſhall have, what not: ſee tit. *Q. Impedit.*

What perſons are incapable of Eccleſiaſtical promotion, nor to be preſented to a Church, and if preſented may be refuſed by the Biſhop: ſee tit. Encumbent, and Enfant.

An immediate Office, and Miniſter to the Kings Courts, b. 5.11.15.23.26. ſee writ to the Biſhop, Ordinary, Clergy, Proceſs, Excommunication.

Burglary, ſee *Coron.*

Burning.

Where action of the caſe lies for burning an houſe: ſee tit. Action upon the caſe.

Were he that hath his Clergy ſhall be burnt in the hand: ſee tit. Clergy.

Where it is felony to burn houſes: ſee tit. Corone.

Burning the hand of a felon pardoned by the King. ſee tit. Clergy.

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C

Capacity.

OF persons not in being, nor known, at the time of the estate, limited, and given, or not named by their proper names, &c. where, how, and when they shall take estates in lands, &c. or not, b. 100. to 105. and 130.134.136.114.110. b. 2.51. b.6.17. b. 7 8,9. b.10.27,28.31.32.57.

Of right heirs, right heirs of the body, an infant in the mothers belly, or such like without a proper name, and where, how, and when they shall take estates in lands, &c. or not, b. 1. 66,67.95.99.100. to 105. 115. 126. 130.134,135. b. 2.51.91,92. b. 3.20.61.83. b. 5.2. p.8. b 6.17, 18. b.7.9. b. 10. 50, 51. see tit. Remainder and Enfant.

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Where the Kings grant to one incapable at the time of the grant, shall be good, and the grant implicitely make him capable, or not, b.1.56. b 3.73. b. 1.46.52. b.5.2. p.56. b.7.14 b.8.56,167. b.10.27.67. see tit. Grants of the King, Denizen, and Villein.

Capacity of the King double, natural, and politick, and where he shall take an estate in lands, &c. in the one, where in the other, b. 6.27. b.7.10.12.32. see tit. King.

Capacity of an alien born to have land by descent, to purchase lands, or gain goods: see tit. Alien born.

Capacity of the Queen without the King, and to what purposes she shall be accounted as a woman sole: see tit. Prerogative.

Capacity of a woman Covert, and where she may take an estate in lands, of the gift, or devise of her husband, or a stranger, or not: see tit. Baron and Fem. and Agreement, and assent.

Capacity of Monks, or the Subprior, and where they shall take an estate in lands, or &c. or have property in goods, and sue actions without their Soveraign or not: see tit. Abbot and Prior.

Capacity of an heir, notwithstanding the attainder of his Father, Brother, or other ancestor, and where yet notwithstanding they shall have lands by descent, or not: see tit. Attainder, Corruption of blood, and Discent.

Where the Kings grant to a body not incorporate, or person incapable, shall be good, and make a capacity, or not: see tit. Grant of the King.

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Capacity of a bastard, and where he shall have an estate in land, or &c. by purchase, by name of son, by reputation: see tit. Bastard, and Reputation.

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Who are not capable of Ecclesiastical Benefices, but may be refused by the Bishop: see tit. Encumbent, Enfant Presen. to a Church. *Q. Impedit*,

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Where Commissions shall be awarded to inquire of the decay of Castles, or &c. see tit. Commissions.

Of tenure by Castle-ward: see tit. Escuage, Tenure, Ward, Extinguishment.

Where the King shall have primer seisin of lands held of him, as of an honour, Castle, &c. or not: see tit. Tenure and Prerogative.

Where tenure and service by Castle-ward, shall be discharged for a time, and after revive, or not: see tit. Extinguishment.

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Where the certificate of the Bishop, of bastardy and mulierty, shall estoppe the parties or strangers, and no traverse to it, or not, b.7.14.43.44.

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Where certificate of the Commissioners upon the statute of bankrupts, shall estop the parties, see tit. Bankrupts, False imprisonment, and Esloppel.

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Where the Kings Charter or Grant ſhall be void, becauſe he hath not power to grant, and what things he cannot grant. b.4.33,34, 35. b.5.2.p.28.50. b.7.7.25.36,37. b.8.16,17. 19.22.55.77.125,126. b.10.113. b.11.4.53.83. 89,90. ſee tit. Grants of the King.

Where the Kings Charter of pardon of all debts ſhall extend to every debt, or not, and what debts ſhall by it be pardoned, what not. b.1.50. b.5.2.p.56. ſee tit. Grant of the King.

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Charter of pardon of all felonies and treſpaſſes, ſhall be good for treaſon, for what treaſon, and for what not. b.6.13.

Of pardon of murder, or the death of a man, what Charter good, by what words, and what not.

Charter of pardon of all felonies and treſpaſſes ſhall be good for treaſon, for what treaſon, and for what not.

Where and what Charter of pardon ought to by the party himſelf, the form to plead it, what not. b.6.79. b.6.68. ſee tit. Notice, and Office of Court.

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The Kings general pardon by Parliament, 13 *Eliz.* expound. b 6.13.

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Certain rules for expoſition of Charters of pardon of the King, or of grants of the King. ſee tit. Grant of the King.

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Where Reſceit ſhall be granted to leſſee for years tenant by *Elegit*, Statute Marchant upon defalt. or faint pleading of the tenant of the franktenement to avoid circuit of Action. ſee tit Reſceit.

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Form of pleading ſeiſin alledged in Maſters of Colledges, or &c. and where it ſhall be in right of their Colledge, Houſe, or &c. ſee tit. Corporation and Pleadings.

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Where dower ſhall be avoided, becauſe aſſigned or recovered by Covin. b.2.67. b 3. 78. b.5.2. p.30. b.6.58. b.8.101. 133. ſee tit. Dower.

Where termor for years, tenant by Statute Merchant, *Elegit*, &c. ſhall falſifie a recovery had againſt him in reverſion, becauſe it was upon faint pleading, or &c. by Covin and Colluſion. b.6.57. b.9.135. b.11.33. ſee tit. Reſceit, and Falſifying of recovery.

Where a recovery againſt tenant for life ſhall not bind him in reverſion, but he may enter for the forfeiture, becauſe it was by Covin and Colluſion. b.1.15,16. b.3.4.60. b.10.37. 39.44,45. ſee tit. Stat. 32 H.8.c.31. and 14 *Eliz.* c.1. there.

Where a gift or grant of goods ſhall be avoided, becauſe it was by Covin and Colluſion, to defraud creditors. b.3.81,82,83. b.5.2.p.60. b.2,25,26. b.6.18. b.10.58. ſee tit. Stat. & 3H. 7.c.4. 13 *El.* c.5. there.

Where feoffments, or &c. of lands ſhall be avoided, becauſe by Covin to defraud Debts, Creditors and Executions, and againſt whom they ſhall be void, againſt whom not. b.3.82. b.2.p.60. b.6.72. b.11.74.93. ſee tit. Statutes, and 27 *El.* c.4. there.

Where an adminiſtration and releaſe upon it ſhall be void, becauſe obtained and made by Covin. b.3.78. b.6.19. b.8.143. ſee tit. Adminiſt.

Of outing the Lord of his ward, relief, or &c. and what ſhall make a colluſion in a conveyance of lands by the tenant to ſuch intent, and the Lord ſhall have wardſhip of the lands notwithſtanding or not. b.1.122. b.2.94. b.3.66. 81. b.6.76. b.7.40. b.8.164. Stat. *Marl.* 6.c.6.

Where

Where colluſion ought to be by the Lord of all the mean eſtates, and conveyances after the firſt eſtate by the tenants made by colluſion, b. 1. 121. b. 2. 94.

Where colluſion may be averred upon the joynt eſtate made to the ſon and heir and a ſtranger, or not, b. 6. 76. b. 8. 164.

Where colluſion ſhall be apparent in caſes or not, but muſt be avered, and the cauſe of the Covine ſhewn, or not, b. 3. 81. b. 7. 40. b. 8. 123. b. 9. 109, 110.

Where colluſion ſhall not be averred by the Lord, againſt his acceptance of ſervices by the hands of the feoffee, b. 3. 66. ſee tit. Acceptance.

Where a fine ſhall be avoided, and not bind him that has right, becauſe levied by Covine. b. 3. 77, 78. ſee tit. Fines.

Where the Lord cannot enter upon the feoffee ſuppoſed by colluſion, but put to his writ of ward to try the colluſion, b. 9. 73 b. 21. 77.

Where reſceit ſhall be granted to leſſee for years, tenant by ſtatute Marchant, *elegit*, or by him in reverſion in fee, or &c. upon def. render, or faint pleading of tenant for life by covine and colluſion to make them loſe their rights: ſee tit. Reſceit.

Where remitter ſhall not be to the iſſue in tail, or wife, becauſe of covine and colluſion: ſee tit Remitter.

Where property of goods ſhall not change, and be taken away by bargain and ſale, in market open, becauſe of covine: ſee tit. Contract.

In forging of falſe deeds, and how that ſhall be puniſhed: ſee tit. Forgery of falſe deeds.

In conſpiracies, and how that ſhall be puniſhed: ſee tit. Conſpiracy.

Where a conveiance of land by the father to his ſon and heir, ſhall be void becauſe of covine, and he adjudged in by deſcent, and the land aſſets: ſee tit. Aſſets

Where laches of claim within five years upon a fine levied, ſhall not prejudice, becauſe levied by covine: ſee tit. Contin Claim.

where reſignation ſhall not abate a writ, but ſhall be void becauſe done by covine: ſee tit. Writ.

Where Letters Patents of the King ſhall be repealed, becauſe of covine, and the King thereupon deceived in his grant: ſee tit. Grants of the King.

Where Executors ſhall be charged upon *Devaſtavit*, notwithſtanding the recovery, &c. of the goods of the dead, becauſe the recovery was by covine, and what ſhall be ſaid covine in ſuch caſe: ſee tit. Aſſets, and Executors.

Where Preſentment to a Church, ſhall be void, and avoided, becauſe by colluſion: ſee tit. Preſent. to &c.

Where warranty collateral ſhall not bar, becauſe after diſſeiſin by covine and colluſion: ſee tit. Warranty.

Where ſeiſin of rent, or &c. by hands of the diſſeiſor ſhall not bind the diſſeiſ. becauſe of colluſion: ſee tit. Seiſin.

Where acceptance of rent, ſhall not bar to claim, and have the land, becauſe of the covine in the leſſee, and what ſhall be colluſion in ſuch caſe: ſee tit. Acceptance and Arrerages, and Notice.

In leſſee for years, by ſecret conveiance of land by covine to defraud his leſſor, and what ſhall be ſuch covine and conveiance, b. 3. 64 65. 77, 78. ſee tit. Norice, Acceptance, Arrerage, Contin. Claim.

Commandment.

Where command by parol ſhall be good and ſufficient, and ſhall be pleaded without ſhewing a deed of it, and ſo of a licence or not, b. 6. 38. b. 9. 69. 99, 100, 101, 102. b. 10. 92. b. 11. 48. ſee tit. Monſtrance of deeds, and falſe impriſonment, and licence.

Where he that does, and executes a thing by Commandment, or &c. under the authority given to him by another, is no treſpaſſer, or &c. though he that commands him hath no authority, or his authority is diſproved, or void, and where contr. b. 6. 52. 54. L. 8. 38. b. 10. 69. 70. 76, 77. b. 6. 18.

Where he that has authority by the command of another ſhall be a treſpaſſer, or &c. for not purſuing his power, and what execution of an act ſhall be purſuing, what not, b. 1. 111. 173. b. 5. 2. p. 9. 94. b. 11. 4. b. 4. 46. b. 5. 2. p. 91. ſee tit. Authority, Feoffments or Deeds.

Where the command ſhall be traverſed, and iſſue taken upon it, or not, b. 6. 24. b. 8. 66, 67.

Where a command may be countermanded, ſee tit. Authority, Countermand, and Revocation.

Where a man ſhall be principal in caſes of felony, or death of a man, by command, or not: ſee tit. Corone.

Where cont. claim made by a ſervant or ſtranger, by command ſhall be good and veſt an eſtate, or not: ſee tit. Cont. Claim.

Where the Maſter or Soveraign ſhall be charged, and anſwer for the act and offence of his ſervant, and by command, or not: ſee Charge.

Where a condition to be performed to one perſon, may be performed to another, by command, and that countervail the performance: ſee tit. Condition.

The authority of a Baily, and what things he cannot do by his general authority, without ſpecial command: ſee tit. Authority.

Where a man ſhall have aid of the King, where he juſtifies as Baily of the King, or by his command: ſee tit. Aid of the King.

Commiſſion and Commiſſioners.

Commiſſions of *Niſi prius*, and their authority, b. 10. 103. ſee tit. Juſtices.

Commiſſion of Juſtices of Oier and Terminer, and their authority, b. 4. 46, 47. b. 9. 50. 118. ſee tit. Juſtices, and Oier and Terminer.

Commiſſion of Juſtices of Goal delivery, and their authority, and when their commiſſion ceaſes, b. 4. 46, 47. b. 9. 118. b. 10, 53, 54. ſee tit. Juſtices.

Commiſſion of Juſtices of Peace and their authority, b. 5. 2. p. 59. and 71, 72. b. 4. 46, 47. b. 8. 120. b. 9. 118, 119. b. 10. 53. 76, 77. ſee tit. Juſtices and Peace.

Commiſſion upon the ſtatute of bankrupts, and their authority, b. 2. 25, b. 8. 98. 121. ſee tit. Juſtices and Statutes, 13 *Eliz.* c. 7. there.

Commiſſion of Juſtices of Aſſiſes, and their authority, b. 8. 57. b. 10. 53, 4. 103.

Commiſſions of ſewers, and their authority, b. 5, 2. p. 100. b. 6. 20. b. 10. 138, 139, 140, 141, 142, 143.

Where Bargains and Sales, Feoffments, Leaſes, or &c. made of the lands, or &c. of other men, by Commiſſioners, ſhall be good and ſtand in force againſt the owners and their heirs, b. 2. 16, 17. 25. 80. b. 9. 76, 77.

Where a Commiſſion ſhall be awarded to make inquiry of concealments, ſubſtractions, frauds, or other miſdemeanors of Officers and Miniſters of the King, &c. and their authority, b. 10. 109. 112. 114.

Where Commiſſions ſhall be awarded to make inquiry of decay of Caſtles, Towns, Bridges, or &c. and their authority, b. 10. 139. 114, 141.

Where, and when, and by what act, the firſt Commiſſion ſhall ceaſe and be determined, by grant of another, b. 3. 75. ſee tit. Corporation, b. 4. 46.

Commiſſioners in cauſes Eccleſiaſtical, and their authority, b. 5. 1. to 10.

Commiſſions upon the Statutes, 32 H. 8. c. 13. 1 E. 6. c. 14. ſee tit. Statutes; and theſe Statutes there.

Of Purveyors, and their authority: ſee tit. Officers.

Where Commiſſioners ſhall fine to the King, or forfeit a certain ſum of mony in name of a penalty, for their negligence, or miſdoing, b. 4. 16. b. 70, 71.

Where judgments, given by Juſtices, or other Commiſſioners ſhall be void becauſe not before a Judge: ſee tit. Falſif. a recovery.

Where and to what preſentments or Offices found, before Commiſſioners, traverſe may be, and to what not: ſee tit. Bar. Certificate.

Where and what Commiſſions of the King, ceaſe and determine, by Demiſe of the King, what not: ſee tit Grant of the King.

Where an Office taken before Commiſſioners, ſhall be equivalent, with an Office taken before the eſcheator, and where it may be taken by them without warrant: ſee Office the Eſcheator.

Offices taken before the eſcheator, by Virtue of Writ or Commiſſion: ſee tit. Office before, &c.

Where Juſtices by Commiſſion ſhall be puniſhed for their miſdoing, where not: ſee tit. Enditement.

Where it is no challenge to a juror, that he was heretofore a Commiſſioner to examine witneſſes: ſee tit. Challenge.

Common and Commoners.

What ſhall be common appendant and to what land, how the title ſhall be made to it, and with what beaſts to be uſed and taken with, what not, b. 4. 37, 38. b. 6. 59, 60. b. 8. 78, 79.

What ſhall be appurtenant, and how title ſhall be made to it, and with what beaſts it ſhall be taken and uſed, b. 4. 37, 38. b. 6. 59, 60. b. 7. 5. b. 8. 78, 79.

Becauſe of vicinage, what it ſhall be, and who ſhall have it, and how title ſhall be made to it, and how to be uſed, &c. b. 4. 38. b. 6. 59. 60. b. 7. 5.

Common of eſtovers, and how they ſhall be claimed, and what title ſhall be good to have them, and what not, b. 4. 86, 87. b. 5. 2. p. 17. 24. b. 8. 47. b. 9. 112. ſee tit. Aſſiſe.

Of Turbary, and how title ſhall be made to it, b. 4. 37. b. 8. 47. 50. ſee tit. Aſſiſe.

Becauſe of commorancy and reſiancy, and what title to it ſhall be good, what not, b. 6. 60.

Of paſture way, or &c. claimed by Inhabitants, or Pariſhioners, and form of pleading, to make a title to it by them, b. 4. 32. b. 6. 60.

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Claim conditionally, or under manner, and where it ſhall be good, b. 5. 2. p. 78.

How a Commoner may meddle in the land, and what things he may do, what not, b. 8. 78. b. 9. 112. ſee tit. Diſtreſs.

What ſhall be ſufficient ſeiſin of a Common to have an Aſſiſe, b. 6. 57. ſee tit. Aſſiſe, and Seiſin.

Grant to a man when the beaſts of the Grantee ſhall go there, and how it ſhall be taken and conſtrued, b. 1. 87. ſee tit. Grants.

Where Aſſiſe lies of a common of paſture, or a parcel of a common, and how approvement may be made by the Lord of the waſte: ſee tit. Aſſiſe and Approvement.

Where it ought to be append. to a meſſuage houſe or land, or not, &c. ſee tit. Appendant.

Where and what common may be granted or aſſigned over, what not: ſee tit. Aſſignee.

Where a common ſhall be extinguiſhed by unity of the poſſeſſion of the land, or parcel of it, or by alienation of the land to which, &c. or not: ſee tit. Extinguiſhment.

Where a *Quod permittat* lies of a common, and againſt whom, &c. ſee tit. *Quod permittat.*

Where common appendant, or &c. paſſes by the feoffment of the Mannor, to which without the words, without the appurtenances or not: ſee tit. Appendant.

Where

Where grant of common not expreſſed where, &c. ſhall be good, and how the grantee ſhall have benefit of ſuch grant. ſee tit. Grants.

What cuſtom or preſcription to have common ſhall be good, what not. ſee tit. Cuſtom and Preſcription.

Where recouping for common of paſture ſhall not be. ſee tit. Recouping.

Claim by the Lord for him and his tenants, how, and for whom. ſee tit. Preſcription.

Common Bench.

Juſtices of the common Bench and their authority, and of what pleas and matters this Court ſhall have juriſdiction, of what not. b. 10.76.

Pleas of land belong to the Court of common Bench. ſee tit. Statutes, and Mag. Chart. c.11. there, and the expoſition of it.

The courſe of the common Bench in award of proces, and difference betwixt the common Bench, Kings Bench, and Exchequer in award of proces, ſee tit. Courts.

Where office found before the Eſcheator, or &c, ſhall be traverſed in the Court of Common Bench. ſee tit. Traverſe to office.

Where prohibition ſhall and may be granted out of the Common Bench. ſee tit. Prohibition.

Office of the Pronotary of the Common Bench, and to whom it belongs to grant it. ſee tit. Officers.

Common Law.

Where the common law ſhall be preferred before cuſtom or ſtatute law. b.2.35. b.4.71, 72. ſee tit. Prerogative and Statutes.

The foundation of the common law, it is founded upon the law of God, &c. ſee b.3. Epiſtle there.

Where the Judges of the common law are bound to take notice of the civil law, and direct their judgment according, and contrar. the Judges of the civil law. b.4.29. b.5.2. p. 58. b.8.6.8.135. ſee tit. Notice and Ignorance.

Where no need to alledge cuſtom, or make preſcription in a thing allowed by the common law. ſee tit. Cuſtom and Preſcription.

Where a man may have and maintain an action or proces at the common law, or given by ſtatute at his election, or not. ſee tit. Election.

Where in an action, &c. a man may have and pray judgment at the common law, or which is given by ſtatute, or not. b.9.72.74. b.11.62. ſee tit. Forreſts and Election.

Where Covenants, Agreements, Warrants, or Reſervations ſpecial betwixt parties, ſhall take away the general intent and force of the common law. ſee tit. Covenant, Warranty and Reſervation.

Where and in what caſe Formedon in deſcender was at the common law. ſee tit. Formedon.

Where diſcents ſhall be at the common law to heirs collateral of lands given in Frankmarriage or in tail, and alienation barred before the ſtatute of Weſt. 2. c.1. ſee tit. Formedon.

Where and when Mortdanceſtor lay at the common law upon a gift in tail of lands, or &c. ſee tit. Mortdanceſt.

Where all the heirs by cuſtom of Gavel-kind ſhall not rebut by warrant of their anceſtor, but the heir at the common law only. ſee tit. Rebutter.

Where a man ſhall vouch as heir who is not heir at the common law, and ſhall be vouched who is not heir at the common law. ſee tit. Voucher.

Where the common law was in many caſes wanting, and in ſome caſes a man without remedy for his right. ſee tit. Statutes. W.2.c.1. c.5. Gloc. c.3. 11 H.7. c.20 &c.

Where and by whom Hereſie was tried and determined at the common law. ſee tit. Hereſie.

Where and againſt what perſons and eſtates an action of waſt lay at the common law, and againſt what not. ſee tit. Waſt three times.

Where and what ſtatutes are but declarative and affirmative of the common law. ſee tit. Statutes.

Common weal.

Where and what things are not diſtrainable for rents or ſervices, becauſe neceſſary for the common weal. b. 11.50. ſee tit. Diſtreſs.

Where a man may juſtifie his entry into the land of another, and taking his goods without claiming ought to his own uſe, and juſtifiable becauſe for the common weal. ſee tit. Juſtification.

Where action of the caſe lies not againſt a man who has raiſed a nuſance, or done any thing to the hurt of another, becauſe for the weal publick. ſee tit. Action of the caſe.

Where an obligation with a condition to reſtrain a man to uſe and exerciſe his trade or myſtery, ſhall be void becauſe to the prejudice of the common weal. ſee tit. Condition and Monopoly.

Where Monopolies ſhall not be ſuffered, becauſe to the prejudice of the common weal. ſee tit. Monopolies.

Where Preſcription or Cuſtom to do a thing which is for the weal publick needs not. ſee Cuſtom and Preſcription.

Where a Sheriff, Officer or other may juſtifie the entry or breach of an houſe, becauſe for the common weal. ſee tit. Juſtification.

Compoſition.

Where and what partition betwixt Parceners of an Advowſon ſhall be good, and how they ſhall preſent with compoſition, how without. ſee tit. Preſent. to a Church, Partition, and Parceners.

Where a man ſhall be diſcharged of tythes by compoſition, and what compoſition ſhall be good, what not. ſee tit. Tythes.

Computation.

Of ſix months upon bargain and ſale, and inrollment of a deed, and how the ſix months ſhall be accounted. b.5.2. p.1. ſee tit. Enrollments.

Of the time for the beginning a ſecond leaſe, made to begin after another leaſe in being, and how the time ſhall be accounted ſee tit. Leaſes.

How time ſhall be accounted in Deeds, Leaſes, or &c. to have and to hold from the making thereof, or from the date thereof, or from the day of the date, &c. b.5. 2. p. 1.94.

Where and to what intents the whole term ſhall be accounted as one day, to what contr. b.5.2.p.94.76. b.4.71.

Of the time upon a leaſe for years with condition or reſervation of rent, to be paid one month, or &c. after any Feaſt, in which &c. how to be accounted. b.10.129.

How the year and day upon continual claim ſhall be accounted. b.1.97. b.8.100. ſee tit. Cont. Claim.

How and to what time the forty days for attendance of him who holds by eſcuage ſhall be accounted. b.9.49. ſee tit. Eſcuage.

Where computation ſhall be made according to cuſtom of the Country for quantity of land or not, according to ſtat. *de terris admenſurand.* b.6.67.

Of leap-years how. b 8.19.

Of the day in caſes, and how divided or not. b.1.76.102.106.174. b.3 39. b.5.2. p.1. 62. b.6.33. b.10.127.129.

Of the age of an infant Executor upon adminiſtration committed during minority. b.5. 2. p.9.29. b.6.67. ſee Adminiſtrat.

How and in what caſes the year and day ſhall be accounted. b.1.96,97. b.4.43. b.5.2.p.107. b.8.100.

Of the time to claim upon fines levied of lands, and how the five years ſhall be accounted. ſee tit. Cont. Claim.

How attachment ſhall be in Aſſiſe, and how the fifteen days ſhall be accounted and tried. ſee tit. Attachment of the year and day upon waif and eſtray, and how, and to what time to be accounted. ſee tit. Waif and Eſtray.

Of year and day to claim upon judgment final in a writ of right at the common law. b. 8.100,101. b.1.96,97.

Of year and day upon wreck of the Sea, how and to what time to be accounted for the owner to make his claim. ſee tit. Wreck.

Of year, day, and waſt for the King upon forfeiture for felony, or &c. and how the year and day ſhall be accounted. ſee tit. Forfeiture.

Of the third part upon the Statutes 32 H.8. and 34 H.8. to deſcend and be in ward. ſee tit. Statutes, and there 32 H.8.c.1.

Of profit, and iſſues of lands received upon forfeiture of marriage, or intruſion, &c. and how to be accounted. ſee tit. Action upon ſtat. and ſtatutes Merton. c.6.7.

How the time ſhall be accounted to have the writ by Jornies Accounts. ſee tit. Jornies Accounts.

Of ſix months to preſent to a Church for the Ordinary upon notice given to the Patron, and to what time the ſix months ſhall be accounted. ſee tit. Notice and Ordinary.

Of the year and day to bring and begin appeals, and how the year and day ſhall be accounted. ſee tit. Appeals.

Of the ſix months time upon preſentation or collation to a Church to have damages in a *Q. Impedit*, and how, and to what time the ſix months ſhall be accounted. ſee tit. Expoſition, and *Q. Impedit.*

Concealments.

Where and what lands ſhall be ſaid concealed, what not. b.3.73,74. b.4.36. b.10. 109. to 115.

Condition.

Where and what words in the Kings, or a common perſons grant ſhall make a condition, where and what not. b.2.71,72. b.3.21.25. b. 5.2. p. 78,79.116. b.10.40,41. b.1.104,105. b.4.3. 88.121. b.8.44.

Againſt Law, and which ſhall be ſuch, and how conſtrued. b.1.23.25.84,85.137,138.130. 132. b.3.82.93. b.5.2.p.56. b.6.40. to 43. b.8. 17. b.10.36. to 43. b.4.3.

Repugnant, which ſuch, and how conſtrued. b.1.84,85.130,131,132. 137.177. b.4.3. b.5. 2. p.56. b.6.40,41.58. b.7.38,39. b.8.74.76. b.9.128. b.10.36. to 42.79.86.

Impoſſible, which ſhall be, and how conſtrued. b.1.84,85. b 5.2. p.22. b.2.79. b.6.40. 41. b.8.82,83.

Where and what perſon ſhall enter for a condition broke, where a ſtranger to the deed ſhall enter for a condition or not. b.3.62.65. b.4.120. b.5.2. p.16,17.24.55,56.112. b.7.12. b.8.43,44.90,91.95. ſee tit. Aſſignee and Statute. 32 H.8.c.34. there.

Where and what words conditional import in themſelves a re-entry, and without a clauſe of re entry, what not. b 1.104.

Where an eſtate and poſſeſſion in lands, or &c. upon a condition broken, ſhall be adjudged in the grantor, feoffor, or &c. without entry in deed, ſeiſing or claim, or not. b.1.85.94,95. 147.174. b.2.53. b.3.65.84,85. b.4.53. b.8.44. 95. ſee tit. Claim.

Where upon condition broken the eſtate ſhall be void from the beginning, and to what intents the leſſor, feoffor, or &c. ſhall be adjudged by re-entry in of his firſt eſtate, and to what intents not. b.1.84,85.132. b.2.52. b. 6.40. b.7.c.14. b.8.43,44.75. b.10.40,41.

Where and what condition upon feoffment in fee, that he ſhall not alien. ſhall be good, what not. b. 1.88.130. b.5.2.p.56. b.10.38.

Where a condition upon a gift in tail, or leaſe for life, years, &c. that he ſhall not alien nor waſt, ſhall be good. b 10.29,40.

Where a condition upon an eſtate in fee, or tail, that the wife ſhall not have dower, is not good. 1.10.39.

Where a condition upon grant of rent, or &c. that if the grantee dye, his heir within age, that the rent, &c. ſhall be good or not.

Where a condition upon grant of an Annuity not to charge his perſon, ſhall be good or not. b.6.58. b.7.38 39.

Where a condition upon a gift in tail or leaſe for life, or &c. that if they alien or go about to alien, or upon any other contingent, that then the land ſhall be and remain to another in fee, or &c. ſhall be good or not. b.1. 84.130. b.6.40,41,42,43. b.8.90. b.9.128. b. 10.36. to 43. and 79 ſee tit. Remainder.

Where a condition upon a leaſe for life, or years, that if he be outed or diſturbed by the leſſor or a ſtranger, that he ſhall have fee, ſhall be good, and how it ſhall take effect or not. b 1.84,85. b.8.75,76.91.

Upon condition that a man ſhall not diſturb, moleſt or hinder another, but ſuffer him, &c. what act ſhall be a breach of ſuch a condition, what not b.8.90,91. b 9.51.

Where a condition upon a leaſe for life or years, that if the leſſor grant his reverſion to another in fee, or &c. ſhall be good, and how it ſhall be taken and conſtrued, if he be alien. b.1.84.130 b.8.76.

Where a condition that a man ſhall not uſe his trade, myſtery, or art, ſhall be void. b.8. 125. b.11.53. ſee tit. Monopolies.

Where a condition upon an obligation, or &c. to keep one harmleſs or without damage, or diſcharge him, &c. ſhall be good; and what act ſhall be a performance of it, what not. b.2.3.47. b.5.2. p.24. b.9.25. b.10.100.

Where a double condition ſhall be good, one to be performed of the part of the feoffor, or &c. another of the part of the feoffee, or &c. and how and when they ſhall be ſaid performed. b.1.156.

How a condition upon a feoffment, or &c. to pay moneys, by him, his heirs or executors, or to him, his heirs or executors, ſhall be performed, and to whom and by whom the payment to be made b.2.50.52. b.5.2. p.96. 114. b.8.95. b.1.133.136.

In the disjunctive, and how to be performed, and who ſhall have his election of the disjunctive. b 2.37. b.5.2. p.22.112. b.8.90,91. ſee tit. Demand and Annuity.

Where a condition to be performed at a place certain, may be performed at the ſame place or another, or not. b.4.72,73.

Where a condition to be performed at a day certain, may be performed the ſame day or another, or not. b.7.15.

Where a condition to be performed to one or by one perſon certain, may be performed to the ſame perſon and another, or to another only, and the form of pleading thereupon. b.2.60. b.7.12,13

Where a condition to ſatisfie or pay moneys, &c. ſhall be ſatisfied and performed by retaining, and that ſhall countervail payment indeed, or not. b.5.2. p.117.

How a condition to be performed, and no place expreſſed, &c. muſt and ſhall be performed. b.4.73.

How a condition, and no day nor time expreſſed, &c. muſt be performed, and when, and how. b.1.25. b.2 70.73.79. b.6.30,31. b. 7.15. b.8.91.

How acondition to pay moneys ſhall be performed, and what ſhall be ſaid ſatisfaction, or ſhall countervail payment or not. b.5 2.p.114. 117. b.8.76. b.9.78.

How a condition, that if a man treſpaſſes the Plaint. &c. and that be proved, &c. ſhall be performed, &c. and in what manner the proof ſhall be. b.4.74. b.6.20. b.5 2. p. 108. b.11.39.

How a condition to levy a fine of lands, or &c. ſhall be performed. b.4.45. b.5.2.p.127.

How and when a condition upon feoffment, or obligation to re-enfeoff, or give in tail, ſhall be performed, and what acts ſhall diſable, what not. b.1.25.133. b.2.59.70.79,80. b.3. 34. b.5.2. p.21. b.6.30,31. b 8.90,91.

How a condition or Covenant upon a feoffment, or obligation to be performed to a ſtran- &c. ſhall be performed, and what act is a breach, what not. b.2.3.79.1.25.117. b.8.90,91

To make aſſurance at the coſts and charges, &c. how to be conſtrued, and what party ſhall bear the charge. b.5.2.p.22.

How a condition that a ſtranger ſhall do an act, &c. ſhall be performed, and when ſaid to be performed. b.2.3.

How a condition that the obligor ſhall make a ſure and ſufficient eſtate in lands, or &c. or ſuch eſtate as his Counſel ſhall adviſe, &c. ſhall be performed, and what act ſhall perform it, what not. b.2.3.b.5.2. p.19,20.23.

Where by performance or not performance of a condition, the eſtate of the feoffee, or his heirs and aſſigns ſhall be abridged and become but a term for years, or &c. and that a term ſhall be an eſtate in fee, and when does the eſtate in fee increaſe or paſs, or not. b.1.84. 105.130. b.8.74,75,76.90,91.95.145.

How a condition to keep a Park, &c. ſhall be performed, and what act ſhall be performed, and what breach of the condition. b.9.50.

How a condition not to ſuffer any whore to abide in the houſes leaſed to him ſhall be performed, and what act ſhall be performance, what not. b.8. 21.

How a condition upon an obligation to ſtand to award and arbitrement, &c. ſhall be performed. b.5 2 p.103. b.32.92.98. b.10.131. ſee tit. Arbitrement.

How a Condition or Covenant to leave houſes in as good pight, and eſtate as he received them, ſhall be performed, and what act ſhall be performance, what not. b.1.98. b.5.2. p. 21. b.7.15.

How a condition that a man ſhall keep the peace, or be of good behaviour, ſhall be performed, and what act ſhall be a breach of it. b.9.51. ſee tit. Peace.

How a condition that the leſſee and his aſſigns ſhall nor alien without the licence of the leſſor, or &c. ſhall be performed, and what alienation ſhall be a breach, what not. b.3.64. 3.64. b.4.119,120. b.6.38.

Where a condition which reſerves a reentry for a certain time, or defeats the eſtate for a certain time, ſhall be good or not. b.1. 84,85.87.132. b.2.52. b.6.40. b.10.41.

Where a man is not bound to perform a condition upon an obligation, feoffment, or &c. without notice or requeſt, and what ſhall be good and ſufficient notice and requeſt; what not, and where cont. b.1.113. b.2,3.70. 79.81. b.5.2.p.19,20. b.6.30,31. b.8.82.92.

Where time convenient and reaſonable, ſhall be allowed to him that ought to perform a condition, after requeſt made or notice given, and what time ſhall be ſaid reaſonable, &c. b.1.22.25. b.2.3.28.34. b.6.31.

Where a condition ſhall be performed by attendance at a day or place, &c. or by tender and refuſal to the party to whom, &c. and what ſhall be a good and ſufficient tender, what not. b.5.2.p114. b.9.79. ſee tit. Tender and refuſal, and Tout temps priſt.

Where a condition ſhall be performed by acceptance of another thing then that compriſed within the obligation or condition, or of part in ſatisfaction of the whole, or not. b.5.2.p.117. b.9.78.99. ſee tit. Acceptance.

How a condition which conſiſts of ſeveral acts to be done by ſeveral perſons, but it is not expreſſed by which it ſhall be performed, nor who ſhall do the laſt act to the performance of it. b.2.3, b.5.2. p.20.22,23.127.

Where a Condition or Covenant ſhall not be ſaid performed, if the intent of the parties be not performed, though the words be fully accompliſhed, and cont. b.1.25.137. b.2.81, 82. b.5.2 p.21.117. b.7.12,13. b.8.44.70.90, 91. b.3.28.34. b.4.80.

Where a condition upon an obligation, grant, feoffment, or &c. ſhall be diſcharged in part, by act of God, of the Law, or the party to which, &c. and ſhall ſtand in another part or not. b.4.52.120. b.5.2. p.22.56. b.8. 131. ſee tit. Apportionment.

Where a condition upon an obligation, grant, feoffment, or &c. ſhall be diſcharged by death, or any other act of God, or not. b. 2.79,80.59,60. b.5.2. p.22. p.8.90.

Where a condition upon an obligation, grant, feoffment, or &c. ſhall be diſcharged by act of Law, or not. b.2.52.71.79. b.10.131 ſee Apportionment.

Where a condition upon an obligation, grant, feoffment, leaſe, or &c. ſhall be diſcharged by the act of the parties, and by what act, and what not. b.1.79. b.2.71.73.77,78. b.1.174.147. b.2.52.59. b.4.52,53. b.8.91,92. b.10.41. b.4.120. b.5.2.p.55. ſee tit. Apportionment.

Where and by what act a condition ſhall be extinguiſhed or put in ſuſpence for a time, or not. b.1.97 147.174. b.2.52.59,60.73. to 79. b.3.64. b 4.52,53.120. b.5.2. p.55. b.9. 140.142. b.7.14. b.8.76.

To perform Covenants contained in Indentures, and how, and what act ſhall be performed, what not. b.4.80. b.5.2. p.20.22. b.7.20.

How a condition to carry Wood out of a Wood ſhall be performed; and what act is a breach. b.1.83.

In Law what they are, and how to be performed, and what act ſhall be a breach of ſuch conditions. b.4.121. b.5.2. p.116. b.7.34. b. 8.44,45. ſee tit. Implied.

Apportioned, and where, or not. ſee tit. Apportionment.

Of payment of rent reſerved upon leaſe for years, or &c and for defalt. of payment re-entry, what demand of rent ſhall be good and effectual, what not. ſee tit. Demand. and Entry congeable.

Where a remainder ſhall be good on condition or contingency, and how it ſhall take effect. ſee tit. Remainder.

Where a condition ſhall avoid an eſtate in part, or againſt one perſon, and ſtand *in force* for another part, or againſt another party or not. b.1.85.132. b.2.53. b.4.121.

Where a defeaſance ſhall avoid as a condition to avoid circuit of action. ſee Circuit of action.

Where an Infant ſhall be bound to perform a condition, and what, and what not. ſee tit. Enfant.

How the condition of an obligation, that either of them ſhall ſtand to arbitrement, or do any other thing, ſhall be performed. ſee tit. Expoſition.

Upon annuity granted for counſel given, or ſervice done or to be done, or &c. how to be performed. ſee tit. Annuity.

How time ſhall be accounted upon a condition to pay rent at a Feaſt, &c. or a Month, &c. ſee tit. Computation.

Where a man ſhall plead a condition without ſhewing a Deed or not. ſee tit. Monſtrance of Deeds.

Where a deed may be delivered upon condition or not. ſee tit. Deeds.

Where the heir who enters for the condition broken, ſhall be in ward or not. ſee tit. Ward.

Where a Verdict which finds a condition not pleaded nor given in evidence, ſhall be good, and the parties have benefit of it. ſee tit. Verdict, and Monſtrance of Deeds.

Where entry ſhall be lawful upon the Kings poſſeſſion by reaſon of a condition broken without petition, traverſe, or &c. ſee tit. Ent. Congeable.

Where adminiſtration of goods may be granted conditionally. ſee tit. Adminiſtration.

Deviſe upon condition, and what words in a Teſtament to make a condition, what not. ſee tit. Deviſe.

Where a fine of lands, &c. may be levied upon condition, or no. ſee tit. Fines.

Where

Where a Count ſimple of a deed, without ſpeaking of the condition where the deed was conditional, ſhall be good. ſee tit. Count.

To what time an act done upon condition ſhall have relation. ſee tit. Relation.

Condition to revoke uſes, and what revocation ſhall be good, what not. ſee tit. Revocation.

Upon aſſignment of a debt to the King, revokable, or &c. how to be performed. ſee tit. Revocation.

To make an eſtate at the Coſt, &c. how to be performed. ſee tit. Damages and Coſts.

To be performed over ſea, how to be tried, and from what place ſhall the viſne come. ſee Enqueſt and Trial.

Confederacy, ſee tit. *Conſpiracy*.

Confeſſion.

Where judgment ſhall be given againſt the defend. upon his confeſſion, though the verdict finds for him. b.2.2.5. b.5.2.p.30. ſee tit. Judgment.

Where the writ ſhall abate by confeſſion of the Plaintiff or demand. or by his own ſhewing in pleading by replication, or evidence, or not. b.3.1. b.5.2. p.18. b.9.53. ſee tit. Writ.

Where aſſiſe ſhall be awarded to enquire of ſeiſin and diſſeiſin, notwithſtanding it be confeſſed. ſee tit. Aſſiſe.

Where huſband and wife ſhall not be received to acknowledge an action. ſee tit. Baron and Feme.

Where in *Per quæ ſervicia*, or *Quid juris clamat*, the tenant ſhall not be compelled to attorn, without advantages ſaved to him by confeſſion of the Plaint. ſee tit. Attornment.

Where in an action againſt Executors, the confeſſion of one ſhall bind his companion. ſee tit. Executors.

Where the ſucceſſion of a Parſon, Vicar, or &c. ſhall falſifie a recovery had againſt his predeceſſor by confeſſion, render or &c. or not. ſee tit. Falſifie a recovery.

Where and what matters and things ſhall be confeſſed by demurrer in Law, where and what not. ſee tit. Demurrer.

Where the def. ſhall be amerced upon his plea found falſe by confeſſion, or &c. ſee tit. Amercement.

Where a man ſhall be eſtopped of a thing confeſſed by way of recital: ſee tit. Eſtoppel.

Where a man ſhall make purgation againſt his confeſſion in caſes of felony, or not. ſee tit. Clergy.

Where debt lies for parcel of a debt, and the Writ and Count maintained by confeſſion, to be ſatisfied of the reſidue. ſee tit. Debt.

Where the verdict which finds againſt that which is confeſſed and affirmed by the parties in pleading, ſhall be void. ſee tit. Verdict.

Where a man ſhall have a writ of error againſt his own Confeſſion. ſee tit. Error.

Confirmation.

Where a deed (by the words given and granted) or &c. without the word Confirmed to him that has poſſeſſion of the land, or &c. ſhall be a confirmation. b.2.21. 24. b. 5. 2. p.15.

Where the Lord by confirmation may abridge the ſervices of his tenant, but not reſerve a new rent, tenure, &c. b.9.142.

Where a confirmation to one perſon and one eſtate, ſhall enure to all and their eſtates, and where a deed for parcel of the land or part of the time, ſhall enure to the whole. b.5.2. p.81.

Where a Confirmation to the huſband and wife gives the eſtate to one of them who had nothing before, and enures to both; and how, or not. b.2.24. b.9.139. ſee tit. Releaſes.

Where Confirmation to leſſee for life or years, inlarges not their eſtate for want of words, and by what words ſuch eſtates ſhall be, &c. R. 1.147. b.9.139. to 142. ſee tit. Releaſes.

Where an eſtate for life or years without Impeachment of waſt, becomes puniſhable for waſt by confirmation after, and contr. b.8. 76. b.9.140. ſee tit. Waſt.

Where an eſtate in fee ſhall be changed and abridged by confirmation or not. b.9. 139.142.

Where a condition ſhall be extinguiſhed and gone by confirmation. b.1.147. b.9.140.142. b.7.14. b.8.76. ſee tit. Conditions.

Where a confirmation made by the Lord Paramount to the tenant peravail, extinguiſhes the meſnalty or not. ſee b 9.142. ſee tit. Extinguiſhment.

Where a confirmation inlarges an eſtate in rent, or &c. of which there was no reverſion at the time of confirmation. b.1.147. b.5.2.p. 15. ſee tit. Grants.

Where confirmation, releaſes, or &c. made by the Son in the life of his Father, without warranty, ſhall not bar him of his future right. b.10.148.

Where a leaſe, grant, or &c. made by an Abbot, Biſhop, or &c. ſhall bind the ſucceſſor by confirmation of the Chapter, or &c. and what ſhall be ſufficient confirmation, what not. b.2.39.24. b.4.23,24. b.5.2. p 3. b.11.9. b.10.60.62. b.6.34.

Where a leaſe, grant, or &c. made by a Parſon or Præbend, ſhall be good, and bind the ſucceſſor by confirmation and agreement of the Patron, &c. and what ſhall be a ſufficient agreement and confirmation, what not. b.1.153. b.4.23. b.10.9. b.11.19. b.5.2. p. 81. b.6.34.

Where a grant, leaſe, or &c. by a Dean, is not good to bind his ſucceſſor, without the confirmation of others, and of whom. b.2.39. 42. b.4.23. b.5.2.p.3.

Where the void grant of the King or common perſon ſhall be made good by act of Parliament or letters patents of the King. b.1.51. b.4.108. b.9.68. b.11.69. b.8.128.

Where the grant, or &c. of the King ſhall be good, and not need the confirmation of other Kings which ſucceed after, or not. b.8. 176. ſee tit. Grant of the King.

Where upon the joyning of two in a feoffment, grant, leaſe, or &c. who have ſeveral eſtates, this ſhall enure as the grant, feoffment, or &c. of one, and the Confirmation of the other. b.1.76.147. b.2.35.38. b.6.14,15. b.7. 14. b.10 49.

Where a confirmation made to two, where one has poſſeſ. alone ſhall enure to both, and they ſhall take an eſtate by it or not. b. 2.21.24.

Where a confirmation upon condition ſhall be good or not. b.5.2. p.81,82.

By Parliament, and how to be conſtrued. b.5.2. p.62,63,64. b.8.19.122.126.128. ſee tit. Cuſtoms, Parliament & Stat.

Where confirmation by tenant in tail with warranty ſhall make diſcontinuance. ſee tit. Diſcontinuance.

Where the tenant or a ſtranger ſhall eſtop the Lord by his deed of confirmation, to claim other rents or ſervices, &c. ſee tit. Avowry.

Of Franchiſes by Act of Parliament, and how ſuch confirmation ſhall avail. ſee tit. Franchiſes.

Where a writ of meſne ſhall be maintained upon a confirmation. ſee tit. Meſne.

The form of pleading a confirmation. ſee tit. Pleading.

Where the confirmation of the diſſeiſee, to the grantee of the diſſeiſor of a rent, or &c. ſhall make the grant good, and bind him after re-entry. ſee tit. Diſſeiſin,

By acceptance. ſee tit. Acceptance.

Where and what ſtatutes are but confirmations of the common law, and declarations of it. ſee tit. Statutes.

Of Letters Patents of Kings and Queens by Parliament, notwithſtanding miſ-naming, or &c. the conſtructions of thoſe ſtatutes. ſee tit. Statutes. 34 H. 8. 1 Eliz. 35 Eliz. 18 Eliz. 43 Eliz.

Conſanguinity and Alliance.

Expoſition of the words, *puero*, *ſanguini*, *ſemini*, *proli*, *exitui*, *liberis*; and *proximo de ſanguine*. b.3.40.61. b.1.103. ſee tit. Expoſition.

Who ſhall be a perſon next of kin, to whom adminiſtration of goods ought to be committed. ſee tit. Adminiſtration.

Who ſhall be a perſon next of blood to enter for forfeiture upon aſſent to a raviſher, upon the Statutes of rape. ſee tit. Rape.

Where the father and mother, &c. ſhall have treſpaſs or raviſhment of ward of their ſon or daughter, &c. and the form of the writ. ſee tit. Ward.

Where voucher lies not amongſt privies of blood. ſee tit. Aid of one Coparcener to another there.

Where entry of one Coparcener ſhall avail another, and veſt the eſtate in her for privity of blood. ſee Entry Cong.

Where a writ of Covenant lies by and againſt an heir, for privity of blood. ſee tit. Covenant.

Where Mortdanceſtor lies not amongſt privies of blood. ſee Mortdanceſt.

Where a ſtranger not privy in blood may enter for a condition. ſee tit. Condition.

Where entry ſhall be lawful upon diſcent, becauſe of privity of blood. ſee tit. Ent. Congeable.

Where reſervation of rent cannot be but to thoſe who are privy in blood. ſee tit. Reſervations.

Where and what ſhall be conſanguinity ſufficient to raiſe uſes of lands. ſee tit. Uſes and conſiderations.

What ſhall be conſanguinity ſufficient to which a deviſe may be good by Stat. 32 & 34 H.8. what not. ſee tit. Deviſe and Statutes.

Where aid ſhall be granted of one Coparcener to another, for privity of blood. ſee tit. Aid.

Conſcience. ſee tit. *Subpœnd.*

Conſent, ſee *Aſſent*.

Conſiderations.

What ſhall be a good and ſufficient conſideration to make *Aſſumpſit*, upon which an action of the caſe will lye. ſee tit. Action of the caſe.

What are good and ſufficient conſiderations to raiſe or change uſes of lands, what not. ſee tit. Uſes.

Where a man may aver another conſideration then that which is compriſed and expreſſed in the deed, or not. ſee tit. Averments.

Where power to revoke uſes ſhall be void againſt purchaſors of good faith, and upon good conſiderations. ſee tit. Revocation.

Conſimili caſu.

Writ of entry in *Conſimili caſu*, in what caſe it lies, and for whom. b.8.48.49. ſee tit. Entry, and writs of Entry and Statutes. W.2. c. 24. there. b.11.80.

Conſpiracy.

In what place and County the writ of conſpiracy ſhall be brought. b.7.1. ſee tit Writ.

Where conſpiracy lies not unleſs he be by lawful manner acquitted, where acquit upon a void indictment. b.4.45. b.9.26.56.

Where conſpiracy lies againſt indictors or not, and what ſhall be a good bar in conſpiracy againſt them. b.9.26.56.

Where a man may inform the jurors, and what evidence given, or information made, ſhall not be conſpiracy, and what ſhall be a good bar upon it, what not. b.9.78. b.4.16. ſee tit. Enditement.

Where and how confederacies and conſpiracies ſhall be inquired of and puniſhed, without a writ of Conſpiracy. b.9.56,57.

What Juſtices may inquire of confederacies and conſpiracies. b.9.56. ſee tit. Juſtices of Oyer and Terminer.

Of conſpiracies and confederacies amongſt artificers, and how to be puniſhed. ſee tit. Statutes, and there 2 *El.* 2. c.15.

Where a writ of conſpiracy lies upon conſpiracy alone, without putting it into action. b.9.56,57.

Con-

Conſtables.

The authority of a Conſtable: ſee tit. Authority, and Juſtification.

Bar in falſe impriſonment againſt a Conſtable, and what ſhall be good: ſee tit. Falſe impriſonment, and Juſtification.

Conſultation.

Where conſultation ſhall be granted upon ſuit in Court-chriſtian for tythes, or not, b.2. 44,45. b.4.75.b.5.9.14. b.7.44. b.2.47,48.b.11. 8,9.16. ſee tit. Attachment upon a Prohibition, and Tythes.

Where conſultation ſhall be granted upon ſuit in the ſpiritual Court, to reverſe eſpouſals, or make them of force, b.4.20. b.7.44.

Where conſultation ſhall be granted upon ſuit in the Spiritual Court, for a deviſe, &c. where the iſſue is upon a thing temporal as heir or not heir, or ſuch like, or not, b.4.17 20. b.7.44.

Where conſultation ſhall be granted upon ſuit in Court-chriſtian, for a deviſe or legacy, or for diſturbance of execution of a deviſe, b. 5.11.2. p.73. b.6.23. ſee tit. Prohibition.

Where a conſultation ſhall be granted upon ſuit in Court-chriſtian, for defamation and ſlander, or not, b.9.17.20. b.5.9.2. p.51. ſee tit. Action upon the caſe.

Where conſultation ſhall be granted upon ſuits in the Court-ſpiritual for monies or other things concerning matrimony, or not, b. 5.9.

Where conſultation ſhall be granted upon ſuit in Court-chriſtian for a mortuary, b. 5.9. ſee tit. Mortuary.

Where conſultation ſhall be granted upon ſuit in the Court-ſpiritual, for laying violent hands upon a Prieſt, or beating him, or not, b.4.20.b.5.13,14.2. p.5.

Where conſultation ſhall be granted upon ſuit in Court-chriſtian for monies which concern not matrimony, b.4.20. b.5.2. p. 51. 66, 67,68.

Where conſultation ſhall be granted upon ſuit in Court-chriſtian, for duties of the Church ſubſtracted, b. 5. 2. p. 72, 73. ſee tit. Action of the caſe.

Where conſultation ſhall be granted for ſuit in Court-chriſtian, for reparation of a Church, or for monies taxed to the reparation of a Church, b.5.9.2. p. 67,68.

Where conſultation ſhall be granted upon ſuit in Court-ſpiritual for damages or coſts recovered there, or not, b.4.20. b.5.13,14.

Where conſultation ſhall be granted upon ſuit in Court-chriſtian for Tythes againſt the Kings tenant, or not, b.2.44. ſee tit. Tythes.

Where conſultation ſhall be granted upon ſuit in Court-chriſtian, for not celebrating Divine Service, or not, b. 5.2. p. 72,73. ſee tit. Action of the caſe.

Where conſultation ſhall be granted for part or parcel, or not, b. 6. 23. ſee tit. Prohibition.

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Contempt.

In a Sheriff for not certifying or removing a record out of the County-Court, b.4.33.

For purſuing a ſuit in Court-chriſtian after Prohibition delivered, or &c. b. 2.40,41. ſee tit. Attachment upon Prohibition.

In a Biſhop, and where his temporalties ſhall be ſeiſed into the Kings hands for his contempt, b. 5. 12,13. b. 8.68. ſee tit. *Q. non Admiſ.*

For ſhewing forth the Popes Bulls, and how puniſhable, b.5.15,16.

In him who arreſts a man in another Court, after he has impleaded in another Court before, &c. and how to be puniſhed, b.8.60. ſee Fine to the King.

Where the contempt ſuppoſed in the attachment upon Prohibition, ſhall be traverſed, b. 2.41.43.

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What ſhall be a good excuſe of a contempt, and where a man ſhall not be charged without notice, and what ſhall be ſufficient notice, and what not, b.2.43.

Of fines to the King for contempt: ſee Fines to the King, b.8.60.

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Continuance.

Form of entry of continuance in the Kings Bench upon continuance, b.5. 2. p.75. ſee tit. Emparlance, b.1.145. b.2.64.

Form of entry of continuances upon Demurrer in Law, b. 1.36.39. 58.61. 145. b. 2. 64,65.

Form of entry of continuances in the Court of Exchequer, b.1 36.40.

Form of continuance upon Iſſue joyned, and no return of the writ of *Venire facias*, b. 2. 28.

Continual claim, and claim.

Where and how continual claim to veſt an eſtate in lands ſhall be made, where upon the land, where not; and what ſhall be ſufficient claim, what not, b.2.54. b.3.84,85,86.

Where continual claim muſt be from year to year, and how the year ſhall be accounted, b.1.97. b.8.100.

Where continual claim made by one perſon ſhall advantage another, or not, b. 9.106.

Where continual claim made by a ſervant or by command, ſhall be good, or not, b. 9. 106.

Within what time claim is to be made, upon fines levied of lands, or &c. by ſtrangers who have right, and where laches of claim ſhall bar them, or not, b.1 97. b.3 77,78,79.87. 90,91. b.2.93. b.4.12. b. 5.2. p. 107.124,125. b. 8. 100. b. 9. 105,106. b. 10.49.99. ſee ſtat. 4 H.7. c.24. and Averments.

Where laches of claim upon a fine levied, by grant and render, ſhall not prejudice the party, who &c. b.3.90. b.8.100.

Where laches of claim ſhall not prejudice the iſſue in tail, or him that claims an eſtate in tail, b.3.87. ſee tit. Laches.

Where laches of claim upon a fine levied, &c. ſhall bar an infant, or not; and what time he ſhall have to claim, b. 3.91. b. 8.100, 101. ſee tit. ſtatutes, 4 H.7. c.24.

Where a woman Covert ſhall be barred of her right, upon a fine levied, what ſhall be laches to claim or not, and what time ſhe ſhall have to claim, b. 3 91. b. 8.100,101. ſee tit. Stat. 4 H.7. c.24. there, and Laches.

Where a man impriſoned ſhall be barred of his right upon a fine levyed of land, and his laches to claim ſhall bind him, or not. b. 3. 91. b. 8. 100, 101. ſee tit. Stat. 4 H.7. c.24. there, and Laches.

Where laches of claim by a man over Sea, and out of the Realm, upon a fine levyed of land, ſhall bar him of his right or not; and what time he ſhall have to make his claim, b. 3.91. b. 4.125. b.88.100,111. b.7.23. ſee tit. Stat. 4 H.7. c.24. there, and Laches.

Where laches of claim upon a fine levyed, ſhall bar a man of unſound memory or not, and what time he ſhall have to claim, b.3.91. b.8.100,101. ſee tit. Stat. 4 H. 7. c.24. there.

Where non-claim by a lunatick ſhall not prejudice him, to take away his entry upon diſcent, b. 3.91. 125. b.8.100,101.

Where and what things ſhall be veſted in him that has right, without entry or claim, where and what not, b.1.94.97. b.2.53,54. b. 3.84,85,86. b.4.53. ſee tit. Condition and Entry congeab.

Where, and what things ſhall be veſted in him who has right preſently by claim, and the poſſeſſion adjudged in him without other circumſtance, b. 1.85.94.147.174. b. 3.84,85. b.6.68. ſee tit. Ent. Congeable.

Where and what things of a villein, the Lord ſhall have by claim, and what he ſhall not have nor be adjudged in poſſeſſion of, without entry or ſeiſure, and what ſhall be ſufficient claim, what not, b.2. 54. b.68.73.

Where, and within what time claim ought to be made, upon a Judgment in a writ of right, or fine levyed at the Common Law, b. 1.96,97. b. 8.100,101.

Where, and within what time claim ought to be made to prevent a diſcent in lands, b. 5.2.107. b. 8. 100. ſee tit. Diſcent and Computation.

Where, and within what time claim ought to be for waiſe and ſtray by the owner, b.5.2. p.107. ſee tit. Waiſe and Stray.

Where, and within what time the owner ought to claim goods wrecked, b.5.2. p. 107. ſee tit. Wreck.

Where claim ſhall make diſſeiſin, and a man be a diſſeiſor againſt his own claim; ſee tit. Diſſeiſin.

Where entry or claim of the huſband ſhall veſt the eſtate in the wife, or remit her or not; ſee tit. Baron and Feme.

Where a villein ſhall be infranchiſed, for abiding a year and a day in ancient demean without claim of the Lord; ſee Villenage.

Where tenant for life or years ſhall forfeit his eſtate by claim of another and greater; ſee tit. Forfeiture.

Where a man or woman ſhall be judged in lands, or &c. according to their claim in pais or no; ſee Remitter.

Contra formam collationis.

Where, and for whom it lies, and againſt whom, and for whom not, b. 6.68. b.8. 170. b. 4. 121.

Contra formam feoffamenti.

Where and for whom, and againſt whom this writ lies, where and for whom, and againſt whom not, b.4.11.121.

Contract.

Where property of goods ſhall be changed, and altered from the owner, by contract, bargain and ſale in a Market, by a ſtranger, or what not, b.3.78.83. b.5.2. p.83. ſee tit. Colluſion.

Where contract ſhall be gone, and determined, by accepting an obligation, for the ſame debt or not, b.6.45. ſee tit. Extinguiſhment.

Where contract ſhall be gone, determined and extinguiſhed by recovery, or bar in action another time in a Court of Record: ſee tit. Extinguiſhment.

Where a contract, and debt upon it, be it perſonal or real, ſhall be apportioned, or not: ſee tit. Apportionment.

Where and what ſhall be a naked pact, upon which no action lies, and what ſhall be a ſufficient conſideration to make good contract or Aſſumpſit: ſee tit. Action of the caſe.

Where a contract made by an infant, ſhall be good and bind him; ſee tit. Enfant.

Where a contract or ſale of trees by tenant in tail, ſhall bind his iſſues after his death, or not: ſee tit. Gift and Sale, and Wood.

How a contract or ſale of things not in poſſeſſion, but which by poſſibility might be had, ſhall be good, or not: ſee tit. Grants, and things in Action.

By contract of all goods and chattels what thing will paſs, what not: ſee tit. Gift.

Bar in debt upon contract, and what ſhall be good: ſee tit. Debt.

Where contract in Market open, ſhall be void becauſe of covin: ſee tit. Colluſion.

Where and againſt whom debt upon contract lies, and againſt whom not: ſee tit. Aſſignee and Debt.

Where payment in debt upon contract is no plea without acquittance: ſee tit. Acquittance.

Of trees ſold by the leſſor during the leaſe where good, and how: ſee tit. Woods and Property.

How a contract part whereof is to be performed over Sea ſhall be tried: ſee tit. Over the Sea.

Contribution.

Where one ſeoffee or recogniſor ſhall have contribution againſt the others, b.3.12.13. ſee *Audita querela.*

Where

Where the heir of the recogniſor ſhall not have contribution againſt the feoffors of the recogniſor, b. 3.12,13. ſee tit. Heir and Debt.

Where contribution ſhall be among parceners for ſuit to a Court, or &c. ſee Partit. and Parceners. For reparations of a Church, or &c. how to be made and levyed: ſee tit. Bilaws.

Where tenant in dower ſhall be contributory to the heir for the ſervices which he does: ſee tit. Dower.

Where contribution ſhall be of the lands of every Lord where the heir is vouched in the ward of divers: ſee tit. Recover in value.

Where contribution ſhall be, and the Lord ſhall not have all the ſervices of one tenant, but every one ſhall hold of him for his part: ſee tit. Avowry, and Apportion.

Of Hundreds, to ſatisfie the debt of him who was robbed, and how it ſhall be done: ſee tit. Hue and cry.

Of vouchees, one alone ſhall not render in value, but every one according to his portion: ſee tit. Recover in Value, and Voucher.

Where the ſurviving joynt obligor, or recogniſor ſhall be charged with the whole debt and have no contribution, and contr. ſee tit. Execution.

Conuſance of plea.

To hold pleas claimed by the Kings grant, b. 5.9,10. not to be granted or allowed where he is a party, b. 8.118. ſee tit. Agent and Patient.

Copy-hold.

Where Copy-holder may enter without admittance, and to what intents he ſhall have poſſeſſion without admittance, and where admittance ſhall be ſufficient for all, or not, b.4.21,22,23.28. b.9.105.107.

Where admittance of a Copy-holder, out of the Mannor or Court, ſhall be good, or not, b.4.26,27.30.

Where admittance by the Lord of a Copy-holder in another manner, who accords to the ſurrender, ſhall be good; and how to enure, b.4.25.28,29. b.8.136.

Where, and what ſhall be ſufficient poſſeſſion and ſeiſin of a Copy-hold, to make the Siſter or Uncle heir, what not, b. 4. 21,22 ſee tit. Diſcent.

Where a Grant and admittance to a Copy-hold ſhall be good, and ſtand, &c. notwithſtanding imperfection in the Lords Steward, Lord for the time, or diſſeiſor, or not, b. 1. 120.117.140. b. 4. 21,22. twice, 23,24,25,26, 27. twice 30. twice 31. b.8.63.

Deed of entry of admittance of a Copy-hold. in the rolls of the Court, and where an eſtate ſhall paſs according to the admittance, which varies from the ſurrender, or not, b. 4. 25.28,29.

The form of pleading in making title to a Copy-hold by cuſtom of a Mannor, what ſhall be good, and time ſufficient to make a Copy-hold, what not, b.4.21,22.31. ſee Limitation.

Where ſurrender and admittance to a Copy-hold out of the Court ſhall be good, by whom, and by whom not, b.4.26,27.30.

Where ſurrender of a Copy-hold out of Court, and admittance after in full Court: ſhall be good, or not, b.4.25.29,30. b.5.2. p. 114.

Where ſurrender or grant of a Copy-hold by him who has neither Mannor nor Court Baron at the time, &c. or a Court only without a Mannor, ſhall be good, or not, b. 4.24, 25, 26, 27.

Which are good cuſtoms of a Copy-hold, and what ſurrenders, grants, or &c. ſhall be well warranted by the cuſtom, what not, b. 4. 23.30,31. b.8.99.105.107. b.3.8,9.

Where ſurrender of a Copy-hold, may be countermanded by the party himſelf, and what act collateral, without aſſent and privity of the party, ſhall be a countermand, what not, b.4.23.25.29,30. b.5.2. p.84.

Where a Copy-hold ſhall be extinguiſhed, and deſtroyed for ever, and by what acts, or not; but being ſuſpended, &c. ſhall become Copy-hold after by grant, &c. or &c. b. 2. 8. b.4.24,25,27.31. b.6.37. b. 8.64. b. 9.104.107. b.7.39. b.2.16,17. b.8.99,100.

Where the ſurrender of the huſband of the Copy-hold of his wife, is no diſcontinuance to the wife, but that ſhe may enter, b.4.23.

Where and what fine ſhall be paid, for a Copy-hold to the Lord, and how it ſhall be aſſeſſed and payed, and where he ſhall have ſeveral fines, or not, b.4.22.27,28. b.8 99. b. 9.107.11.44.

Where an eſtate in Copy-hold land cannot paſs by any other way, but by ſurrender, and where contr. b.2.9. b.4. 21. 24,25.

Where and what ſhall be good cauſe to forfeit a Copy-hold, what not, b. 4.21.23.25. 27,28. b.8.92.99,100. b.9.75.107. b.10.131.

Where and for what cauſe of forfeiture of a Copy-hold, the Lord may enter and ſeiſe, without preſentment of the Homage, or upon what not. b.8.99,100.

Where the Copy-hold ſhall hold land granted by the Lord charged with rent, or &c. granted by the Lord before, or be liable to the Lords Statute, &c. or not, b. 4.23,24.27. 23. b.8.63. b.9.107.

Where the iſſue may enter after ſurrender or leaſe (by licence of the Lord) made by the anceſtor, and it ſhall be no diſcont. b.3.9. b.4.22,23.

Where an eſtate in tail ſhall be of a Copy-hold, or not, b. 3.8,9. b. 4.22,23. ſee tit. ſtatute W.2.c.1. there and Formedon.

Where, and what ſtatutes extend to Copy-hold land, and within which is Copy-hold land conteined, by conſtruction of Law, without words expreſs, within which not, b. 3.8, 9. b.4.22,23.26. b.6.37.b.7.39.b.9.10 5.

How, and in what place, and Court, the Copy-hold of an Ideot ſhall be ordered, b.4. 126. ſee tit. Id.

What remedy for the Copy-holder, if the homage preſent not the ſurrender made to them, or preſent it in another manner, and what remedy againſt the Lord if he will not admit the Copy-holder, b. 4.25,26,27. 29,30. b.5.2. p.114.

Where the Copy-holder ſhall have an action of treſpaſs againſt his Lord, or not, b.2.17. b.4.21,22. b.9.76.

Where a Copy-holder ſhall have an action of treſpaſs againſt a ſtranger, and what damages he ſhall recover, b.4.21.26.31.

Where a writ of falſe judgment lies not for a Copy-hold, b.4. 21.30. ſee tit. Falſe judgment.

Where a writ of right cloſe lies not for tenant by copy of Court Roll, at the will of the Lord, b. 4.21.

Where tenant by copy of court roll may do waſt or not, and how he ſhall be puniſhed for it, b.4.25.27. b.5.2.p.13. b.8.63. ſee tit. Waſt.

Where Copy-hold land may be ſurrendred by attorney, b 9.75,76.

What eſtate ſhall paſs by ſurrender of a Copy-hold to uſe, &c. where no eſtate is expreſſed, and where fee-ſimple ſhall be without the word heirs, or not, b.4.29. ſee tit. Eſtate.

Where the King, or other Lord, ſhall have year, day, and waſt, of a Copy-hold, or not, b. 4.30.

Of what time Copy-holds have been, and their antiquity, b.4.21.

Where a woman ſhall be endowed of a Copy-hold, or not, b.4.22.30. ſee tit. Dower.

Where a man ſhall be tenant by courteſie of a Copy-hold, or not, b.4.22. twice.

Where a grant of ſuch eſtate as has not not uſually by cuſtom been granted, ſhall be good and warranted by cuſtom, or not, b. 3. 8,9. b.4.23.29,30,31.

Where Copy-hold land ſhall paſs by Grant of all his Demean lands, or not, b. 1.46. b.4. 21. ſee tit. Expoſitions.

Where rents of Copy-holds, ſhall be accounted parcel of rents of Aſſiſe, b. 4.21.

Where ſurrender of a Copy-hold upon condition ſhall be good, b. 4.21.25. b. 5.2. p. 114.

In what perſon the fee of a Copy-hold remains, after ſurrender to the uſe of one for life, without limiting the fee, b.4.23.29.

Where cuſtom of Copy-hold ſhall be good for wood, or other profit of Copy-hold land, and warranted by cuſtom, b.4.30,31.

Where recovery againſt tenant in tail, in action real of a Copy-hold, ſhall be diſcontinuance, b. 4.23.

Where releaſe of a Copy hold by deed ſhall be good, b.4.22,23.

Where diſcent of a Copy-hold ſhall not take away the entry of him that has right, b. 4.22,23.

Not aſſets by diſcent, &c. b.4.21. ſee tit. Aſſets.

Cuſtom of a Mannor that a woman ſhall have it during her widow-head, where good, and how to be pleaded, b.4.30.b.5.2. p.116.

Where a Copy-holder ſhall have aid of the King or Queen, b.4.21,22,23. ſee Aid of the King.

Where ſurrender of the huſband to the uſe of his wife ſhall be good, b. 4. 29.

Where a Copy-hold or tenant at will ſhall have aid of a common perſon; ſee tit. Aid.

Where leſſee for years of a Copy-hold ſhall have and maintain an *Ejectione firmæ*; ſee tit. *Ejectione firmæ.*

Where a Copy-holder ſhall have the emblements or not, but the Lord, who enters for forfeiture; ſee tit. Emblements.

Where a Copy-hold granted by the huſband and wife, Lady of a Mannor, ſhall bind the wife and be good; ſee tit. Baron and Feme.

Where a grant of a Copy-hold by the Lord being lunatick, ſhall be good; ſee tit. *Dum non comp.* and Ideots.

Where a Copy-hold granted by the Lord and Infant, ſhall be good; ſee Infant.

Where amendment ſhall be of the Rolls of the Lord of a Mannor for the eſtate and intereſt of the Copy-hold: ſee tit. Amendment.

Who ſhall have the eſcheat of a Copy-hold, attainted of felony: ſee Eſcheat.

Where a Copy-hold granted by a diſſeiſor, or &c. ſhall be good and ſtand in force againſt the diſſeiſee, or not: ſee tit. Diſſeiſin.

How a Copy-holder muſt make preſcription, &c. ſee tit. Preſcript.

Where acceptance of a leaſe of a Copy-hold, deſtroies a Copy-hold: ſee tit. Acceptance.

Corody and Penſion.

Incident to every foundation of an houſe of Religion, b.9.129. b.10.33.64. ſee tit. Append.

What perſon ſhall be ſaid the founder of an houſe to have a Corody, and where the King and a common perſon joyn in the foundation, who ſhall have the Corody, b.9.129. b. 10 33. ſee Foundation.

Where the founder-ſhip of an houſe of Religion cannot be ſevered nor transferred by any means from the founder and by conſequence, nor the Corody, b.7.23.13. b. 11.77, 78. ſee tit. Append. and Foundation.

Aſſiſe of a Corody, or of parcel of it, and the plaint thereupon, b. 8.46. ſee tit. ſtatutes W. 2. c.25.

Where a Corody cannot be granted in reverſion neither by the King, nor &c. b. 8. 55.

Where a *Nuper obiit* lies of a Corody: ſee *Nuper obiit.*

Coroner.

Of treaſon, the principal offence to the Crown, and all the matter which concerns it: ſee tit. Treaſon.

Where, and what death of a man ſhall be murder, what not, b. 4. 40. 42. b. 9.65.68.81. 112. b.5.17.

Where and what death of a man ſhall be ſaid and adjudged Homicide, what not,

b.1.99. b.4.42.124. b.5.2. p.91.109.17. b.7.9. 13,14.

Where and what ſhall be pety treaſon, and where the death of a man or woman ſhall be pety treaſon, though he that kills is not ſervant to him that is killed at the time of death. b. 1. 99. b. 7. 13. *Calvins* caſe. b. 3. Epiſtle there.

Where the death of a man ſhall not be adjudged Homicide, becauſe in defence of his houſe and goods. b.5.2.p.91.

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Where a leaſe, grant, or &c. by a Dean, or Dean and Chapter without the Biſhop, or his confirmation, ſhall be good againſt the ſucceſſor, or not: ſee tit. Abbot, & Confirmation.

Where a leaſe by Dean, or Dean and Chapter, or Biſhop, ſhall be void in the very fact by death, or not, but ſhall be made good by acceptance: ſee tit. Leaſes and Acceptance.

Where, and what chattels the ſucceſſor of a Dean, or Dean and Chapter, ſhall have after the death of the predeceſſor, what not: ſee tit. Abbot, Chattels, Executors, & Corporations.

Of appropriation of a Church to a Dean and Chapter, how it ſhall be done, and where good: ſee tit. Appropriation.

Elections of a Dean, and how they ſhall be made: ſee tit. Election.

The foundation of a Dean and Chapter, &c. and how they are founded and incorporate: ſee tit. Corporation, Grant of the King, and Founders.

The form of pleading, in alledging ſeiſin of rent, where, &c. he ſhall ſay, ſeiſed in right of Deanery, or &c. ſee tit. Corporation, and pleading.

Where a writ or proces ſhall be directed, and awarded to a Dean and Chapter, in the vacancy of the See of the Biſhop, or not: ſee tit. writ to the Biſhop and Ordinary.

Where excommunication certified by the Dean and Chapter, ſhall be good: ſee tit. Excommunication.

Death and Life.

Where a leaſe for years is void *ipſo facto*, by death of the leſſor or no, or by other means, or not, but voidable by entry, b.1.51. 134.139.153,154. b.2.77.b.3.60.65.b 4.23,24. b 5.2.p.3.b.7,8. ſee tit. Leaſes and Acceptance. Ent. Congeab. and Condition.

Where diſcontinuance of proces is by demiſe, or death of the King, b.7.29,30. ſee tit. Diſcontinuance of Proces, and ſtatutes, 1 E.6. c.17. Reattachment and Refummons.

Where mainpriſe in action ſhall be diſcharged by demiſe and death of the King, b. 11.38. ſee tit. Mainpriſe.

Where the whole writ abates not for the death of one of the tenants or defendants, b. 5.2. p.18.

Where death of a ſtranger to the writ abates it, b.7.29,30.

Where judgment ſhall be given, and good, notwithſtanding the plaint. or demand. or tenant or defendant, be dead at the time of the judgement, b.1.102.106. ſee tit. Judgment.

Where falſifying of recovery is, becauſe the tenant or defendant in the action, was dead at the time of the judgment given: ſee tit. Falſ. of recovery.

Where iſſue ſhall be taken upon deſcent, and dying ſeiſed: ſee tit. Iſſues joyned.

Where a writ of eſcheat lies, yet the tenant dies not ſeiſed: ſee tit. Eſcheat.

Where tenant in mortdanceſtor upon plea in bar, ought to traverſe, the dying ſeiſed, or not: ſee tit. Mortdanceſter.

Where, and what dying ſeiſed is ſufficient to maintain an aſſiſe of mortdanceſtor, what not: ſee tit. Mortdanceſtor.

Where he that has right may enter, notwithſtanding death, and dying ſeiſed: ſee tit. Ent. conge.

What is ſufficient dying ſeiſed of the brother to make the ſiſter of the whole blood heir and rebutte, the brother of the *half* blood: ſee tit. Diſcent.

Where a writ ſhall be purchaſed by journies accounts upon death, or not: ſee tit. Journies accounts.

Where no execution ſhall be againſt the heir or executor out of judgment, after death of the party: ſee tit. Execution.

Where attornment is good, notwithſtanding the death of the grantor, or grantee: ſee tit. Attornment.

Where the Heir ſhall have and maintain an action after the death of his anceſtor, or not: ſee tit. Heir.

Where the executor ſhall have and maintain an action after the death of his Teſtator, or not: ſee tit. Executor.

Where the death of a man is not *Homicide*: ſee tit. Corone.

Where the death of a man is *murder*. ſee tit. Corone.

Where a woman ſhall have an appeal of death, and of the death of whom: ſee tit. Appeals.

Appeal of death, &c. by the heir, and who ſhall be ſaid heir, to have an appeal: ſee tit. Appeals.

Within what time appeals of death ought to be begun, &c. ſee tit. Appeals.

Where dying ſeiſed of a baſtard, makes his ſon or daughter heir, and what is ſufficient dying ſeiſed, what not: ſee tit. Baſtardy.

Where divorce may be after the death of the parties, and of what effect it ſhall be. ſee tit. Baſtardy, and Divorce.

Where a condition upon a grant of rent, or &c. that if the grantee dies, his heir within age, the rent ſhall ceaſe, is good: ſee tit. Condition.

Where, and what chattels, debts, or &c. coming to the huſband by marriage, or &c. the wife ſhall have after the death of her huſband, what not; ſee tit. Baron and Feme.

Where, and what chattels, or &c. coming to the huſband by intermarriage, ſhall he have after the death of the wife: ſee tit. Baron and Feme.

Where, and what chattels executors ſhall have after the death of their Teſtator, what not; but the heir ſhall have: ſee tit. Chattels, Executors, and Heir.

Where a man ſhall be excuſed, becauſe he had no notice of the death of a ſtranger by whom he claims, &c. ſee tit. Notice.

Where, and to what intents a man may have an heir in his life time, to what not: ſee tit. Heir.

Where the death of his [illegible] is ſummoned and ſevered abates the writ, or not: ſee tit. Severance.

Decies

Decies tantum.

Count in *Decies tantum.* b 8.36,37.

What verdict ſhall be good in *Decies tantum.* b.10.116.

Where *Decies tantum* ſhall be an action popular, when an action particular to the party who ſues, &c. ſee Action popular.

Bar in *Decies tantum*, and where the Kings Charter ſhall bar the party, or contr. ſee tit. Action popular, and Charter of the King.

Decrees.

How decrees in the Court of Chancery, or Exchequer-chamber, ſhall bind. ſee tit. Courts.

Deeds.

What writing ſhall be good and ſufficient to make a deed, and where it ſhall be void, and ſuſpicious by razure, interlining a new writing. b.5.2. p.23.119. b.10.92. b.11.27. ſee tit. Obligation.

Where a deed without date ſhall be good, and if the date is falſe, or impoſſible, and how a man ſhall take benefit of it by way of Count, or &c. b.2.5.

Where, and what ſhall be ſufficient delivery of a deed, what not. b.3.20.35.

Where a man ſhall ſay the deed was delivered another day, then on that which it bears date. b.2.4,5. b.5.2.p.117.

Where a deed ſhall have two deliveries, &c. b.2.9. b.3.26.35. b.5.75.84.119. b.9.137.

Where a deed may be delivered as an eſcrow to be delivered over, and where it ſhall be good by the firſt delivery without another, or not. b.3.26.35. b.5.2.p.75.84.119.b.9.137. ſee tit. Debt.

How, and to what time deeds ſhall have relation by their delivery, to what not. b.2.5. b.3.26.35.36. b.5.2. p.75.83. ſee tit. Countermand.

Where a deed ſhall become void by breaking the Seal, or raſure, &c. b.5.2.p.23.119. ſee tit. Debt and Obligation.

Where the ſeal of a deed ſhall be good and ſufficient, and the ſealing of many by one ſeal, ſhall make it the deed of all. b.2.3. b.5.2.p.23.

Where the deed ſhall be good without the words In teſtimony of which. b.2.4,5.

Where, how, and when a man illiterate ſhall be bound to deliver a deed, and obliged by it. b.2,3.9.

Where a deed ſhall be void for the uncertainty, and becauſe it wants entendment. b.1. 85. b.5 2.p.121. b.8.56.155,156. ſee tit. Obligation.

Where a deed ſhall be void, for falſe and incongruous Latine, or not. b.5.2.p.121. b.9. 47,48. b 10.133. ſee tit. Falſe Latine.

Where a deed ſhall be void in part, and ſtand in part, or void againſt one, and good againſt another. b.5.2. p.23.119. b.10.86,87. b.11.27.

Where the *Habendum* in deeds ſhall be good, where void, and where the eſtate in the premiſes of a deed ſhall be changed, abridged, or inlarged by it. b 2.23.52.55. b.5.2.p.7,8.94. b.6.36. b.8.56.93.154. b.9.47.

Where a deed made to one, and delivered to another to his uſe, ſhall not be ſaid a deed, till he to whoſe uſe agree, or diſagree. b.3.26. b.5.2.p.119. ſee tit. Agreement.

Where, and what deed ſhall be ſaid a deed indented, what not. b.5.2.p.20. ſee tit. Endenture.

Where a ſtranger to a deed ſhall take avail by a deed made to another, and have an eſtate by it, and how or not. b.1.127. b.5.2. p.71. 81.117.

Where, and when a deed ſhall be condemned or cancelled. b.5.2. p.74,75. b.6.45.

Where a deed pleaded ſhall remain in the Court, and where it ſhall be delivered again to the party. b.5.2.p.74,75. b.6.45.

Where the deputy of an office cannot be without deed. b.9.51.

Where a man may plead a feoffment, grant, releaſe, confirmation, or &c. by the name compriſed in the deed, though he be miſnamed, and in truth he have another name, or not. b.10.57.107. 122,123.125. ſee tit. Miſnaming.

Where a man in pleading may ſay not his deed generally, or plead the ſpecial matter, and conclude, and ſo not his deed. b.2.3.4,5. 7,8,9. b.3.26.59. b.5.2.p.23.119. b.9.137.

Where the words (if it happen) or other words of condition in a deed, ſhall be good, and change the eſtate limited by the premiſes or not. ſee Condition, Repugnant, and Tail.

Where warranty in a deed, ſhall neither amend, nor inlarge the eſtate given by the premiſes. ſee tit. War.

Where a deed made before time of memory ſhall be good, &c. or not. ſee tit. Trial, and grant of the King.

What ſhall be good evidence upon iſſue, not his deed. ſee tit. Evidence.

Where command by word without a deed ſhall be good or not. ſee tit. Commandment, Corporation, and Monſtrance of deeds.

Where licence by words without deed, ſhall be good. ſee tit. Licence.

Where partition without deed ſhall be good, and reſervation of rent upon partition, for equality of partition without deed ſhall be good. ſee tit. Partion.

Where aſſignment of dower, of aſſent of the father, mother, or &c. ſhall be good without deed, or not. ſee Dower.

Where feoffment of lands ſhall be good, though the lands be out of view. ſee tit. Feoffment.

Where exchange ſhall be good without deed. ſee tit. Exchange.

Where a man ſhall plead in bar in action of debt upon an obligation, matter in deed, againſt ſpecialty without ſhewing a deed, and what matter. ſee tit. Debt, and *Audita quer.*

Where a deed belongs to the heir, where to the Executors and Land-tenant. ſee tit. Charters and Detinue.

Where more or leſs paſſes by the deed of feoffment then is compriſed in the deed, and where the whole by the livery, and not by the deed. ſee tit. Feoffments.

Where *recitat* in the deed ſhall make it good, and without it the deed is not good, &c. ſee tit. Grants, Grants of the King, and Eſtoppel.

Where a man ſhall take avail of a deed, by way of feoffment, grant, releaſe or confirmation at his choice, and by what words within a deed. ſee tit. Election.

Where a Count-ſimple, upon a deed without ſpeaking of the condition, where the deed is conditional, is good, or not. ſee tit. Count.

Where eſtoppel ſhall be by deed poll, or deed indented, and where a ſtranger ſhall eſtop the parties, or privies to the deed, and contr. ſee tit. Eſtoppel.

Of deeds inrolled, and the whole matter concerning them. ſee tit. Enrollment.

Of a deed of obligation, and the matter concerning it. ſee tit. Obligation.

Of deeds of releaſes. ſee tit. Releaſes.

Of deeds of confirmation. ſee tit. Confirmation.

Of deeds which concern warranty. ſee tit. Warranty. Warr. of Charters, Counterplea of Warranty, and of Voucher, and Voucher.

Of deeds of defeaſance. ſee tit. Def.

Where a joint deed made by two or more, may become ſeveral by words ſubſequent, or not. ſee tit. Expoſition, Grants, and Annuity.

Where a man ſhall take avail of a deed, without ſhewing it. ſee tit. Monſtr. of Deeds.

Where a deed ſhall be avoided by dureſſe. ſee tit. Dureſſe.

Where a deed ſhall be avoided by infancy. ſee tit. Enfant & Corporat.

Where a deed ſhall be avoided becauſe of unſound memory, by what perſon, and by what not. ſee *Dum non compos mentis*, and Ideot.

Where a deed ſhall be avoided becauſe of Covert. ſee tit. Bar. & Feme.

Where the delivery of a deed ſhall be countermanded. ſee tit. Count.

Certain rules and obſervations for conſtruction of deeds. b.1.95.100. b.2.35.55.71. b.4. 81. b.5.2.p.7,8.28.56. b.6.33.36.64. b.7.23. 42. b.8.94.145.154. b.9.47,48.52,53. ſee tit. Entendment and Aſſurances.

Defamation.

Where action of the caſe lies and ſhall be maintained upon defamation, and upon what words, where, and upon what not. ſee tit. Action of the caſe, and Stat.2. R 2.c.5.

Where prohibition lies, and ſhall be granted upon a ſuit in Court-chriſtian, for defamation and ſlander, or not. ſee tit. Prohibition.

Of actions for ſlander of Peers, and the expoſition of the Statutes which concern it. ſee tit. Action upon Statutes. W.1.c.33. and 2 R. 2.c.5. there.

Default and Appearance.

Where the default of one def. is the default of both, or of all, or not. b.5.2. p.75. b. 6.25.

Where in action againſt the huſband and wife, the default of the wife ſhall be the default of the huſband, or not. b.5.2. p.75. ſee tit. Baron and Feme.

Where in action againſt executors, the default of one ſhall be the default of both, or all. ſee tit. Executors.

Where an executor may appear freely without proces, and plead. b.8.60.

Where the vouchee may appear *gratis*, and be received to enter in the warranty, and counterplea the lieu, or not. ſee tit. Voucher.

Of appearance by attorny, and where, and in what caſes the plaintiff or defendant may appear by attorny. ſee tit. Attorny.

Where default ſhall be in departing in deſpight of the Court, and what ſhall be departing in deſpight of the Court. ſee tit. Departing in deſpight of the Court.

Where judgment final ſhall be given in a writ of right upon default of the tenant, or vouchee. ſee tit. Right.

Where a recovery had upon default, or render ſhall be falſified, and by whom. ſee tit. Falſifying of recovery.

Where a writ of diſceit lies upon a recovery by default. ſee tit. Diſceit.

Where a *Quod ei deforceat* lies not upon a recovery by default, and in what writs, or what contr. ſee tit. *Q. ei deforceat.*

Where reſceit ſhall be granted to a wife upon default of her huſband, or to him in reverſion upon default, or &c. of tenant for life, or to the leſſee for years, or &c. upon def. or &c. of tenant in fee, or &c. ſee tit. Reſceit.

Of Retraxit upon default of the plaintiff, and the whole matter concerning it. ſee tit. Retraxit.

Where execution ſhall be awarded upon default, after *Nihil* returned, upon the firſt *Scire facias*, or not. ſee tit. Execution.

Where the defend. in Præmunire ſhall be attainted, and Judgment given againſt him upon default, or not. ſee tit. Præmunire.

Aſſiſe awarded upon default, and the conſequence of it. ſee tit. Aſſiſe.

Writ of waſt awarded upon default to inquire of waſt, and the conſequence of it. ſee tit. Waſt.

Where, and what day the jurors ſhall be demanded and amerced if they make default. ſee tit. Amercement and Demand.

Defeaſance.

Where a defeaſance ſhall avail as a releaſe to diſcharge Debts, Covenants, or &c. and ſhall be pleaded in bar to avoid circuit of action. b. 1. 113. ſee tit. Circuit of action.

Where a defeaſance ſhall avail as a condition to avoid an eſtate in lands. b. 2. 71, 74. b.4.9.

Where the def. after execution ſhall avoid execution, and the Statute and Recogniſance upon which, &c. b.6.13.

Where

Where a defeaſance, releaſe, or &c. made by the head of a corporation only, ſhall bar the ſucceſſor and whole corporation for ever. ſee tit. Corporation, and Abbot.

Where a ſtranger to the deed of defeaſance, ſhall have avail by it, and plead it: ſee tit. Deeds.

Where a defeaſance, or other matter may be pleaded in bar, by force of a deed, without ſhewing it or not: ſee tit. Monſtr. of deeds.

Degrees.

Where entry ſhall make a degree, to have a writ of Entry in the *per*, or *per & cui*, or not: ſee tit. Entry.

Where, and what releaſe ſhall make a degree, &c. and he to whom the releaſe is made, be ſuppoſed in the *per*, by him who releaſed, or not: ſee tit. Releaſe.

Delay.

Where judgment may be delaied and reſpited by diſcretion of the Court: ſee tit. Office of Courts, and Judgment.

Where the Juſtices ought not to delay juſtice to the ſubjects, neither for the privy ſeal, nor other ſeals of the King: ſee tit. Statutes, 2 E. 3. & 20 E. 3. and *Superſedeas*.

How, and in what manner Homage to be made by the heir upon livery, may be reſpited: ſee tit. Livery.

Where it ſhall be in the diſcretion of the Juſtices, to ſtay reſtitution, upon forcible entry and traverſ. tend. &c. ſee tit. Forcible entry.

Where is delay for age, and a plea demurring: ſee tit. Age.

Where delay ſhall be for Eſſoine: ſee tit. Eſſoine.

Where delay ſhall be for reſceit: ſee tit. Reſceit.

Where delay ſhall be for protection: ſee tit. Protection.

Where delay ſhall be for writ of error: ſee tit. Error.

Where delay ſhall be for attaint: ſee tit. Attaint.

Demands and demandable.

See tit. *Requeſt.*

Double in deed and law, b. 8. 153, 154.

The order to be obſerved in demands, by *præcipe quod reddat*, or &c. and where a writ or plaint ſhall not abate for want of form, or cont. b. 3. 31. b 4. 39. 87. b. 11. 55. 82.

Where *præcipe quod reddat*, lies of a Knights fee, and how, b. 9. 124.

Where a demand by *præcipe quod reddat*, lies not againſt the King, b. 4. 55. b. 6. 51. ſee tit. Petition, and Prerogative.

Where a *præcipe quod reddat* lies of a meſſuage, or houſe, and where they ſhall be recovered by demand of land, b. 4. 87.

Where a *præcipe quod reddat*, or plaint in aſſiſe ſhall be of a Will, b. 4. 87. ſee tit. Aſſiſe and Dower.

Where a *præcipe quod reddat* lies not of tithes, b. 11. 25. ſee tit. Tithes, and Statutes, 32 H. c. 7.

Where a *præcipe quod reddat* lies of an advowſon, or not, b. 1. 16. 91, b. 2. 74. b. 5. 2. p. 4. 40. ſee tit. Advowſon, b. 11. 45.

Where a *præcipe quod reddat* lies of land, and what things are included and ſhall be recovered by demands of it, b. 4. 87. b. 11. 49.

Where a *præcipe quod reddat* lies of a Mannor, and where a forſpriſe needs in it, or not, b. 5. 2. p. 11. b. 11. 47. 49. ſee tit. Mannor and writ.

Where a *præcipe quod reddat* lies of wood, and how the demand ſhall be, b. 4. 87. b. 11. 49. ſee tit. Woods and Aſſiſe.

Where a demand by *præcipe quod reddat*, ſhall be maintained againſt him in reverſion, upon an eſtate for life, or not, b. 8. 151.

Where a *præcipe quod reddat* lies againſt leſſee for years, or Gardian, b. 6. 7. ſee tit. Dower.

Where a demand by *præcipe quod reddat*, ſhall be in the diſjunctive, b. 2. 37. b. 5. 2. p 22. 40. b. 6. 36. b. 10. 127, 128.

Where a demand by *præcipe quod reddat*, or plaint in aſſiſe ſhall be of ſo many acres of ſaucies, b. 6. 47.

Where a demand by *præcipe quod reddat*, ſhall be of a moity, 3. 4. part, or &c. b. 3. 1. ſee tit. Dower, and Avowſ.

Where a demand by *præcipe quod reddat*, ſhall be of offices and how, &c. b. 8. 47. ſee tit. Aſſiſe and Plaint.

Where one joynt-demand by *præcipe quod reddat*, or plaint in Aſſiſe, ſhall be of many things of ſeveral natures, or not, b. 8. 47. ſee tit. Writ.

How a demand by *præcipe quod reddat*, or plaint in Aſſiſe, ſhall be of rents, or &c. iſſuing out of lands in two Counties, b. 4. 4. b. 7. 3. ſee tit. Writ, and Aſſiſe.

Where, and againſt whom a demand by *præcipe quod reddat* lies not, but a *Quod permittat*, b. 5. 2. p. 101. b. 8. 46, 47. b. 9. 55. ſee tit. *Quod permittat.*

Where reentry for a condition broken upon a leaſe for years, or &c. reſerving rent, ſhall not be good without demand by the leſſor, or his grantee, and where, and how to be done, and what demand ſhall be good, and effectual, what not, b. 1. 139. b. 2. 31. b. 4. 72, 73. b. 5. 2. 113, 114. 56. b. 7. 28. b. 10. 129. ſee tit. Condition and entry congeab.

Where the Sheriff after requeſt to enter an houſe to make execution, or &c. may break the houſe, &c. and not before demand made, b. 5. 2. p. 92. 93.

Where a condition is not to be performed, without a requeſt to him that is to perform it, and what ſhall be ſufficient, what not: ſee tit. Conditions.

Where iſſue ſhall be taken, and joined upon requeſt, b. 5. 2. p. 25. b. 7. 28. ſee tit. Requeſt, and Tender.

Where a demand by *præcipe quod reddat* ſhall be of eſtovers, and how: ſee tit. Aſſiſe, and Common.

Where a demand by *præcipe quod reddat* ſhall be of a way, and where it lies, or not ſee tit. Aſſiſe, and Way.

Where *Ceſſavit*, nor other *præcipe quod reddat* lies not of Homage, or Fealty: ſee tit. *Ceſſavit*, and Homage.

Where a demand by *præcipe quod reddat*, or plaint in Aſſiſe ſhall be by theſe words, (with the appurtenances) or not. ſee tit. Aſſ. & Plaint.

Where a demand by *præcipe quod reddat*, or plaint in Aſſiſe which demands or comprehends one thing twice, or one thing iſſuing out of another ſhall not be good, but abate: ſee tit. Writ.

Of dower, and of what things, and damages, ſhall not be recovered, without demand of dower: ſee tit. Damages, & Dower.

Where, and what day jurors ſhall be demanded and amerced if they appear not, and where they ſhall be demanded upon pain: ſee Amercement. Fine to the King, and Pain.

Departure in deſpight of the Court ſhall be, where the defendant makes def. the ſame term in which he once appeared upon demand: ſee tit. Depart. in deſpight.

Where a man ſhall not be non-ſuited the ſame term being demanded, becauſe he has once appeared, but barred by a *Retraxit*: ſee tit. Non-ſuit, and *Retraxit.*

Where denying rent demanded is diſſeiſin of rent, and of what rents, and what not: ſee tit. Diſſeiſin.

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Verdict in ejectment of ward, and what good, what not. ſee tit. Ward, and Verdict.

Where judgment ſhall be given in ejectment of ward, &c. ſee tit. Judgment.

Who is a deforceor againſt whom a writ of ejectment, or &c. lies, and who not. ſee Ward.

Where, and what damages ſhall be recovered in ejectment of ward. ſee tit. Ward.

Eyre.

Of Juſtices in Eyre, and their authority. ſee tit. Juſtices.

Elegit.

Where execution ſhall be awarded by *Elegit*, and how the Sheriff ſhall demean himſelf upon it, and what lands ſhall be delivered in execution. ſee tit. Execution and Extent.

Where Aſſiſe lies by tenant, by *elegit*. ſee tit. Aſſiſe.

Where the Lord who has the wardſhip of the heir of his tenant, ſhall out the tenant by *Elegit*, or not. ſee tit. Ward.

Where tenant by *Elegit* ſhall falſifie a recovery had againſt him in reverſion, who has the franktenement. ſee tit. Falſifying of recovery.

Where tenant by *Elegit* ſhall be received upon def. or &c. he in reverſion who has the franktenement in action againſt him. ſee tit. Reſceit.

Where action of waſt lies againſt tenant by *Elegit*, or not. ſee tit. Waſt.

Election.

Where it is in election of the purchaſer to take in one courſe of conveyance, or other, or not; and upon what words, within the deed, &c. b.2.35,36. b.4.72. b.6.36. b.8. 167.

Where the Lord who may chooſe to have the wardſhip of the heir of his tenant, or to waive

waive it, and take the rents and ſervices, at his pleaſure, b.2.68.

Where upon grant of a rent charge the grantee may diſtrein, or have a writ of annuity at his election, or not, b.3.29. b.2.36. b.4.49. b.6.58. b.7.24. b.10.128.

Where upon two or three actions, it is in a mans choice to have one or the other, or not, b.2.37.61. b.4.93. to 95. b.5.2. p.88. b.6.64.45. b.9.51,52. ſee tit. Bar and Recovery.

Of Abbots, Biſhops, or other heads of Corporations, how to be made, and what election of them good, b. 4. 77, 78. b. 3.74. b. 10. 31 34.

Of a Sheriff of a County, and how he ſhall be choſen, b.3.72. b.4.33. b.5.2. p.92. ſee tit. Sheriff.

Where, and by what acts and accidents election upon grants ſhall be gone and determined, and by what not, b. 2.37. b.3.24.84. b.4.49. b.7.7,8. b.10.128.

Where, and when upon grant or obligation the grantor, or obligor ſhall have election, and where, and when the grantee or obligee, b.2.37. b.5.2. p.22.25.112. b.6.36. b.8.155. b 10. 127,128. ſee tit. Annuity, Demand, Gift, and Plaintiff.

Where it is in election of the iſſue in tail, to have the land taken in exchange, or the land deſcended to him from his father, b.1.96. ſee tit. Exchange.

Where it is in election of the tenant to attorn to the firſt or ſecond grantee of the reverſion, where, &c. b.1.122. b.5.2. p.112. ſee tit. Attornment.

Where heirs or executors ſhall have election upon grants, where, &c. or not, b.2.36,37.

Where it is in election of the Lord to have a writ of forfeiture of marriage, or to detein the land, until &c. b.4.82. b.5 2. p. 127.58. b. 6.70.76. b. 10. 119. ſee tit. Action upon the Statutes Merton. c.6.7. tit Statutes.

Where it is in election of the iſſue in tail to bring his writ of Formedon, or to enter, and make claim, b.2.84.85.

Where it is in election of the tenant to vouch, or &c. by warranty in deed, or law, b. 4.81. ſee tit. Warranty.

Where it is in election of the plaint. in action, to have judgment by the common law, or given by ſtatute, or not, b.5.2. p.59. ſee tit. Judgment, b.11.62.

Where he to whoſe uſe, &c. ſhall have election, to execute the eſtate in the land, as owner of it, or by authority to him given or reſerved, b.6.18. ſee tit. Authority.

Where the Lord may elect to avow upon the feoffor or feoffee, or not; ſee tit. Avowry and notice.

Where the leſſor may elect to bring an action of debt againſt the leſſee, or aſſignee, after aſſignment by the leſſee, of his term; ſee tit. Aſſignment.

Where it is in the election of the Eſcheator, to return an office found before him into the Chancery or Exchequer; ſee tit. Office before the Eſcheator.

Where it is in the election of the officer, who arreſts a man upon a warrant of the Peace, to carry the party arreſted, to what Juſtice he pleaſes; ſee tit. Arreſt, and Peace.

Where it is in election of the Sheriff upon *Fieri facias* to him directed, to ſell a term, or deliver it in execution upon extent; ſee tit. Execution.

Of a Coronour, and how it ſhall be; ſee tit. Coronour.

Where upon demurrer offered by one party, the other ſhall not have election to refuſe to joyn in demurrer; ſee tit. Demurrer.

Where election ſhall precede an eſtate, where follow it; b. 2.36.

Where it is in the election of party plaint. to bring an action in what place or County he pleaſes; ſee tit. Writ.

Where it is in the election of the obligee, to bring his action of debt againſt one obligor, or all; ſee tit. Obligation.

Where a man may elect to make title by preſcription general or ſpecial; ſee tit. Preſcription.

Where, and what writs may be ſued and maintained by the huſband and wife, or huſband alone at his election, where, and what not; ſee tit. Huſband and Wife.

Where there may be election to have a writ of entry in the *per. per* and *cui*, or in the *poſt*, or not; ſee tit. Entry, and writ of Entry

Of grand aſſiſe in the writ of right, and the order of it; ſee Right.

Where a contract, or action upon it ſhall be gone, and extinct by acceptance of an obligation for it, or not; but the party may have his action upon one or the other, at his election; ſee tit. Contract and extinguiſhment.

Where a contract, or action upon it, ſhall be gone and extinct by recovery or not, but the party may maintain his firſt action, or an action upon the judgment, at his election, or not; ſee tit. Extinguiſhment.

Where, and what actions may be ſued againſt the huſband and wife joyntly, upon a thing done during the Coverture, or againſt the huſband alone at the election of him that ſues: ſee tit. Baron and Feme, and joyning in action.

How conditions in the disjunctive ſhall be performed, and what party ſhall have election; ſee tit. Election.

Where appeals, and inditements ſhall be good againſt the principal and acceſſory joyntly, or ſeverally at the election, &c. ſee tit. Appeals.

Where an executor upon a deviſe to him, ſhall have election, to take as Executor or Legatee; ſee tit. Deviſe.

Where a woman ſhall have election to be indowed of one land or another, or to be anew indowed; ſee tit. Dower.

Prerogative of the King to ſue in what Court he pleaſes, and to chuſe what action he will.

Where a man may vouch one or two upon joynt-garranty at his election, or not; ſee tit. Voucher.

To have execution, by *Fieri facias*, *Capias*, or *Elegit*, or not; ſee tit. Executions.

Of a woman after death of her huſband, or iſſue in tail, or &c. to make a leaſe good by acceptance; ſee tit. Acceptance.

Where it ſhall be in election to make a leaſe, grant, gift, or deed by him, good at full age, or not; ſee tit. Enfant.

In grants, feoffments, leaſes, &c. to make them good by agreement, or avoid them by diſagreement after; ſee tit. Agreement, and Diſagreement.

Where a man ſhall pray, and have proces at the common law, or proces given by ſtatute, or not; ſee tit. Proces.

Where a man or woman ſhall be remitted, againſt their claim below, at election, or not; ſee tit. Remitter.

Where it is in the election of Juſtices of Peace, to make reſtitution upon the ſtatutes of forcible entry, or ſtay it upon traverſe tend. ſee tit. Forcible entry, and Peace.

Where the King ſhall have election to have the wardſhip of the iſſue in tail, upon a gift made by his tenant without his licence; ſee tit. Prerogative.

Eloigning.

Where a woman ſhall be barred of dower by eloigning the heir, and by eloigning, and deteining of Charters; ſee tit. Dower.

Embleaments.

Where the diſſeiſee ſhall have the embleaments of the diſſeiſor or abator after his reentry, or not; b.11.51.

Where the diſſeiſee ſhall have the embleaments of the feoffee, or leſſee, of the diſſeiſor, or abator, or not; b.5.2. p.85. b.11.51.

Where tenant by copy of Court, or leſſee at will ſhall have the embleaments, notwithſtanding the entry of the Lord, or leſſor, b.4. 21. b.5.2. p.116.

Where leſſee for years ſhall not have the embleaments, after his eſtate determined; b. 5.2. p.85 116.

Nor leſſee for years of a leſſee for &c. b. 5. 2 p. 85 116.

Where leſſee for life, or his executors ſhall have the Embleaments, b.5.2. p.84,85.

Where the huſband who has an eſtate in the right of his wife, ſhall have the embleaments, b.5.2. p.116.

Where the wife ſhall have the embleaments of the huſband after his death, and not the huſbands executors, where contr. b. 5.2. p.116

Where the King ſhall have the embleaments upon outlary, b.5.2. p.116.

Emparlance.

The form of entry of emparlance in the Kings Bench, and difference betwixt emparlance upon plea in bar, and upon replication; b.5.2. p.75. ſee tit. Continuance.

Where after emparlance, the def. ſhall have hearing of the deed, Teſtament, or record, or not; b.5.2. p.74.

Encumbent.

Where *Q. Impedit*, or &c. lies and is maintainable, againſt an incumbent alone, or not; b 7.25,26.

What pleas the incumbent ſhall have in *Q. Impedit*, or &c. as well againſt a common perſon, as the King; and how, and when, and what not; b. 6.48. b. 7.26. b. 10.44. ſee tit. Statutes, 25 E.3. c.7. there, b.4.117.

Where, and to what intents the preſent. to a Church. ſhall be ſaid an incumbent, by admiſſion without induction, to what not; b.4. 75. b.6.49. b.7.26. ſee tit. Preſent. to a Church, and *Q. Impedit*.

What manner of perſons cannot be preſent. to a Church, to be incumbents, but the Biſhop may refuſe them, &c. b. 4.17. b. 5.2. p. 57,58. b.8.4.61.

Where an incumbent ſhall be removed upon recovery in a writ of right, or *Q. Impedit*, or &c. where not, b 6,29 30.48.50,51. ſee tit. Writ to the Biſhop.

Of an incumbent perſon Imparſonee, &c. ſee tit. Appropriation.

Where an incumbent ſhall plead a deed made to the patron without ſhewing it; ſee tit. Monſt. of deeds.

Where an incumbent ſhall have aſſiſe, or treſpaſs, of diſſeiſin or treſpaſs done him, of tithes in his glebe land, or Church-yard, &c. ſee tit Aſſiſe, Treſpaſs, and parſon.

Where plenarty by ſix moneths ſhall be ſufficient title, and bar, in *Q. Impedit*, or &c. or plenarty in a Parſon imparſonee, or not; ſee tit. *Q. Impedit*.

Where a leas by a Parſon, Prebend, or &c. of his Parſonage, or &c. ſhall be void by their deaths, reſignat. not reſidence, or &c. or not; ſee tit. Leaſes, and Parſon.

Endenture.

Where, and what ſhall be ſaid and accounted an Indenture, or deed indented, what not; b.5.2. p.20. ſee tit Deeds.

Where eſtoppel ſhall be by Indenture, and where a ſtranger ſhall eſtopp. and be eſtopped by it, or not; b.1.155. b 4.53,54. b.5.2. p.20. b.6.15. b 8.53. b.9 8,9.

Where an action of Covenant may be maintained upon an indenture without words of Covenant, and upon what words within the deed, upon what not; b.4.80. b.5.2. p.17,18. ſee tit. Covenant.

How conditions to perform Covenants contrived within Indentures, ſhall be performed, and the form of pleading thereupon; ſee tit. Condition.

Of Indentures of defeaſance, and where they ſhall be conſtrued, and avail as a condition, to avoid circuit of action; ſee tit. Circuit of action, and Defeaſance.

Of inquiſition found before the Eſcheator, and that the counterpart of the Indenture, ought to remain with the Jury; ſee tit. Eſcheator.

Where uſe of land may be declared by Indenture, bearing date before, though the aſſurance ſubſequent vary in time, quantity of land, or &c. ſee tit. Uſes.

Endictment.

Who have power and authority to take Indictments, who not. b.4.41.45,46. b.9.18. 118.

Where the Indictment which wants the year and day, nor makes it uncertain when the thing was done ſhall be good or not. b.4. 41.48.

Where an Indictment which wants the place and makes it uncertain where the thing was done, ſhall be good or not. b.9.66.

Where an Indictment ſhall be good by intendment, or implication of words, or not. b.4.41,42.44.47. b.5.2.p.120,121. b.8.57.

Where an Indictment ſhall be good, by words equivalent, and what ſhall be ſaid words equivalent, or not. b.5.2.p 122,123.

Where to be void and inſufficient for not putting in certain, the part of the body in which the wound was given, and which words imply ſufficient certainty, which not. b.4.40, 41. b.5.2.p.121.

Where an Indictment is good, without ſhewing the depth of the wound, or not. b.4. 40,41. b.5.2.p.122.

The order to form Indictments at this day by Statutes. b.11.29.

Where an Indictment which wants the word (felonioufly) is good, or not. b.4.41.49. b.9. 69. b 5.2.p.121.

Where an Indictment by words general, as common thief, Foreſtallor, Champertor, Barretor, or &c. is good, or not. b.8.36,37. ſee tit. Barrettor.

In what place and County Indictments ſhall be taken, in what not. b.9.118. ſee tit. Appeals and Writs.

What is a good Indictment of murder or Homicide, what not. b.4.40,41. b.9.62,63.116. 118. b.5.2.p.122,123. b.4.42.44,45.

Relation of words in Indictments, where they are good by ſuch relation, or not. b. 4. 40.41.

Where an Indictment upon a Statute is good without rehearſing the Statute, and where againſt the form of the Statute, will be ſufficient. b.4.48. ſee tit. Action upon Statute, and Forcible Entry.

Where an Indictment or Preſentment not expreſſing before what Court or Judge it was, &c. is good or not. b.4.41.

Where an Indictment taken in the time of one King, ſhall ſtand in the time of another, and the party be arraigned, and put to anſwer upon it, or not. b.7.31.

Indictment of Burglary, and what ſhall be good, what not. ſee tit. Corone.

For what place and County the Country ſhall come to try the iſſue upon an Indictment felony or treaſon. ſee tit. Corone.

Where the inqueſt upon iſſue joined upon Indictment of felony in one County, may find a thing done in another. ſee tit. Enqueſt.

What ſhall be a good Indictment of high Treaſon, what not. ſee tit. Treaſon.

What ſhall be a good indictment of petty treaſon, what not. ſee tit. Corone.

Of indictments and preſentments in Leets, which ſhall be good, which not. ſee tit. Leets.

Where an indictment is inſufficient for default of the word *percuſſit*, He ſtruck. b.4.41. b.5.2.p.122,123.

Where good againſt many upon the death of a man, and the form of indictment in ſuch caſe. b.4.40.

Againſt many, inſufficient againſt one, where it ſhall be void againſt all. b.4.40.

Where the principal and acceſſory may be joined in one indictment, or ſeveral indictments may be at election. ſee tit. Appeals and Election.

Againſt the principal, which good, which not. ſee tit. Corone.

Againſt the acceſſary, which good, which not. b.4.40,41. ſee tit. Corone.

Where good by the word (about) or not. b.4.40,41.

Where good for murder, without the words (of malice forethought) or not. b.4.40,41. and upon the Statute of Recuſants. 23 of *Eliz.* b.11 60,61.

Where an indictment ſhall be good without the words (in the peace of God, or of our Lord the King) or not. b.4.41.

Where void and inſufficient for falſe and inſenſible Latine, or not. b.4.39.42. b.5.2.p. 120,121. ſee tit. Falſe Latine.

Where void and inſufficient by ſuppoſing one thing to be done at two ſeveral days. b. 4.48.

Where an indictment is but an inqueſt of office to find the truth of the fact, and therefore defects in law in them ſhall be ſupplied, &c. b.4.42.47.

Where ſurpluſage in an indictment ſhall make it vitious, or not. ſee tit. Surpluſage.

Where indictment by inqueſt which finds matter of record, is good or not. ſee tit. Enqueſt.

Where an indictment of a Juſtice of record, for a thing as juſtice ſhall be good or not. b.4. 16. ſee tit. Conſpiracy.

Where indictments of treſpaſſes or other miſdeeds perſonal, &c. and Bars in them. b. 9.113.118. ſee tit. Bar 44.

The office of the Juſtice upon a vitious Indictment. b.4.45.

Where an indictment or preſentment, &c. are not traverſable, where contr. ſee tit. Bar.

Where a man may be indicted and arraigned, notwithſtanding an appeal hanging againſt him, or not. ſee tit. Appeals.

Where a man once acquitted, ſhall be again indicted and arraigned. ſee tit. Appeals and Corone.

Of accuſation by indictment, &c. ſee tit. Accuſation.

Where verdict at large may be given upon indictment of murder, felony, or &c. and what verdict is good, what not. ſee tit. Corone.

Where conſpiracy lies againſt indictors, &c. and what ſhall be a good indictment for them, what not. ſee tit. Conſpiracy.

What ſhall be a good indictment upon the Statute 8 H.6. of forcible entry, what not. ſee tit. Forcible Entry.

Enfant.

Levies a fine, how, and within what time he muſt avoid it. b.1.76. b.2.57,58.77. b.5.2. p.44,45.38. b.8 58. b.11.69.77. ſee Error.

Where a feoffment or leaſe by an infant is void, or voidable, and where good by acceptance, &c. b.4.125. b.5.2.p.27. b.8.42,43. ſee tit. Acceptance.

Where a releaſe or confirmation made by an infant will be good, and bind him, b 5.2.p. 27. ſee tit. Acquittance.

Where a contract by an infant ſhall bind him or not. b.9.87.

Where an infant ſhall be charged for waſt done, and recovery againſt him ſhall bind him. b.8.44.

Where uſurpation upon an infant by preſent. to a Church ſhall bind, and put him out of poſſeſſion, or not. b.6 49,50. b.11.33. ſee tit. Statutes, W.2.c.5.

Where an infant is bound by warranty collateral diſcend. upon him during his nonage. b.1.67.140.

Where an infant is to be excuſed for a breach of a condition in deed, or law, by his nonage, or not. b.8.44.

Where a ſtranger ſhall take advantage of the nonage of an infant, and avoid eſtates made by him, or not. b.1.140. b.3.13. b.4. 125. b.7.8. b.8.43,44.52. ſee tit. Age, and *Dum fuit infra ætatem.*

Where an infant in his Mothers belly ſhall be vouched, and what things he ſhall have, and his capacity to take, &c. b.9.9. b.10.52. ſee tit. Capacity.

Where an infant, &c. ſhall falſifie a recovery had againſt him during his nonage, or not. b.6.8.44.100. ſee tit. Falſe Recovery.

Lord of a Mannor grants a Copy-hold, it ſhall bind him. b.4.23. b.8.63.

Declaration of uſe of a fine levied by him good, and binds him. b.2.58. ſee tit. Uſes.

The King an infant ſhall not avoid a grant becauſe of his nonage. b.5.2. p.27. b.7.10.12. ſee tit. King and Prerogative.

Where an infant is not to be amerced, but if he be, is pardoned in action brought by him. b.5.2.p.49 b.8.61. ſee tit. Amercement.

Where an infant ſhall ſue by guardian, and how the entry ſhall be in the roll. b.4.53,54. ſee tit. Attorny.

Where an infant is bound by non-claim within a year and day upon waif and eſtray. b.5.2.p.138. ſee tit. Waif and Eſtray.

Where a corporation ſhall not avoid their grant, &c. becauſe of infancy of their Head and Soveraign. ſee tit. Corporation.

Where, and what ſtatutes bind the infant, what not. b.3.91. b.8.44.100. ſee tit. Cont. claim, &c.

Where an infant is bound by non-claim within five years upon a fine levied, and how the five years ſhall be accounted. ſee tit. Cont. claim, computat. and ſtatut. 4 H.7.c.24.there.

Where the infant ſhall be charged by ceſſing of ſervices, and recovery in *ceſſavit*, ſhall bind him for ever. ſee tit. *ceſſavit.*

Where an infant ſhall attorn, and where not. ſee tit. Age and Attornment.

Where a Teſtament or deviſe by an infant ſhall be good or not. ſee tit. Teſtament.

Where an infant ſhall enter upon diſcent of the baſtard eigne, by reaſon of his nonage. ſee tit. Baſtardy.

Where an infant is bound by Statute-Marchant, Staple, or recogniſ. or not. ſee tit. *Audita querela.*

Where the infant plaint. in *Per quæ ſervitia*, or &c. ſhall acknowledge the acquittal, warranty, or other advantage to the def. and ſhall be bound by it. ſee tit. Attornment.

Where age ſhall be granted, and the plea demur in *Partit. faciend.* ſee tit. Age.

Where an infant may make Attorny, and appear by Attorny, or not. ſee tit. Attorny.

Where entry ſhall be lawful upon diſcent, becauſe of nonage. ſee tit. Entry congeable.

Where age ſhall not be granted in aſſiſe, &c. but the circumſtances ſhall be enquired of to his advantage. ſee tit. Age, and Aſſiſe.

Where alienation of an infant ſhall be good by cuſtom. ſee tit. Cuſtom.

Where an infant ſhall be barred by his acceptance. ſee tit. Acceptance.

Where diſclaiming lies for an infant in a writ of right, &c. ſee tit. Diſclaiming.

Where proces ſhall be awarded to make the infant come to be viewed. ſee tit. Proces.

Enfranchiſement.

Where enfranchiſement of a villain or nief ſhall be by eſpouſals, and for what time. b.4. 55.

Where enfranchiſement of a villain ſhall not be by attornment. b.9.83. ſee tit. Attornment.

Where enfranchiſement ſhall not be by feoffment to a villain, by the tenant of the Lord by colluſion. b.11.77.

Where enfranchiſement of a villain ſhall be by action brought by the Lord againſt him. b.11.77.

Where a villain ſhall be enfranchiſed, by abiding a year and day in ancient demean. b.5.2.p.107.

Where a villain of the King ſhall not be enfranchiſed by grant of land, &c. to him by the King. b.5.2.p.56.

Where a villain ſhall be enfranchiſed for ever, and where but for a time. b.4.55.

Where enfranchiſement ſhall be by matter *in pais*, to which the Lord is party, or not. b. 455.b.9.83. b.11.77.

Where

Where a villein shall be enfranchised by matter of record, to which the Lord is party, or not; b.5.2. p.56. b.11.77.

Enfoxmations, see tit. **Inforxmations.**

Enheritance.

Where a man shall have an estate of inheritance without the word (Heirs) by grant, devise, &c. or not; b.1.85,86,87.100.103. b. 3.21. b.4.29. b.5.2. p.112. b.6.16,17.27. b.10. 57. see Estates.

Where no estate shall be of inheritance, by feoffment, grant, or &c. though the word heirs, are within the deeds of feoffment,grant, or &c. b.1.46.43.66.85.104.140.147.155. b.2. 21.23,24. b.4.29. b.5.2. p.112. b.8.27.

Where two have joynt estates for life, and several inheritances; b. 1.84. b. 8.87. see tit. Estates.

May descend, not ascend, b. 3.40. see tit. Discent.

Where attainder of the father shall be corruption of blood in the sons, so that they shall not inherit to the father, or other ancestor; see tit. Corruption of blood.

In chattels, and where the heir shall have them as parcel, or incident to the Inheritance; see tit. Chattels.

Who shall be heir, and have the land by discent, who not; see tit. Discent, and Heir.

Enquest.

Where several *Venire facias* shall be awarded to have the inquest, or but one joynt *Venire*, upon one or several issues; b. 8.66. b. 11.5,6.

Where the defend shall have *Venire facias*, to have the Inquest, with Proviso, or without, or not, b.10.104.

How a *Venire facias*, or &c. of the *Tales* shall be awarded, and how many of the *Tales* may be, or not; b.104,105.

Where the Inquest shall be taken of the *Tales*, the *Venire facias*, or principal pannel being quashed, or where by the principal pannel but one or two are returned; b. 10. 104, 105.

Where the Inquest shall not be taken for defect in the proces, or defect in the return of the Sheriff, or &c. b.5.2. p. 36.41,42. b.6.14. b.8.66. b.10.104.119. b.11.7.

Where a *Venire facias* anew shall be awarded, or not; b.5.2. p.36.37.41,42. b.6.14. b.8. 65. b.11.7. b.10.104.

Where the Inquest shall be discharged, and for what causes, b.8.65,66.

Which are Inquests of office, and where to be taken, and what shall ensue upon them, b. 10.119.

Where the Inquest shall find matter of record, where it ought to take notice of it, upon pain of attaint, and there finding it good; b.1.8,9.28.35.41.168,169. b.2.19,20.25.50.57. 70.91. b. 3.7.69. b. 4.64,65.101,102. b.5.1,2. and 2. p.3.99.104. b.8.67. b.9.3.8. b.11.9.19. b.7.121.

Where the Inquest shall try and find a spiritual, and take knowledge of it upon pain of attaint, or not; b.4.29.b.5.2.p.98.104.b.7.43.

Where the Inquest shall try and inquire of a thing done beyond Sea, or in Scotland, or not; b.6.46,47. b.7.23.26,27. *Calvins* case.

Where the Inquest may, and must find matter of estoppel, and good; b.4.53.

Where the Inquest is not estopped by pleading of the parties, but are at large to find the truth of the matter; b.2.4.75.b.4.53.126. b.5.2. p.30. see tit. Estoppel.

Where the Inquest shall take notice of, and find matter in a forein County, and their finding and Verdict upon it good; b. 5. 2. p. 56. b.6.46. b.7.2.

Where the Inquest shall not be charged with matters in Law, and if they meddle with them and find them, their finding as to them to be nothing, and void; b. 2.75. b. 4.42.53. b.5.5. b. 6.6. b. 7.1. b.8.115. b. 9.12,13.23.25. 30. b.10.92. b.11.10.

How the Justices may order the Inquest, and their authority to punish them for eating and drinking; b. 5.2. p. 40. b.8.41. b.11. 43. see tit. Amercement, and Fines to the King.

Where the party shall have avail of estoppel found by the Inquest, though not pleaded; b.4.53.

From what review and County shall the Inquest come, upon trial of issues, and from what not; see tit. Visne, and Trial.

To whom a *Venire facias*, or &c. to have an Inquest, shall be awarded; see above, and tit. Coronors.

Where the Inquest shall be of two Counties, or not; see tit. Assise.

How proces shall be awarded against the Inquest, when one party is an alien born, and how the Inquest shall be taken; see tit. Alien.

Where after issue joyned for parcel, or one def. and demurrer for the other party or parcel, no proces shall issue against the Inquest, but it shall cease because of the demurrer, and where contr. see tit. Demurrer.

Of election of the grand Inquest in the writ of right, and the order of it; see tit. Right.

Where the Inquest shall be demand. and amerced; see tit. Amercement.

What writings, or records given in evidence shall the Inquest have with them; see Evidence.

Where the Inquest shall be taken in a writ of right, in stead of the grand assise; see tit. Right.

Where the Inquest of office, or other assesses all the damages &c. see tit. Damages and Atraint.

Where the Inquest ought to sever the damages, against the def. or not; see tit. Damages and Apportionment.

Where the Inquest ought to sever the damages, which the plaint. is to recover: see tit. Damages and Apportionment.

Where the Inquest ought to sever the costs and damages; see tit. Damages.

Where the Inquest shall be supplied from the standers by; see tit. Jurors.

Where the Inquest shall enquire of, and try the intent of a man, and where they shall be charged to inquire of it; see Trial.

What return of the Sheriff shall be good upon a *Venire facias*, *Habeas corpora*, or distress against the Inquest; see tit. Retorn of the Sheriff.

Where the parties shall have avail of a condition found by the Inquest, without pleading, or giving it in evidence or no; see Monst. of Deeds and Verdict.

Where trial shall be by the first jurors, and others, or by the first jurors alone; see Trial.

Where the Inquest shall try a thing before the time of memory, or not; see tit. Trial and Grants of the King.

Inquest demanded upon pain; see tit. Pain.

Where the Inquest shall fine to the King, and for what offences and misdemeanors; see tit. Fine to the King.

Of challenges to the Inquest, or to the Jurors; see tit. Challenge.

Enrollment; see **Inrollment.**

Entendment.

Where a writ shall be good by intendment; b.3.44. b.8.119. see tit. Writ.

Where Plaint. in assise shall be good by intendment; b.8.57. see tit. Plaint.

Where a Count shall be good, by intendment, or not; b. 5.2. p. 120. b 3.1,2. b.8.57. 133. b.10.54. see tit. Count and Plaint.

Where avowry shall be good by intendment, or not; b. 3. 1, 2. b. 7.23.25. see tit. Avowry.

Where a bar shall be good by intendment, and good if it be certainty to common intendment; b.3.1,2. b.5.2. p.121. b,8.57. b.10.59. see tit. Bar.

Where verdict shall be good by intendment, or not; b.3.9. b.4.65. b.5.2. p.5.35,96. 108.122. b. 9.51. 68,69.74. b. 10.57. see tit. Verdict.

Where an intendment shall be good, by inditement, or not; b. 4.40,41.48. see tit. Enditement.

Where the Kings grant shall be taken, and construed by intendment, and if two intendments be, which shall be taken; see tit Grants of the King.

Where the Kings Prerogative shall be taken by intendment, and the best be intended for him; see tit. Prerogative, and Grant of the King, and Tenure.

Where estoppel shall be by intendment of that which is intended, and implied within the record; see tit. Estoppel.

Where a deed, or grant, &c. shall be void, because of want of intendment; see tit. Deeds, Grants and Gifts.

Upon feoffment, grant, or &c. without limiting any estate, and what estate the feoffee, grantee, or &c. shall have; see tit. Estate, and Devises.

Upon speaking of escuage generally; see tit. Escuage.

Upon speaking to make proof generally; see tit. Condition, and Witnesses.

Upon speaking of *J. S.* or &c. generally who shall be intend. the father or son; see tit. Writ.

Upon speaking of Courts, and what Courts shall be intended, Courts of record, in which a man shall sue for penalties, &c. see tit Courts.

Upon speaking of the feast of Saint *Michael*, where, &c. what feast shall be intended; see Exposition.

Where the special reservation of the party, destroies the general intendment of the Law; see tit. Reservat.

Where the intention of the parties shall direct the assurance of lands, and uses, and the intent of the parties is more regarded then the strict words of a deed; b. 1.99.100,101. b. 2. 75,76,77. b. 5.2. p.26. b. 6.33.64. b.8.94.155. b.9.9,10. b.11.15. see tit. Uses and Deeds.

Where the condition of an obligation shall not be said performed, if the intent of the parties be not performed, though the words be fully performed, and contr. see Condition.

Where the intent of a man shall be tried, and inquired, as a thing marerial; see tit. Trial.

Where by grant, feoffment, or &c. the grantee,feoffee,or &c. shall have other things, or intermeddle in other lands, to make that which is implied, and intended in the grant, or &c. see tit. Grants.

Where a plea that has two intendments, shall be taken, and intended most strong against him that pleads it; see tit. Pleadings.

Where an estate uncertain to whom, and of what thing, &c. shall be guided by intendment; see tit. Devise, Estates, Grants, and mistaming.

Where the return of the Sheriff shall be good by intendment; see Return of the Sheriff.

What cause of excommunication shall be intended, where no cause is expressed; see tit. Excommunication.

Where tenure shall be according to the special reservation of the party, and not according to the general intendment of the Law; see tit. Reservation, and Tenure.

Where the intent of the testator is more respected in the exposition of wills, then the words of the Testament; see tit. Devises.

Enterpleading.

How livery shall be made, where two are found heirs to one man, and when, and how, they shall interplead, b.7.45. see tit. Livery.

Where interpleading shall be by two, where they are to have *ouster la maine* of the King; see tit. Livery.

Upon what office two shall interplead where they sue to have livery, or &c. out of the Kings hands, b.7.45.

Entry in lands, and writ of Entry.

Where entry shall make a degree, to have a writ of entry, in the *per* and *cui*, or in the *post*; b.1.2,

b.1.2.125.136. b.3.62. b.4.27,28,29.71. b.5.2. p.17.113. b.6.79. b.7.9.

Where, when, for, and againſt whom a writ of entry in *Conſimili caſu*, lies,&c where, when, for, and againſt whom not; b.6.8. b.8. 48,49. ſee tit. Statutes, W.2. c.4.24.25.

Form of the writ of entry in *Conſimili caſu*, and what matter is ſufficient to abate it, what not: b.8.49.

Where, and of what thing a writ of entry, *Ad terminum qui præteriit* lies; ſee b. 8. 47. and Demands.

Where a writ of entry in the *per*, or *per* and *cui* lies of an office; b. 8.47. ſee tit. Demand. Aſſiſe, and Plaint.

Where a man may have a writ of entry in the *per*, or *per* and *cui*, or in the *poſt*, at his election, or not; b 6.9.

Where a man have an Aſſiſe, or writ of entry in nature of Aſſiſe of his own poſſeſſion; ſee Election.

Of the writ of entry, *cauſa matrimonii præ-locuti*, ſee tit. *Cauſa matrimonii præ-locuti.*

Of the writ of entry, *Cui in vita Contradicere non potuit*; ſee tit. *Cui in vita.* Of entry by intruſion.

Of the writ of entry, *dum non compos mentis*; ſee tit. *Dum non Compos &c.*

Of the writ of entry upon alienation, *Dum fuit infra ætatem*; ſee tit. *Dum fuit infra ætatem.*

Where a man upon recovery or fine levied, ſhall be adjudged in poſſ. preſently, without entry or ſeiſin; ſee tit. Cont. Claim. Ent. Congeable, Poſſeſſion and Recovery.

Where upon a condition broken, a man ſhall be adjudged in poſſeſſion preſently, without reentry, or not; ſee tit. Conditions.

Where a man ſhall have treſpaſs, and puniſh the mean treſpaſs without reentry, or not; ſee tit. Treſpaſs.

Where a condition giving entry to a ſtranger, is void; ſee tit Condition.

Of eſpleas alledged in writs of entry, how, and in which; ſee tit. Eſpleas.

Entry in lands, and Entry Congeable.

Where poſſeſſion, and ſeiſin in lands, or &c. ſhall be reveſted and adjudged in him that has right without entry, in deed, or not; b.1. 85.94.97.147. b. 2.53. b. 3.65.84,85. b. 4.53. b. 6. 62. b. 8. 44.95. ſee tit. Conditions, and Cont. Claim.

Where entry of the wife or her heir ſhall be lawful, after diſcontinuance by the huſband, or not; b.1.102. b.3.51.59. to 61. 85. b. 5.2. p.80. b.8.43.44. b. 9.141. ſee tit. Diſcontinuance of lands, and the Statutes, 11 H. 7. and 32 H. 8.

Where entry ſhall be lawful upon diſcent becauſe of nonage, and by whom, where, and for whom not; b. 4.125. b. 7.11. b.8.43,44. 100. ſee tit. Enfant, and *Dum fuit infra, &c.*

Where entry in lands is lawful upon diſcent, becauſe the owner during the time was over Sea, or not; b. 8. 100.

Where entry is lawful upon diſcent after recovery, fine, &c. or not, b. 6.51. b. 8.72. b. 10.27 38. ſee tit. Falſifying of Recovery, and Remitter.

Where entry upon diſcent ſhall be lawful becauſe of privity of blood, or not; b. 1.95. 98.102.137. b.3.61,62. ſee tit. Baſtardy.

Where entry of the diſſeiſee ſhall be lawful upon diſcent, or not; b 4.22,23. b.7.11. b.8.101. b.11.33. ſee tit. Cont. Claim.

Where the entry of the diſſeiſee is lawful, upon the Lord by eſcheat; b.4.58. b.8.101.

Where the entry of the heir is lawful, where the entry of the anceſtor was not; b. 4.125. b.1.111. b.3.60. b.8.43. ſee tit. Ideot.

Where the entry of the heir is lawful, becauſe of right diſcended to him, b.8.43,44.

Where the entry of him in reverſion, or remainder, is lawful, notwithſtanding recovery had againſt tenant for term of life; b.1.16. b.3.2.60. ſee tit. Falſ. of Recovery, and Forfeiture, and Statutes, 32 of H.8. c. 32. 14 *Eliz.* cap. 8.

Where entry is lawful upon a ſtranger, to the recovery, who comes in by a mean eſtate, &c. b.6.51.

Where entry is lawful upon tenant in dower after diſcent, or not; b.8.101.

Where entry is lawful upon tenant by courteſie, or upon the iſſue after his death, after diſcent; b.2.34.

Where entry of the feoffees of him to whoſe uſe, is lawful upon him to whoſe uſe himſelf, and where the ancient uſe ſhall not revive, without their entry upon a ſtranger; b. 1.101,112.126.128.130.134. b.7.9. ſee tit. Uſes.

Where entry ſhall be lawful notwithſtanding a recovery againſt himſelf, or his anceſtor, or after execution upon recogniſance ſued, or not; b.4.66,67.82. ſee tit. Recogniſance, and Damages, and extent.

Where entry or recovery of one ſhall avail the other, and veſt the eſtate and franktenement in him, and where the entry of one ſhall advantage another; b.8.44. b 9.106.140.142. and 11. ſee tit. Cont. Claim, and Remitter.

Where entry once taken away, and not lawful, ſhall become lawful after, by matter of after fact; b.3.34. b.8.43,44.

Where the entry of the Leſſor, or &c. upon Leſſee for years, or &c. to ſee if waſt be done, ſhall be lawful, and how he ought to demean himſelf upon ſuch entry; b.8.146.

Where entry, and ſeiſure of land by the King, or his Miniſters, ſhall be good, without office found or not; b. 1.42.48. b.2.52. b.3.2, 3.10,11. b. 4.54.58.126,127. b. 5.2. p. 55,56. 109,110. b. 7.12,13,14.25. b. 8.169.170. b. 9. 16.95. b.11,12.

Where the King cannot enter into lands, or ſeiſe them by office found without a writ of *Scire facias*, or other proces, or contr. b.3.11. b. 4.56.58.126. b. 8.169. b. 9.95.96. b.2.80. b. 11,12.

Where the King ſhall preſently be in poſſeſſion of land, or &c. by office found, or not, till he has entred, or ſeiſed; b. 3.11. b.4.58. b.5.2. p.36. b.9.95,96 b. 11,12. ſee tit. Office before, &c.

Where entry may be upon the Kings poſſeſſion without livery ſued, petition, or *ouſter la maine*, or not; b.1.50.133. b.2.53. b.4.55, 56.59. b.7.32. b.8.76.172. b. 9.69.98. ſee tit. Intruſion, and Livery.

Where entry into lands for a certain time is good, and may be; b. 3. 61. ſee tit. Condit. Forfeiture of Marriage, and Election.

Where entry may be in a moity, and the eſtate ſtapd for the other moity upon a joint demiſe; b.4.73. ſee tit. Join-tenants.

Where entry into lands may be, becauſe of a condition in Law, and which are conditions in Law, which not; ſee tit. Conditions.

Where entry may be in lands, or &c. for conditions in deed, and upon whom, and by whom; ſee tit. Condition, Aſſignee, and Statutes; 32 H. 8. c.34. there.

Where entry into lands, or &c. may be, by reaſon of a condition created, and added to an eſtate by defeaſance; ſee tit. Circuit of Action.

Where entry or reentry may not be in lands, &c. for a condition, without demand of the rent reſerved upon the leaſe, &c. and what demand is good, what not; ſee tit. Demand.

Where entry ſhall not be for a condition, &c. becauſe of acceptance of rent, after the condition broken, and where contr. ſee tit. Acceptance.

Where the leſſor, feoffor, or &c. by reentry for a condition broken, ſhall be adjudged in his former eſtate, and to what intents, and the eſtate avoided from the beginning, and to what not: ſee tit. Condition.

Where the Lord of a villein ſhall not have an eſtate in lands or goods of the villein, without entry, ſeiſure, or claim; ſee tit. Cont. Claim.

Where the entry of the huſband ſhall veſt the eſtate in the wife, or not; ſee tit. Baron, and Feme.

Where entry of the *mulier* may be upon diſcent during his nonage; ſee tit. Baſtardy.

Where an infant may enter notwithſtanding his feoffment, leaſe, or &c. ſee tit. Enfant, and Acceptance.

Where entry may be upon diſcent during the time of impriſonment; ſee tit. Dureſs.

Where entry of a Parſon, Prebend, &c. may be notwithſtanding alienat. of their predeceſſ. ſee tit. Continuance.

Where entry may be becauſe of his own feoffment, of his anceſtor, becauſe of unſound memory; ſee tit. *Dum non compos mentis*, and Ideots.

Where the iſſue in tail may enter, notwithſtanding the exchange of his anceſtor; ſee tit. Exchange.

Where the Lord may enter for eſcheat, upon the death of his tenant without heir, or not: ſee tit. Eſcheat, and Infant.

Where entry of the Lord, in right of an infant his ward is lawful, or not; ſee tit. Ward, and Colluſion.

Where entry may be becauſe of forfeiture, by alienation, to the diſinheriting, &c. or not; ſee tit. Forfeiture, and above.

Where entry may be becauſe of aſſent to Rape: ſee tit. Rape, and Statutes, 6 R.2. c. 6. 4,5. P. & M. c.8.

Where entry may be againſt his own releaſe, or confirmation, becauſe of right or title accrued of late time; ſee tit. Releaſes, and Confirmation.

Where the entry of him to whoſe uſe, ſhall be diſſeiſin to the feoffees or no, &c. ſee tit. Uſes.

Where entry may be for right, notwithſtanding releaſe of actions: ſee tit Right.

Where the deviſee may enter lands, or &c. deviſed unto him, without aſſent of the executors, or not; ſee tit. Deviſe.

Where an action of treſpaſs may be maintained, and againſt whom without reentry, and againſt whom after reentry, againſt whom not; ſee tit. Treſpaſs.

Where tenant at will may enter upon a diſſeiſor, or not; ſee tit. Tenant at will.

Where he that enters into land, or &c. of another, by courſe of law, ſhall be a treſpaſſor from the beginning by matter of after fact; ſee tit. Juſtification.

Where entry of the ſon or daughter born after, may be lawful upon the Uncle, &c. who entred as heir; ſee tit. Diſcent, and Veſting and Deveſting.

Where entry of the executors upon a deviſe made that they ſhall ſell the land, or &c. may be upon a diſcent; ſee Deviſe.

Where entry of one remits his companion, or not; ſee tit. Remitter.

Where entry in the land of another is lawful by reaſon of common claimed; ſee tit. Common.

Where entry in the land of another is lawful to diſtrein, &c. or not; ſee tit. Diſtreſs.

Where executors may enter the heirs land, to take, &c. ſee tit. Chattels, and Deviſe.

Where, and what entry of the heir after death of the Anceſtor, where the King is to have ward, or primer ſeiſin, is intruſion upon the Kings poſſeſſion, or not; ſee tit. Intruſion.

Where entry cannot be againſt the patentee of the King, without *Scire facias* ſued againſt him upon traverſe tend. or petition to the King: ſee tit. *Scire facias*, Petition, and Traverſe to office.

Where a ſtranger to a recovery may enter, and falſifie the recovery without action ſued; ſee tit. Falſ. Recovery.

Where a woman may enter, and take her dower without aſſignment; ſee tit. Dower.

Where the heir, or &c. may enter for forfeiture of the joynture to the wife, by her alienation againſt the Statute, 11 H.7. c.20. ſee tit. Statutes.

Where the aſſignee of a reverſion may enter for a condition broken, and what aſſignee; ſee

ſee tit. Statutes, 32 H.8.c.34. Aſſignee, and Conditions.

Entry of pleas.

Form of entry of a warrant of attorny, where another thing then land is demanded. b 4.87. ſee tit. Demand.

Form of entry of pleas, and where the entry ſhall be in Latin, though the pleading was in another language. b.10.132. ſee tit. Statutes 36 E.3.c.15.

Where upon a plea pleaded, an iſſue joined, the entry ſhall be, and of this he puts himſelf upon the country, and where, he requeſts that it may be inquired by the country. b.10. 54.59.

Form of entry, and titling records in the Kings Bench. b.9.99.

Form of entry of verdicts, &c. and where the entry is to be. That the Jurors were elected, tried and ſworn. b.9.101. twice.

Form of entry of continuances of pleas in Courts, and the difference of entries in the ſeveral Courts. ſee tit. Continuances and Courts.

Form of entry Imparlances. ſee tit. Emparlance.

Form of entry of admittance of a Guardian for an infant, where he ſues by a Guardian. ſee Infant.

Whereupon for parcel, and iſſue joined for another, entry ſhall be of the proces continued againſt the inqueſt. ſee tit. Demurrer.

Where the Court of office, and by diſcretion, may enter, and record a thing done, two or three terms after, or not. ſee tit. Office of Court.

Form of entry of a Clerk delivered to the Ordinary. ſee tit. Clergy.

Form of judgment upon a writ of error. ſee tit. Error.

Where ſpecial matter ſhall be entred for evidence, or not. ſee tit. Evidence.

Form of entry of non-ſuit, and upon what roll to be entred. ſee tit. Nonſuit.

Form of entry of *Retraxit*. ſee tit. *Retraxit*.

Form of entry of departure in deſpight of the Court. ſee tit. Departure in Deſpight, &c.

Form of entry of verdicts. ſee tit. Verdicts.

Form of entry of Judgments. ſee tit. Judgments.

Form of entry of executions. ſee tit. Executions.

Form of entry of an excommunication pleaded. ſee tit. Excommunication.

Entry of judgment upon a writ or count abated, or when the plaint. is barred. ſee tit. Judgment.

Form of entry upon diſclaim. ſee tit. diſclaim.

Equipollent.

Where a condition to pay mony, &c. ſhall be ſatisfied and performed by way of retaining, and that to countervail payment in fact, or no. ſee tit. Condition.

How a condition to pay mony ſhall be ſatisfied and performed, and what is ſatisfaction to countervail payment, what not. ſee tit. Conditions.

What is atrornment in fact, and what acts ſhall countervail attornment in law. ſee tit. Attornment.

Where an office taken before Commiſſioners ſhall be equipollent with an office taken before the eſcheator. ſee tit. Office before, &c.

Error.

Form of the writ of error, and where it ſhall be, which before you reſideth, and what matter is ſufficient to abate it, what not. b.3. 1,2.15. b.4.93. b.11.38. b.5.2.p.111.

In fact, and what things may be aſſigned for error in fact; where, and what not. b.5.2. p.39.44. b.6.14.

Where error may be aſſigned in granting or denying age, aid, voucher, view, or &c. or not. b.8.58,59. b.9.16.28,29. b.11.40.

Where no error to ſuffer a man to make attorny, where he ought not by Law. b.8.58, 59. ſee tit. Attorny.

Where error is in a writ of debt, becauſe in the *debet*, where it ought to be in the *debet* and *detinet*, or contr. ſee Debt.

Where error ſhall be aſſigned in trials, becauſe the *Venire* was not from two or three towns, as it ought. ſee tit. Viſne.

Where error, &c. becauſe the name of the Sheriff, or &c. was not put to the return. ſee tit. Return of the Sheriff.

Where error, &c. in entry of verdicts for defend. of the words, that the Jurors were elected, tried and ſworn. ſee entry of Pleas.

Where ſhall be aſſigned in entry of judgment, becauſe one of the parties, plaint. or def. was dead at the time, &c. ſee tit. Judgments.

Where error ſhall be aſſigned in judgments, and the entry of them upon the writ or count abated, or judgment, that the plaintiff ſhall be barred. ſee tit. Judgments.

Where error, &c. in outlawry, becauſe the party was over ſea at the time, &c. ſee tit. Utlary.

Where error ſhall be aſſigned in awarding execution. ſee tit. Execution.

Where error ſhall be aſſigned in granting a *Niſi prius*, or &c. ſee tit. *Niſi prius*.

Where error may be aſſigned in joining in action, or not. ſee tit. Joining in action.

Error not to be aſſigned in a thing to his own advantage. b.5.2. p.39. 44. b. 8. 59. b.7. 4.

Where error ſhall be aſſigned in fines levied of lands, or &c. by an infant, or other matter, and what matter is error, and within what matter is error, and within what time fines ought to be reverſed for nonage. b.5.2. p.44.45.38. b.2.57.77. b.2.76. b.8.58. b.11. 69.77. ſee tit. Enfant and lacheſſe.

Where error ſhall be aſſigned in miſreturn of the Sheriff, in avoidance of outlawry. ſee tit. Utlary.

Where error cannot be aſſigned upon judgment given upon attainder of felony, &c. b.6.14.

Where error ſhall be aſſigned upon recovery for default of original. b.3.5,6. b.5.2. p. 37.39. ſee tit. Falſifying of recovery.

In law, and what may be aſſigned error in law, what not. ſee Above.

Form of aſſigning errors, and where, and when the plaintiff ought to aſſign them. b.1. 12.35. b.5.2.p.39.44.

Where writ of error lies by or againſt the King, upon judgment erroneous, or not. b.1. 34.42. b.3.1. b.4.89,90. ſee tit. Attaint.

Who ſhall have a writ of error, and where it lies for the executors, where for the heir, and who ſhall be ſaid heir to have it, or not. b 5.2.p.32.38.40.43.60.111. b.8.62.65.

Where error lies for the Garniſher. b.5.2. p.90.

Where error lies for him in reverſion or remainder, in the life, of tenant for life, or after. b.3.4.61. b.9.141. b.10.44.

Where a writ of error lies not againſt diſclaim. b.8.61,62.

Where a man may maintain a writ of error againſt his own confeſſion. b.8.62.

Where, and what record is ſufficient upon which errors may be aſſigned, where parcel of a record, or not. b.11.39.41.

Where diminution ſhall be alledged in a writ of error, and by whom, and whom not. b.5.2. p.44.47.

Where a writ of error ſhall be ſued in Parliament, and upon judgment, in what Court, &c. b.10.69.

In what Court, and how judgment erronious in the Kings Bench ſhall be redreſſed. b.3.70.b. 4.53.85,86.70. b.5.2.p.18.27,28.43.89.97.b.6. 8. ſee tit. Statutes. 27 *Eliz*.c.8. and Utlary.

In what Court, and how judgment given in the Exchequer ſhall be redreſſed. b.1.11.34. 38. b.8.58.65.68. b.11.59.

In what Court judgment erronious given in the Kings Bench in *Ireland* ſhall be redreſſed. b.7.18. *Calvins* caſe.

In what Court judgment erronious given before the Steward of the Kings houſe, or in the Marſhalſie, ſhall be redreſſed. b. 10. 69.

No error lies upon judgment given in the County-Court. b.6.11,12. ſee Falſe judgment and Suitors.

No error lies upon judgment erronious, given in Court Baron. b.6.11,12. ſee Falſe judgment.

Where writ of error lies upon judgment erronious, given in the Court of Pipowders. b.6. 11,12. ſee tit. Falſe judgment.

Where writ of error lies upon judgment given before Juſtices in Eyre. b.9.28.

How, and in what Court judgment erronious given in *Wales* ſhall be redreſſed. b.5.2.p.85.

Where a writ of error lies upon judgment erronious given upon a writ of rediſſeiſin. b. 6.12. b.8.143.

Upon judgment erronious given upon attainder of murder, or &c. it lies not. b.6.14.

The writ of error enſues the nature of the firſt action, in which judgment erronious was given. b.6.25.

Where judgment erronious given in any Court ſhall be redreſſed and amended by the ſame Court by a writ of error, or without it. b.8.137.143,144. b.3.59. ſee tit. Amercement and Utlary.

Where judgment erronious ſhall be reverſed by another error, not aſſigned by the party. b. 5.2.p.37.58. b.11.8. ſee tit. Office of Court.

Where judgment erronious ſhall be reverſed or amended by plea, without ſuing a writ of error. b.8.142.144.157. ſee tit. Amendment and Utlary. b.3.59.

Bar in writ of error, and who ſhall plead it, and when, what ſhall be a good bar, what not. b.1.13.16.111,112. b.3.1.59.61. b.6.25. b.8. 7.62.152.154. ſee Releaſes.

Where a record in part, or againſt one, ſhall ſtand in force againſt the other part or perſon, or not. b.1.8. b.2.77. b.3.3. b.5.2. p.32.90.

Judgment in the writ of error, for the plaintiff or defendant, in the former action. b.1.40. b.3.4. b.5.2.p.39.89,90.111. b.6.7.25.45. b.8. 96.143. ſee tit. Reſtitution, and Utlary.

Where, and when execution ſhall be awarded upon judgment reverſed, and in what Court. b.1.40. and 11. b.10.118. ſee tit. Statutes. 31 E.3.c.12. 27 *Eliz*. c.8. Touching Errors and Records.

Where by reverſal of a record by a writ of error, and other record depending upon it is reverſed and gone. b.5.2. p.90. b.8.142.152. b.9.119.

Where amendment may be after a writ of error brought, and in what thing, and what not. ſee tit. Amendment.

Where the Court of office ſhall not give judgment, if any thing erronious in the writ, count, or proces, appear to them, or contr. ſee tit. Office of Court.

Where ſummons and ſeverance lies in a writ of error, or not. ſee tit. Severance.

Where two ſhall join in a writ of error, or not. ſee tit. Severance.

Where two ſhall join in a writ of error, or not. ſee tit. Joyn. in action.

Of nonſuit in a writ of error, and where nonſuit of one plaint. in error, is the nonſuit of all, or not. ſee tit. Nonſuit.

Where the releaſe of one plaint. in a writ of error, ſhall bar all, or not. ſee tit. Jointen.

Where an act of Parliament may be erronious, and the Parliament may err. ſee tit. Parliament.

Eſcape.

Where, and what ſhall be an eſcape of a priſoner for debt, or other perſonal duty, upon which the Sheriff or Goaler ſhall be charged, and what not. b.3.43,44 52.68,69.72. b.5.2. p.86,87,88.b.8.142.b.9.68 98 ſee ti. Authority

Where eſcape ſhall be, yet the priſoner ever in the Gaol. b.3.69.72.

Where an eſcape is no diſcharge of execution, but he may be in execution again, and he that let him at large, may retake him, or not. b.3.44.52.72. b.5.2. p.86,87. ſee tit. *Audita querela*, and Execution.

Where, and what ſhall be ſaid negligent eſcape, or voluntary in criminal cauſes, where, and what not. b.7.6,7.

Where, and what ſhall be an eſcape upon which a town, or hundred, ſhall be charged upon felony or robbery, or not. b.7.6,7. b.11. 43. ſee tit. Amercement.

How eſcape ſhall be tried and adjudged. b. 11.65.

Where action of debt, or the caſe lies againſt a Sheriff or Goaler, upon eſcape of a priſoner in execution, at the election of the party. ſee tit. Election.

Count in debt, or &c. againſt a Sheriff, or Goaler, upon eſcape. b.3.66,67,68. b.4.33.

Where a man may retake beaſts, and diſtrein them, after they have eſcaped out of his land, &c. or not. ſee tit. Diſtreſs.

Where, and what eſcape in a Goaler, or &c. ſhall be a forfeiture of his office, what not. ſee tit. Forfeiture.

Eſcheator.

How the eſcheator ſhall demean himſelf in taking inqueſts, &c. and upon return of them. b.1.42. b.5.2. p.57. ſee Eſchequer, and office before, &c.

Where entry, or ſeiſure of land for the King by his officers, is lawful without office found before the eſcheator, or not. ſee Ent. Congeable.

The Mayor of *London*, eſcheator of *London*. ſee tit. *London*.

Where trial ſhall be by examination of the eſcheator, if lands be ſeiſed into the Kings hands. ſee tit. Aid of the King, and examination.

Eſcheat.

Count in the writ of eſcheat, eſpleas are not to be alledged in it. b.4.11. b.3.35. b.8.86. ſee tit. Eſplees.

Form of the writ of eſcheat, and what matter is ſufficient to abate it. b.8.86,87.

Where a joint writ lies not upon ſeveral tenures, b.8.86 87. ſee tit. Writ.

Where a writ of eſcheat lies, and is maintained, where the tenant dies ſeiſed. b.3.35.

Where entry of the Lord may be, upon death of the tenant without heir, without being put to a writ of eſcheat, or not. b.3.2. b.4.125. b.8.43,44.101. b.9.141. ſee tit. Enfant.

Of a right, and how the Lord ſhall take avail of it. b.3.35. b.4.125. b.10.112.

For the King, and where he ſhall have eſcheat of tenements held of other Lords, and the Lords not, and where contr. b.7.10. b.10. 112. b.3.10.112. ſee tit. Treaſon.

Where the Lord by eſcheat ſhall hold ſubject to the charge impoſed upon the land by the tenant, or not. b.1.122.139. b.8.45.

Bar in writ of eſcheat, what good, what not. b.8.101. b.9.141. ſee tit. Enfant and Acceptance, and Bar.

Iſſue in writ of eſcheat, and where ſeiſin is not traverſable. b.4.11. ſee tit. Seiſin.

Of a Copy-hold, who ſhall have it upon attainder of felony, b.4.30.

Upon dying ſeiſed of a baſtard without heir or not. ſee tit. Baſtard.

Upon dying of an infant without heir, after feoffment by him not. ſee tit. Enfant.

Upon death of an Ideot without heir by him not. ſee tit. Ideot.

Where the Lord by eſcheat may rebutt by warranty made to the tenant. ſee tit. Warranty, Rebutter, and Aſſignee.

Where, and what Charters of the land, the Lord by eſcheat ſhall have, what not. ſee tit. Charters.

Where the Lord by eſcheat ſhall not be ſeiſed to other uſes. ſee tit. Uſes.

Where acceptance of rent excludes the Lord of his eſcheat of the Land, or not. ſee tit. Acceptance.

Where a writ of eſcheat ſhall be maintained, ſuppoſing the tenant died without heir, where he had iſſue, which ſurvived him, or not. ſee tit. Diſcent.

Where he that has right may enter upon the Lord, who entred becauſe of eſcheat. ſee tit. Entry Congeable.

Where the Lord of whom the land is held, ſhall have the eſcheat of the land, after the King his year, day and waſt. ſee tit. Forfeiture.

Where the land ſhall eſcheat to the Lord, rather then diſcend to the heir of the half blood, or of the part of the mother, and cont. ſee tit. Diſcent.

Where lands, which a man attainted for felony, or &c. ſhall have after the attainder ſhall be forfeited to the Lord as eſcheat, as well as to thoſe he had at the time of the felony. ſee tit. Forfeiture.

Where eſcheat of land ſhall be becauſe of alien born. ſee tit. Alien born.

Where eſcheat is becauſe of baſtardy. ſee tit. Baſtardy.

Eſchequer.

Where, and what office found before the eſcheator, ſhall be returned into the Court of Exchequer, what not. b.1.42. ſee tit. Office before the Eſcheator.

Where, and of what matters and pleas the Exchequer has juriſdiction, and of what not; and other matters concerning this Court. b.2. 16.50. ſee tit. Courts.

How, and in what Court judgment erronious given in the Exchequer, ſhall be redreſſed. ſee tit. Error.

Where traverſe to an office found before the eſcheator, ſhall be in the Court of Exchequer, or not. ſee tit. Traverſe to an office, &c.

Where he that is the Kings debtor ſhall have *Quo minus*, and who ſhall have it, who not. ſee tit. *Quo minus*.

Where a bill lies, and is maintainable by the King againſt accountants in the Exchequer, and who ſhall be ſaid an accountant there, who not. ſee tit. Bill.

Where, and when eſtreats of other Courts ſhall be certified and delivered into the Court of Exchequer, and how. ſee tit. Eſcheats.

What proces ſhall be awarded by courſe of the Court of Exchequer, againſt the inqueſt upon iſſue joined there. ſee tit. Courts.

Where the record ſhall be remanded to the Court of Exchequer to award execution upon judgment reverſed, or affirmed in a writ of error. ſee tit. Error and Remover.

Eſcuage.

Certain, and incertain, and what ſhall make Knight ſervice, what tenure in ſocage. b.6.19, 20. b.4.6.

What ſervice he that holds by eſcuage incertain ought to do, and how, and when it ſhall be done. b.9.49.

Intendment of eſcuage, upon general ſpeaking of eſcuage. b.6.20,21.

Where a man ſhall hold by Knight Service, and yet neither do nor pay eſcuage. b.4 88.

Where eſcuage ſhall be apportioned. b.6. 1,2. b.8.105. ſee tit. Apportionment.

Where, and to what time the computation of forty days ſhall be made for attendance of him who holds by eſcuage. b.9.49. ſee tit. Computation.

Where ſeiſin of other ſervices, and of what ſhall be ſeiſin of eſcuage, of what not. ſee tit. Seiſin.

The form of pleading tenure by eſcuage. ſee tit. Pleadings.

Eſplees.

What, and whence derived, where they ſhall be alledged in a writ of right in the Count, and how, and in what perſon. b.1.8. b.3.54. b.6.3.

Where they ſhall be alledged in the Count, in the writ of entry in the *poſt*, and how, and in what perſon. b. 1. 57.72.81.91. b.2.12. b.3.56.

Why they ſhall be alledged in the Count in a *Formedon in deſcender*; how, and in what perſon. b.3.53.

Where they ſhall be alledged in the Count in *Formedon* in remainder, and how, and in what perſon. b.6.4. b.3.53.

Where they ſhall not be alledged in *ceſſavit*. b.4.11.

Where they ſhall not be alledged in Count in a writ of eſcheat. b.4.11.

Where they ſhall be twice alledged in a Count. b.3.53.

Where they ſhall be alledged in the Count, in one perſon, or more. b.3.53.

Eſſoine.

Where it lies not in aſſiſe of novel diſſeiſin. b.4.35. b.8.50. ſee tit. Protection.

Where, and what eſſoin lies in a writ of dower, what not. b.9.15.

Where eſſoin lies not, nor ſhall not be allowed in a *Q. Impedit*. b.4.35. ſee tit. Protection.

Of ſervice of the King, and what ſhall be good and ſufficient warrant of eſſoin of the King, and how long to indure. b.2.17. ſee tit. Seals.

Where eſſoin lies not in debt, informat. or &c. for forfeitures and penalties given by ſtatutes, or not, but is taken away by ſtatutes. b.6.20. ſee tit. Statutes, 4, 5. P. & M.c.5. and every where amongſt ſtatutes.

Eſtates.

Where a man ſhall have an eſtate of inheritance, without the words (heirs or ſucceſſors) or not. b.1.85,86,87.100.103.105. b.4. 29. b.3.21. b.5.2.p.112. b.6.16,17.27. b.10. 55. ſee tit. Inheritance, and Deviſe.

Where a man ſhall not have an eſtate of inheritance, by feoffment, grant, or &c. though (heirs) be mentioned in the deed. b.1.43.46. 66.85,86.104,105. 140.155. b.2.23,24. b.4: 29. b.5.2. p.112. b.8.23,24.27. ſee tit. Inheritance.

Where, and what eſtate ſhall be baſe fee, and fee-ſimple determinable, and where an eſtate of franktenement ſhall be diſcendable, and diſcend to the heir. b.1.76.48.16.40.147. b.3.84,85,86. b.8.96. b.10.96.98. b.11.49.

Where an eſtate in fee may be limited upon another eſtate in fee, and ſo of two eſtates in fee of the ſame land, at the ſame time, or not. b.1.49.85.134.136,137. b.10.98.

Where two ſeveral eſtates of the ſame land, or &c. may ſtand together, and at once, in the ſame perſon, at the ſame time, and how and when they ſhall be executed. b.1.41.45. 49.89.95.104.128.130. b.2.17.60,61.92. b.3. 5. b.5.2.p.13.40. b.6.72. b.8.74,75. 90.154. b.9.132.134. b.10.52. b.11.80,81. b.4.48. ſee tit. Remainder and Mortdanceſt.

Where a man may have an eſtate of franktenement for a certain time, as till certain monies are paid, or &c. b. 4. 30.82. ſee tit. Condition, and Action upon Stature Merton. c.6,7.

Where two men or women may have joint eſtates of franktenement, and ſeveral eſtates in their iſſues. b.1.84. b.87. b.10.50. b.3.37. ſee tit. Tail.

Where a gift of land, or &c. to a man and his heirs, males or females, ſhall be an eſtate in fee, and not in tail. b.8.21,22.27.74.76. ſee tit. Tail.

What eſtate the grantee, or &c. ſhall have upon a grant, or &c. generally without limiting any eſtate certain. b.2.24,55. b.4.29. b 8. 85.95.154.

Where a grant, leaſe, or &c. ſhall be good for a greater eſtate then the grantor himſelf has, and ſhall be good, and ſtand after the grantors eſtate determined. b.1.51.134.139. 146, 147. b.2.57. b. 3. 84. b.4.21,22,23,24. b.6.15. b.7.23. b.8.34. ſee tit. Extinguiſhment.

Where an eſtate in lands, or &c. avoided for a certain time, or in part, ſhall be good, and ſtand in force after, or not. b.7.8. b.8.17. ſee tit. Condition and Charge.

Where an eſtate in lands, or &c. made to two in the future, where one only has the poſſeſſion, ſhall enure to both, and both take an eſtate

eſtate by it; b.2.21.24. b.9.139. ſee tit. Confirmation.

For years or life upon condition to have fee, where, and when the fee ſhall veſt, when not; ſee tit. Condition.

Where an eſtate in lands ſhall and may be avoided, or ceaſe for a certain time; ſee tit. Condition.

Where by words of the *Habendum* in deeds, the eſtate given by the premiſes, ſhall be charged, inlarged, or abridged; ſee tit. Deeds.

Where an eſtate in lands, or &c. land ſhall reveſt in the feoffor, or &c. upon condition broken, without entry in deed; ſee tit. Condition.

Where an eſtate by condition broken ſhall be void from the beginning, and the leſſor, or &c. adjudged in his firſt eſtate by reentry, and to what intents, what not; ſee tit. Condition.

Where by condition performed, or not; the eſtate of the feoffor ſhall be abridged, and become but a term; ſee tit. Condition.

Where entry or claim of the huſband, ſhall veſt the eſtate in the wife, and remit her, or not; ſee tit. Baron and Feme.

Where tenant of the land cannot charge the land by his grant, with common, piſcary, &c. during his eſtate, or according to his grant; ſee tit. Charge, Grant, and Extinguiſhment.

Where an eſtate in rent, or &c. ſhall inlarge by confirmation, of which there was no reverſion at the time of confirmation; ſee tit. Confirmation, and Grants.

Where confirmation to one, and one eſtate, enures to all and their eſtates, &c. ſee tit. Confirmation.

Where a confirmation to the huſband and wife, ſhall give an eſtate to the party that had nothing before; ſee tit. Confirmation.

Where an eſtate ſhall be changed and abridged, by a confirmation, or not; ſee tit. Confirmation.

Where an eſtate lawfully veſted, ſhall be after deveſted, or not; ſee Chattels, and diſcent, and veſt, and deveſt.

Where an eſtate or inheritance ſhall be in chattels; ſee tit. Chattels.

Where an eſtate in lands of one, made to others by Commiſſioners, ſhall be good, or not; ſee Commiſ.

What words in Teſtaments, and laſt Wills, import an eſtate in fee, what fee tail, and what but for life; ſee tit. Deviſe.

Of what eſtate of the huſband the wife ſhall have dower, and where ſhe ſhall be indowed of a frank-tenement diſcendable, or fee-ſimple determinable; ſee tit. Dower.

Where an eſtate in uſe, or remainder to the right heirs, or one not being, nor known at the time, &c. be good; ſee tit. Capacity.

Where two having ſeveral eſtates, joyn in aſſurance, how it ſhall be conſtrued; ſee tit. Confirmation, and expoſition.

Of eſtates in tail, and what words make an eſtate tail, and what ſpecial, &c. and the whole matter concerning eſtates in tail; ſee Tail.

Of eſtates in reverſion and remainder, and the whole matter concerning them; ſee tit. Remainder.

Of eſtates in uſes, and the whole matter concerning uſes; ſee tit. Uſes.

Of eſtates in abeiance; ſee tit. Abeiance.

Of eſtates in ſuſpenſe; ſee tit. Suſpenſe.

What eſtate he muſt have that will preſcribe, &c. ſee tit. Preſcription.

Of an eſtate for life, granted to him in reverſion, and another how to be conſtrued; ſee tit. Expoſition, and Surrender.

Where warranty inlarges not an eſtate in lands, &c. and determines with the eſtate given in the premiſes of the deed; ſee tit. Warranty.

Where two ſhall not acknowledge an eſtate by fine, without ſhewing in which of them the fee reſts, and where an eſtate ſhall not be made by fine, or two and their heirs, but the fee ſhall be to one of them in certain; ſee tit. Fines.

Where a fine upon acknowledgment of right, &c. changes their eſtate, and gives a frank-tenement to him that had no eſtate before; ſee tit. Fines, and Confirmations.

Where a man may reſerve to himſelf a leſs eſtate then he had before the aſſurance; ſee tit. Reſervation.

Where he that is of another eſtate then that to which the warranty was made, ſhall vouch, or rebutt by the warranty; ſee tit. Warranty, and Rebutter.

Where a grant to him that has two eſtates in him together is good, and how it ſhall enure; ſee tit. Grant.

By grant of all his eſtate, by him that has two eſtates in him, what eſtate ſhall paſs, and when, &c. ſee tit. Grant.

Where an eſtate incertain to whom, &c. or what thing, &c. ſhall be guided by the intent of the parties; ſee tit. Entendment, Deviſe, Miſnaming.

Where an eſtate limited for life, or lives, ſhall determine by death; ſee tit. Expoſition.

Where there be joyn-tenants, that take their eſtate at ſeveral times; ſee tit. Joyntenants, and Baron and Feme.

Where huſband and wife take an eſtate by moities or not; ſee tit. Baron and &c.

Eſtoppel.

What, and the deſcription of it; b.1.155. b.2.4.56.58. b.4.53.

The form of pleading eſtoppels, and manner of concluding the plea, in pleading them; b.4.53. b.11.52.

Where ſuing a writ of one nature eſtopp. to have a writ of another nature, and bars the plaint, &c. b.4.5.43.94. b.5.2.2. p.33.85. b 6. 7.8.45.46.

Where eſtoppel is by uſing a writ, and the ſuppoſal of it, and Count upon it, or not; b. 6. 8.

Where eſtoppel is by action begun, and diſcontinued, or non-ſuit, or not; b.6.8.

Where eſtoppel is by verdict, or not; b. 8.53. ſee tit. Appeals, Corone, and Falſ. of Recovery.

Where eſtoppel is by Letters Patents of the King, and to whom, and whom not; b.1. 43. b.4.71. b.6.15. b.7.14. b.8.8.28.

Where eſtoppel is for a certain time, and indures but a certain time; b.4.54. b.6.15.

Where eſtoppel is to ſpeak againſt that which is implied, and intended in the record, or confeſſed, and not denied in pleading, or not; b. 4, 5.

Where a ſtranger to a record, or deed is eſtopped by it, or not; b.4.71. b.9.140,141. b.10.96.99. ſee Averments.

Where a ſtranger to a record or deed, ſhall eſtopp. the party, or privy to a deed, record, or not; b. 2.55,56. b. 5.2. p. 101. b. 9.33,34. ſee tit. Avowry, and Certificate of the Biſhop.

Where eſtoppel is by Indenture, and a ſtranger may eſtopp and be eſtopped by it, or not; b.1.155. b 4,5.53,54. b. 5.2. p.20.69. b. 6.14,15. b.8.53. b.9.8,9.

Where an eſtoppel is by an obligation, or deed poll, or not; b.2.4.33 39. b.5.2. p.20.69. b.6.30. ſee tit. Obligation.

Where eſtoppel is by recital, or not; b. 143. b.9,10.

Where eſtoppel is againſt the King, and for whom, and where he eſtoppes others; b.1.43. b.8.15.

Where eſtoppel found by the inqueſt is good, and the party ſhall have benefit of it where he could not plead, &c. b. 2.4. b. 4.53. b.5.2. p.30.

Where a woman, and her heirs are eſtopped by the act of the huſband, and her ſelf, during the coverture, or not; b.1.76. b.2.57. 77. b.10.43. ſee tit. Averment, Fines of lands, and inrolment.

Where eſtoppel is by certificate of a Juſtice of Peace, or &c. or for a thing by him recorded of office, or not; b. 7.14. b. 8.121.10.16. 54. ſee Certificate.

Where eſtoppel againſt eſtoppel puts the matter at large; b.1.43. b.9,10.

Where iſſue in tail is not bound by matter of eſtoppel, done by his anceſtor; b.1.96. b. 3.3.5,6.51.88. b.9.90 b.6. ſee tit. Aſſurances, Averment, Falſ. of Recovery, and Fines.

Where the Jurors are not eſtopped by pleading of the parties, not bound by their admittance, or confeſſion in pleading; b.2.4. b.4.53.126. b.5.2. p.30. ſee tit. Enqueſt.

Where eſtoppel is by Act of Parliament; ſee tit. Parliament and Remitter.

Where eſtoppel is by Demurring in law by confeſſion, and what things are confeſſed by demurring in law, what not; ſee tit. Demurrer.

Where eſtoppel is to parties and ſtrangers by certificate of the Biſhop, or not; ſee tit. Certificate of the Biſhop.

Where eſtoppel is by inqueſt of office to make preſentments, &c. and no traverſe ſhall be, and where contr. ſee tit. Bar, and Traverſe to office, &c.

Where eſtoppel is by fines levied, to whom, and of what pleas, and averments, of what, and to whom not: ſee tit. Averment, and Fines.

Where eſtoppel is by return of the Sheriff, or &c. or not; ſee tit. Averment.

Where eſtoppel is by Teſtament, or letters of adminiſtration or not; ſee tit. Teſtam. and Adminiſtration.

Where inrolling of a deed eſtops, whom, and whom not; ſee tit. Inrolment.

Where eſtoppel is by warranty, and where a ſtranger ſhall eſtopp the party by it, and in what actions; ſee tit. Warranty, and Remitter.

Where the date of a deed eſtopps to ſay contrary to it, or not; ſee tit. Deeds.

Where eſtoppel is by acceptance of homage, fealty, or rent; ſee tit. Acceptance.

Where eſtoppel is by partition; ſee tit. Partition.

Where eſtoppel is by exemplifications of records, or &c. and under what ſeals, what not; ſee tit. Exemplification.

Where recovery, or bar in an action, bars, and eſtoppes in another action, or not; ſee tit. Bar,

Eſtovers.

Where Aſſiſe lies of eſtovers, where of parcel of eſtovers, and how, &c. ſee tit. Aſſiſe.

Common of eſtovers, and how to be claimed, and what title to them is good, what not; ſee tit. Common.

Eſtranger.

Where a ſtranger to the record ſhall not take avail of diſcontinuance of proces, or error, or other defect in the proceeding; b. 9. 68. 119.

Where a ſtranger ſhall not take avail of the nonage of another, and where contr. b.1.140. b.3 13. b.4.125. b.7.8.43,44. ſee tit. Age and Enfant.

Where a ſtranger to a record or deed ſhall be eſtopped by it, or not; b. 4.7.1. ſee tit. Eſtoppel, and Averment.

Where a ſtranger to a record or deed, ſhall eſtop the party or privy to the record, or deed; b.2.55,56. b.5.2. p.101. b.9.33,34. ſee tit. Eſtoppel, Avowry, Certificate of the Biſhop, and Proteſtation.

Where, and what averment a ſtranger may have againſt a fine levied, what not; b. 4.71. b.9.140,141. b.10 96.99. ſee tit. Averment.

Where a ſtranger to Avowry ſhall eſtopp the avowant, to claim other ſervices then ſuch as the deed imports; ſee tit. Avowry.

What pleas a ſtranger to the avowry ſhall have, what not; ſee tit. Avowry, and Hors de fee.

Where notice by a ſtranger to the avowry, ought to be given to the Lord, to make him change his avowry, and is ſufficient, what not; ſee tit. Avowry.

Where a ſtranger to the warranty ſhall eſtopp another, and rebutt him by it, or not; ſee tit. Warranty, and Aſſigner.

Where

Where a ſtranger to a deed ſhall take avail of it, and how, or not; ſee tit. Deeds, and Condition.

Where a deed ſhall be ſhewn to a ſtranger, becauſe he conveies a title by it, &c. or not; ſee tit. Monſtr. of deeds.

Where ſtrangers to a deed, if it be ſhewn in Court ſhall take avail of it; ſee tit. Monſtr. of deeds.

Where a ſtranger to a deed and condition in it, ſhall enter for the condition, &c. ſee tit. Condition.

Where entry may be by a ſtranger to the recovery, who comes in by a mean eſtate, and where a ſtranger ſhall falſifie a recovery, or not; ſee tit. Entry congeable, and Falſ. of recovery.

Where a fine may be fine to a ſtranger, to the original writ of Covenant, or &c. and where not; ſee tit. Fines.

How conditions upon eſtates in lands, or bonds, are to be performed to, and by ſtrangers; ſee tit. Conditions.

Where a remainder may be deſtroyed by the act of a ſtranger, and by what act; ſee tit. Remainder.

Where an *Audita querela* lies by a ſtranger to the recogniſance; ſee tit. *Audita querela*.

Where a ſtranger to a record ſhall have a *Scire facias*, to have execution of it, or not; ſee tit. *Scire facias*.

Where the entry of a ſtranger hanging a writ, abates it, or not; ſee tit. Writ.

Where reſervation of rent may be to a ſtranger, or not; ſee tit. Reſervation.

Where continual claim made by one, ſhall avail another who is a ſtranger; ſee tit. Continual Claim.

Where lacheſs of continual claim, upon fines levied, ſhall bar ſtrangers; ſee tit. Continual Claim.

Where a lawful act ſhall become wrongful, by matter of after fact done by a ſtranger; ſee tit. Commandment, and falſe impriſonment.

Where a writ lies, and is maintainable, by a ſtranger to the original; ſee tit. Error.

Where death of a ſtranger abates a writ; ſee tit. Writ and Ward.

Where colluſion may be averred by the Lord, upon feoffment to the heir, and a ſtranger; ſee tit. Colluſion and Ward.

Where a ſtranger to the partition, ſhall have the the ſame advantage with thoſe who are privies in blood, and parties to the partition, or not; ſee tit. Partition.

Where agreement, or diſagreement ſignified to a ſtranger, is material; ſee tit. Agreement, &c. and Condition.

Where Count in action ſhall be againſt a ſtranger to the original, how, and when; ſee tit. Count.

Where not notice of the death of a ſtranger by whom is claimed will excuſe, &c. ſee tit. Notice.

Where proteſtation may be where a man has two or three matters to plead to ſave his advant. againſt the party, and a ſtranger; ſee Proteſtation.

Where menace or dureſs by a ſtranger, will avoid a deed, as well as if it were done by the party himſelf, to whom, &c. ſee tit. Dureſs.

Where a meſnalty or Seigniory ſhall be extinguiſhed by the act of a ſtranger, as by the tenant paravail, or the Kings ſeiſin; ſee tit. Extinguiſhment.

Where arbitrement which concerns a ſtranger, in an act to be done to him, or for him, or to which he ought to be party, is good, or not; ſee tit. Arbitrement.

Where miſnaming a ſtranger ſhall be pleaded, and where a ſtranger ſhall plead miſnaming; ſee tit. Miſnaming.

Where vouching a ſtranger not named in a writ of Aſſiſe of novel diſſ. ſhall not be admitted; ſee tit. Counterplea of voucher.

Where, and what pleas the voucher being a ſtranger to the original, ſhall have, ſee tit. Voucher.

Bar in waſt by grant, or &c. of a reverſion to a ſtranger; ſee tit. Waſt.

Where a ſtranger in blood, ſhall not plead detaining of Charters, in bar of a writ of dower; ſee tit. Dower.

Where a fine levied betwixt the plaint. and a ſtranger as the voucher, or &c. is good; ſee tit. Fines.

Eſtreapment.

Form of a writ of eſtreapment; b. 5. 2. p. 115.

To whom the writ of eſtreapment is to be directed; b. 5.2. p.115.

Where the writ of eſtreapment purchaſed before the return of the writ upon which, &c. is good, b.5.2. p.48.

Where the writ of eſtreapment lies before Judgment, where after, and in what actions; b.5.2. p.115.

The Sheriff his authority upon the writ of eſtreapment; b.5.2. p.115.

Where it lies againſt the huſband and wife joyntly; ſee tit. Joyning in action.

Eſtreats.

Where, and when eſtreats of, &c. in other Courts, ſhall be certified and delivered to the Court of Exchequer, and how they ſhall be delivered; b. 8. 61.

Eviction.

Where a woman evicted of her dower, ſhall be indowed anew; ſee tit. Dower.

Where a new extent ſhall be upon eviction, or avoidance of the former, or not; ſee tit. Extent.

Where exchange is diſſolved by eviction of part or whole; ſee tit. Exchange.

Where iſſue in tail ſhall be reſtored to his firſt action, upon eviction or alienation of aſſets diſcended to him; ſee tit. Reſtored to the firſt action.

Where the vouchee ſhall never be reſtored to the land recovered in value, though the demandants title be after diſproved, and the land evicted; ſee tit. Recovery in value.

Evidence to the Inqueſt, upon iſſues joyned.

What writings or records are good evidence, and to which the inqueſt, what not; b. 10.92,93. ſee tit. Enqueſt.

What ſhall be good evidence in a writ of waſt, upon iſſue no waſt done, what not; b.5. 2. b.119.

What is good evidence in debt againſt execution upon iſſue, never execut. or upon iſſue, nothing in their hands, what not; b.6. 46,47. ſee tit. Aſſets.

What is good evidence in a writ of annuity, upon iſſue upon preſcription, or not; b. 10.13,14. ſee tit. Annuity.

What ſhall be good evidence in debt upon an obligation upon iſſue, not his deed, what not; b.11.27. ſee tit. Bar, and Debt.

What is good evidence upon cuſtom put in iſſue, that a woman ſhall have an eſtate for life, or during widow-hood, b.4.30. ſee tit. Cuſtom, and Copy-hold.

What ſhall be good evidence upon iſſue in debt againſt the heir, aſſets by diſcent, what not; b.5.2. p.60. b.6.46,47. ſee tit. Aſſets.

What ſhall be good evidence in action of treſpaſs upon embleaments taken, upon iſſue not guilty; b. 5.2. p. 85.106. ſee tit. Embleaments.

Where a man ſhall not have the ſpecial matter for his plea, but ſhall be put to the general iſſue, and have the benefit of the ſpecial matter by way of evidence, and the ſpecial matter entred for evidence; b.4.13.18. b. 10.90. ſee tit. Bar, and Debt.

Where a thing before time of memory may be given in evidence, or not; ſee tit. Trial.

Where a thing done in a forein Country, may be given in evidence or not; ſee tit. Enqueſt.

Where the inqueſt ſhall find a condition, and the parties have avail of it, though it be not pleaded, nor given in evidence; ſee tit. Verdict, and Monſtr. of deeds.

Where a thing ſpiritual ſhall be given in evidence, and the inqueſt ought to take notice of it, or not; ſee tit. Enqueſt.

Where a thing done over Sea ſhall be given in evidence, or no; ſee tit. Enqueſt, and Iſſue.

How the inqueſt ſhall demean themſelves, upon matter in bar given them in evidence; ſee Enqueſt.

Where verdict which finds matter of writing or record, not ſhewn in evidence, is good; ſee tit. Verd.

What ſhall be good evidence in action of the caſe upon finding and converting, upon iſſue not guilty; ſee tit. Action of the caſe.

Where verdict given without evidence is good; ſee tit. Verdict.

Examination.

Of the wife to the fine levied by her and her huſband, where neceſſary, and the reaſon of it; b.1.76,77. b.2.58. b. 10.43. ſee tit. Baron, and Feme. Fines and Averments.

Where examination ſhall be in debt, upon arerages of account, of whom, how, and of whom not; b.6.53 b.10.103. ſee tit. Statutes 5 H.4. b.8.

Of the age of an infant upon a fine levied by him, how to be tried, whether within age, or of full age; ſee tit. Error.

Of the age of an infant in *Audita querela*, by him ſued to avoid a Statute-ſtaple, or &c. by him acknowledged; how, and when; ſee tit. *Audita querela*.

Of ſummons upon writ of diſceit, where to be tried by examination, where by the country; ſee Diſceit.

Not attached by 15 days in Aſſiſe, to be tried by examination, &c. ſee Attachment.

Where trial, if lands be ſeiſed into the Kings hands, upon aid prayed of the King, &c. ſhall be by examinat. of the eſcheator; ſee Aid of the King.

Where trial in caſes is by examination of the party himſelf; b.9.31.

Where trial is by examination if ſuch one was Sheriff, or not; b.9.31.

Where trial is by examination of the Coronor in caſes; ſee Coronors.

Where trial is by examination of the attorny in caſes; b.9.31.

Where examination of a Clerk preſented to a Church, ſhall be by the Biſhop, and how the Biſhop ſhall demean himſelf in it; ſee *Q. Impedit*.

Where trial of Ideocy is by examination, &c. and how; ſee tit. Ideot.

Where cuſtom upon examination of parties, &c. to be condemned or diſcharged without other trial is good, or not; ſee tit. Cuſtom.

Where trial is by examination of witneſſes, and where conviction ſhall be by their examination without other trial; ſee tit. Witneſſes.

Of examination upon deeds to be inrolled; ſee tit. Inrolments.

Where amendment is to be of the roll, record, proces, or &c. upon examination of the Clerks of the Court; ſee tit. Amendment.

Exaction, ſee Extortion.

Ex aſſenſu partium, ſee tit. Aſſent.

Exception.

The proper place for except. b. 9.53.

Conſtruction of words of exception and where a forſpriſe, exception or ſaving ſhall be void, as well in acts of Parliament, as in Grants, Leaſes, or &c. b. 1.47.53. b.6.5.13,14. 75,76. b. 7.19,20.39. b. 8.29.118.137,138. b. 10.55. b.46,47.50.

Where forſpriſe ſhall be in a writ demand, or plaint, or not; b. 5.2. p. 11. b. 11.49. ſee tit. Writ.

Where forſpriſe ſhall be in fines levied of lands, or not; b.2.74. ſee tit. Fines of lands.

Of exception of woods, underwoods, great woods, upon a leaſe, feoffment, or &c. and how to be conſtrued, and what is excepted by thoſe words, what not; b.4.63.b.5.2.p.25. 11, 12. b. 8.63,64. b. 11.47,48,49,50. ſee tit. Woods.

Where

Where a writ of error ſhall be upon a bill of exception; ſee tit. Error.

Of exception in a Charter of pardon, and where to be pleaded, by the party that would have avail by it; ſee tit. Charter, and Pleading.

Where exception or reſervation of a parcel of a thing, leaſe, grant, or &c. is good, or not; ſee tit. Reſervation.

Where reſervation, or exception of the profits of a thing given, granted, or &c. is good, or not; ſee tit. Reſervation.

Where a man ſhall be compelled to attorn, upon a grant of a reverſion, without ſaving or exception of advantages, &c. ſee tit. Attornment.

Where entry into a warranty upon voucher ſhall be ſpecially with exception, and ſaving his action, entry, or rent; ſee tit. Voucher, and Proteſtation.

Where a Proviſo in deeds ſhall be conſtrued in nature of an exception; ſee tit. Condition.

Where in pleading the Kings general pardon, the pleader ought to alledge, & aver that he is not a perſon excepted; ſee tit. Pleadings.

Exchange.

Where no exchange without the word (exchange.) b.4.121.

Where exchange is good without a deed, or not; b.4.121. b.9.12,14.

Where exchange is void, for what of full and compleat execution, and how an exchange ſhall be executed; b.1.98,99.105. b.2.74.

By tenant in tail, and where it ſhall bind the iſſue in tail after the death of his anceſtor, or not; b.1.96.

Where an exchange betwixt two Parſons of their benefices is good, or not; b 2.74.

Where an exchange of a reverſion is good; b.4.122.

Where an exchange defeated, and void in part, is void in the whole; b.4.122.

Every exchange implies a warr. and what ſhall be a good counterplea to the warr. or voucher, where the voucher is becauſe of warr. by reaſon of exchange; b.1.96.b.4.121. ſee tit. Counterplea of warranty.

Implies a condition, and who ſhall enter for ſuch condition; b.4.121. ſee tit. Condition.

Where exchange with aſſets diſcended bars the iſſue in tail in Formedon; b.1.96. ſee tit. Aſſets, and Election.

What lands ſhall be recover. in value upon voucher by warranty upon exchange, what not; b.4.121. ſee tit. Recovery in value.

What eſtate is to be intended upon exchange, where no eſtate is expreſſed, nor ſpoke of in the exchange; ſee tit. Eſtates.

Where warranty of Charters lies, and ſhall be maintained upon warranty, which riſes upon exchange; ſee tit. Warranty of Charters.

Where in exchange eſtates are to be equal; b.11.80.

Excommunication.

For what cauſe ſhall excommunication be intended to be, where no cauſe is expreſſed in the certificate of excommunication certified; b.8.8.

Where excommunication is certified without mention for what cauſe the excommunication was void, or not; b.6.68.

Where excommunication or abſolution certified by another then the Biſhop, and Ordinary, or Archbiſhop, is void; b.5.14,15.26, 27. twice *Calvins* caſe; b.8.68.

Of excommunication certified by the Biſhop, or &c. now dead ſhall be good, and allowable, or not; b.8.69.

Where a certificate of excommunication by the Biſhop, that another Biſhop has certified him that the plaint. was excommunicated, is good, or not; b.8.69.

Where excommunication or abſolution certified by the Pope, under Lead, or his Delegates be good, or not; b. 5.15.27. twice *Calv.* caſe; b.8.68.

Where excommunication certified by the Commiſſary, Archdeacon, Dean, and Chapter, or Official, be good and allowable, or not; b. 9.41.

Where excommunication certified by him that was party to the ſuit is not good, nor allowable; b.8.68.

Form of the Biſhops letters, or &c. to certifie excommunication, what good and ſufficient, what not; b.8.69.

Where excommunication is certified in another Court, without ſhewing the letters, or &c. or not; b.8.69.

Where excommunication within a County Palatine, ſhall not be allowed in the Courts at Weſtm. of the Common Law; b.8.68. ſee tit. Count Palatine.

The form of entry of excommunication in the rolls, upon pleading it; b.8.62.69.

Where excommunication ſhall be annulled, and the party abſoiled by the writ of the King, and to whom the King may write, to whom not; b.3.23. *Calv.* caſe.

No averment againſt excommunication certified by the Biſhop, it eſtopps; ſee tit. Certificate of the Biſhop.

Of appeals in Courts ſpiritual upon excommunication falſly certified; ſee tit. Appeals.

Where excommunication is a good cauſe of challenge to a Juror; ſee tit. Challenge.

Of the writ, The excommunicate to take, and the whole matter of it; ſee tit. Statutes, 5 *Eliz.* c.23.

Executions.

Where, and againſt what perſons execution ſhall be awarded by *Capias ad ſatisfaciend.* where, and what not; and how the Sheriff ſhall demean himſelf in executing of it; b. 3. 12.43.67. b. 5.2. p. 87.88.90. b. 6. 53.54. b.8. 141,142. b.11.43. ſee tit. Exigent.

Where execution by *Capias* is not ſatisfaction to the party without payment; b.5.2. p.86. and below.

Where execution by *Capias* for the Kings fine, ſhall be execution for the party at whoſe ſuit, &c. and when, or not; b.5.12.b.5.2.p.88.

How execution by *Capias* is to be ſued upon judgment againſt two or more, but one execution to be, execution of one is not ſufficient, the Sheriff muſt take in execution the bodies of all; b.5.2. p.86. b.11.43.

Where after eſcape of him that was in execution by *Capias*, the Sheriff or Goaler may retake him, and he ſhall be in execution again, or not; b 3.44.52.72. ſee Eſcape.

Where execution ſhall be awarded by *Fieri facias*, and how the Sheriff ſhall demean himſelf in executing it, and what goods and chattels ſhall be delivered in execution, what not; b.2.37.b.3.12.80. b.4.65,66,67.74.b.5.2. p.32.87,88.90,91. b.8.143.171.

Where a term and leaſe for years, ſhall be delivered to the party in execution upon *Fieri facias*, to have it as a chattel or no; b. 4.74. b.8.96.171.

Where the Sheriff ſhall be treſpaſſor, in doing execution upon a *Fieri facias*, or not; b.5. 2. p.91.93. b.6.52. ſee tit. Juſtification.

Where goods and chattels ſhall be liable to execution by *Fieri facias*, becauſe aliened, or given by colluſion to defraud creditors; b. 2. 25,26. b.3.81,82.83. b.5.2. p.60. b.6.18.b.10. 56. ſee tit. Colluſion, and Statutes; 1 R.2.c.9. 3 H.7.c.4. 3 *Eliz.*c.7.

What return of the Sheriff is good upon *Fieri facias*, what not; b. 5.2. p. 32. ſee tit. Return of the Sheriff.

Where execution is to be awarded upon *Elegit*, and how the Sheriff ſhall demean himſelf upon it, and what lands, &c. ſhall be delivered in execution, what not; b.3.12. b.4.65. 67.74.82 b.5.2.p.87.90.b.6.78. b.7.39.b.8.171. ſee tit. Statutes, Weſt.2.c.18. and extent.

What is a good return of the Sheriff upon *Elegit*, what not; b. 4.65.74. ſee tit. Extent, and Recogniſance

How execution ſhall be awarded againſt the heir by *Elegit*, or &c. upon recovery againſt him in debt for the death of his father, and where the land of his own purchaſe ſhall be put in execution; b.2.12,13.b.8.52.b.6.47.b.7. 20. ſee tit. Debt, and Aſſets, and Heir.

Againſt the heir upon recogniſance made, & acknowledged by his father, and what lands ſhall be put in execution, and whether he ſhall have contribution of the feoffees of his father; b.3.12,13,14. ſee tit. Contribution.

Where a leaſe for years ſhall be delivered to the party in execution upon *Elegit*; b.4. 74. b.8.96.171.

Where lands aliened by fraud to prevent execution & defraud the creditors, are liable, & ſhall be delivered in execution upon *Elegit*, b.2.25,26.b.3.81,82,83 b.5.2.p.60.b.6.18.b.10. 56. ſee tit. Colluſion, and Statutes.

Where a man may pray execution by *Elegit* upon a recogniſance, or &c. after the firſt day, without ſtaying till all the days are incurred; b.3.22. b.4.94. b.5.2. p.81. b.10.128. ſee tit. Debt, and Recogniſance.

Of what lands, or &c execution ſhall be made upon a recogniſance, or ſtatute ſtaple, or &c. by *Elegit*; and how, and when; b.1.62.128.147.b. 2.52.59.77,80.b.3.12,13,14.b.4.31.65.67.b.5. 2.p.86.91.b.7.14.19,20,21.38,39. ſee tit. Recog.

Where a man ſhall not have judgment, &c. by *Capias*, *Fieri facias*, or *Elegit*, without ſuing a *Scire facias*, firſt; b.2.37. b.3 12.b.4.65, 66.b.5.2. p.88.

Where a man ſhall not have execution, upon a recovery in a writ of annuity by *Fieri facias*, without a *Scire facias* firſt ſued; b.2.37. b.6.45.b.5 2.p.8. ſee tit. *Scire facias.*

Where entry is lawful by vertue of a judgment without a *Scire facias* ſued, or not; b.6. 51. ſee tit. Entry Congeable.

Where a ſtranger to the Record, ſhall have a *Scire facias*, to have execution of it, or a ſtranger to the Kings patent; b.1.96. b.5.2.p. 9. ſee tit. *Scire facias*, and Executors.

Where, and how execution ſhall be made upon a recogniſance, ſtatute-ſtaple, or &c. againſt whom has the lands in execution upon a late ſtatute, or &c. b.4.65,66. ſee tit. Recogniſance.

Where execution ſhall be awarded upon a *Nihil* returned, upon the firſt *Scire facias*, or not; but upon two *Nihils* returned; b.5.2. p. 32.b.8.142. b.5.2. p.88. ſee tit. Charter.

Where a judgment or fine levied of lands ſhall be twice executed by execution ſued by *Scire facias*, or not; b 2.61. ſee tit. *Scire fac.*

Where lands or goods ſhall be liable to execution by the original purchaſed, by the judgment, or by the execution awarded, &c. b.8. 171. ſee tit. Colluſion.

Where execution ſhall be of the goods and chattels, &c. of a man for the duty of another, or not; b.5.2.p.119.b.6.78,79.b.8.171.b.9.74. ſee tit. Baron and Feme, Aſſigner, Abettors, and Join-tenant.

Where execution ſhall be only againſt the ſurvivor, upon a judgment againſt 2 or more, or not; but againſt him, and the heir, or land-tenants of the other; b.3.13,14. ſee tit. Voucher, and recovery in value, and Join-tenants.

Where execution ſhall be awarded againſt mainpernors, and how; b. 5.2. p. 70. ſee tit. Mainprize.

Where upon execution awarded againſt two or more, the Sheriff may deny the whole execution upon one, & ſolely deliver his lands, &c. in execution, and good, or not; b.5.2.p.119.

By *Habere facias ſeiſinam*, and how it ſhall be executed, or upon recovery how the Sheriff ſhall put a man in poſſeſſion, and by what thing; b.1.94.97.187. b.5.2. p.91. b.6.51,52.

Where a man ſhall be adjudged in poſſeſſion preſently upon recovery or fine levied without execution ſued, or not; b.1.97.105, 106. ſee tit. Poſſeſſion and Recovery.

Where execution ſhall be againſt executors of their own goods for damages only, by their plea or own act; b.8.134.b.9.90.94.109. ſee tit. Executors.

Where execution ſhall be againſt executors of their proper goods, for the principal debt, by their pleading, or own act: b. 8.133,134. 132. b.9.88.109. ſee tit. Executors.

Where, and in what Court execution ſhall be awarded upon judgment affirmed, or reverſed, upon a writ of error; ſee tit. Error.

Where judgment ſhall be given, but execution ceaſe; ſee tit. Judgments, and writ to the Biſhop.

Where execution may be twice upon a ſtature, or &c. or after execution determined, or defeated, new execution may be, or not; ſee tit. Extent, and Recogniſance.

Where the Recogniſee, who has the lands in execution ſhall hold over, his term of extent; ſee tit. Recogniſance.

How the Recogniſor, or his alienee ſhall have the land again after execution awarded; ſee tit. Recogniſance.

Upon recovery in value, how, and when; ſee tit. Recovery in value.

Where the executor of an adminiſtrator ſhall not have execution upon a judgment in action brought by the adminiſtrator, nor contr. ſee tit. Executors, and Adminiſtrat.

Of execution upon fines levied of lands, and when a fine ſhall be ſaid executed, and what execution; ſee tit. Fines of lands.

Where exchange is void for want of due execution thereupon; ſee tit. Exchange.

Where *Scire facias* lies againſt executors, to have execution of goods to them come, of late time by one formerly barred in action brought againſt them; ſee tit. Executors.

Where the Sheriff ſhall make execution upon judgment &c. within a Franchiſe, or not; ſee *Non omittas*.

Where, and when the Sheriff may juſtifie the breaking of an houſe to do execution, or not; ſee tit. Demand, and Treſpaſs.

Where, and how, he in execution ſhall be diſcharged of execution, where by the Act of God, of Law, or his own act, or releaſe of the party, and by what words within the deed; b. 5.2. p.86. b. 6.13.25. b. 8.143.152, 153. ſee tit. Eſcape, and *Audita querela*, *Corpus cum cauſa*, and Releaſes.

What manner of execution ſhall be awarded upon judgment in the Marſhalſie; ſee Marſhal.

Executors.

Who may be an executor; b.5.2. p.27. ſee tit. Baron and Feme, Enfant, and Monk.

What perſon may make an executor, what not; b. 4.61. b. 6.23. b. 8.144. ſee tit. Teſtament.

What chattels of the teſtator the executors ſhall have, what not; b.2.93.94. b.3.12.39. b. 4.63.65. b.5.2. p.96. b.7.17.23. b. 8.118. b. 9. 97. b. 10.51.128,129. b. 11.92. ſee tit. Chattels.

Where executors of an adminiſtrator ſhall not have execution upon judgment in action brought by the adminiſtrator, nor contr. b.1. 96. b.5.2. p.9.

Where a teſtator is indebted to many, which ſhall be firſt paid; b.4.59,60. b.5.2. p.9.

Where executors are chargeable, notwithſtanding recovery and judgment againſt them at the ſuit of others, becauſe the recovery was by covine; b.8.132,133,134. b.9.109,110.

Where executors ſhall be charged by their proper goods, for the principal debt, becauſe of their pleading, or own act, and for what act and plea, what not; b.8.132,133,134. b. 9.90 94.109.

Where, and what is *deveſtavit* by the executors, of the goods of the Teſtator, and how chargeable, and execution to be againſt them for it; b.4.60. b.5.2. p.28.30.32. b.8.132,133. b.9.88.109. b.6.19.

Form of the writ of debt againſt an executor, or for an executor, where in the *Debet* and *Detinet*, where in the *Detinet* only; b. 5. 2.p.31.35,36. b.8.159. b.10.120. ſee tit. Debt, and Writ.

Where an executor is chargeable for the contract of the Teſtator without writing, and where for the treſpaſs, and offence of the teſtator, or not; b.3.24. b.8.133. b.9.87,88,89, 90. b.10.77.

Where an executor ſhall have a ſole action without his companion, or not; b.9.37. b.8. 61. ſee tit. Severance.

Where a man may be executor though he refuſed adminiſtration before the Ordinary; b.9.37,38. ſee tit. Teſtament, and Adminiſtration, and Ordinary.

Form of the writ of debt brought by or againſt executor or adminiſtrator, what is ſufficient to abate it, what not; b. 5.2. p. 32.36. b. 8.159. b.4.37. ſee tit. Writ, and Debt, and Adminiſtrat.

Where, and who ſhall be ſaid, an executor of his own wrong, how chargeable, and what thing done by him is good, &c. b. 5.2.30.33, 34. b.9.34.

Where action of account lies, and is maintainable, by or againſt executors, or not; b. 11.89. ſee tit. Account.

Where executors ſhall have arerages of annuity, and action for them; b.2.36. b.4.49. b. 6.4. b.7.39. ſee tit. Annuity, and Arerages.

Where the executor ſhall maintain that action of debt, which his teſtator could not living; b.4.50,51. b. 5.2. p.118. b.7.3. ſee tit. Annuity, and Arerages.

Where the executor ſhall have arerages of rent-ſervice, or rent-charge, and action to recover them; b.4.49. b.7.3.39. b. 10.127,128, 129. ſee tit. Arerages and Statutes; 32 H.8. c. 37. b.8.64,65.118.

Where debt for rent reſerved upon a leaſe for years lies and is maintainable againſt executors, or not; b.3.23,24.

Where action of waſt lies againſt executors; b.5.2. p.12. ſee tit. Waſt.

Where action of the caſe lies and is maintainable againſt executors, upon *Aſſumpſit*, made by the teſtator; b.9.94. ſee tit. Action of the caſe.

Where attaint lies and is maintainable by or againſt executors; b. 6.80. ſee tit. Attaint.

Where a writ of Covenant lies, and is maintainable by, or againſt executors, or adminiſtrators, upon the debt of their teſtator; b.5.2. p.17. ſee tit. Covenant.

Where a writ of error lies by or againſt executors; b.11.41.

Where, and what goods and chattels, or things in action which come to the huſband by intermarriage, or accrue during Coverture, ſhall the executor have after the death of the huſband, or not; b.10.41.51. ſee tit. Baron, and Feme.

Where the executor of a body corporate, ſhall have the chattels, or &c. and not the ſucceſs. b. 4.65. ſee tit. Abbot and Prior.

Where the executors ſhall have the embleaments of lands after the death of the huſband, and not the wife, or contr. b.5.2. p. 116. ſee tit. Embleaments.

Where the executor ſhall have the ward fallen upon the death of the tenant, and not the heir, and contr. b.2.93. ſee tit. Ward, and Statute, W. 2. c.35.

Where the executor needs the Teſtament of the teſtator, and muſt have it to ſhew in action by or againſt him, and what is a ſufficient Teſtament, b. 9.38.41. ſee tit. Monſtr. of Deeds, and Teſtament.

What ſhall be a good bar in debt or other action, brought by an executor, or adminiſtrator, where, and what not; b. 5.2. p.27. b.8.132. b.9.108,109,110.

Where an action or duty ſhall be extinguiſhed, or put in ſuſpenſe by adminiſtrat. as executor; ſee b.8.136. tit. Extinguiſhment.

Where the act of one executor, as confeſſion, nonſuit, default, or releaſe ſhall prejudice, and bar the reſt, or not; b.8.61. b.9.37. ſee tit. Severance.

What iſſue ſhall be taken in debt by or againſt executors; b.6.41.

Where *Scire facias* lies againſt executors to have execution, of a thing come to them of late time by one barred in action heretofore, brought by him againſt them; b.8.134.

Where the releaſe of an infant executor is good, or not; b.5.2.p.27. ſee tit. Acquittance, and Enfant.

Where an executors releaſe of a debt before probate of the Teſtament, is not good; b.5.2. p.28. twice; ſee tit. Releaſes, and Teſtament.

Where the executor ſhall not have debt before probate of the will; b.5.2. p.28. twice; ſee Teſtament.

Where the executor may ſatiſfie himſelf by retaining, or not; b.5.2. p.30.33,34. b.9.34. ſee tit. Aſſets.

Where releaſe or acquittance of a debt by a woman Covert executrix, is not good; ſee tit. Acquittance, and Releaſes.

Where a releaſe or acquittance of a Monk executor, is good; ſee tit. Acquittance and Releaſes.

Where executors ſhall have election upon grants, or &c. as well as the party upon grants in the disjunctive, or not; ſee Election.

Where a writ ſhall be brought by or againſt a man as executor, where as adminiſtrator; ſee tit. Adminiſtrator.

Where, and what ſhall be accounted aſſets, in the executors hand, what not; ſee tit. Aſſets.

Where a woman Covert executor ſhall be prejudiced by her huſband: ſee tit. Baron and Feme.

Where a writ ſhall be maintained by or againſt executor by journies accounts, or not; ſee tit. Verdict.

What ſhall be good evidence in debt againſt executors upon fully adminiſtred, &c. or never executor; ſee tit. Evidence.

Where ſummons, and ſeverance lies in debt brought by executors; ſee tit. Severance.

Upon deviſe to executors, or that the executors ſhall ſell the land, what ſale, or &c. by them or any of them ſhall be good, what not; ſee tit. Deviſe.

Where the deviſee cannot take the thing deviſed to him, or enter the land, without aſſent of the executor, and what is good, and ſufficient aſſent, or not; b 3.39. b.4.28.66. b. 5.2. p. 12.29. b. 8.95,96. b. 10.47.49. ſee tit. Deviſe.

Where a writ of debt lies againſt the ordinary, or his executors, or not; ſee tit. Ordinary.

Where the Ordinary may ſequeſter the goods of the dead, and how he ſhall demean himſelf in it, and where he may ſequeſter, though the teſtator had made executors; ſee tit. Ordinary.

Where an executor ſhall account to the Ordinary, and of what things; where, and of what not; ſee tit. Ordinary.

How a condition upon a feoffment, or &c. to pay monies by him, his heirs or executors, or to him, his heirs or executors, ſhall be performed; and to, and by whom; ſee tit. Conditions.

Where one executor may have an action againſt his companion, or not; ſee tit. Extinguiſhment.

Exemplification.

Where, and under what ſeals of Courts exemplifications ſhall be ſufficient to be pleaded, or eſtoppe a man, under what not; b.2.5. 7. b. 3. Epiſt. 1. there. b. 5. 2. p. 53,54. b. 8. 8. 28. ſee tit. Monſtrance of deeds, and Record.

Where and who ſhall have exemplification, or *conſtat* of the Kings Letters Patents, and to whom they ſhall be as availeable as the Letters Patents themſelves, to whom not; b. 5. 2. p. 52. b. 8. 8. ſee tit. Statutes; 3 E. 6. cap. 4. and Inrollment, and Monſtrance of Deeds.

Where, and what perſon ſhall have exemplification of a deed inrolled, and to what purpoſe it ſhall be availeable, as if he had the deed it ſelf, or not; b.5.2. p.52,53.74. ſee tit. Inrollment and Statutes; 6 R. 2. c. 4. there.

Where

Where a man ſhall have exemplification of Statutes, or Acts of Parliament. b.2. Epiſt. 1. there. b.8.7,8.38.

Where exemplification was not pleadable at the common law. b.5.2.p.52.53,54.

Difference betwixt exemplification and *conſlat*, and in what points. b. 5. 2. p. 52, 53, 54.

Where exemplification of the tenour of a record, ſhall be ſufficient, and to what intent and purpoſe. b.8.8. ſee tit. Monſtr. of Deeds.

Exemption.

Where, and what perſons ſhall be exempted to be ſworn upon an inqueſt for their dignity, without a Charter of exemption, and how they ſhall be diſcharged. b.6.53. ſee tit. Baron and Feme. b.9.48.

Where a man ſhall be exempted to be a Juror by the Kings Letters Patents. b.8.108. ſee tit. Jurors.

How a man ſhall be diſcharged to be ſworn upon an inqueſt by the Kings Letters Patents. b.8.108.

Where a Charter of exemption to be a Juror, ſhall be allowed, where the King is party or not. b.8.108.

Where the King may grant exemption to pay or to be collector of the tenth of fifteen. b.8.108.

Where the Kings grant to be exempt to pay toll, is good. ſee tit. Toll.

Where, and to what intents the Queen is a perſon exempt, to what not. ſee tit. Aid of the King, and Prerogative.

Of Eccleſiaſtical juriſdiction granted by the King. b.5.9,10.14,15.

Under what ſeal the charter of exemption to be a juror, ſhall be ſufficient, under what not. b.6.53.

Exigent.

In what actions a *Capias* and *Exigent* lye at the common law, in what not. b.3.12. b.5.1. p.88.92.

Where, and what actions a *Capias* and *Exigent* are given by Statutes. b.3.12. b.5.2. p.88.

Where *Capias* and *Exigent* lye in action of account. b.3.12. ſee tit. Account and Statutes. Marlb.c.23. Weſt.2.c.11.

Where is *Capias* and *Exigent* in debt. b.3. 13. b.5.2.p.88.72. ſee tit Proces and Statutes. 25 E.3.c.17.

Where *Capias* and *Exigent* lye in raviſhment of ward. b.9.72. ſee tit. Ward and Statutes. Weſt.2.c.35.

Where *Capias* and *Exigent* lye in a writ of treſpaſs. b.3.12. b.5.2. p.88. b.10.72. ſee tit. Proces.

Where *Capias* and *Exigent* ſhall be awarded againſt a Baron or Baroneſs, Earl or Counteſs, or Lord of the Parliament, or not. b.6.53,54. b.9.49.68. b.7.15.33,34. b.10.76. ſee tit. Arreſts, and Execution, and Parliament.

Where *Capias* and *Exigent* lies againſt executors, or not. b.6.80. b.9.109. ſee tit. Executors.

Where *Exigent* ſhall be awarded after the firſt *Capias*, or not. b.5.2. p.32.88,89. b.8.142. ſee tit. Charter and Execution.

Where *Capias* or *Exigent* ſhall be awarded in another County then that where the original was brought, or not. b.5.59.

What return of the Sheriff ſhall be good upon *Exigent*, what not. ſee Return of the Sheriff.

Where forfeiture of goods is by award of the *Exigent* or not. b.5.2. p.110,11. ſee tit. Forfeiture.

Where mainprize ſhall be found for him that comes in upon *Capias* or *Exigent*, and what manner of mainprize. ſee tit. Mainprize.

Who is to grant the office of the *Exigenter*. ſee tit. Officers.

Where *Exigent* ſhall be awarded againſt the acceſſary before all, or any of the principals be attainted. ſee tit. Corone.

Expoſition of words and ſentences.

Of the word *Engleterre*. b.7.16,17. ſee tit. Stat. 14 E.3.c.4.

Of the words *in, apud, de vel ex*, (in, at, of, or from) in writs or grants. ſee b.7.41,42. ſee tit. Charge and Trial.

Of the word (there) and how it ſhall have relation. b.6.73.

Of the word *juxta*, and how it ſhall have relation. b.6.73. b.10.132. ſee tit. Relation.

Of the words, *idem, eadem, ejuſdem*, or *eundem*, and how they ſhall have relation. b.8.32. b.10,124. ſee tit. Relations.

Of the word (*prædicti*) and how it ſhall have relation, where two things are mentioned before, b.1.153. b.8 57.74,75.91. b.9.47,48. b. 10.64.67.69.106.129.138. b.11.50,51.

Of the words *quæ vel quas*, in deeds, and how they ſhall have relation. b.8.148.154,155. ſee Relation.

Of the word late, or *nuper* in Latin. b.2.47.

Of the words (*ſemine, ſanguine, exitu, prole, leberis,*) b.1.103. b.3.40.61. ſee tit. Tail, and Eſtates, and Statutes. W.2.c.1.

Of the words *homo* or *hominis*, Statutes, or Charters. b.6.52. ſee tit. Relations.

Of the words, *uterque, utrumque, quilibet*, or *quemlibet*. b.5 2.p.103. ſee tit. Obligation.

Of the words *bona* and *catalla*. b.8.33. ſee tit. Gift.

Of words copulative (*conjunctive* and *conjunctim*) and how they ſhall be expounded. b.3.39. b.4.41.50.79,80. b.7.7,8,9. b.8.85. b. 10.110.112. ſee tit. Relation.

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Of the words (void, irrite, and held for null) in Statutes, &c. and how they ſhall be conſtrued and expounded. b.1.24. b.3.82,83. 59,60.88,89. b.5.2. p.3.5.119. b.10.60.100. b.11.67.73.

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Of the words *durante termino*. b.1.155. b.8. 145.

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Of the words (*ipſo facto*) in deeds or ſtatutes, or &c. b.5.9.119.

Of the word (college,) and what is a college, what not. b.4.106.108. ſee tit. Statutes. 31 H.8.c.13. 1 E.6.c.14.

Of the word (hereditament) and what thing is compriſed, and included in it, what not. b. 3.2.4.8. b.7.33,34.

Of the word (*proxima advocatio.*) b.8.144, 145. b.7.28. b.10.53,54.

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Of words of number, and where the ſingular number includes the plural, and contr. and where the number is material. b 10.100, 101.103.106,107. b.8.48. ſee tit. writ. b.5.2. p.35.

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Of the words *qualis, talis*, or *talia, qualia*, and how they ſhall have relation. b 4.18. b.6. 33. b.10 104. b.11 33. ſee tit. Relation.

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Of the word (other) in ſtatutes, or &c. and how to be conſtrued. b.1 177. b.2.46.

Of the words (to be held of us, &c. and of other chief Lords by the ſervices therefore due, and of right accuſtomed) in the Kings grant, how to be conſtrued. b.6.6. ſee tit. Grant of the King, and Tenure.

Of the words (any in the Act of Parliament notwithſtanding.) b.7.19,20.

Of the word (irrevocable) in deeds. b.8.82. ſee tit. Revocation.

Of the words (when and then.) b.3.20,21. ſee Deviſe.

Of the word (paying) where it is taken for a condition, where not. b.3.21. ſee tit. Condition.

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Of the word (*dedi*) in grants or &c. b.1,2. b.4 81. b.5.2.p.17,18. ſee tit. Warranty.

Of

Of the word (*pro*) in deeds, &c. b.4.88.
Of the words (*fatuus*, or *Idiota*) in ſtatutes, &c. b.4.127,128. ſee tit. Ideot.
Of the words (*a confectione præſentium*) in deeds. b.5.2.p.1,2. 93,94. ſee Computation and Leaſes.
Of the words, (from the date, or the day of the date) in deeds, or &c. b.5.2.p.1. ſee Leaſes.
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Of the words (*piſcis* and *piſces*) in a writ, or &c. b.5.2.p.35.
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Where two having ſeveral eſtates join in aſſurance to a ſtranger, how it ſhall be conſtrued. b.1.76.147. b 2.35.57,58. b.5.2.p.7,8. b.6.14,15. ſee tit. Confirmation.
Where an act done at one inſtant, ſhall enure to ſeveral intents, and where done at ſeveral times, ſhall enure as done at one inſtant, and how the time ſhall be accounted to ſupply it. b.1.76.174. b.7.74,75. b.3.26,27. b.5. 2. p.7,8. 15. 19.79. b.6. 14,15. 33,34. and rents.
Of a feoffment made by tenant for life to him in remainder in tail. b.1.76,77. b.6.14,15. ſee tit. Surrender.
Of a feoffment made By tenant for life, and him in remainder in tail. b. 1.76,77. ſee tit. Diſcent.
Of a grant of tenant for life, of his eſtate to him in reverſion, and another. b. 2.61. ſee tit. Surrender.
Of a grant, leaſe, or &c. made to a tenant for life or years, how it ſhall enure. b.2.23,24. ſee tit. Confirmation, Jointenants and Surrender.
Of a leaſe for life of lands in ſeveral Counties, reſerving rent, and how, &c. b.2.75. b.5. 2. p.79. ſee tit. rents.
Of a grant of ſo many loads of wood to be taken by aſſignment of the grantor. b.5.2 p. 25. ſee tit. Grants.
Of the words *a feſto*, or *ad feſtum* of *S. Michaël*) b.11.39. ſee tit. Intendment.
Of the word Barretor. ſee tit. Barretor.
From or to what time, an act to be done upon condition, ſhall have relation. ſee tit. Relation and Condition.
Of the time to which a deed ſhall have relation, In date, delivery, or &c.
Of Forſpriſe, or exception in writs, leaſes, or &c. ſee tit. Exception and writ.
Of the Charter of the King to pardon, and diſcharge all debts, and who are diſcharged by it, who not. ſee tit. Charter.
Of conditions. ſee tit. Conditions.
Of Covenants. ſee tit. Covenants.
Of deviſes. ſee tit. Deviſes.
Of intails. ſee tit. Tails.
Of grants, gifts, exceptions, and the reſt, &c. and of woods or trees. ſee tit. Woods and Exception.
Of teſtaments. ſee tit. Teſtament.
Of the word (proof) in deeds, and what proof ſhall be intended. ſee tit. Intendment and Conditions.
Of leaſes. ſee tit. Leaſes.
Of releaſes. ſee tit. Releaſes.
Of grants and common perſons. ſee tit. Grants and Deeds.
Of the Charters and grants of the King. ſee Charters and Grants of the King.
Of feoffments of lands. ſee tit. Feoffments.
Of reſervations. ſee tit. Reſervations and Exceptions.
Of Statutes and Acts of Parliament. ſee tit. Statutes.
Of remainders and reverſions. ſee tit. Remainder.
Of confirmations, ſee tit. Confirmation.
Of limitations, ſee tit. Limitation.
Of words relative, ſee tit. Relation.
Of deeds, and the *Habendum*, &c. in them. ſee tit. Deeds.
Of obligations, and words in them. ſee Obligation.
Of ſurrenders, ſee Surrender.
Of warranty, ſee tit. Warranties.
Of words in Indictments. ſee tit. Indictments.
Of aſſurances of lands, or uſes. ſee tit. Aſſurances, and entendments and uſes.
Of words and ſentences which concern men or women, ſee tit. Capacity.
Of the words (for ſervice, or counſel given, or to be given) ſee tit. Annuity.
Of tenures, ſee tit. Tenures.
Of the words, (moity of an advowſon of a Church, or advowſon of a moity of a Church) ſee tit. Advowſon.
Of words, (upon return of Sheriffs) ſee tit. Return of Sheriffs.
Of a grant by him that has two eſtates in him at the time of the grant. ſee tit. Grants.
Of words in pleading, and which import full and ſufficient allegation in fact, which not. ſee tit. Pleadings.
Of gifts, grants, or deeds by themſelves to men or women. ſee tit. Conuſance, Fines, Dower, Aſſets, Remainder.

Ex poſt facto.

Where a man ſhall be a treſpaſſor from the beginning by matter of after fact, or not. b.8. 146. b.9.22,23.11.76. ſee tit. Action of the caſe, juſtification, and treſpaſs.
Where he that does a thing by command, or authority given him by another, ſhall be a treſpaſſor by matter of after fact done by him who commanded him, or not. b.6.18. ſee tit. Command.
Where action of the caſe lies againſt him who has goods or chattels, bailed to him by matter of after fact, or not. ſee tit. Action of the caſe.
Where a man ſhall be puniſhed by action of falſe impriſonment by matter of after fact, or not. ſee tit. Falſe impriſonment.
Where agreement, or diſagreement after, ſhall have relation from the beginning to an act done before. ſee tit. Agreement and Relation.
Where a grant, leaſe, gift, or &c. is incertain in the disjunctive, is good, and ſhall be certain by matter of after fact. ſee tit. Gift, Annuity, Demand, Election, Expoſition and Plaint.
Where a condition broken, and entry for it, ſhall make an eſtate void from the beginning, and to what intents, and to what not.
Where waſt once puniſhable ſhall become diſpuniſhable by matter of after fact.
Where extent is after extent, and new extent after the firſt avoided, or determined, by matter of after fact, or not. ſee tit. Extent.
Where waſt once diſpuniſhable, ſhall become puniſhable by matter of fact. ſee tit. Waſt.
Where entry once taken away ſhall be lawful by matter of after fact. ſee tit. Entry congeable.
Where a franchiſe or cuſtom is extinguiſhed by matter happening of late time, or not. ſee tit. Extinguiſhment and Corporation.
Where the Kings Charter ſhall become void by matter of after fact, and the party loſe the benefit by it. ſee tit. Charter.
Where damages to be recovered in an action, ſhall be recouped by matter of after fact. ſee tit. Recover.
Where a releaſe extinguiſhing right, bars an action fallen of late time, ſince the releaſe, or not. ſee tit. Releaſes.
Where failing of a record is, becauſe it was reverſed of late time. ſee tit. Failing of a Record
Where an act of Parliament ſhall be repealed by another act of late time, and where, and what is a repeal, what not. ſee tit. Parliament.
Where *Scire facias* lies by him who was once barred in an action, to have execution of aſſets fallen after. ſee tit. Executors.
Where *Scire facias* lies againſt an heir, to have in value lands diſcended to him of late time. ſee tit. *Scire facias*.
How execution ſhall be awarded upon a Statute Merchant, or Recogniſance, where the lands were in execution before, upon a late Statute, or recovery of late time. ſee tit. Recogniſances, and *Scire facias*.
Where a leaſe upon contingency is good, upon matter of after fact. ſee tit. Leaſes.

Extent.

By *Elegit*, upon a Statute Merchant, or &c. and how it ſhall be done by the Sheriff, and how he ſhall demean himſelf upon it, and what return is good, what not. b.4.65,66,67. 74. b.5.2.p.90. b.8.171. ſee tit. Execution, and Recogniſance.
Where a man ſhall have re-extent after another upon the firſt avoided, or determined by matter of after fact, or not; b.4.66,67. b.5.2. p.87. ſee tit. Recogniſance and Statutes. 32 H. 8.c.5.
How the recogniſor ſhall have his land delivered in execution, after the debt ſatisfied, and where he cannot enter, but muſt have proces againſt the recogniſor, and what. b.4.66, 67.82. ſee tit. Entry congeable, and Recogniſance.
Where the recogniſee, after the extent ſatisfied, ſhall retain the land until he be ſatisfied of his coſts and damages. b.4.67.82. ſee tit. Entry congeable and Recogniſance.

Extinguiſhment.

Where rent, ſervice, or &c. is extinguiſhed by purchaſe of the land, out of which, &c. or parcel of it, or not. b.6.1,2. b.8.105.106. b.9. 135. ſee tit. Apportionment.
Where the ſeigniory or ſervice is extinguiſhed by purchaſe of the land, or parcel of it. b. 6.1,2. b.8.105,106. ſee tit. Apportionment.
Where unity of poſſeſſion of the whole land, or parcel of it, by wrong, or diſſeiſin, extinguiſhes the rent, ſeigniory, or &c. or not. b.4.52. b.6.39. b.8.1,2. ſee tit. Apportionment and Suſpence. b.9.135. b.10.67.
Where unity of poſſeſſion by courſe of law, as Diſcent, or &c. of land, or parcel of it, extinguiſhes the whole rent, or &c. or not. b. 4.49. b.9.135. ſee tit. Apportionment.
Where unity of poſſeſſion of the land and rent, and feoffment over of the land, extinguiſhes the rent, or &c. b.2.28.31.47.68.73. b.3.30,31.65. b.4.38.49. b.6.39.69,70. b.7.24. b.5.2.p.113. ſee tit. Count and Voucher.
Where the meſnalty ſhall be extinguiſhed by act of the tenant paravail. or Lord paramount, or not. b.3.66. b.4.9. b.9.129,130, 131,134.
Where the ſeigniory ſhall be extinguiſhed by the act of a ſtranger, or act of the King, becauſe of his poſſeſſion or ſeiſin, or not. b.1.47. b.2.15. b.6.5,6. b.8.118. b.7.25. ſee tit. King.
Where a common is extinguiſhed by purchaſe of the land, out of which, &c. or of parcel of it, or by alienation of the land or parcel of it, or not; but ſuſpended. b.4.38. b.5.2.p.101. b.8.79.13. b.7.9.135.
Where ſuit of Court is extinguiſhed by unity of poſſeſſion of the land, or of parcel of it. b.6.2.
Where the whole ſeigniory is extinguiſhed, by the Lords releaſe of parcel, &c. b.6.1.
Where rent, common, or &c. is not extinguiſhed, but ſuſpended, though one man has an equal eſtate in both. b.2.47. b.4.52,53. b.9.134.
Where rent, or &c. may be granted to the tenant of the land, out of which, &c. or not. b.2.61. b.9.123.134.35.

Of

Of the ſeigniory of a common ſon by an eſtate in remainder, conveighed to the King; b 2.15. ſee Above, and tit. King.

Of rent reſerved upon a leaſe for years, or &c. by feoffment of him in reverſion; b.2.28. 31.68. b.5.2. p.113. b.69,70. ſee tit. Remainder, and Debt.

Of tithes by unity of poſſeſſion of the lands out of which, &c. and where, and where not; b.1.111. b. 2.27.48,49. b. 11.10.14,15. ſee tit. Tithes.

Where cuſtoms, or liberties, and immunities by preſcription, ſhall be extinguiſhed, by matter or accidents happened of late time, or not; b.4.87,88. b.6.45. b.9.23.140. b. 10.50. ſee Ancient Demean, Corporation, and Copyhold.

Where cuſtoms, franchiſes, liberties, or immunities, are extinguiſhed by the Kings ſeiſin, and what, and what not; b.9.25,26.133. b.10.64.

Where Copyhold, and the cuſtom of it, is gone, and extinguiſhed by what acts, and means, done by the Tenant, or Lord, or both together, or not; b. 2. 17. b. 4.24,25,26,27. 31. b.6.37. b.8.64. b.9.104.107. ſee tit.Copyhold.

Where preſcription, or cuſtom is gone, and extinguiſhed by change or alteration of the thing, to which, &c. or not; b.4.87,88. ſee tit. Corporation, above, and Cuſtom.

Where rent, uſe, or &c. ſhall continue after the eſtate out of which, &c. is determined, and whether the eſtate ſhall continue, and the rent, or &c. ſhall be extinguiſhed, and determined, or not; b. 1. 49.76.51.96. 134.139.147. b.2.57. b.4.21.23,24. b.6.60. b. 7.23. b. 8.34.70.145. ſee tit. Confirmation, and Grant.

Where action, or duty is extinguiſhed by the obligee his making the obligor executor, or contr. or not; b.8.136. ſee tit.Executor,and Releaſes.

Where debt is gone, and extinguiſhed by intermarriage, betwixt the obligor, and obligee; b.8.137. ſee tit. Baron and Feme, and Releaſes.

Where a contract, or debt upon contract is gone, extinguiſhed, and determined by bond, ſtatute, or &c. taken for it, or by recovery, or bar in a former action commenced upon it, or not; b.4,5.43,94. b. 5,2. p. 33.85. b. 6.40. 45. 7, and 8. b. 8. 72. ſee tit. Contract, and Acceptance.

Of a condition annexed to an eſtate in lands, and where, and by what act, and by what not; b.1.97.147,148.174. b.2.50.52.59, 70.72. to 78. b. 4.25.53. b. 5.2. p.55. b. 7.14. b.8.75. b.9.142.

Where, and how a mannor may be extinguiſhed, and diſſolved; ſee tit. Mannor.

Where a Leet, or Law-day ſhall be extinguiſhed by unity, and ſeiſin of the King, or not; ſee Leet.

Where a warren, chaſe, or &c. are gone and extinct by unity of poſſeſſion, ſeiſin of the King, or &c. or not; ſee tit. Forreſt.

What thing in action, or right to lands, or goods, is gone, and extinguiſhed by outlary and forfeited to the King, what not; ſee tit. Thing in action.

Where a woman ſhall have dower of rent, or &c. of which the eſtate is determined,and extinct; ſee tit. Dower.

Where arerages of rent reſerved upon a leaſe are loſt, by entry for a condition broken, or acceptance of a ſurrender, or not; ſee tit. Arerages.

Where rent granted for life, or by tenant for life, is not extinguiſhed by death, but in larged, and continued by confirmation; ſee tit. Confirmation.

Where confirmation extinguiſhes a condition, or not; ſee tit. Confirmation.

Where a releaſe or confirmation, which go in extinguiſhment of right or rent, may be upon condition and good; ſee tit. Condition.

Where a releaſe of all his right in lands, extinguiſhes rents, and ſervices, though he to whom, &c. hath nothing in the land; ſee tit. Releaſes.

Where rent, warranty, or action are loſt, and extinct, by entring generally into warranty without ſaving the right, action, or &c. ſee tit. Voucher, and Proteſtation.

Where entry, right, action, or &c. are gone by Attornment generally, without proteſtation to ſave advantages; ſee tit. Attornment, and Proteſtation.

Where a man by his negligence ſhall loſe the benefit of warranty, and it ſhall be extinguiſhed, and loſt for ever; ſee tit. Warranty.

Where action of waſt ſhall be extinguiſhed, and gone for ever, and by what acts and means; ſee tit. Waſt.

Where arerages of rent are extinguiſhed and loſt for ever, by accepting notice of a new tenant, without accepting the arerages; ſee tit. Avowry, Notice, and Tender.

Where an eſtate in lands, or &c. is extinct by taking another eſtate, and where two eſtates may ſtand together in one perſon, at one time, where contr. ſee tit. Eſtates.

Where, and by what acts, and means acquitted betwixt the meſne and the tenant ſhall be extinguiſhed; ſee tit. Meſne.

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Where a future right diſcendable, is extinguiſhment by a mans feoffment; ſee tit. Entry congeable, and Right.

Where extinguiſhment of rents, ſervices, or &c. in poſſeſſion of a body corporate, is mortmain; ſee tit. Mortmain.

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Where, and by what act power to revoke uſes, or &c. is extinguiſhed, by what not; ſee tit. Revocation.

Where a Covenant or warranty indeed, extinguiſhes a Covenant, or warranty in law; ſee tit. Warranty.

Where authority given to executors, to ſell the Teſtators lands, is extinguiſhed; and by what acts where, and by what not; ſee tit. Authority, and Deviſe.

Where a future right is not extinguiſhed by a releaſe, and where right, rent,action, or &c. are extinct by releaſe; ſee tit. Releaſes.

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F.

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Where rent may be reſerved upon leaſe of a Fair; b.5.2. p.3.4. ſee tit. Reſervation.

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Where, and what is good bar, and juſtification, in falſe impriſonment by a Conſtable; 5.2. p.59. b.8.126. ſee tit. Arreſts.

Where, and what is good bar and juſtification by a Sheriff, Baily, or Serjeant of the Mace in a writ of falſe impriſonment againſt them, what not; b.6.54. ſee tit. Arreſts; b. 9.69. b.10.70.76.

Where, and what is a good bar, and juſtification by a Mayor or his under-officer, of a Borough, or Town incorporate, in falſe impriſonment againſt them, what not; b.5 2.p.64. b.11.99. ſee tit. Bilaws.

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Where, and what is good bar and juſtification in falſe impriſonment, becauſe he was a watchman; b. 9.68. ſee tit. Arreſts.

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Where a man ſhall be excuſed in falſe impriſonment, though the warrant or precept to him directed be inſufficient; b.9.68.b.10. 70.76. ſee tit. Arreſts.

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Where in writ of falſe impriſonment of his own wrong without ſuch cauſe generally, is no good replication, but the cauſe ought to be traverſed, and where; b. 8. 67.121. ſee tit. Eſtoppel.

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Form of the writ of falſe judgment; b. 4, 33.

Where writ of falſe judgment lies upon a judgment in Juſticies, or not; b. 6.11,12. ſee tit. Error.

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Where writ of falſe judgment lies not upon judgment given in the Court of Pipowders; b.6.11,12. b.10.73. ſee tit. Fairs, and Courts.

Where writ of falſe judgment lies upon judgment given by the Sheriff in the County Court, or Hundred Court; b.6.11,12. ſee tit. Suitors.

Where falſe judgment lies upon judgment given in Court Baron; b.6.11. ſee tit. Mannor.

Where a writ of falſe judgment lies not for a Copyholder; b. 4.22.30. ſee tit. Copyhold.

Judgment, in falſe judgment, as well againſt the ſuitors, as againſt the party plaintiff or defendant; b. 8. 40.145. ſee tit. Amercement, and Error.

Falſe Latin.

Where an obligation or other deed, is not void for falſe Latin; b.5.121. b.9.47,48. b.10. 133. ſee tit. Deeds, and Obligations.

Where a writ ſhall abate for falſe Latin, or becauſe the plural number is put for the ſingular, or contr. b.4.40. b.5.2. p.45. 121. b.7.27. b. 8.159. b. 9. 48. b. 10.133. ſee tit. Amendment, and Writ.

Where a writ ſhall not be by journies accounts, upon a writ abated for falſe Latin; b. 6.10 ſee Journies accounts.

Where falſe Latin in a writ ſhall be amended, or not; ſee tit. Amendment.

Where inditements are void and inſufficient for falſe and inſenſible Latin; ſee tit. Enditements.

Falſifying of Recoveries.

Where a recovery ſhall be falſified, for def. of Original, or not; b. 3. 3, 4, 5. b. 5. 2. p. 37. 39.

Where a recovery ſhall be falſified, becauſe he againſt whom it was had, was not tenant at the time, &c. and by whom, and how, by whom not; b. 1.96. b. 3.3.7. 88. ſee tit. Eſtoppel.

Where a recovery ſhall be falſified, becauſe the Court has not juriſdiction, and therefore the judgment, before a not-judg. where, and what not; b. 4.47. b.9.66. b.10.76,77. b.11. 64. ſee tit. Error, and Judgment.

Where an infant ſhall falſifie a recovery had againſt him becauſe of his nonage, or not; but judgment againſt him, ſhall bind him, as a man of full age; b.6.8. b. 8.44. ſee tit. Enfant.

Where he in reverſion, or remainder, ſhall falſifie a recovery had againſt tenant for life, and how; b.1.16.62. b.3.61. b. 6.8. b. 10.39. 44,45. ſee tit. Entry Congeable, and Forfeiture, and Statutes, 14 *Eliz.* c.8. ſee Error.

Where falſifying a recovery ſhall be becauſe he againſt whom it was had, was dead at the time, &c. b.1.106. ſee tit. Judgment.

Where tenant for term of years, by *Elegit*, or ſtatute Merchant, or ſtaple, ſhall falſifie a recovery againſt him in reverſion, being tenant of the franktenement; b.6.57. b. 9.135. b. 11.33. ſee tit. Reſceit.

Where the grantee of a rent charge, or &c. ſhall falſifie a recovery had againſt the tenant of the land, or not; b. 1.62.127,128. b. 2.51. b.6.42.

Where the ſucceſſor of a Parſon, Vicar, or ſuch like, ſhall falſifie a recovery had againſt their predeceſſors by def. render, or action tried, or not; b.5.2. p.14. b.6 8.

Where the ſucceſſor of a Biſhop, Abbot, or ſuch like, ſhall falſifie a recovery had againſt their predeceſſor, or not; b.6.8.

Where iſſue in tail ſhall falſifie a recovery had againſt his anceſtor, and how, or not; b. 1.62,63.94.96,97. 106. b. 2.16,52.74.77. b.3. 3.5,6.51. to 61. b 4 121. b.68.32.40. b.10.37. ſee tit. Entry Congeable, and Remitter.

Where the party himſelf, againſt whom the recovery was had, or his heir, ſhall falſifie yet, and by what means, and pleas; b.6.8.

Where a recovery ſhall be falſified becauſe of Covin, and Colluſion, and by whom, or whom not; b.6.58. b. 3.61.78. b. 8.132,133. b.9.109. b 10.39.44.45. ſee tit. Colluſion, and Dower; b.5.2. p.31. b.1.9.15.

Where a woman ſhall falſifie a recovery had againſt her huſband, or againſt her, and her huſband, to have dower; b.2.78. b.6.8 b.10. 49.99. ſee tit. Dower, and Statutes; Weſt.2. cap. 3.

Where the diſſeiſee, or &c. falſifie a recovery had by a woman againſt the diſſeiſor, or abator; ſee tit. Dower.

Fealty, ſee Homage.

Fees to Officers.

Where, and what officers, may claim fees by preſcription, and what fees, what not; b. 11.90.

Fee-ſimple, ſee tit. Eſtates, Feoffments.

Of a meſſuage with the appurtenances, what thing paſſes, what not; b.2.32. ſee tit. Appendant.

Of land what things paſs, as incident, or included in it; b.4.62,63.87. ſee tit. Appendant.

Where feoffment of acres by name of a mannor, or contr. is good, and by feoffment of one thing by name, another thing of another nature, and name paſſes, or not; b.4.62, 63.87.122. ſee tit. Deeds.

Where a feoffment, and livery of ſeiſin of land, is void by the preſence of others, upon the lands, at the time of the livery, or not; b.2.23.31,32. b.5.2. p.113,114. b.6.99.

Where feoffment by him in reverſion, and livery, and ſeiſin made during the term for years, or life, is good, or not; b.2.23,24.31. b.6.60.b.5.2.p.113.123,124.ſee tit.Remainder.

Where upon feoffment of diverſe lands, or many acres, livery and ſeiſin in part in name of all paſſes the whole, or not; b.2.75. b.5.2. p.79.

Where more or leſs paſſes by the deed of feoffment then is compriſed in it, and where the whole paſſes by the livery, and not by the deed; b.4.62.87. ſee tit. Deeds.

Where livery and ſeiſin made by an attorny upon a feoffment is good, and what warranty of attorny is good, and what not; b.4.125. b.5.2. p.19.90.94. b.8.82.b.9.76,77.

Where feoffment, and livery, and ſeiſin within view, is good, and what is good livery within view, where, and what not; b. 1.156. b.2.32. b.2.26. b.9.137.

Where by feoffment to many, and livery, and ſeiſin to one, all ſhall take the eſtate, or not; b.3.26.29. b.5.2. p.95.

Where upon feoffments of lands in ſeveral Counties, there ought to be ſeveral liveries, and ſeiſin, and how, &c. b.2.75. b.5.2. p.79.

How, and at what time livery and ſeiſin made upon a feoffment in fee, or upon an eſtate for life, ſhall have relation; b. 2.75. b. 3.78. b.5.2. p.79.

What acts, and words make good livery and ſeiſin upon feoffment, or &c. b.6.26.

Where a feoffment, and livery and ſeiſin by an infant is void, and where voidable; ſee tit. Enfant.

How a feoffment made by tenant for life, and him in reverſion ſhall be conſtrued; ſee tit. Confirmation, and Expoſition.

Where feoffments of lands are void, becauſe upon Colluſion to defraud creditors, &c. and againſt what perſons, and what not; ſee tit. Colluſion.

Where a feoffment ſhall be intended to be fee-ſimple, where, but franktenement; ſee tit. Eſtates.

Feoffment by him to whoſe uſe which good, which not; ſee tit. Uſes, and Statutes, 1 R.3. c.1. 27 H.8. c.10.

Where a feoffment may be pleaded, by a name compriſed in the deed, though it be otherwiſe named in truth, &c. or not; ſee tit. Deeds, and Miſnaming.

The form to plead a feoffment, or eſtate for life; b 8.82.

Where a future right ſhall be gone, and extinguiſhment by a feoffment; ſee tit. Entry Congeab. and Right.

Where feoffment to leſſee for years to have fee, and livery, and ſeiſin upon it, be good, and how, and when the fee paſſes; ſee tit. Condition.

Where feoffment by tenant for life to him in reverſion, or remainder, ſhall enure as a ſurrender; ſee tit. Surrender.

Where feoffment by tenant for life, forfeits his eſtate; ſee tit. Forfeiture.

How feoffment by tenant for life to him in reverſion, and a ſtranger ſhall enure, and be conſtrued; ſee tit. Expoſition, and Surrender.

Where upon feoffment by him in reverſion, and reentry of the outed leſſee, the reverſion ſhall be to the feoffee; ſee tit. Attornment, and Remainder.

Of feoffments upon conditions, &c. ſee tit. Conditions.

Feoffments to Uſes, ſee Uſes.

Fieri facias, ſee tit. Execution.

Fine to the King.

How reaſonable it ought to be, &c. b.11.44.

What ſhall be properly ſaid a fine, what an amercement, how, and in what Court, and by whom the one and the other may be aſſeſſed and impoſed, by whom not; b. 8. 38. to 42. 56,60.120. b.11.43,44. ſee tit. Amercement.

In action upon ſtatutes, and where; b. 8. 60.

In appeals, and where; b.8.60. ſee Appeals.

In aſſiſe, and where; b.8.59. b.9.72.

In Attaint, upon the plaintiff, or defendant, and where; b.6.60.

In diſceit, and where; b.8.59.

For denying a deed, or record, and where; b. 8.60.

In writ of maintenance, and where; b. 8.60.

In *Proprietate probanda*, and where; b.8.60.

In a writ of recaption, and where; b.8.60. 120. ſee Recaption.

In a writ of Treſpaſs, and ejectment, &c. b. 4.104. b.8.38.59. b.9.72.

In a writ of action of the caſe; b. 4.104. b. 8. 60.

For aliening without licence; ſee tit. Alienation without licence.

For contempts; ſee tit. Contempts.

Where a fine to the King, and impriſonment ſhall be of him, who binds another, not to exerciſe his art; ſee tit. Condition.

Where Fine ſhall be made to the King in Forcible entry; ſee tit. a writ of Forcible Entry.

Where Fine ſhall be made to the King, for diſſeiſin done with force or without, and by whom; b.8.59. b.9.72. b.11.43.

Where fine ſhall be made to the King for reſcue; b.8.59.

Where fine ſhall be made to the King in *Quo warranto*; b.9.28,29.

Where fine ſhall be made to the King for hunting in Forreſts, or &c. ſee tit. Forreſts.

Where fine ſhall be made to the King for ejectment; ſee tit. Ejectione firm.

Where the Kings tenants wife ſhall fine to the King for marrying without his licence; b. 4. 55.

Where fine ſhall be made to the King by Jurors, and for what miſdemeanors; b. 8.41. b. 11.43. ſee tit. Amercement, Enqueſt, and Pain.

Where the Lord in his Leet, or Steward, may aſſeſs a fine; ſee tit. Leet.

Where the Kings fine ſhall be to the value of the land; ſee tit. Pain.

Where ſuitors in baſe Courts ſhall fine to the King, for not removing the record, or &c. ſee tit. Falſe judgment.

Where Juſtices of Peace, or other Commiſſioners, ſhall make fine to the King for their miſdoing; ſee tit. Commiſſioners.

Where a man convict of perjury, ſhall make fine to the King; ſee tit. Perjury.

Where fine ſhall be made to the King, for intruſion upon the Kings poſſeſſion; ſee tit. Intruſion.

Where

Where fines to the King ſhall be ſeverally aſſeſſed, upon every def. or plaint. ſee tit. Amercements

Where *Capias* for the Kings fine ſhall be awarded, and the conſequence of it; ſee tit. Execution.

Where a fine ſhall be made to the King, by him that breaks the Peace; ſee tit. Peace.

Where fine to the King ſhall be in Rediſſeiſin; ſee tit. Rediſſeiſin.

Fines of Lands.

Upon what writ a fine of lands may be levied; b. 5.2. p.39.

Where a fine levied of another thing, not mentioned in the original writ, upon which the fine is levied, is good, or not; b.1.69.76. b.2.72.75,76. b.3.89. b.6.33 b.7.38.

Where a fine ſhall be levied with a forſpriſe, or not; b.2.74. ſee tit. Forſpriſe.

Where a fine may be levied to the party to the original, and to a ſtranger, and good; b. 2.76,77. b.3.5,6. ſee tit. Remainder.

Where a fine levied ſhall be void, or voidable in part, or againſt one, and good, and ſhall ſtand for the other part, and the other party; b. 1.76.87. b. 2.77. b. 3.91. b.4.121. ſee tit. Deeds.

Where a fine levied betwixt the plaint. and a ſtranger to the original, as the voucher, tenant by reſceit, or &c. is good, or not; b. 3.29.

Where, and what perſons have power to take cogniſance of Fines; b.8.118.

Where a fine ſhall be levied upon acknowledgment of right, and where the Conuſee ſhall grant, and render again by the ſame fine; b. 1 69.79. b. 2.72.75,76,77. b. 3.5.51. b. 88, 89,90. b.5.2. p.4.21.38.68. b.6.33.55.63. b.7. 32 38.

Where a fine ſhall be levied of a rent, and and in what manner, and where granted with a clauſe of diſtreſs, and where without, and how the diſtreſs ſhall be limited; b. 1.76. b. 2.77. b.3.29. b.6.33. b.7. 38.

Where a fine ſhall be levied with condition. or not; b.2.6,7. b.5.2. p.38.

Where a fine levied upon acknowledgment of right, as that, &c. or upon render, or releaſe ſhall be accepted by the huſband and wife, and bind them, and the heirs of the wife for ever; b.1.76. b.2.57.74.77. b.9.43. ſee tit. Examination, and averment.

Where a fine levied is good if any of the parties was tenant of the land at the time of the levying it; b.3.29.88.

Form of levying a fine to two, or by two, or more; and where two ſhall not acknowledge without ſhewing in whom the fee reſts, and where it ſhall not be levied to two and their heirs, but muſt limit the fee to one in certain; b.2.74. b.3.84. b.5.2. p.38.

Where a fine upon Cogniſance of right, or &c. to two ſhall change their eſtate, or give a franktenement to him that had nothing before, ſo of huſband and wife, upon cogniſance made to them, or not; b. 2.74. ſee tit. Confirmation, and Averments.

Where a fine may be levied of a reverſion, and where it muſt make mention of the mean eſtates; b.6.8. ſee tit. *Quid juris clamat.*

Where a fine may be levied to and by the King, and what manner of fine; b.1.27.40. b. 7.32. b.9.138. b.11 79.

Where a fine may be levied for years, and a leaſe of years made by it, and bind the eſtate tail, and how, &c. b. 1.76.174. b. 3.51. b. 5.2. p. 4,5,6.20,21. b. 6.33.35.63. b. 7.8. ſee tit. Leaſe.

Where a fine levied by tenant in tail, ſhall bar the iſſue in tail, or not; b.1.76.87.96. b.3. 51.60.88,89,90,91. b.4.121. b.5.2. p.4.b.7.32. ſee tit. Averments.

Where a fine ſhall be levied of an advowſon; b. 8.145. ſee tit. Advowſon.

How warranty ſhall be in a fine levied by two or more, or by huſband and wife; b. 1. 68,69. b.3.14. ſee tit. Warrant.

Where a fine ſhall be avoided, and not bind him that has right, becauſe levied by colluſion betwixt the parties; b. 3.77,78. b.5.2. p.124. ſee tit. Colluſion

When a fine ſhall be ingroſſed; b. 3.86. b. 5.2. p.39. b.6.68.

The form of pleading to avoid a fine, (that the parties to the fine had nothing) and the replication to it; b. 3.88. ſee tit. Replication, and Fall. of recovery.

The order, and form, of levying fines, and pleading them; b. 1.27.56.68.168. b.2.6. b.3. 86. b. 4.69. b. 9. 104. ſee tit. Record, and Pleading.

Where, and when a fine ſhall be executed, and what matter ſhall be execution of it, what not; b.1.97. b.2.61. b.3.5. ſee tit. *Scire facias*, and when it ſhall be twice executed there.

Where cogniſance of a fine, before the ſame Judge who was party to the fine, is void; b.8.118.

Where, and what parties, privies or ſtrangers, are barred, and eſtopped by fines levied, and of what pleas, and averments; ſee tit. Averments.

Where, and how ſtrangers to fines levied, ſhall be barred, by non-claim within the five years, &c. & who the 5 years ſhall be accounted; ſee tit. Cont. claim, and ſtatutes; 4 H.7.c.24.

Where a woman ſhall be barred to have dower, by a fine levied by her, and her huſband; ſee tit. Dower.

Levied at the Common Law of lands of ancient demean, how to be redreſſed, and reformed; ſee tit. Ancient demean, and Diſceit.

Where, upon a fine levied of the reverſion, the rent paſſes without mention of it; ſee tit. Grant, and Attornment.

Levied by an infant, how, and when to be reverſed, and reformed; ſee tit. Error.

Where the record it ſelf of the fine ſhall not be removed, but the tranſcription of it; ſee tit. Error, and Record.

Where a rent, condition, or &c. ſhall be extinct by fine levied of the land, or not; ſee tit. Extinguiſhment.

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Expoſition of fines within ſtat. W. 2. c.1. (That the fine in Law ſhall be null) levied by tenant in tail; ſee tit. Expoſition.

Where, and when a man may ſhew his Coſinage in *Scire facias*, to have execution out of a fine, as Coſin; ſee tit. Coſinage.

Where a fine levied by a woman Covert without her huſband, may be avoided by the huſband, otherwiſe it binds the wife and her heirs for ever; ſee tit. Baron, and &c.

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Where a fine ſhall be reverſed for error, and what matter is error; ſee tit. Error.

Where a fine by tenant in tail of a rent, or reverſion, or &c. is no diſcontinuance.

How remainders ſhall be limited upon fines levied of lands, and where a man may reſerve to himſelf a leſs eſtate then he had before; ſee Remainder.

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Count in writ of Forcible entry, and what is good, what not; b.5.2. p.120.

Where colour ſhall be given in a writ of forcible entry, upon the ſtatute, 8 H. 6. b. 10. 89.

Where, and what damages ſhall be recoverable in forcible entry upon the ſtatute, 5 R.2. or H.6. b.11.30.

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What ſhall be a good title to a Park, Chaſe, or Warren, no man may have them without the Kings licence; b 11.86,87.

What judgment ſhall be given upon the ſtatute of malefactors in Parks, b.9.72.74. ſee tit. Statutes, W.1. c.20.

What judgment ſhall be given in a writ of treſpaſs of miſdoers in Parks, what not; b. 9. 74. ſee tit. Judgment, and Election.

Bar, and juſtification in treſpaſs of entring into a warren, and taking his Conies, &c. or into a Chaſe, Park, or &c. and what is good, what not; b. 9.49.

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Where a Forreſt, Warren, or Chace, may be parcel or append. to an Honor or mannor, or &c. ſee tit. Appendant.

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Where a Chaſe, Warren, Forreſt, or &c. will paſs by feoffments, grant, leaſe, or &c. of land, or thing to which, &c. they are append. or &c. ſee tit. Appendant, and Grant of the King.

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Where tenant for life or years, or &c. ſhall forfeit their eſtate by making a greater eſtate, and by alienation or diſheriting of him in reverſion, and who ſhall enter for forfeiture, and who not; b. 1.9.15,16.66,67.71.76. 107.110. 135.140. b.2.37.55,56.68.74.51. b.3.4 77,78, 79.84. b.5.2. p.40.80.b.6.14,15.b.9 106. b.10. 39. 44,45.98. b. 11.80. ſee tit. Diſſeiſin, and Entry Congeable.

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Where a Gaolor may retake a priſoner who eſcapes, or not. ſee tit. Eſcape.

Gavelkind.

Cuſtom of Gavelkind. b.100.103.159,160. b.4 25. b.6.22.60. b.8.86. b.9.133. ſee tit. Cuſtoms.

Where uſe of Gavelkind land ſhall inſue the nature of the land, and diſcend or remain as the land, &c. b.1.101.103. ſee tit. *Subpœna* and Uſes.

Where the Son inheritable in Gavelkind or Borough Engliſh cannot indow his wife. *Ex aſſenſu Patris*, or &c. b.6.12. ſee tit. Dower.

Where Cuſtom of Gavelkind is gone and extinguiſhed or not. b.4.25. ſee tit. Cuſtoms.

Where Gavelkind land is not held by Knight ſervice, till the Statute 31 H.8.c.3. b.9.103. ſee tit. Statutes.

Where a writ ſhall abate in the whole or part by the Act of God. ſee tit. Writ.

Where a writ ſhall be purchaſed by Journies accounts, the firſt abating by the act of God, or not. ſee tit. Journies accounts.

Where a condition or Covenant ſhall be diſcharged by the act of God, or not. ſee tit. Condition.

Where a condition becomes impoſſible by the act of God, and the conſequence of it. ſee tit. Condition.

Where leſſee for years, or &c. ſhall be diſcharged, and excuſed of waſt, becauſe it came by the act of God. ſee tit. Waſt.

Where laws humane not founded upon the law divine, are not good. ſee tit. Common Law.

Where a man ſhall have an action of treſpaſs, and puniſh the mean treſpaſs, without re-entry by the act of God. ſee tit. Treſpaſs.

Grand Serjeanty.

Every Barony is held by grand Serjeanty. b.2.81. b.9.124.

Land held of the King by grand Serjeanty forfeited to the King by alienation without licence, not ſo at this day by the Statute 1 E. 3.c.12. b.2.81. ſee tit. Alienation without licence, and Statutes Prærogat.c.7. and 1 E.3. c.12. there, and licence.

What relief he ſhall pay who holds by grand Serjeanty. b.7.33,34. b.9.124. ſee tit. Relief, and Stat. Mag. Chart. 2.

Grants of a common perſon.

Where a grant is ſufficient to charge the land with rent, and by what words it is ſufficient, by what not. b. 6.39 b.8.154. ſee tit. Charge.

Where by grant of a reverſion, rents and ſervices paſs, or not. b.2.68. b.3.23,24. b.4.53, 54.73. b.5.2. p.3.55. b.6.70. b.8.79. ſee tit. Attornment.

Where, and what things appendant, appurtenant, or incident paſs by the grant of the principal in the caſe of a common perſon, with the words, with the appurtenances, where, and what not. b.1.122. b.2.32. b.10. 64. ſee tit. Appendant.

Of all his lands and tenements, what things paſs, what not. b.4.87. b.7.33,34. b.10.107. b.1..50. ſee tit. Expoſition.

Of all his (hereditaments) what paſſes, what not. b.1.121.b 3.2,3.8.b.7.33,34.

Where by grant of the land, the reverſion paſſes. b.10.107.

All his goods and chattels, what things paſs, what not. b.8.33. ſee tit. Gift, and Franchiſe.

Where the grant of the leſſor (during the term) of the trees, or other things growing, is good, or not. b.4.62,63. b.11.48.50.81. ſee tit. Gift, and Woods.

Where the grant of a reversion or remainder in tail, during the life of the tenant in tail, is good, or not; b.2.51.

Where the grant of the reversion of one tenant, there being two or more, or of the reversion of parcel is good, or not; b.2.67.b. 3.28. b 8.79. see above.

Where upon a lease for the life of the lessor, the grant of the reversion be good, or not; b.2.51.61.

Where a grant of a rent, or &c. out of a reversion, or such thing as lies not in demean, shall be good, and when it shall be given, or not; b.1.62.127,128. 154,155. b 2.35.52. b. 4.48.53. b.5.2. p. 2.4.7.81 94. 123, 124. b.6. 35. b.11.48. see tit. Leases, and Reservation, and Remainder.

Where a grant in the disjunctive is good, and who shall have election; b. 2.37. b. 5 2. p. 22.40. b.6.36. b. 10.127,128. see Annuity, Gift, and Demand.

Where the grant of the gardian in socage, or for nurture, is good, or not; b.3 38,39.

Of the first and next advowson of the Church of, &c. how to be taken and construed; b 8.144,145. see tit. Exposition.

Where the tenant of the land may charge the land by grant of rent, during his estate, and according to it, and if he grant for more, how it shall be taken, and construed; b.1.76. 122.139. b.7.23. b. 8.145. see tit. Extinguishment, and Escheat.

Where grant of a rent, or &c. to begin for the future time, is good, or not; b. 1.154, 155. b. 2. 55. b. 7. 38. b. 8. 74, 75. 95. see tit. Leases, the like.

Where a rent granted out of land, and another thing not manurable, and upon which a distress cannot be taken shall be good, and how construed; b. 4. 53. b. 5.2. p.4.b.7. 23. see tit. Reservation, the like, and above.

Where a grant by him that has two estates in him at the time of the grant, is good, and how it shall enure, and take effect; b. 1.42. 53 see tit. Estates.

By the tenant of his whole estate, or by him who has two estates in him, what passes, and how much; b.1.45,46. b.2.51,52.b.3.84.

Where a grant of a thing which possibly, and contingently may be, but is not in possession of &c. is good, or not; b.2.50,51.b.4.66. b.5.2. p.24, 25.124. b.10.51,52.

Where recital in a grant is material, and makes it good, and where void by false recital or misrecital, or not; b.1.46. b.2.33,34.67. b. 3.10.28. b. 4.35.74. b. 6.36. b. 10.110. see Grant of the King.

Where grant of the patron and ordinary is good to charge the Church, and where the parson shall hold it charged; b.1.147. b. 5.2. p.81 see tit. Annuity, and Parson.

Where a joynt grant of rent, &c. shall become several by construction of Law, and where it is severed by the word (*Percipiendum*,) and where part of the land shall be discharged by words subsequent, or not; see b.1. 84. b.5.2. p. 7, 8. 19. b. 10. 106,107. see tit. Deeds, &c.

Where by grant of one thing, another passes, as incident, implied, or intended in the grant, b.4.73.87,88. b.5.2. p.3.55. b 8.79. b. 10.28. b.11.52. see above, the beginning.

Of rent by tenants in common, how to be construed; b.5.2. p.7. see above.

Where a grant is void for the incertainty in the thing granted; b.1.155. b.2.67. b.4.55. 66. b.8.155. see tit Deeds.

Where a grant is void for the incertainty in the person, or persons to whom, &c. b. 1. 85. b.5.2. p.68. b.8.155. see tit. Deeds.

Where a grant of a reversion, or remainder by such names, or of a seigniory or parcel of it is void; b. 2.61. 67. 91. b. 3, 4. b.4. 66. b.5.2. p.124. see tit. Assignment, and Remainder.

Of estovers, and how they shall be taken; b.4.86. b. 5.2. p. 117.24,25. b. 8.47. see tit Common.

Where the grant of an office by a common person, is good, or not; see tit. Grant of the King.

Where a grant is void because without intendment; see tit. Deeds, and above for incertainty.

Where a grant shall be good without deed, and what things pass without deed, what not; see tit. Deeds, and Corporation, and Licence.

Where a grant, feoffment, or &c. is good, though the grantee, or thing granted be misnamed; see Misnaming.

Where a grant shall be good without the proper name of the grantor, or grantee; see tit. Capacity, and Name.

Where, and what thing cannot be granted over; see tit. Appendant, Annuity, Assignment, and Deputy.

Where grants in the present, past or time to come shall be expounded, and taken one for another; see tit. Exposition.

Where a grant of a common shall be good, and how taken; see tit. Common, and Exposition.

In as ample manner, and form, or, in the best manner that may be, or to the best profit of the grantee, and how these words shall be taken, and construed; see tit. Exposition.

Where a grant of a thing in abeiance is good, or not; see tit. Abeiance.

Where a grant of a thing in suspense is good, or not; see tit. Suspense.

Where a void, or voidable grant, is good by confirmation; see tit. Confirmation.

Where, and what thing in action, or right, may be granted by a common person, where, and what not; see tit. Thing in action.

Where grants upon conditions are void, and how, and when they shall cease, and be void upon conditions; see tit, Conditions.

Where grants, or &c. made by him to whose use, are good, or not; see tit. Uses.

Where grants in remainder are good, or not; see tit. Remainder, and Capacity.

Where the grant of one executor is good, and binds his companion, and all their estate, and interest shall pass; see tit. Executors.

All his (demean lands) what passes; see tit. Exposition.

Where a grant, lease, or &c. made by a Parson of a Church before induction is void; see tit. Encumbent, and Q. *Impedit*.

Where a Lord by grant, or &c. may alter, and change the tenure of his tenant, or not; see tit. Tenure, and Confirmation.

Where grants of annuities for counsel, service, or other consideration are good, and how, and when such grants, and annuities, shall be determined, and cease: see tit. Annuities.

Where grants, or &c. made by Ideots, are void; see tit. Ideot.

Where a grant by, or to a woman cov. is good, or not; see tit. Baron, and Feme, and Agreement.

Grant of a Corody, what grant is good, what not; see tit. Corody.

Where grants to corporations or by them, are good, or not; see tit. Corporations.

Where grants before the time of memory are good, or not; see tit. Trial, and Grant of the King.

Where, and what things may be assigned over, what not; see tit. Assignment.

Of grants, and grants and renders by fines; see tit. Fines of Lands.

Of a grant in Frankmarriage, and what is good, what not; see tit. Frankmarriage.

Where a grant of a rent, reversion, or advowson, by tenant in tail, or &c. is discont. or not; see tit. Discontin.

Where grants made by two who have several estates, and interests are good, and how to be construed; see tit. Exposition.

Certain rules for the construction of grants; b.1.95.100. b.2 24.55.71.75. b.4.81. b.5.2. p. 78.56 79. b. 6.36.64. b. 7. 23. b 8. 145. 152. 154. and 94. b.10.28. see tit. Deeds, and Entendment; b.3.29. b.7.23,24.

Grant of the King.

Where the Kings grant is good by these words (of meer motion, certain knowledge, or of special graces) or not; b. 1.43,44.45, 46. 48,49,50,51.53. b. 2.32.50.54. b. 3.4.73. b. 4.34,35.75.102. b. 6.6.55. b. 8.45.74. b. 9. 100,101. b. 10. 63, 64. 109. 112, 113,114. b. 11. 11.

Where the Kings grant made at the instance of the party, out of false suggestion, or false consideration, is void, or not; b. 1.29,30.41. 43. b. 2.54. b. 5 2. p. 93. b. 6.56. b. 10.67.100, 111,112,113,114. and 81. b.3 33.

Where the Kings grant is void, for default of recital, false misrecital, misnaming, or &c. or not; b.1.43 45,46.50,51.57. b.2.16,17.50. 54.b 3.10 31.73.76.78. b.4.35. b.5.2. p.15.93, 94.b.6.55.56.66. b.7.11.12. b.8.28.55,56.167. b.9.47. b.11.4.67.76. see tit. Statutes 34 *H.8.* c 2.18 *Eliz.* c.2. 43 *Eliz.* c.1. there of confirmation of Letters Patents, and Grants, &c.

Where the Kings grant is void to all intents, because he was deceived in his grant, and not appriſed of the law, or grant; b. 1.29 35 43, 44 45,46,47,48,49, 50, 51. 53. b. 2.16,17.33, 34.54. b.4. 33,34,35. b. 5.2. p. 94. b. 3.73,74. 78. b.6.29.55,56.66. b.7.12.14. b. 8.55,56.74. 77 165,166,167. b.9.46,47.b.8.94.b.10.27.64, 65 67.112. b.11.4.11.87.90.

Where the Kings grant is void to all intents, because not in his power to grant, and what things he cannot grant by Letters Patents; b.4.33,34,35. b.5.2. p.28.48.50.51. b. 6.73. b.7.7.25.36,37. b.8.16,17.19.22.55.77. 125,126. b. 10.113. b.9.97.123. b.11.4.53.85. 89,90.

Where the Kings grant is void, because the value of the thing granted is not surmised, and suggested to him; b.3 33. b.10.81. see tit. Statutes, 1 H.9. c.6. see Above.

Where the Kings warrant is void, because no office was found before the grant, and where good without office found; b. 1.42. b. 3.10. b.5.2. p.55,56. b.6.5.b.7.11,12.b.8.166. b.11.2. see tit. Office before Escheators, and Entry Congeable.

Where the Kings grant, or a common persons, before the time of memory, is not available; b.9.34. see tit. Trial.

Where the Kings grant by words general is void for the incertainty, or not, and the exposition of them; b.3.4. b.4.66.b.7.14.b.8.45, 46.55,56. b. 9.23.29,30.47. b. 10.26,27.64,65. 112,113. b.11.11. Below.

Where a grant of Charter of pardon of all debts, and demands, shall extend to all debts, or not; and what debt is pardoned, what not; b.1.50. b.5.2. p. 56. see tit. Charter.

Where a thing append. incid. or regardant, passes by the Kings grant of the mannor to which, &c. or &c. by the general words (with the appurtenances) and without special words, or not; b.1.50. b.3.31. b.5.2. p.11. b. 6.66. b.7.19. b.10.64,65. see tit. Statutes, Prerogatives, c 15. there.

Where the grant of Franchises has (*Tot & talia qualia*) &c. and how those words shall be taken, and construed; b.9.23.25,26,27,29, 30. see tit. Relat.

Where the Kings grant to a common person, to make a foundation of a Chantry Hospital, or &c. or to amortise lands to it, is good, and by what words; b. 7.25. b.10.2. to 5.8. to 16.27.30. to 35. b. 8. 81. see tit. Corporation.

Where the Kings grant of a thing which by possibility he may have is good, or not; b.3. 29. b.5. 2. p 63. b.6.73. b.7.14.

Where the Kings grant of a reversion by the name of a reversion is good, and where the Kings reversion will pass by another name, as lands, tenements, or not; b.1.45.51. b.4.35. b.6.55.65. b.8.55. 57. b. 10.63. see tit. Exposition, for the exposition of lands, &c. and Remainder.

Where

Where the Kings or a common perſons grant of an office, is good, and where it ought to have the words (We have conſtituted.&c.) and where a grant of an office to the King is good, or not; b. 1.51. b. 4.33. b 8. 55, 56, 57.95. b. 9. 44,45,46,47. 99. 100,101. b. 11. 3, 4.

Where the Kings grant is ſufficient to make a Corporation, and by what words,what not; b.3.73. b.8.107,108.115. to 121.

Where the Kings grant of cogniſance of pleas is not good without ſhewing allowance heretofore, &c. and allowance in what Court, and before what Juſtices is ſufficient; b.9.25, 26,27,28,29. ſee tit. Preſcription.

Where the Kings grant to a body not incorporate nor capable, is good, and makes them capable, or not; b.10.27.29,30,31.

Where the Kings grant of land, or &c. to a perſon incapable, is good, or not; b. 152. b.3.73. b.5.2. p.56. ſee tit. Capacity.

Where the Kings grant enures to two intents, and where it hath two intents, what ſhall be taken, and how conſtrued; b.1.46.52. b.3.73,74.b.5.2. p.56. b.7.14. b.8.56.67. b.10. 10.27.67. b.11.11.

Where a prerogative of the Kings may be granted over, and the grantee have it as fully as the King had it, or not; b.2 44. b.4.55.73. b.5.2. p. 56. b. 7.25. ſee tit. Prerogative, and Stat. 27 H.8. c.24.

Where the Kings grant is void becauſe no *ad quod damnum* was ſued upon it, and where it needs, or not; b.10.142.

Where the Kings grant is good againſt the heir or ſucceſſor, and binds them, though not the grant, nor letters patents ſpeak for him, his heirs or ſucceſſors, or not; b. 8. 108,109. ſee tit. Heir.

All his demean lands, what paſſes; b.1.46. ſee tit. Expoſition.

Where, and what grants of the King ſhall ceaſe and determine by his death; b.1.44,45. 47,48. b.7.30.

Where the Kings grant is good, without confirmation of his ſucceſſor King, or not; b.8.167. ſee tit. Confirmation.

Where the Kings grant or Charter, to diſpenſe with a ſtatute is not good without the clauſe of *Non obſtante, &c.* and where not good, though that clauſe be inſerted; b. 4.35. 103. b.7.14. b.5.2. p.37,38. b.8 6.14.29.108, 109. b 11.9.19. ſee tit. Charter.

Of a thing in action, and what thing in action, the King may grant, what not; b.3.1, 3,4.59.11. b.11.12. ſee tit. Thing in action.

Where the Kings grant to be exempt of Juries is good and allowed, or not; b. 8.18. 108. ſee tit. Exempt.

Where the Kings grant is good to be diſcharged of the Fifteenth or the collection of it; b.8.56. ſee tit. Exemption.

Where the Kings grant of a Fair, or Market is good; ſee tit. Fair, and Market.

Where the Kings grant of Aliens lands ſeiſed into his hands, is good; ſee tit. Alien born.

To be diſcharged of Toll, and where, and what is good; ſee tit. Toll.

Where the Kings void or voidable grant, may be made firm, and good, by the Kings letters patents, or Act of Parliament; ſee tit. Confirmation.

By deeds inrolled, where,and when good; ſee tit. Inrollments.

Where the Kings grant ſhall not be avoided for nonage; ſee tit. Age; and Prerogative.

Where the King grants land without expreſs tenure, how, and by what tenure the grantee ſhall hold; ſee tit. Tenure.

Where the King ought to grant land, to be held of the chief Lord; ſee tit. Tenure.

Where the King may grant land, or &c. to the Queen his wife; ſee tit. Prerogative, and Aid of the King.

Where a grant, feoffment, or &c. by the Queen alone is good; ſee tit.King and Queen, aid of the King, and Prerogative.

Under what ſeals, the Kings grants ought to be; ſee tit. Seals.

Where the King ſhall be eſtopped by his letters patents of grant, and others alſo ſhall be eſtopped by them; ſee tit. Eſtoppel.

Where, and what grant of the King, of Ideots, Lunaticks, or their lands, and goods, is good, or not; ſee tit. Ideots.

Where and what grantees of the King, ſhall have aid of him; ſee Aid of the King.

Where writ of dower lies againſt the grantee, or Committee of the King of ward; ſee tit. Dower.

Where a man may make title, and juſtifie in action, as grantee of the King without ſhewing the letters patents of the King, or not; ſee tit. Monſtr. of deeds.

Where the grantee of the King of a reverſion, ſhall enter for a condition broken, or not; ſee tit. Condition.

The form of pleading the letters patents of the Kings grants; ſee tit. Pleadings.

Where the Kings grant is good, becauſe of reputation; ſee tit. Reputation.

Of cogniſance of plea, or to hold pleas; ſee tit. Cogniſance.

Certain rules and directions for the expoſition of the grants, and letters Patents of the King; b.1.43.45.50. b.3.5. b.5.2. p. 50. b. 6. 13.79. b. 8.45.56.74.77.117. b. 10. 64,65,67, 117. 110.115. b 11.11.

Gifts and ſale.

All my goods and chattels, what things paſs, what not; b.8.33.

Of goods to a man abſent good, until diſagreement; b.3.26,27. ſee tit. Agreement, &c.

Where a gift of goods is good, notwithſtanding the giver be out of poſſeſſion at the time of the gift, or not; b.4.66.

In the disjunctive, and where good, and who to have election, the donor, or donee; b. 2. 37. b. 8. 155. ſee tit. Demand, and Election.

Where void becauſe of incertainty in the thing granted, or the perſon to whom, &c. ſee tit. Grant.

Where a gift or ſale of trees growing upon the land, by tenant in tail binds the iſſue, and ſhall be good after his death, or not; ſee tit. Woods.

Where a gift of goods to a woman covert is good; ſee tit. Agreement, and Baron and Feme.

Where a gift of goods by an infant is void, weere voidable; ſee tit. Enfant.

Where a gift of goods ſhall be void becauſe of Covine, to defraud executions, or creditors; ſee tit. Colluſion.

Where a gift or ſale of trees by the leſſor during the term is good, or not; ſee tit. Woods.

Where an eſtate of franktenement by gift, may be chattels; ſee tit. Chattels, and Remainder.

Where a bargain and ſale of goods, and chattels of other mens by commiſſioners, is good; ſee tit. Commiſſioners.

Where a gift or ſale of goods diſtreined for amercement, or &c. is good; ſee tit. Diſtreſs.

Where a bargain and ſale by the Sheriff, of goods and chattels of other mens,ſhall be good upon a writ of execution; ſee tit. Execut.

Of a thing in action, or a right where good, or not; ſee tit. Things in action, and Right.

Where a gift of goods of a villein is good, or not; ſee tit. Cont. Claim.

Where a gift to himſelf is good, or not; ſee tit. Expoſition.

H.

Habeas corpus, or Corpora.

Where, and in what Courts the proces againſt the Jurors, is by *Habeas corpora*, in what not, ſee tit. Courts.

What return of the Sheriff is good upon *Habeas corpus*, or *Corpus cum cauſa*, what not; ſee Return of the Sheriff.

What return of the Sheriff is good upon *Venire facias* againſt the Jurors, or upon the *Habeas corpora*, or *Diſtring.* ſee tit. Return of the Sheriff.

Where *Habeas corpora* anew ſhall be awarded againſt the Jurors, & why; ſee tit. Enqueſt.

Where, and who ſhall be removed, &c by *Corpus cum cauſa*, or *Habeas corpus*, who not; ſee tit. *Corpus cum cauſa.*

Where, and what priſoners removed by *Corpus cum cauſa*, or *Habeas corpus*, ſhall be remanded back; ſee tit. *Corpus cum cauſa*, Removing and Remand.

Habere facias ſeiſinam.

How execution ſhall be made upon a writ of *Habere facias ſeiſinam*, and by what thing the Sheriff ſhall put the party in poſſeſſion; b.1.94.97.105. ſee tit. Execution.

What return by the Sheriff is good, upon a writ of *Habere facias ſeiſinam*, b.5.2.p.91. b. 6.52. ſee tit. Execution, and Return of the Sheriff.

Heriots.

What ſhall be ſaid Heriot cuſtom, what Heriot ſervice, &c. b.8.105.

Where, and what tenant ſhall pay Heriot; b.8.105. b.10.55,56.

What ſhall be good avowry or cogniſance for Heriot in Replevy, or Juſtification in treſpaſs; b.8.105.104. b.10.55,56.

Where two Heriots ſhall be paid for one ſame land, where one only was paid before; b 6.1. b.8.105.

Where many purchaſe lands jointly, no Heriots ſhall be till the death of the ſurvivor; b. 8.105.

Where Heriot ſhall not be apportioned; ſee tit. Apportionment.

Where Heriot ſhall be extinguiſhed by unity of poſſeſſion, or not; ſee tit. Extinguiſhment.

Heir.

Where, and what chattels, or things perſonal the heir ſhall have after the death of his father; b. 2. 93. b. 4. 63. b. 7.17. b.8.118. b. 10.128, 129 b.11.92. ſee tit. Chattels.

Where, and what goods and chattels, the King, Heir, or ſucceſſor ſhall have, and not the executors; b.9.97. b.11.92.

Where, and what charters of the land the heir ſhall have as belonging to him; b. 1.2. ſee tit. Charters, and Detinue.

Where a man ſhall be charged in debt, as heir to the anceſtor, and what perſon ſhall be charged, and what land.; b. 3.12,13,14. b.2.25. ſee tit. Aſſets and execution.

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Where the plaintiff in appeal shall be imprisoned; see tit. Appeal.

Where a man shall be imprisoned in action upon statutes; see tit. Action upon statutes, and statutes Marlb. c.4.15.

Where the Sheriff shall be imprisoned for amercement; see tit Amercement.

Where imprisonment shall be in *Quo warranto*; see Fine to the King, and *Quo warranto*.

Of imprisonment by a Constable, and where he may justifie it, &c. see tit. False imprisonment, and Authority.

Of imprisonment by Justices of Peace, and where they may justifie it, &c. see tit. False imprisonment, and Peace.

Where a man shall be imprisoned for double vexation by several suits in several Courts; see tit. Contempt.

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Where Justices of Peace, or other Commissioners shall be imprisoned; see Commissioners.

Perpetual, and for what offence; b.5.15.

Where a man shall be imprisoned for suing to *Rome*, and disturbance, by Bulls of *Rome*; b.5.15. see tit. *Præmunire*.

By the Sheriff of offendors upon the writ of estreapment; see tit. Estreapment.

Where the King cannot pardon the imprisonment of him that is convict of murder in Appeals; see tit. Grant of the King, and b. 5 5.2. p.50.

Where bilaws to imprison men for not paying taxes, are not good, &c. see tit. Bilaws.

For libelling; see tit. Libel.

The King may pardon imprisonment, or other corporal punishment, upon forgery of him who is convict in the Star-chamber; see tit. Forgery.

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Where a gift, grant, or &c. in the disjunctive is good, notwithstanding the incertainty; b 2.37. b. 5.2. p.22.40. b. 6.36. b. 8.155. b. 10.127.128. see tit. Annuity, Gift, Condition, and Demand.

Where a deed is void for incertainty, and false intendment; b. 1.85. b. 5.2. p.121. b. 8. 56. 157. b. 9. 47. see tit. Deeds, and obligations.

Where the grant of the reversion of one tenant, where there are two, or of parcel of &c. is good, notwithstanding the incertainty, or not; b.2.67. b.3.28. b.8.79. see tit. Grant.

Where a grant, or lease for years to begin in the time future, upon incertainty of time is good, and how it shall begin; see tit. Grant, and Leases.

Where the Kings grant by general words is void for the incertainty; see tit. Grant of the King.

Where a Count incertain shall be good, and supplied by intendment; see tit. Count.

Where an inditement shall be void because of incertainty; see tit. Enditement.

Where an estate upon incertainty until certain monies are paid is good; see Estates.

What estate the grantee, or &c. shall have upon a grant generally without limiting any estate in certain; see tit. Estates.

Where a fine shall be void for the incertainty, and where a fine incertain shall not be accepted; see Fines and Misnaming.

Where an office found before an escheator, is good, notwithstanding the incertainty; see tit. Office before, &c.

Where the incertain return of the Sheriff is good; see tit. Return of the Sheriff.

Where a verdict incertain is good, or not; see tit. Verdicts.

Where a remainder which depends upon contingency incertain shall be good, or not; see tit. Remainder.

Of elections upon grants incertain, who shall have them, who not; see tit. Elections.

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Corody incident to the foundation and Patronage of an Abby, Priory, or &c. b. 10.64. see Corody, and Appendant.

Where, and what services are incident one to another, and where one passes by grant, or recovery of another; b. 4.8,9. b.9.33.35. b. 10.127. see tit. Avowry, Seisin, and Homage.

Fealty incident to every tenure; b. 6.6,7. b.7.7. see tit. Homage.

Rent, and services incident to a reversion and pass by the grant of it; b. 2.68. b. 3.22. 24. b. 4.53,54. b. 5.2. p. 3.55. b. 6.70. see tit. Grants.

Where by grant of one thing, other things pass as Incident, &c. b.4.49. b.10.28. b.11.52. see tit. Grants.

Where one office may be appendant to another, and which, or not; see tit. Append.

Where by the Kings grant of one thing, other things as appendants or incidents pass by general words without mentioning of them; see tit. Grant of the King.

Court of Pipowders incident to a Fair or or Market; see tit. Fairs.

Where, and what things incident to others cannot be severed, nor dissappend. by any means; see tit. Appendant, and Releases.

Court Baron is incident to a mannor; see tit. Mannor.

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Indicabit.

For whom, and against whom it lies, and the writ; b.5 2. p.102. b.10.136. see tit. Advowson, and statutes; W. c.5. there, and Art. Cler. 9 E.2. c.2.

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Upon intrusion upon the Kings, or his Committees possession, the form of them and in what Courts, and the bars in them; b.1. 16.26. b. 3.7.9. b. 4.58. b. 5.2. p. 52.93. b.6. 21. b.7.30,31. see tit. *Quo minus*, and Intrusion.

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The form and manner of replication by the Kings attorny upon information; b.6.21. b.8.11.29. b.11.65,66.

Where informations are not discontinued by demise of the King; b. 7.30,31. see tit. Statutes; 1 E.6.c.7. there.

Upon the statute of maintenance, and buying of titles; b. 7.30,31. see tit. Statutes; 32 H.8. c.9.

Where information exhibited in the time of one King, shall stand in the time of another; see tit. Enditements.

Of informations, and actions popular upon statutes, and bars in them; see tit. Actions popular.

Where information incertain shall be good by intendment, or not; see tit. Entendment.

Where *Scire facias* shall be awarded upon information or suggestion to the Court; see tit. Suggestion, and *Scire facias*.

Statutes made against the abuses of informers, and the expositon of them; 18 *Eliz.* c.5. 27 *Eliz.* c.10. 29 *El.* c.10. b 6.19.29.

Upon the statutes of Recusants; b. 11. 56. to 66. see Recusants.

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What Courts have power to inrol deeds, what not; b.1.5.7.31.108.116.173. b.2,10,11. 50. b.4.68.70. b.5.2. p.69.113.

Where estoppel is by enrolment of a deed, and to what persons; b.4.71. b 10.43.

Where a deed inrolled shall bind a woman Covert, or not; b.10.43.

Where a man shall have benefit of inrolment of a deed, and the inrolling shall avail him as much as the deed it self, or not; b. 5. 2. p.53.

Where a feoffment, grant, or &c. made to the King, or by him by deed inrolled is good, and when to be inrolled; b.3.29.

Where a grant, or &c. made to the King, or by him, without a deed inrolled, shall be good, or not; b.2.70.15.50.52. b.7.12. b.11. 66,67. see tit. King

Of inrolling of bargains and sales, according to the statute 27 H.8.c.16. and the exposition of this statute, and which shall be construed to be bargains and sales within this statute; b.8.36.45. b.4.71. b. 7.40. b. 8.6.93,94. b.9.106. b.11.24.48.

The form of pleading inrolments of deeds, and of the statute of inrolment, and what pleading is good, what not; b. 1. 5.7.21.108. 116.b.2.10,11.b.4.68.b.8.6. see tit. Pleadings.

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Where a reversion or seigniory passes by bargain, and inrolled without attornment; see tit. Attornment.

Where a reservation of rent shall be good upon bargain and sale, see tit. Reservation.

How the six months shall be accounted upon the statutes of inrolment; see tit. Computation.

Where upon conveiance by bargain and sale, and another conveiance together, as feoffment, or fine, it shall be in the purchasers election by which of them he will claim; see tit. Election.

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Of informations, of intrusions, and in what Courts, they shall be made, and bars in them; see tit. Information.

Form of the writ, and Count of intrusion of ward (marriage not satisfied,) and bar in it; see tit. Action upon statutes.

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Where the husband and wife, shall join in a writ of Covenant; b.5.2. p.16.18. see tit. Baron and Feme.

Where the husband and wife shall join in a *Q. Impedit*; b.5.2. p.57.97. see tit. Baron and Feme.

Where the husband and wife shall join in a writ of false imprisonment; b. 5.2. p. 59. see tit. Baron and Feme.

Where the husband and wife shall be jointly sued for wast done; b. 5.2. p. 75.115. see tit. Baron and Feme.

Where the husband and wife shall be jointly sued in an action of debt, or &c. upon the statutes of recusants, for forfeitures given by the statutes; b 11.62. see tit. Baron and Feme.

Where the husband and wife shall join in debt upon a bond, or &c. b.10.106.

Where the husband and wife shall be sued jointly in a writ of ravishment of ward, or &c. b.9.72.

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Where the husband and wife shall be jointly sued by the writ of estreapment; b.5.2.p. 115. see tit. Baron and Feme.

Where a man may jointly appeal againſt the principal and acceſſary; b. 4.47. ſee tit. Appeals.

Where two ſhall join in attaint or be jointly ſued; b.6.25. b.11.43. ſee tit, Attaint.

Where two ſhall join in a writ of Error; b.6.25.

Where two or more ſhall join in *Audita querela*; b.6.25.

Where the Aunt and Neece ſhall join in *Ceſſavit*, or not; b 8.118. ſee tit. *Ceſſavit*.

Where action of debt may be againſt one obligor, or not, but debt muſt be jointly againſt both; b.9.53. ſee Obligation.

Where two ſhall join in a writ of *Dum fuit infra ætatem*, or not; b. 8.43. ſee *Dum fuit infra ætatem*.

Where two ſhall join in Formedon in diſcender; b 8.87. ſee tit. Formedon.

Where the Aunt and Neece ſhall join in actions, in what, and what not; b 8.87.118.

Where two ſhall not join in action upon a joint grant, but ſhall ſue their action ſeverally, becauſe the law makes ſeveral grants; b. 5.2. p.8. ſee tit. Grants, and Charge.

Where one tenant in common ſhall have an action of waſt againſt his companion; b.11. 49. ſee tit. Waſt, and ſtatutes. W.2. c.22.

Where tenant for life, and he that has the inheritance ſhall join in a writ of right; b.5.2. p.40. ſee tit. Right.

Where jointenants ſhall not join in an action; b.5.2. p.40.

Where ſeveral heirs ſhall be jointly ſued, and charged with the anceſtors debt; b.2.25. b.3.12,13,14. ſee tit. Charge, and Heir.

Where divers cauſes of action or ſeveral wrongs, or things of ſeveral natures, may be joined in one writ, and good, or not; b.8. 47,48. 86,87. ſee tit. Writ.

Where the King, and a common perſon ſhall join in an action, where not; ſee tit. Action popular, Information, and Prerogative.

Where an Abbot, Prior, and Monk ſhall join in action, and where they ſhall be jointly ſued, and where the Monk ſhall ſue without his Soveraign, or be ſolely ſued; ſee tit. Abbot, and Prior.

Where an executor ſhall ſue, or be ſued alone, without his companion, and where an executor, and executor of an executor ſhall join in action; ſee tit. Executors.

Where a man ſhall have one joint writ of things in ſeveral Counties, or not; ſee tit. Writ, and Aſſiſe.

Where a man cannot have one writ of *Ceſſavit* upon ſeveral tenures; ſee tit. *Ceſſavit*.

Where ſeverance ſhall be in action brought by two, where one will not proſecute; ſee tit. Severance.

Where two join in an action, non-ſuit of one, is non-ſuit of both, or not; ſee tit. Non-ſuit.

Where two join in action, the releaſe of one, ſhall be the releaſe of all, and bar his companions, or not; ſee tit. Jointenants, and Releaſes.

Joining in Aid.

By the Leſſor, and Leſſee, and where, or not; b.4.6. b.9.20,21.

By the meſne to the tenant, and where, or not; b.9.22,23.

Where joining in aid by the leſſor to the leſſee, or meſne to the tenant ſhall be freely without proceſs; b.4.61. b.9.20,21,22.

What pleas are to be pleaded after joining in aid; b.9.22,23. ſee tit. Aid.

Join-tenants, and Tenants in common.

Where many ſhall be ſaid join-tenants, by feoffment, grant, or gift, and by deed or without, and by what words in a deed, and by what manner of limitation, and by what not; b.3.26.29. b.1.85.101. b.5.2. p.8. b.10.50. ſee tit. Feoffment.

By teſtaments, and deviſe, and by what manner of limitation, by what not; b. 3.39. ſee tit. Deviſe, and Teſtament.

By fine in fee-ſimple it cannot be; b.3.84. b.2.74. b.5.2. p.38. ſee tit. Fines.

Where men are tenants in common by grant, feoffment, or &c. b. 2.62. b. 3. 39. b. 4. 63.

Where join-tenants are for life and ſeveral inheritances; b. 1.84. b. 3.37. b.5.2. p.3.8. b. 10.50.

Where jointenants are, and yet they took their eſtates at ſeveral times; b. 1. 100, 101. ſee tit. Capacity, and Baron Feme.

Where the huſband and wife ſhall be jointenants, and where by intireties, where by moities; b. 1.78.101. b.2.68. b. 3.5.14.25.30. b.8.72,73.171. ſee tit. Baron and Feme.

Where, and by what acts join-tenure is ſevered, by what not; b.1.96.128. b.2.60,61. b. 3.3,4,5,6. b.4.62,63.73. b.6.12,13.b.8.43 5.2. p. 52.

Where rent reſerved upon a leaſe made by one join-tenant, ſhall not go to his companion; b.1.96.

Where join-tenants are for life, and the fee in one of them, and how, and when it is executed; b.2.60,61.74. b. 3.84. b.5 2. p.38.40. b.8.163. b.9.126. ſee tit. Eſtates, Ward, *Scire facias*, and Mordancеſtor.

Where a releaſe by one join-tenant, tenant in common or copercenor, to the companion, is good, or not; b.6.78,79. b.8 63.

Where a join-tenant ſhall hold charged with rent granted by his companion, after releaſe made to them by the grantor; b.6.78,79.

Where a join-tenant ſhall be ſubject to execution by *Elegit*, for his companions debt, after his releaſe to him; b.6 78,79.

Where a releaſe to two join-tenants, or tenants in common, extinguiſhes all actions which he had againſt them jointly, and ſeverally, and releaſe to one extinguiſhes all actions which he had againſt him, and the reſt; b.5.2. p.7.56. ſee tit Releaſes, and Charter.

Where the releaſe of one join-tenant, or tenant in common, bars his companion, and extinguiſhes his right, or not; b. 2.68. b.5.2. p.97. b.6.25.78. ſee tit. Executors.

Where warranty made to two join-tenants, is gone by diſſeiſin, made by one to another, or by their partition, or not; b.1.122.128. b. 6.12. b.8.75. ſee tit. Warranty.

Where warranty made to two join-tenants, ſhall enure as ſeveral warranties; b.5.2. p.19. ſee tit. Expoſition.

Where two tenants in common join in a grant of rent, how it ſhall be conſtrued; b.5. 2. p.7.

Aſſiſe by one join-tenant againſt another, form of the writ, and manner of the judgement; b.6.12,13. ſee tit. Judgment.

Of joining in action by or againſt join-tenants, and tenants in common; ſee tit. Joining in action.

Where a releaſe, or confirmation made to one join-tenant, tenant in common, or copercenor by a ſtranger who has right, enures to all, or no; ſee tit. Releaſes, and Confirmation.

Where a deviſe by a join-tenant is void; ſee tit. Deviſe.

Of partition betwixt join-tenants, tenants in common, or parcenors, and where good without deed, or not; ſee tit. Partition.

Where a man may be join-tenant with the King, or not; ſee tit. Prerogative.

Where the join-tenant who ſurvives ſhall have the arerages of rent incurred in the others time, or not; ſee tit. Arerages.

Where, and what things of joint-purchaſe, or which came to the wife during the Coverture, ſhall the wife have after the death of her huſband, or not; ſee tit. Baron and Feme.

Where the wife after divorce, ſhall have the lands, or &c. given jointly to them, or not; ſee tit. Baron and Feme.

Where non-ſuit of one join-tenant, plaintiff in an action, is the non-ſuit of both, or not; ſee tit. Non-ſuit, Severance and Execution.

Where the default of one join-tenant is the default of all, or not; ſee tit. Default.

Where grant of the reverſion of that join-tenant who has the fee, upon leaſe to two, and the fee to one, be not good; ſee tit. Grant. b.3.61.

Where upon alienation made by two infants join tenants, the ſurvivor ſhall have the writ of *Dum fuit infra ætatem*, for the whole or not; ſee tit. *Dum fuit infra ætatem*.

Of contribution betwixt tenants in common, join-tenants, and parcenors for ſuit to Court, where one has done all; ſee tit. Stat. Marlb. c.9. and Contribution.

Where many purchaſe jointly no Hariot ſhall be, till after the death of the ſurvivor; ſee tit. Hariot.

Where execution ſhall be only againſt the ſurviving join-tenant, or not; ſee tit. Execution, and Recovery in value.

Where upon execution awarded againſt two jointly, the Sheriff may levy the whole upon one only; ſee tit. Execution.

Where upon warr. made by two jointly, the charge of recovery in value, ſhall not ſolely run againſt the ſurvivor; ſee tit. Recovery in value.

Where warranty made to two, or &c. ſhall be derained by one only, or &c. ſee tit. Counterplea of War.

Where, and by what words an obligation is joint, by what ſeveral; ſee tit. Obligation.

Where attornment by one join-tenant is good, and binds all, or not; ſee tit. Attornment.

Where ſeiſin of ſervices by the hands of one join-renant, is good and ſufficient to bind all; ſee Seiſin.

Of waſt by one join-tenant, or tenant in common againſt his companion; ſee tit. Waſt, and ſtatute Weſt.2. c 22. there.

Where the heir of that join-tenant who had the inheritance jointly with another for life ſhall be in ward, and when; ſee tit. Ward.

Where mortdanceſtor lies for the heir of him that had the fee, with another who had an eſtate for life; ſee tit. Mortdanceſtor.

Where after partition made betwixt two joint leſſees for life, he in reverſion upon the death of one may enter in his part; ſee tit. Partition.

Jointure.

Bar in dower by reaſon of Jointure, and where, and what Jointure is good, and ſufficient to bar a woman to have dower, what not; ſee tit. Dower.

The ſtatute 11 H 7. c.20. of Jointures, and the expoſition of the ſtatute; ſee tit. Statutes.

The ſtatute of 27 H.8.c.10. of Jointures, and the expoſition of it; ſee tit. Statutes.

Journies Accounts.

Within what time a man may purchaſe a writ by journies accounts, after the firſt writ abated; b.6.11.

Where a writ by journies accounts ſhall not be purchaſed in another Court; b.6.10.

Where a writ ſhall be purchaſed by journies accounts, upon a writ abated, for variance betwixt it and the record upon which it was founded; b.6.11.

Where a writ upon journies accounts ſhall be as well upon an original writ abated, as upon a judicial, or not; b.6.10.

Where a writ by journies accounts ſhall be upon a writ abated for non-tenure, or not; b.6.10.

Where a writ by journies accounts ſhall be upon a writ abated for falſe Latin; b.6.10.

Where a writ by journies accounts ſhall be upon a writ abated for jointenancy, or not; b. 6.10.

Where a writ ſhall be by journies accounts upon a writ abated, for waging law of not ſummons; b.6. 10.

Where writ ſhall be by journies accounts upon a writ abated, by making the plaint. Knight, or &c.

Where

Where a writ ſhall be by journies accounts, the firſt writ abating the party, or town; b. 6. 10.

Where it ſhall be upon a writ abated for fault of form; b.6.10.

Where the writ by journies accounts ſhall not be for the heir, nor Executor; b.6.10.

Where the writ by journies accounts, ſhall not be after a writ purchaſed by journies accounts; b.7.45.

Form of pleading upon a writ purchaſed by journies accounts; b. 6.10,11. ſee tit. Pleadings.

What counterplea of voucher is good upon a writ purchaſed by journies accounts; ſee tit. Counterplea of voucher.

From what time damages ſhall be recovered in a writ purchaſed by journies accounts; ſee tit. Damages.

Ipſo facto.

Expoſition of the words (*ipſo facto*) in ſtatutes, or deeds; b.5.3. ſee tit. Expoſition; b.9.119.

Where a Church is void in fact, or by the very fact; b 4.75,76.79.90.117. b.6.21.40,61. ſee tit. *Quare Impedit.*

Where notice ought to be by the Ordinary to the Patron, upon voidance of a Church *ipſo facto*, or not; ſee tit. Notice.

Where a leaſe for years is void *ipſo facto*, by death of the leſſor, or other accident; ſee tit. Leaſes, and Parſons.

Ireland, and Scotland.

Where, and to what purpoſes *Scotland*, or *Ireland*, are not parcel of the Kingdom of *England*, but Realms by themſelves, and to what purpoſes, not; b. 7. 3. 15, 16. 22, 23. to 28. b. 9.117.

Where the Peers of *Ireland*, or *Scotland*, ſhall be ſummoned to come to the Parliament of *England*, where the Parliament held in *England* binds thoſe of *Scotland*, or *Ireland*, or not; b.7.17,22.

Where, how, and in what Court judgment erroneous given in *Ireland* ſhall be reformed; b.7.18. ſee Error.

How treaſon committed in *Ireland* ſhall be tried; b.7.15.23. ſee tit. Enqueſt.

Where a man born in *Scotland*, is an alien born in *England*, or not; ſee tit. Alien born.

How he that is born in *Scotland*, or *Ireland*, ſhall not have trial by medlety of tongue; ſee tit. Alien.

Where a protection becauſe he abides in *Scotland* or *Ireland* ſhall be allowed, or not; ſee tit. Protect.

Where outlary ſhall be avoided becauſe over Sea in *Ireland*, or *Scotland*, or not; ſee tit. Utlary.

Where a Duke or Earl, or other of the nobility of *Scotland*, or &c. ſuing in *England*, ſhall be named by their names of dignity, or not; ſee tit. Writ, and Name.

Where negligence of claim upon a fine levied, or upon diſcent, ſhall not prejudice him that is over Sea in *Ireland*, or in *Scotland*; ſee tit. Cont. claim, and Entry congeable.

Where eſcuage is due to the Lord from his tenants upon a voyage into *Scotland*, or *Ireland*; ſee tit. Eſcuage.

Where, and what ſtatutes made in *England* ſhall bind thoſe of *Scotland*, or *Ireland*, for their bodies, lands, or goods, or not; b. 7.23. 26. ſee tit. Statutes.

Iſſues, and profits.

Where the King ſhall have the iſſues and profits of the lands of the heir of his tenant, before office found or not, and from what time; b.4.59.127. b. 8.170. ſee tit. Office before, &c.

From what time the King ſhall have the iſſues and profits of the lands of the heir upon livery ſued; b. 2. 80. b. 8. 172, 173. ſee tit. Livery.

Where the King ſhall have the iſſues and profits of the lands of an Ideot; ſee tit Ideots.

Where livery, *Ouſter la maine*, or &c. ſhall be together with iſſues out of the Kings hands; ſee tit. Livery.

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Who is Judge in Court Leet. ſee tit. Leets.

Where, and in what Courts the ſuitors are Judges. ſee tit. Juſticies and Suitors.

Where Juſtices are bound to take notice of Cuſtoms without the pleading of the party. ſee tit. Notice.

Where, and of what Acts of Parliament the Juſtices are bound to take notice of duty without pleading of the party, or not. ſee tit. Notice, and Parliament.

Juſtification.

By the Sheriff in treſpaſs or falſe impriſonment, and what is good, what not. b.5.2. p. 91.93. b.6. 52.54. b.9.68. b.10 70.

By a Conſtable in treſpaſs, or falſe impriſonment. b.5.2. p.59. b.9.68. b.11.44.

By watchmen in falſe impriſonment or treſpaſs. b.9.66.68. ſee tit. Falſe impriſonment.

Where a Fray is cauſe Juſtifiable to arreſt a man. b.11.44. ſee tit. Affray, and Falſe impriſonment.

Juſtification in treſpaſs, or falſe impriſonment, for finding ſurety for the peace. b.5.2. p.59. b.6.54. b.9.68. ſee tit. Peace, and Falſe impriſonment.

Where arreſt of a man is good and juſtifiable, without ſhewing the warrant, or not. b.9.69. b.10.92. ſee tit. Arreſts.

Where juſtification in treſpaſs or falſe impriſonment is good, though the act was wrongful, becauſe by order of law, and by virtue of proces directed to him. b.6.52. b.9.68. b.10. 70.76. ſee tit. Falſe impriſonment, and Commandment.

Where entry into another mans land by order of law is juſtifiable, though nothing be claimed in it. b.6.52. b.8.126.146.

Where taking or intermedling with another mans goods without making title to them is juſtifiable, or not. b.4.38. b.8.146.

Where beating down a nuſance is juſtifiable, and how. ſee tit. Nuſance.

Where the leſſors entry to ſee if waſt be done is juſtifiable. ſee tit. Entry congeable.

Where a man ſhall be a treſpaſſor from the beginning, by matter of after fact, though the act at firſt was juſtifiable. ſee tit. *Ex poſt facto.*

Where, and what is juſtification to enter a Warren, Chaſe, Park, or Forreſt. ſee tit. Forreſt.

Where aid of the King ſhall be granted to him that juſtifies, as the Kings Baily. ſee tit. Aid of the King.

How a commoner may meddle with land, and what he may juſtifie to do, what not. ſee tit. Common, and Commoner.

What is good juſtification in treſpaſs, or &c. for Heriot. ſee tit. Hariot.

Where juſtification as ſervant Baily, &c. to a corporation is good, or not. ſee tit. Corporation.

Of juſtification by licence, and what is good, what not. ſee tit. Licence.

Of juſtification in treſpaſs of aſſault and battery. ſee tit. Treſpaſs and Expoſition.

Of juſtification of ſeiſing a man as his villein, and what is good, what not. ſee tit. Villenage.

Of juſtification in treſpaſs for taking of a ſervant, or woman. ſee tit. Treſpaſs.

Where waſt in cutting of trees is juſtifiable. ſee tit. Waſt.

Where juſtification of entry into lands, or taking of goods, is good by force of the cuſtom. ſee tit. Cuſtom, and *London.*

Where juſtification in treſpaſs or falſe impriſonment is good by force of Bylaws, or not. ſee tit. Bylaws.

K.

King.

He cannot be a diſſeiſor, nor wrong doer, and therefore ſhall not be impleaded in a *Præcipe quod reddat*, nor by *Q. impedit*, but ſuit ſhall be to him by petition. b.4.45. b.6.51. b.7.26.32. ſee tit. Prerogative, and Encumbent, and Petition.

Where, and in what caſes the King may be put out of poſſeſſion of land, a Church, or &c. and have action to redreſs the wrong, or not. b.1.46. b.6.51. b.7.28. b.8.157. b.19. 112. ſee tit. Diſſeiſin, Preſentment to a Church, and *Q. Impedit.*

Where a fine may be by the King, or to him, and how, what manner of fine, or not. b.1. 27.40. b.7.32. b.9.138. b.11.77. ſee tit. Fines.

Where a writ of error or attaint lies by or againſt the King, upon erroneous judgment. b.1.34.42. b.3.1. b.4.89,90. b.6.14. ſee tit. Attaint, and Error.

Where the Kings grant of a thing not in him, but which poſſibly may be, is good, becauſe no remedy can be had againſt the King by writ of Covenant. b.3.29. b.5.2. p.63. b.7. 14. ſee tit. Grant of the King.

Where the Kings writ ſhall abate for want of form, matter, or falſe Latine, &c. or not. b. 7. 30, 31. b. 8. 26. 56. ſee tit. Writ, and Amendment.

Where pledges of Proſecution ſhall not be found in a writ brought by the King or Queen. b. 8.61. ſee tit. Pledges.

Where the King or Queen ſhall be amerced upon non-ſuit in a writ brought by them.

Where the King may waive the Demurrer, and take iſſue, and contr. b.5.2. p.104. ſee tit. prerogative.

The King ſhall have action of account, where a common perſon ſhall not, as againſt executors, or &c. b. 10. 114. b.11.89.90,91. ſee tit. Account.

Where double iſſue ſhall be taken in action where the King is party. b. 1. 18 32. ſee tit. Joined.

Where the King in action brought by him ſhall recover damages, where not. b. 6. 51. b.7.19.

Where *Scire facias* lies for the King, and where he cannot enter, nor ſeiſe lands, &c. without *Scire facias* ſued. b.3.11. b.4.56.58. 126. b.2.80. b.9.95,96. b.11,12. ſee tit. Entry Congeable, and *Scire facias.*

Where *Scire facias* ſhall be ſued by the King againſt his patentee, to repeal his Patent, or not, but he may ſeiſe, or enter without proces. b.8.4.14.22,23. ſee tit. Repeals, and *Scire facias.*

Where the King ſhall not re-ſeiſe without *Scire facias.* b.8.169. ſee tit. Statutes 29 of *Eliz.* 1. of eſcheats there.

Where the Queen ſhall ſue and be ſued alone, without the King her huſband. b.4.23.

Where conſultation ſhall be granted upon ſuit in Court-Chriſtian for tithes againſt the Kings tenant. b.2.44. ſee tit Conſultation.

Where the King by Prerogative may ſue in what Court he pleaſes. b. 2. 44. ſee tit. Prerogative.

Where the Court ſhall be outed of Juriſdiction, the King being party. b.2.44. ſee tit. Juriſdiction.

Bar in *Q. Impedit* brought by the King, what is good, what not, and where uſurpation, or laps, ſhall bind him, or not. b.4.79. b.6.29.49. b.7.28. ſee tit. Prerogative, Plenarty, and *Q. Impedit.*

Where *Quare non admiſit* lies for the King. b 5.12. ſee tit. *Quare non admiſit.*

The King is a perſon mixt, and has two capacities. b.2.44. b.5.28. b.6.27. b.7.10.12. 32. ſee Capacity and Reſignation.

Where the King ſhall have tithes, and is capable of them. b.2.44. ſee tit. Tithes.

Where a writ ſhall abate by the Kings act, as by making the plaintiff Knight. b.6. 10. b.7.23. ſee tit. Writ.

Where the Kings confirmation to the Landtenant, or incumbent is good, or not. b.1. 42. ſee Confirmation.

Where the Kings or a common perſons void grant may be made good by confirmation by Act of Parliament, or the Kings Letters Patents. b.1.51. b.9.60. b.11 69. ſee tit. Confirmation.

Where the Kings grant is good without the confirmation of other Kings after. b.8. 167. ſee tit. Confirmation.

Where cogniſance of a plea granted by the

the King, and allowed, is good, and what allowance is ſufficient; ſee tit. Grant of the King twice.

Where the King ſhall have a Corody or not; ſee tit. Corody.

Where, and what debts, and things in action, the King may grant, and aſſign over, and how the grantee ſhall ſue for them; ſee tit. Things in action.

Where diſcontinuance of tail is by the King or not; b.1.44.47.52. ſee tit. Diſcontinuance.

Where the Kings reverſion; or remainder ſhall be diſcontinued or diverted, by the act of a ſtranger; b.1.16. b.2.16.53. b. 6.55. b.9. 132. ſee tit. Diſcontinuance, and ſtatutes, 31 H.8.c.36. 34 H.8.c.20. there.

Where the King ſhall be ſaid ſeiſed in the right of his Crown by forfeiture for treaſon, or otherwiſe; b. 1.28.89. b. 4.101. b. 7.12. b. 9.25.

Where the Kings entry is lawful without, and before office found, or not; ſee tit. Entry Congeable.

Where entry may be upon his poſſeſſion, and his poſſeſſion avoided, without Livery ſued, petition, or *Ouſter la maine*: ſee tit. Entry Congeable, Intruſion, and Livery.

Where the King is eſtopped, and how, and where he ſhall eſtop others; ſee tit. Eſtoppel.

Where, and what goods and chattels of the King, the ſucceſſor ſhall have, not the executors; ſee tit. Heir.

Where execution awarded for the Kings fine, ſhall be executed for the party, at whoſe ſuit, &c. ſee tit. Execution.

Where a rent ſeigniory, or &c. is extinguiſhed by the Kings ſeiſin, or not; ſee tit. Extinguiſhment, and Tenure.

Where, and what Franchiſes, and Liberties, are extinguiſhed by the Kings ſeiſin, what not; ſee tit. Extinguiſhment.

Where fine ſhall be made to the King, and in, and upon what actions, in what not; ſee tit. Fine to the King.

Where a grant, feoffment, or &c. to, or by the King by deed inrolled is good, and when the inrolment ſhall be, and be ſufficient, or not; ſee tit. Inrolments.

Where a grant, feoffment, or &c. to, or by the King by deed inrolled is good, and when the inrolment ſhall be and be ſufficient, or not; ſee tit. Inrolments.

Where a grant, gift, or &c. to or by the King is good without deed, or inrolment of it; ſee tit. Inrolment.

Where aid of the Queen only ſhall be granted without aid of the King, where ſhe has an eſtate in lands, &c. and where of the King, and of both; ſee tit. Aid of the King.

Where a feoffment, grant, leaſe, or &c. by the Queen alone, is good; ſee tit. Prerogative.

Where the King may grant, &c. lands to the Queen his conſort; ſee tit. Baron and Feme, and Prerogative.

Where the King cannot command himſelf by his writ, and therefore cannot be impleaded by *Præcipe quod reddat*; ſee tit. Agent and Patient.

Where averment may be againſt what is certified and witneſſed by the Kings writ, and not be eſtopped by it; ſee tit. Eſtoppel.

Where the King ſhall have the wardſhip of of lands to which the heir has right, or title to enter; ſee tit. Ward.

Where the King has election to have the wardſhip of the iſſue in tail of the donee, of his tenant in fee, or of the heir of his tenant in fee; ſee tit. Ward, and Prerogative.

Where the King cannot enter into the land of the ward, nor ſeiſe his body, but is put to his action to recover them; ſee tit. Ward.

Where the King having wardſhip, may out the termor, or tenant by ſtatute ſtaple, Merchant, *Elegit*, or &c. or not; ſee tit. Ward.

Where a man cannot be tenant in common with the King; ſee tit. Prerogative.

Where the Kings tenant cannot alien without the Kings licence, and other matters touching licence of the King; ſee tit. Licence.

Where and what Franchiſes or Cuſtoms, ſhall take place againſt the King, and bind him, what not; ſee Cuſtom, Franchiſe, and Exemption.

Where a man may juſtifie in action, or maintain an action, or make title by Letters Patents of the King without ſhewing them; ſee tit. Monſt. of Deeds.

Where the King may give land to be held of another then himſelf, and where he ought to give land to be held of another, and not of himſelf; ſee tit. Tenure, and Prerogative, and Reviving.

Where the Kings capacities to purchaſe lands ſhall be double, natural, and politick, and where he ſhall take in one capacity, and where in another; ſee tit. Capacity.

Where, and what grants, commiſſions, or &c. of the King, ſhall determine, and ceaſe by his death; ſee tit. Grants of the King.

How the time, or day ſhall be accounted, and divided upon the Kings demiſe; ſee tit. Computation, and Day.

Where a man indited in the time of one King, may be arraigned in the time of another, and how; ſee tit. Corone.

Where diſcont. of proces ſhall be by demiſe of the King, or not; ſee tit. Diſcont. of proces. Reattachement, and Reſummons.

What pleas the incumbent ſhall have in *Quare Impedit* by the King; ſee tit. Encumbent.

Of *Non omittas* granted where the King is party, and the whole matter concerning it; *Non omittas*.

Where the King ſhall not have preſentment to a Church without notice given to the Patron, &c. ſee tit. Notice.

Where the King ſhall have embleaments of, &c. ſee tit. Embleaments, and Forfeiture.

Where excommunication ſhall be annulled, and the party aſſoiled by the Kings Letters; ſee tit. Excommunication.

Where nuſance ſhall not be abated, but ſtand for the Kings advantage; ſee tit. Nuſance.

Where eſtoppel is by charter, or the Kings Letters Patents, and to whom, and whom not; ſee tit. Eſtoppel.

Where the King may revoke his preſentment to a Church; ſee tit. Prerogative, and Repeal.

Of *Quo minus*, and what debtors of the King ſhall have it; ſee tit. *Quo minus*.

Where, and what is good bar in *Quo warranto*, by the King; ſee tit. *Quo warranto*.

Where the King ſhall not avoid his feoffment, grant, or &c. for nonage; ſee tit. Age.

Where, and what ſtatutes bind the King, what not; of which he ſhall have avail though not named in them; ſee tit. Statutes.

Where, and what ſhall be ſaid Tenure in chief of the King, what not; ſee tit. Tenure.

Where, and under what Seals the King may command his Juſtices, to ſurceaſe proceeding, and grant *Superſedeas*, under what not; ſee tit. Seals, and *Superſedeas*, and Statutes 2 E.3. 20 E.3. there.

Where the King cannot be ſeiſed to the uſe of another; ſee tit. Uſes.

Of informations for the King, and the whole matter concerning them; ſee tit. Informations.

Where the King cannot hold of any other perſon, but their ſeigniories ſhall be extinguiſhed by the Kings ſeiſin; ſee tit. Extinguiſhment, Tenure, Treaſon, and Prerogative.

Where ſurrender of the Kings Patent is good, & how to be done; ſee tit. Surrender.

Where a charter of exemption of a Juror ſhall be allowed, though the King be party, or not; ſee Exemption.

Where the King cannot hold of himſelf; ſee tit. Prerogative, and Tenure.

Where reſignation may be made to the King; ſee tit. Reſignation.

Where the King cannot take an eſtate in lands, or &c. without matter of record, and what is ſufficient matter of record to intitle the King, what not; b. 2.10.15.50.53. b.3.29. b.4,54. b.5 2. p. 90.109. b.7.12. b. 11. 66,67. ſee tit. Inrolments, and office before the eſcheator, and entry congeable.

Where the King ſhall have the iſſues, and profit of land after office found, and from what time; ſee tit. Iſſues and profits, and office before, &c.

Of the Kings grants, and where they ſhall be good, or not, and the whole matter concerning them; ſee tit. Grant of the King.

Of the Kings charter of pardon, and what things he may pardon, what not; and the whole matter concerning the Kings charter; ſee tit. Charter.

Of the Kings ſafe conduct granted, and the validity of it.

Knights.

Where challenge ſhall be to the array, becauſe Knights are not returned upon the pannel; b 6.54. ſee tit. Challenge.

What ſum of mony ſhall be paid for relief of the heir of a Knight, or the heir of him that holds by Knight ſervice; b.7.33.34. b.9. 124. ſee tit. Relief.

Where the heir ſhall be in ward, notwithſtanding he be Knighted in the life of his father; b. 6.73. b.8.173. ſee tit. Ward.

Where *Præcipe quod redd.* lies of a Knights fee; ſee tit. Demand; b.9.124.

Where a writ abates becauſe of being made heir, hanging the writ; b.6.10. b.7.27.

Where challenge ſhall be to the Knights in a writ of Right; ſee tit. Challenge.

The ancient revenue of a Knight, and when the name of a Vicount began; b.7.33.b.9.124.

L.

Laches.

Where forfeiture is of goods in caſe of goods ſtoln, for negligence of freſh ſuit, or not; b. 5.2. p. 109.111. b. 6.10. ſee tit. Appeals.

Where the Kings Prerogative is that no negligence can prejudice him, and that *Nullum tempus, &c.* no run of time can hurt him, and where contr. b.4.23.127. b.6.29. b. 7.28. 30. b.3.78. b.5.14,15. ſee tit. Prerogative.

Where ſtrangers are barred by negligence of claim upon fines levied, and what time they have to claim, or not; b.1.9. b.2.93. b.3. 78,79,80.90,91.87,88. b.4.125.106. b. 8.100. b.9.105. b.5.2. p.124. ſee tit. Cont. Claim.

Where negligence of claim upon a fine levied, bars him that claims an eſtate tail, or not; b.3.87. ſee tit. Cont. Claim.

Where negligence of claim upon a fine levied, bars an infant, and what time he has to claim; b.3.91. b.8.100. ſee tit. Cont. claim, and Statutes 4 H. 7.

Where negligence of claim upon a fine levied, bars a woman Covert, and what time ſhe has to claim; b. 2.93. b. 8.100. b. 9.138. b.10.49.99. ſee tit. Cont. claim, and ſtat. 4 H. 7. c.24.

Where negligence of claim bars a man out of the Realm, and beyond Sea, and what time he has to claim; b.3.91. b.4.125. b.7.23. b.8. 100. ſee tit. Cont. claim.

Where negligence of claim upon a fine levied, bars a priſoner, and what time he has to claim; b. 3.91. b. 4.125. b. 8.100. ſee tit. Continual claim, and ſtat. 4 H.7. c.24.

Where negligence of claim upon a fine levied, bars a man of unſound memory, and what time he has to claim; b. 3.91. b. 4.125. b.8.100.ſeetit.Cont.claim,and Stat. 4 H.7.c.24.

Where negligence is in an Infant, for not reverſing a fine levied by him during his nonage, and what time he has to reverſe it; b. 1. 76. b.2.57.77. b.5.2. p.38.44,45. b.8.58.b.11. 69.77. ſee tit. Error.

Where negligence ſhall not be imputed to an infant, in permitting warranty collateral to him, to diſcend during his nonage; b. 1.67. 140. ſee tit. Enfant.

Where executors by their negligence may charge themſelves to an action, to which they were not chargeable at the beginning; b.8. 133. ſee tit. Executors.

Where executors by their negligence may charge themſelves of their own goods; ſee tit. Executors.

Where negligence hinders to have the writ by journies accounts, ſee tit. Journies accounts.

Where by negligence to enter a man ſhall not be tenant by courteſie; ſee tit. Courteſie.

Where negligence loſes the advantage of warranty for ever; ſee tit. Warranty.

Where the huſbands negligence of ceſſing ſervices, binds the wife for ever; ſee tit *Ceſſavit*.

Where the huſbands negligence to ſuffer warranty collateral, to diſcend upon the wife during Coverture, binds the wife, or not; ſee tit. Warranty.

Where negligence hurts not a man over Sea, but he may enter upon diſcent; ſee tit. Entry Congeable.

Where negligence ſhall not be imputed to a man over Sea, at the time of outlary, but he may avoid it; ſee tit. Utlary.

Where negligence ſhall not be imputed to a man of unſound memory, but he may enter againſt his own feoffment; ſee tit. Entry Congeable.

Where an alien born by his negligence loſes the advantage of trial by the half tong; ſee tit. Allen born.

Where aid ſhall not be after iſſue joyned, becauſe of negligence it was not prayed before; ſee tit. Aid.

Where negligence ſhall be imputed to an heir, in ſuing livery out of the Kings hands; ſee tit. Livery.

Where the Patron of a Church by his negligence, ſhall loſe his preſentation to the Church and the Ordinary preſent by laps; ſee tit. Preſentation to a Church.

Where negligence is in not claiming goods waived, and eſtrayed; ſee tit. Waif, & Eſtray.

Where laches is in not claiming wreck of Sea; ſee tit. Wreck.

Where negligence is in not praying that the party in execution upon *Capias* for the Kings fine, ſhould remain in execution for the party; ſee tit. Execution.

Law, ſee *Ley*.

Leaſes.

What is a leaſe for years, what for life, and what ſpeaking and words make a leaſe for years and life, what not; b.1. 155 b.6.26.35.

Where, and how a leaſe for years may be by fine; b.1.76.174. b.3.51. b.5.2. p.3.to 6. b.6. 33.56.63. b.7.73. b.9.138.

Where a leaſe for years to begin preſently, or in the time future (another leaſe then in being) is good, and when it ſhall begin, and when take effect, where, and how not; b.1. 155. b 2.35.54,55. b. 4.52,53. b. 5.2. p.7.81. 94.123,124. b.6.35,36. b.8.70.73,74.93,94. b. 10.85.106. ſee tit. Remainder, and Reverſion.

Where a leaſe for life to begin in the future time, is not good; b.2.55. b.5.2. p.94. b.8.74, 75. ſee tit. Limitation.

Where a leaſe made by a Baily ſeneſchal or other, deputed to make leaſes is good, and in whoſe name to be made; b. 9.76,77. ſee tit. Baily, and Commiſſions.

Where Leaſes, Bargains, and Sales, or &c. made of other mens lands by Commiſſioners, are good, and ſhall ſtand againſt the owners, and their heirs; b. 2.16,17.25.80. b. 9.66,67. ſee tit. Commiſſions.

Where a leaſe for years is void in the very fact, by death of the leſſor, or other accident, or not; but voidable by entry, &c. b. 1. 51. 134,139.153,154. b.2.77. b.3.60.65.84.b.423, 24.b.5.2.p.23.124. b.7.8. ſee tit. Acceptance, and Condition, and Entry congeable.

Where and what leaſe by him who has power reſerved to him to make leaſes for life, or years, &c. is good, and ſhall ſtand though the Leſſors eſtate be determined, and what not; b.1 134.136.139.176. b.6.33. b.8.70. b. 9.75, 76,77. b.10.79.85.

Where a leaſe for years is void for incertainty in time, &c. b.1.155.b.3.19. b.6.35.

Where a leaſe for years upon contingency is good, by matter of after fact, or not; b.1. 155. b.3.19. b.6 35.

Where a leaſe to begin after the death of the leſſor is good, or not; b.1.155.

Where a leaſe by him who has but a particular eſtate, is good, and ſhall hold, when the leſſors eſtate is determined; b.1.134.139.b.2. 5. ſee tit. Grant. The like.

Where a leaſe by an huſband and wife, ſhall be reputed in law, the leaſe of both, or not; b.2.61. b.3.19.21.28. b. 5.2. p.26. ſee tit. Baron and Feme.

Where a leaſe by an Abbot, Prior, Parſon, or Prebend, without the Covent, Chapter, or Patron, binds the ſucceſſor by agreement, and acceptance of rent after, or not; ſee tit. Abbot, and Prior, Acceptance, and Confirmation.

Where a leaſe, by an Abbot, or Biſhop, or &c. is good, and binds the ſucceſſor by confirmation, or other agreement after by the Chapter or Covent: ſee tit. Confirmation.

Where a leaſe made by a Parſon of a Church, or Prebend, is good, and binds his ſucceſs or by confirmation of the Patron, or not; ſee tit. Confirmation.

Where a leaſe by a Dean is not good without the confirmation of others, and of whom; ſee tit. Confirmation.

Where a leaſe by a corporation is not good without deed; ſee tit. Corporation.

Where a leaſe to a corporation is good, though the name of the corporation be changed; ſee tit. Corporation.

Where a leaſe to a body incorporate is good, though it have no head at the time, &c. ſee tit. Corporation, and Capacity.

Where the Kings leaſe to a body not incorporate, or a perſon incapable, as a Monk, Alien born, or &c. is good; ſee tit. Grant of the King.

Where two join in a leaſe, it ſhall be ſaid the leaſe of one, and confirmation of the other; ſee tit. Confirmation, and Expoſition.

Where an eſtate for years, and a franktenement may be together in one man; ſee tit. Eſtates.

Of exceptions in leaſes; ſee tit. Exception, Property, and Woods.

Where a leaſe is good, notwithſtanding miſnaming; ſee tit. Miſnaming.

Under what ſeals, leaſes of lands, in the County Palatine, are good, under what not; ſee County Palat.

Where the leſſee for years ſhall have the windfalls where the leſſor; b. 11.48. ſee tit. Woods, and Property.

Without impeachment of waſt, in whom is the property of the trees, and how to be conſtrued; ſee tit. Expoſition, Waſt, & Properry.

At will, and what act, or accident is a determination of it, what not; ſee Tenant at will.

Where a leaſe is not good without reciting a former leaſe, and where void, for falſe recital, or miſrecital, in the caſe of a common perſon; b.2.33. b.3.9,10.

Where the Kings leaſe is not good without reciting a former leaſe, and where void becauſe of falſe recital, or miſrecital or not, &c. ſee tit. Grant of the King.

Where, and what leaſes by him to whoſe uſe are good by ſtatute 1 R.3. ſee tit. Uſes.

Where, and what Leaſes made by tenant in tail are good, and ſhall bind the iſſue after his death, what not; ſee tit. Statutes 32 H.8.c.12. and Acceptance.

Where a leaſe made by him who has two eſtates in him at the time of the leaſe is good, and how to be conſtrued, and to take effect; ſee tit. Eſtates, and Grants.

Where by a leaſe of one thing, other things paſs as append. appurt. or incid. or as implied, and intended in it; ſee tit. Appendant, Grants, and Expoſition.

Where a joint leaſe for years, or life, of lands in ſeveral Counties, is good, and both lands paſs, and how the rents reſerved, ſhall be reſerved; ſee tit. Feoffments, Rents, and Reſervations.

Where a joint action of debt, or waſt, may be maintained upon ſeveral leaſes, or not; ſee tit. Writ, and joining in Action, Debt, and Waſt.

Where rent reſerved upon a leaſe for years, or &c. ſhall be apportioned, or not; ſee tit. Apportionment.

Count in debt upon a leaſe for years, and what is good, what not; ſee tit. Debt.

Bar in debt upon a leaſe for years, and what is good, what not; ſee tit. Debt.

Where debt upon a leaſe for years lies, and is maintainable, by, or againſt the aſſignee of a reverſion, or term, or not; ſee tit. Aſſignee, and Arerages.

Where leſſee for years ſhall be received to ſave his term upon def. made, pleading, or &c. of the tenant of the franktenement; ſee Reſc.

Where leſſee for years ſhall falſifie a recovery; ſee tit. Falſifying recovery.

Where action of waſt lies not, there being a mean eſtate for life; ſee tit. Waſt.

Where grantee for years ſhall have a writ of annuity; ſee tit. Annuity.

Where a leaſe is for years or life upon condition, ſhall it be abridged, or inlarged, or not; ſee tit. Condition.

Of leaſes made to defraud debts, and credit; ſee tit. Colluſion.

Where a man having leaſed for his own life, may grant the reverſion of it, or not; ſee tit. Grant.

Where a leaſe ſhall be avoided for a certain time, and after good again for the reſidue of the time; ſee tit. Condition and charge.

Of reſervations of rents upon leaſes for years, or life, and how to be conſtrued; ſee tit. Reſervation.

Where leaſes for years, or life, by Parſons of Churches, Vicars, or Prebends are void for non-reſidence, death, or other accident, or but voidable; ſee tit. Parſon, and Acceptance, above.

Form of pleading a leaſe for years; ſee tit. Pleading.

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Where a leet may be claimed by preſcription, and what title made to a leet, or view of frank pledge is good, what not; b. 8. 38. b. 11.14.

Authority of a Lord, or Steward to aſſeſs fines, &c. or do other things; b.7.6,7.b.8.38. to 40. b.11.42. to 45.

Avowry for amercements in Court, and what is good, what not; b. 6. 77,78. b.8.39, 40. b.11.44,45. ſee tit. Amercements.

Who is Judge in a Court leet, b.6.12.b.8.38.

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What things are preſentable, and inquirable in a Court leet, what not; b.5.2.p.73.104. 112. b.6.20. b.9.112,113.

Where a leet ſhall be extinguiſhed by unity of poſſeſſion and ſeiſin of the King, or not; b.9.25. ſee tit. Extinguiſhment.

Where action of the caſe is for diſtreining men to come to leets, where they ought not; ſee tit. Action of the caſe.

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Where, how, and when presentment in a Court shall be traversed, or not. see tit. Bar.

Where action of the case lies against him who disturbs another to come to the leet. see tit. Action of the Case.

How amercements in Court leets shall be affered, and what afferement is good, what not. see tit. Amercements, Statutes, Magna Charta. c.14.

Where law shall be waged in debt for amercement in the Court Leet. see tit. Ley.

Ley. (Law waging.)

Where law shall be waged in Action of the case upon Assumpsit. b.4.93.95. b.9.87. see tit. Executors.

Where law shall be waged in debt, upon arrerages of account, or no. b.6.53. b.10.103. see tit. Examination, and Stat. 5 H.4.c.8.

Where law shall be waged in debt upon surplusage of account, or not. b.9.87. see tit. Executors.

Where law shall be waged in debt upon amercement in leet, or &c. b.4.95.

Where law waging lies for a guest in debt against his Hoste for eating and drinking. b.9. 87. see tit. Hostelor.

Where law shall be waged in debt upon reteining for salary, or wages, or not. b.9.8.88. see tit. Debt.

Where law shall be waged in detinue for goods, or not. b.4.95. see tit. Detinue.

Where law shall be waged in debt upon a Talley, Merchants book, or papers without a Seal, or not. b. 9.32. see tit. Customs.

Where no law shall be waged in debt brought by the King. b 4.93.95.

Where no law shall be waged in debt by *Quo minus*, by the Kings debtor, or not. b.4. 95. see tit. *Quo minus*.

Where law shall be waged upon a Contract. b.4.93 95.

Where in a plea real law of non-summons, shall be waged at the grand, or petty Cape. b.9.31. see tit. Saving def.

Where, and what day the party who wages law, and has day to do it, shall bring in his hands, and how many. b.9.31,32.

Where non-summons in a plea of land shall be tried by the country, and not by Law-waging. b.9.31,32.

Where a man shall have a second writ by journies accounts upon them abated, by waging law of not-summons. see tit. Journies accounts.

Where waging of law lies not for a body incorporate. b.9.32.

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Where possession and seisin in law shall be adjudged in a man upon a condition broken, without re-entry indeed, or not. b.1.85.94. 97.174. b.2.53,54. b.3.65.84,85. b.4.53. b.8. 44.95. se tit. Condition, and Entr. congeable.

Where possession and seisin in law of landrents, advowson, or &c. shall make a man tenant by courtesie, or no. b.1.97,98. b.8.35. see tit. Tenant by courtesie.

Where seisin and possession in law of land, rent, or &c. in the husband, shall make the wife to be indowed, and what is sufficient seisin and possession, what not. b.6.34.79. b.7. 38. b.8.22.27.35. see tit. Dower.

Where seisin, and possession in law is sufficient to make the sister heir, or &c. b.1.121. b.3.2.40.42. b.8.35. see tit. Discents.

Where possession and seisin in law is by the Lords claim, and sufficient to gain the lands or goods of his villein, or not. see tit. Cont. claim.

Where possession and seisin in law of the bastard, is sufficient to make his issue heir in prejudice of the mulier, or not. see ti. Bastardy.

Where a release to him that has only possession and seisin in law is good, or not. see tit. Releases.

Where tenant in law, though not in deed, of a franktenement, at the time of pleading, shall have plea in bar to the writ, &c. see tit. Pleas.

Where a man shall be adjudged in possession and seisin presently upon recovery by the law, without seisin delivered by the Sheriff, or other execution in fact. see tit. Recovery.

Where an action of trespas shall be upon possession and seisin in law without regress, and the mean trespas be punished. see tit. Trespas.

Where the termors possession shall be adjudged seisin in law to him in reversion, to have an Assise upon outing of his termor. see tit. Assise.

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Where a Covenant, or condition upon an obligation, or &c. shall be discharged by act of law. see tit. Conditions.

Who shall be said an Assignee in law. see tit. Assignee.

Where, and what shall be said a condition against the law. see tit. Conditions.

How matters in law shall be tried. see tit. Enquests.

Where a man or woman in execution shall be discharged of it by act of law. see tit. Execution.

Of licences in deed and law, and how they differ. see tit. Licence, and *Ex post facto*.

Where rent, seigniory, or &c. shall be extinguished by unity of possession, which comes by act of law or not; but shall be apportioned. see tit. Apportion. and Extinguish.

Where a Formedon lies upon a gift in law, without a gift in deed. see tit. Formedon.

Where, and when a Church is void in deed, when in law. see tit. *Q. Impedit*.

Where a joynt reservation of rents, or &c. shall become several reservations by act of law. see tit. Rents, and Reservations.

Where the King shall be presently adjudged in possession and seisin of land, or &c. in law, and not till entry, or seising. see tit. Office before the Escheator.

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By words, how, and the punishment. b.5.2. p.124,125. b.9.59.

What shall be said publishing of a libel, what not. b 9.59.

How he that finds a libel ought to demean himself. b.5.2. p.125.

Where the composer of a libel shall be punished though the party against whom, &c. be dead. b.5.2. p.125.

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Where licence by word is good, and without shewing a deed, may be pleaded, or not. b.6.38. b.9.99,100,101,102. b.11.48. see tit. Corporation, and Monstr. of Deeds.

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Where a condition that he shall not alien without the licence of the lessor is good, and what alienation is a breach of the condition, what not. b.3.64. b.4.119,120. b.3.38.

Where licence is requisite for the Kings tenant to alien, and what licence is good, what not. b.1.44. b.2.80,81. b.4.55. b.6.28. b.85. b.9.106. b.10.25.

Where the King may seise, &c. upon alienation of his tenant, notwithstanding he has the Kings licence, or not. b.1.44. b.2.80. b.6. 28. b.8.85.

Where the Kings tenant may charge the land with rent, without the Kings licence. b.8.85.

Where the Kings tenant may release without the Kings licence. b.3.51.

Where licence is requisite from the King to his tenant, for alienation in mortmain, and of whom; and what is sufficient, what not. b.3.31. b.10.25,26.31.110.

Where licence shall be traversed, and issue taken upon it. b.9.98.

Where the Kings licence is requisite to make a Park, Chase, &c. b.11.86,87. see tit. Forrests.

Of the King to go to election of a Bishop, or &c. b.5.18.

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Of the King to go over sea, and under what seal it is sufficient, under what not. b.2.17. see tit. Contempt.

Where licence is requisite for a forraign Prince to come into *England*. 7.21. *Calv*. case.

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Where the Kings licence is requisite to his widow, to marry, and where she cannot marry with it. b.4.55. see tit. Fine to the King.

Where the Kings licence is requisite for the foundation of a Chantry, or &c. see tit. Grant of the King.

Where the Kings licence is requisite to make an appropriation. see tit. Appropriation.

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From what time the King shall have the issues and profits of the lands of his tenant, who aliens without licence. see tit. Issues of lands.

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The Statutes of limitations, and what was the time of limitation for using a writ in ancient time, and what at this day. Mert.c.8.W. 1.38. West.2.26. 32 H.8.c.2. b.4.20.11. b.7. 40. b.8.75.126. b.9.36. b.11.68.

Of the limits and bounds of the Court of Marshalsie. b.4.46,47. b.6.20,21. b.7.15. b.10. 68. to 78. see tit. Authority and Marshalsie.

Where a devise upon condition is good, and words shall be construed rather in the sense of a limitation, then of a condition. see tit. Devise.

Where Copyholds shall be construed to be within the Statutes of limitations. see tit. Copyhold.

Where a remainder depending upon a condition, is not good; but upon a limitation, contr. see Remainder.

Where an estate in fee may be limited upon another estate in fee, or not. see ti. Estates.

What estate shall be by grant generally without limiting any estate. see tit. Estates.

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Within what limits the Court may be held. see tit. Leet.

Where no limitation of time binds the King, and *Nullum tempus occurrit*, or contr. see tit. Prerogative.

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Where the heir of lands held by Knight ſervice ſhall have livery with iſſues. b.8.172.

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Where livery ſhall be ſued by the heir upon a reverſion diſcended to him, and when. b.2. 93. b.6.3. b.9.126.129.132.

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Where monſtr. of right, or *Ouſter la main* is, and where it ſhall be with iſſues. b.1.158, 159.173. b.2.50.53. b.4.5 5.57. b.7.16. b.9.99. 103.

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Where upon livery ſued by the heir, he ſhall have things append. and incid. by reſtitution of the principal, to which, &c. without mention of them. ſee tit. Grant of the King.

Where the heir ſhall not have traverſe to an office, nor any other ſtranger, unleſs another office be found for him. ſee tit. Office before, &c.

Where a man ſhall ſue livery as well of lands held of other Lords, as of lands held of the King in chief. ſee tit. Prerogative.

Where entry is lawful upon the Kings poſſeſſion, and ſhall avoid it without livery, petition, *Ouſter la main*, or monſtr. of right. ſee tit. Entry congeable.

Livery and Seiſin, ſee tit. *Feoffments.*

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Mayor of *London* eſcheator of the City of *London*. b.4.54.

Cuſtom of *London* to deviſe land, and deviſe in mortmain, and who may deviſe in mortmain, who not. b.4.54.113. b.8.129.

Cuſtom of *London* to arreſt a man without proces. b.9.62,63.67.

Of *London* of forraign attachment. b.10.103.

Cuſtom of *London* that every day there except Sunday, is Market open. b.5.2.p.83. b.8. 127. ſee tit. Faires and Markets.

Cuſtom of *London*, that if a villein abide there a year and day, no proces of law ſhall fetch him out, but he ſhall be infranchiſed. b. 5.2. p.107.

Cuſtom of *London*, that no waging of law ſhall be againſt a Merchants book. b.9.32.

Cuſtom of *London*, that the Mayor and Aldermen there ſhall have the wardſhip of Orphans, and diſpoſition of their lands and goods. b.4.64,65. b.5.2.p.73. ſee tit. Ward.

Cuſtom of *London*, that a recovery there againſt an huſband and wife of the wives lands, ſhall bind her as ſtrongly as a fine at the common law. b.2.57.

Cuſtom of *London* to make guildes and Fraternities. b. 8. 122. 125. ſee tit. Cuſtoms and Preſcription.

Cuſtom of *London* that the Mayor there upon execution and examination of the parties, if he find the plaintiff ſatisfied, may diſcharge the defendant. b. 8. 126. ſee tit. Cuſtom.

Cuſtom of *London*, that if the debtor be fugitive, he may be arreſted before the day of payment to find better ſurety. b.8.126.

Cuſtom of *London*, that upon information that any man is in avowtry with a woman, or keeps a Whore in his chamber, that the Beadle may take them, and carry them to priſon, &c. b.126.

Cuſtom and Franchiſe of *London*, and that they ſhall not be impannelled upon inqueſt out of the City, nor joyn with Forraigners. b. 7.2.

Cuſtom of *London*, that action of debt lies againſt his executors upon ſimple contract. b.5.2. p.82,83. b.8.126.

Cuſtom of *London* to maintain an action for ſcandalous words, and words of defamation. b.4.18.

Where, and what Cuſtoms of *London* are good againſt Statutes, where, and what not. ſee tit. Franchiſes, and Preſcription.

Where Cuſtoms of *London* ſhall be gone, and extinguiſhed by the Kings ſeiſin. ſee tit. Extinguiſhment.

Cuſtom of *London* to make Ordinances and Bilaws, which are good, which not. ſee tit. Bilaws.

Where the whole writ ſhall abate becauſe part of the land lies in *London*, or another Franchiſe. ſee tit. Writ.

Of confirmations of the Cuſtoms of *London*, or other Franchiſe, and how they ſhall avail. ſee tit. Franchiſe.

How trial ſhall be of the iſſue upon a cuſtom of *London*, or other City, and where by the country, where by certificate. ſee tit. Cuſtom.

Where Cuſtom of *London* returned by the Sheriffs of *London*, or &c. upon a writ to them directed is good, or not. ſee tit. Retorn of the Sheriff.

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Lord, and Tenant.

Where the Lord muſt avow upon a perſon certain, and where upon the veray tenant, by the manner, or upon the matter. b.9.134, 135. ſee tit. Avowry.

Where the Lord paramount ſhall make avowry upon the diſcontinuee in tail, and where the donor may make avowry upon him, or upon the iſſue, notwithſtanding the diſcontinuance. b.3.30. ſee tit. Avowry.

Where the heir in tail ſhall be in ward, and where, and to whom, notwithſtanding the diſcontinuance made by his anceſtors. b. 2. 92, 93. b.8.166. b.9.126. ſee tit. Ward.

To whom tenant in dower ſhall be tenant, and by what ſervices. b.8.35,36. b.9.135. ſee tit. Dower.

To whom tenant by courteſie ſhall be tenant. b.8.35. ſee tit. Courteſie.

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Where the Lord ſhall have eſcheat of his tenant. ſee tit. Eſcheat.

Wher the Lord ſhall have the wardſhip of his tenants heir. ſee tit. Ward.

Of the Lord in ancient demean. ſee tit. Ancient demean.

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Of Avowry upon tenants by the Lord. ſee tit. Avowry.

Of diſtreſs by the Lord for rents, or &c. ſee tit. Diſtreſs.

Of Lord, and villein. ſee tit. Villeinage.

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Where the Lord ſhall preſcribe to have common, &c. for him and his tenants, and for whom. ſee tit. Preſcription and Common.

Where a Lord of a Mannor may build a Dovehouſe. ſee tit. Dovehouſe.

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Authority of the Steward, or Lord of the leet to aſſeſs fines, or do other things. ſee tit. Leet.

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M.

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How a man may maintain his writ by Pernancy of profits, againſt Jointenancy pleaded. b.1.123.131.

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What iſſue ſhall be taken, where a man maintains his writ by pernancy of profits. b. 5.2. p.77. ſee tit. Iſſues joined.

Where a writ ſhall be maintained by known by one name and another, againſt miſnaming. ſee tit. *Q. Impedit*, and Reputation.

Mainprize.

Where mainprize ſhall be found by the def. in account, and he that is adjudged to account ſhall go at large upon mainprize, and what ſurety he ſhall find. b.11.38.

Where mainprize ſhall be found by him that comes in upon *Capias*, or *Exigent*. b.10.100.

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Where mainprize ſhall be found by Commandement, and &c. or not. b.10.99,109. ſee tit. Stat. W.1.c.15.

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Maunger and Boyer.

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Where the def. ſhall wage his law in debt for eating and drinking. b.4.95. b.9.87. ſee tit. Ley.

Where the verdict is void becauſe the jurors have eat and drunk or nor; but they ſhall be puniſhed, and how. ſee tit. Enqueſt.

Mannor.

Court Baron incident to a Mannor. b. 4. 27.27.

At what place a Court Baron may be held b.4.26,27. b.9-51. b.10.76.

Who are Judges in a Court Baron. b 4.26. 33. b.6.11. ſee tit. Suitors.

Of what things a Mannor conſiſts, and how Mannors began at the firſt, and that a man may not make a Mannor at this day. b.4.26. b.6.56.64,65,66. ſee tit. Reputation.

Where a Mannor may be out of any town, and where in a *Præcipe quod reddat*, it may be demanded without naming any town, and where it may be ſuppoſed within a Town, &c. b.8.119.

Where a mannor may be within another mannor, or held of another mannor, or not. b.2.91. b.8.83.168. b.9.123. b.11. 17,18.

Where

Where a venew ſhall be of a mannor, and not of a town, and where contr. b. 1.162. b. 6 14.65. b.9.47. b.11.17,18.

How, and what mannor of trial of iſſues joyned, betwixt party and party, ſhall be in ſuits in Court Barons; b.9.31. ſee tit. Aſſent.

Of the ſtatute called *Extenta manerii*; b. 4. 21.

Where there are two manners of Courts Baron, and the ſeveral natures of them, &c. b.4.26,27.

Where, and by what means one mannor may be divided, and made two; and every of them have its Court Baron, &c. where, and by what means not; b 4.26,27. b.6.64.67.

Where a mannor once diſſolved, and deſtroyed, may be revived, and become a mannor again; b.6.64.

Wher, a mannor is not deſtroyed by the grants of the franktenements of all the Copyholders; b.4.24.26,27.

Where land held of a mannor purchaſed by the Lord, is not parcel of a mannor, otherwiſe of eſcheat; b.5.2. p.5,6.

Where tithes may be claimed as appendant to a mannor; b.2.45. ſee tit. Tithes, and Appendant.

Where by grant of all the demean lands of a mannor, the cuſtomary and Copy-hold lands ſhall not paſs; b. 1.46. b.5.2. p. 5,6. ſee tit. Expoſition, and Copy-hold.

Where a leaſe is of a mannor excepting parcel, the part excepted remains parcel of the mannor, or not; b.5.2. p.11. b.6.66.

Where a Lord of a mannor may erect a Dove-cote; b.5.2. p.104.

Where an advowſon or other thing appendant to a mannor once ſevered from it, ſhall be appendant after, or not; b.6.64.

Where grants and admittances of Copyholds out of the mannor are good, or not; b.4.26,27. ſee tit. Copy-holds.

Where retaining a Steward to keep the Courts of the Lord of the mannor, by words, is good; b.4.30. thrice.

Where land in the Sea covered with water is parcel of a mannor, &c. b.5.2. p.107.

Where a *Præcipe quod reddat* of a mannor without a forſpriſe is good, and where otherwiſe; b. 5.2. p.11. b. 8.119. b.11.49. ſee tit. Writ, and Exception.

Of a mannor by reputation; ſee tit. Reputation.

Where rents, ſervices, or other inheritances, may be parcel of a mannor, or appendant to a mannor; ſee tit. Appendant.

Where a leet may be claimed as appendant to a mannor; ſee tit. Appendant.

Where an hundred may be claimed as parcel or appendant to a mannor.

Where, and what things incident or appendant to a mannor, cannot be ſevered by any means; ſee tit. Appendant.

Advowſon appendant to a mannor; ſee tit. Appendant.

Where, and what things appendant or appurtenant, or incident, paſſes by grant or feoffment of a mannor, without the words, (with the appurtenances) in caſe of a common perſon, what not. ſee tit. Appendant.

Where, and what things appendant or appurtenant, or incident, paſs by grant of the mannor, &c. by the general words (with the appurtenances) in the Kings grants, without expreſs mention of them, where, and what not. ſee tit. Grant of the King.

Where upon partition of a mannor, the advowſon remains in common. ſee tit. Partition, and Appendant.

Where the diſſeiſee of a mannor till he has recontinued the poſſeſſ. of the mannor to which &c. ſee tit. Diſſeiſin, Preſentment to a Church, and Remitter.

Where amercement is of ſuitors in a Court-Baron: ſee Amercements, and Suitors.

Where law ſhall be waged in debt upon amercement in a Court-Baron; ſee tit. Law.

Where in ancient time Lords of mannors uſe to have the probate of Teſtaments within their mannors; ſee tit. Teſtaments.

Maſter, ſee tit. *Servant*.

Marſhalſie.

The authority of the Court of the Marſhalſie, and its juriſdiction; b. 6.20,21. b. 7. 15. b.10.68.78.

Action upon the ſtatute *De art. ſuper Chart.* for ſuing in the Court of the Marſhalſie, where none of the parties is of the Kings hoſtel; b. 6.20,21. b. 10.75. ſee tit. *Art. ſup. Chart. in Stat.*

Authority of the Coronor of the Kings hoſtel; b.4.46,47.

Who is judge in the Court of Marſhalſie; b.6.12.

A moſt ancient Court; b.10.69.

The manner of execution upon judgment in the Court of Marſhalſie; b 10.69.

How, and in what Court judgment erroneous given in the Court of Marſhalſie, ſhall be redreſſed; b.10.69. ſee tit. Error.

What grant of the office of the Marſhal of the Marſhalſie is good, and of what eſtate, and what not; ſee tit. Officers.

Meſne.

Writ of meſn, and what is ſufficient matter to abate it; b.8.86. b.9.124.

Count in a writ of mean, and what is good, what not; b.4.93. b.8.86.

Where one writ lies upon ſeveral tenures, or not; b.8.86.

Where a writ of mean lies and ſhall be maintained upon a confirmation; b.9.140.

Where the meſnalty is extinguiſhable by purchaſe of the tenancy peravail, or forejudger, and what ſhall inſue upon it, b.3.66. b.4.9. ſee tit. Extinguiſhment

Where arerages of the menalty ſhall be loſt by acceptance of ſervices, by the hands of the tenant, or not; b. 3.66. ſee tit. Acceptance, and Arerages.

Writ of mean againſt the huſband and wife; b.8.54. b.9.73.

Where the mean ſhall diſcharge himſelf againſt the plaintiff in a writ of mean by putting his own beaſts in the pound; b. 9.21,22. 110.111.

Bar in a writ of mean, and by what acts and means acquittal ſhall be extinguiſhed, and diſcharged; b.8.54.

Where grant to the huſband to be diſcharged of acquittal enures to the wife; b. 8. 54. ſee Baron and Feme.

Judgment in a writ of mean, and where, and upon what plea judgment ſhall be to recover the acquittal preſently, &c. and where to recover damages; b.8.134. b 9.21.110,111.

Where ancient demean is a good plea, in a writ of mean; b. 5.2. p. 105. ſee tit. Ancient demean.

Where age ſhall be granted in a writ of mean, and the plea demur for nonage of the tenant, or demandant; b.6.3. b. 9.85. ſee tit. Age.

Where judgment of forejudger is in a writ of mean, and againſt whom, and whom not; b.9.73. ſee tit. Stat. Weſt.2. c.9.

Proces in a writ of mean; b.9.73. b.11.64. ſee tit. Stat. W.2. c.9.

Joyning in aid of the mean to the tenant, and where freely without proces; ſee tit. Joyning in Aid.

Where the tenant paravail ſhall not have a writ of mean before notice, and requeſt to the mean to acquit him, and put his own beaſts in the pound, &c. ſee tit. Requeſt

Melius inquirendum; ſee tit. *Office before the Eſcheator.*

Miſnaming.

Where a writ ſhall abate by miſnaming the Town, or &c. b.6.10.64. b.7.27. b.8.159.

Where a writ ſhall not abate againſt all for miſnaming one; b.8.159.

Where miſnaming of a ſtranger or his companion, or wife, and contr. ſhall be pleaded, or not; b.6.64.

Where a feoffment, though one, or other of the parties be miſnamed in their proper name, or Surname, or in the thing which paſſes; b.1.46. b.2.33.61.67. b. 3.10. b.4.35. 48.50. b.5.2. p.124. b 6.64,65. and 3. b.11. 21. ſee tit. Deeds, and Feoffments.

Where an obligation is void by miſnaming in the name of Baptiſm, Surname, or &c. or not; b.10.122. to 125. b.11.21.

Where a releaſe, or confirmation is void by miſnaming, in the name of the parties, or the thing, or not; and how to be pleaded; b.2.34. b.10.122. to 126.

Where a leaſe for years is void by miſnaming the perſon of the leſſor, or leſſee, or of the thing demiſed, or not; b. 2.34. b. 3.9. b. 10.122. to 126.

Where a fine is void for incertainty, and miſnaming the one, or other, or of the thing of which it is levied, or not; b.8.155. ſee tit. Fines.

Where the Kings grant is void for miſnaming, or falſe, or miſrecital, or &c. or not; b.1.46. b.2.33,34. b 3.10.73.75. b.4.33. b.6. 55. ſee tit. Grant of the King.

Where the writ upon journies accounts, ſhall not be had, upon a writ abated, for miſnaming; ſee tit. Journies accounts.

Replication to miſnaming pleaded, and what is good; ſee tit. Replication, and maintenance of writs.

Where the grant of a common perſon is void by miſrecital, or falſe recital; ſee tit. Grants.

How the demandant ſhall maintain his writ, againſt miſnaming of the perſon, Town, or &c. ſee tit. Maintenance of writ.

Trial of miſnaming, or of any thing that is parcel of the name, and where the venew ſhall be, when the name, ſurname, or addition is put in iſſue; ſee tit. Trial.

Moderata miſericordia.

Where two ſhall join in moderate amercement, or not; b.11.43.

What ſhall be ſaid exceſſive amercement, upon which *Moderata miſericordia* lies, and how it ſhall be tried, and adjudged; b.11.44. ſee tit. Statutes, Mag. Chart. c.14.

Where *Moderata miſericordia* lies, and ſhall be maintained; ſee tit. Amercement, and Statutes, Mag. Chart. c. 14.

Moities, ſee tit. *Part, and Parcel.*

Monopolies.

Definition of Monopoly; b.11.86.

Where the Kings grant of a monopoly is good, or not; and what is ſuch monopoly, as he cannot grant; b. 8.125,126. to 130. b. 10. 113. b. 11. 84. to 89. ſee tit. Grant of the King.

Where preſcription to have a monopoly is good, or not; b. 8. 129. ſee tit. Bilaws, and Commonweal.

Where an Obligation to have a Monopoly, is not good; b. 8.125. b. 11.53. ſee tit. Condition.

Monſtrance of right.

Where, and for whom it lies, or not; b.1. 50.53.158,159.173. b. 2.50.53. b.4.54.55.58. b.7.17.19.

Where a man may enter upon the Kings poſſeſſion without monſtrance of right or other proces, or ſuit made; ſee tit. Entry congeable. Diſſeiſin, Intruſion, and Livery.

Monſtrance of Deeds, Fines, and Records.

Where a man ſhall not have the deed of a thing meerly in grant, becauſe it is executed, and veſted; b.6.38.

Where he that prays to be received ſhall ſhew a deed of remainder, or reverſion, by which he claims to be received, and when he ſhall ſhew it, or not; b.10.93.94.

Where a man ſhall make title, or maintain an action, or juſtifie by the Kings patent, without ſhewing the Kings letters patents, be he party, privy, or a ſtranger to them, or not; b.6.74. b.10.88.92.93.

Where

Where executors ſhall ſhew the teſtament, and when the def. ſhall have the hearing of it; or &c. and when not; b. 9.38. ſee tit. Teſtament.

Where a man may be compelled to ſhew a record, what is a ſufficient record, and under what ſeal, and where the tenor of a record is ſufficient, b.8.8. ſee tit. Exemplification.

Where payment may be pleaded without ſhewing a deed or acquittance witneſſing it; b 3.65. b.5.2. p.43. ſee tit. Debt.

Where a man may plead in bar in debt upon an obligation, or &c. matter in deed, without ſhewing a deed of it, and what matter, where, and what not; b.1.3. b.3.83. b. 4.84. ſee tit. Debt, and *Audita querela*.

Where a man may plead a defeaſance, or other matter in bar, by force of a deed without ſhewing it, or not; b.5.2. p.75. b. 10.106.

Where a leaſe made by an huſband and wife may be pleaded without ſhewing the deed, and where themſelves may plead it without ſhewing the deed, or not; b.2.61.75. b.3 21. ſee tit. Agreement, and Aſſent.

Where aſſent of a man or woman, may be pleaded without ſhewing a deed of it; b.2.6. 57. b.3.21. ſee tit. Aſſent.

Where a deed made to a ſtranger, ſhall be ſhewn becauſe title is conveighed by it. Where it belongs not to the ſhower, and where it does, or not; b.6.38. b.9.23. b.10.92,93.

Where a ſtranger to a deed ſhall take advantage of a deed ſhewn to the Court by him that is party, or privy to it; b. 5.2. p. 74.76. b.10.92.

Where a man ſhall avow or juſtifie as ſervant, or by force of a warrant, or command without ſhewing the deed; b.10.92.

Where a condition may be pleaded, or a man may have avail of it, where found by the inqueſt without ſhewing it, be it of a chattel, or of a franktenement, or not; b.4.51. b. 5. 2. p.40.74.76. b.10.92,93. b.4.51. ſee tit. Verdict, and Debt.

Where the tenant ſhall not vouch or rebut by warranty without ſhewing a deed, and where contr. b.6.5.

Where the aſſignee ſhall neither vouch, nor rebut by warranty without ſhewing the deed of aſſignment, or contr. b. 3.63. b.4. 121. ſee tit. Aſſignee.

Where the aſſignee ſhall have a writ of Covenant without ſhewing the deed of aſſignment; b. 3. 63. ſee tit Aſſignee, and Covenant.

Where a releaſe may be pleaded without ſhewing the deed; b.5.2.p.75.b.6.38.b.10.93.

Where a licence may be pleaded without ſhewing the deed; b. 6. 38. b. 9.99,100,101, 102. b.11.48. ſee tit. Licence.

Where the Kings Letters Patents inrolled, may be pleaded without ſhewing them; b.5. 2. p.74. ſee Exemplification.

Where inrolment of a deed, or a deed inrolled cannot be pleaded without ſhewing the deed it ſelf; b.5.2. p.52,53.74. ſee tit. Exemplification.

Where he that is in by act of law, ſhall not ſhew the deed; b.5.2. p.75.

Where the grantee of a reverſion ſhall plead attornment, without ſhewing a deed of it, or not; b. 6.38.

Where he that pleads a record muſt ſhew it preſently, or not; b.6 53.

Where tenant by *Elegit*, or &c. ſhall not ſhew a deed; b.5.2. p.75.

Where a man ſhall make title, or do a thing as ſervant to a corporation without ſhewing a deed, or not; ſee tit. Corporation.

Where a man ſhall maintain a writ of Covenant, without ſhewing the deed; ſee tit. Covenant.

Where a deputy ought to ſhew a deed of his deputation; ſee tit. Deputy.

Where exchange is good without deed, and where a deed of exchange muſt be ſhewn; ſee tit. Exchange.

Where licence to alien in mortmain, or to the tenant to alien muſt be ſhewn; ſee tit. Licence.

Where an arreſt is lawful by force of a warrant, &c. without ſhewing it; ſee tit. Falſe impriſonment, and Arreſt.

Where preſcription by a *que eſtate*, is good, where not; without ſhewing the deed of aſſignment; ſee tit. Preſcription.

Mortdanceſtor.

Form of the writ of mortdanceſtor brought by an infant; b.7.40. b.8.126.

What dying ſeiſed in fee, is ſufficient to maintain a writ of mortdanceſtor, what not; b.2.61. b 8.101.

Bar in mortdanceſtor, and what is good, what not; b. 4.43. b. 6.7,8. b. 9.119. ſee tit. Bar.

Where mortdanceſtor lies not betwixt a baſtard, and a mulier; b.8.101.

Where age ſhall be granted in a writ of mortdanceſtor; ſee tit. Age.

Where circumſtances of the plea ſhall be inquired in mortdanceſtor; b.6.4.

Where the heir ſhall have mortdanceſtor, notwithſtanding his anceſtor was attainted; ſee tit. Corone, and Diſcent.

Where in mortdanceſtor a man ſhall plead in bar, without traverſing the dying ſeiſed of the anceſtor; b.4.43. b.6,7,8.

Morgage.

How the condition upon morgage to pay monies by him, his heirs or executors, or to him, his heirs or executors, ſhall be performed, and to whom, and by whom the monies ſhall be paid; b. 2.50.52. b.5.2. p.96,97.114. b.8.95. ſee tit. Condition.

Where the King or other Lord, ſhall have the wardſhip of the heir of the morgagor, and of his lands, where he enters for the condition, &c. or not; ſee tit. Ward.

Where the Lord ſhall retain the land of his tenant, as a morgage till he be ſatisfied the value of the marriage; ſee tit. Action upon the ſtatute.

Mortmain.

Where a gift of lands to men aggregate, and not incorporate, is mortmain, or not; b.1.23, 24,25. b.11.71.

Where mortmain is by purchaſe of an advowſon of a Church; b. 7.26. ſee tit. Appropriation.

Where extinguiſhment of rents, ſervices, ſeigniory, or &c. in poſſeſſion of a body incorporate, is mortmain, or not; b.3.31.b.7.39.

Where a feoffment to the uſe of a body incorporate, ſhall be ſaid mortmain; b. 1.23, 24.123.

Where lands given to do a ſpiritual thing, or work, as to find Prieſts, Chaplains, or &c. to ſing Maſſes, or Dirges, is mortmain, or not; b.1.124. b. 4.105.

Where diſſeiſin, or uſurpation, or intruſion in lands by the Parſon of a Church, or &c. who have two capacities, is mortmain, or not; b.7.26.

Where lands given to a body incorporate, to maintain a Grammar School, or &c. other works of religion, and charitable uſes, ſhall not be mortmain; b.1.23,24,25. b.11.70,71.

Where releaſe of rent is mortmain, or not; b.3.31. b.7.39.

Where lands may be deviſed in mortmain by cuſtom of Cities, or Boroughs; ſee tit. *London*, Cuſtom, and Deviſe.

Where licence of the King, and other Lords, is requiſite to alien in mortmain, and what licence is good, and ſufficient, what not; ſee tit. Licence.

Where the Kings grant to make a foundation of a Chantry, or &c. and amortiſe lands is good, and by what words; ſee tit. Grant.

Where the King may enter and ſeiſe land for alienation in mortmain, what remedy for him that has right; ſee tit. Livery, and Monſt. of right.

N.

Ne injuſte vexes.

Where the writ of *Ne injuſte vexes* lies, by whom and againſt whom, where, and againſt whom not; b. 4.11. b.5.2. p.100. b. 8.65. b.9. 33. ſee tit. Stat. Mag. Chart. c.10.

Bar in *Ne injuſte vexes*, and what is good, what not; b.5.2. p.100.

Niſi prius.

Where *Niſi prius* ſhall be granted in appeals, or other matters of the Crown; b 4.43.

Where, and when a *Niſi prius*, or *Habeas corpus*, or *Tales* ſhall be granted, and where a *Niſi prius* with diſtreſs; b.1.4.

Where after verdict a new *Niſi prius* ſhall be granted, or not, but a *Venire facias*, or *Habeas corpora*; b.8.66. ſee tit. Enqueſt.

Where an Aſſiſe ſhall be turned into an inqueſt, and taken in nature of an inqueſt by *Niſi prius*; b. 8.57. ſee tit. Aſſiſe.

Juſtices of *Niſi prius*, and their authority; b 4.43. b. 10.103. ſee tit. Juſtices.

Non-ability, ſee tit. *Diſability*.

Non eſt factum.

Where upon ſpecial matter pleaded in debt upon an obligation, the concluſion of the plea ſhall be, and ſo not his deed; b. 2.4.9. b.3.26.59. b. 5.2. p. 23.119. b. 9.137. ſee tit. Debt.

What ſhall be good evidence in debt upon an obligation upon iſſue Not his deed, what not; b.11.27. ſee tit. Evidence.

Noſme.

Nomen, as much as *Rei notamen*; b.11.20.

A noſcendo, becauſe it makes known; b. 6. 65. b.11.21.

Error of the name is nothing when the perſon is certain; b.6.65.

No matter for the proper name, while there is no error in the ſubſtance, becauſe names change, but things not; b.6.65,66.

Of dignity, and where it is loſt by intermarriage, or not; b. 4. 117,118. b.6.53,54. b.7.15.6.33,34.

Of dignity, and where it ſhall be inherited by diſcent of right, and where given of courteſie; b.6.53. b.8.16,17.

Knight a name of dignity; b.6.53.b.7.27.

Duke, Earl and Counteſs, names of dignity; b.4.118. b.6.53,54.b.7.15.34.b.9.97.117.

What name is a name of dignity, and where a man or woman muſt be named by ſuch names, or not; b.4.118.b.6.53,54. b.7. 15.34. b. 8.16,17. b. 9.117. b. 10.29. ſee tit. Writ.

Of dignity intailed within the ſtatute of W.2. c.1. b.7.33. b.8.17. ſee Stat. W.2. c.1.

Where a writ ſhall be purchaſed by journies accounts, where the firſt abated by accepting the name of dignity of a Knight; b. 6.10. ſee tit. Journies accounts.

Where a name of dignity is loſt by contempt, &c. b. 11. 1. ſee tit. Corruption of blood.

Where a name of honour or dignity of a man of *France*, *Scotland*, or &c. ſhall be ſuſpended and loſt, if he come into *England*, or not; b.7.15,16. ſee tit. *Ireland*.

Where a grant, feoffment, or &c. is good without the name of Baptiſm, Surname, or name of the Corporation; b. 1.101. b. 2.51. ſee tit. Capacity.

Where a deviſe to a man or woman, is good without the proper name; b.10.57.b.7. 9. ſee tit. Capacity, and Deviſe, and Enfant.

The dignity of a Duke, or Earl, cannot be granted for years; b 9.97,98.

Where a grant of fee-ſimple, expectant by the name of a reverſion, is void; b.2.61. b 5. 2. p. 124. ſee tit. Grants, and Remainder.

What conſtruction ſhall be made of a grant, or &c. by the name of W. S. where there are two of the name; b. 5.2. p. 68. b. 8.155. ſee tit Remainder.

Where,

Where, and what is a ſufficient name of purchaſe, what not. ſee tit. Capacity.

Where grants, leaſes, or &c. made by a body incorporate, ſhall remain, and ſtand, though their name be changed. ſee tit. Corporation and Franchiſes.

By what name a body corporate ſhall be named in a writ, brought by or againſt them. ſee tit. Writ, and Corporation.

Where in a writ, the plaintiff or defendant muſt be named by their name of Baptiſm. ſee tit. Writ and Corporation.

Where in a writ the plaintiff or defendant muſt be named by their ſurname, or not. ſee tit. Writ, and Corporation.

Where a man ſhall ſue a Maſter of an Hoſpital, or ſuch like, by the name and ſurname, without the name of any Church or Corporation. ſee tit. Writ.

Where in a writ the plaintiff ought to name the defendant elder, or younger. ſee tit. Writ.

Where a writ ſhall abate by change of the name of dignity, as creation of a Knight, Biſhop, or other. ſee tit. Writ.

Form of the writ againſt the Guardian, and where it ſhall be general without naming him guardian. ſee tit. Writ.

Where in aſſiſe of rents, or &c. all the landtenants ought to be named. ſee tit. Aſſiſe.

Where an infant in his mothers belly ſhall take an eſtate by ſuch a name. ſee tit. Enfant.

Where grant, feoffment, releaſe, obligation, or &c. ſhall be void for miſnaming. ſee tit. Miſnaming, and Obligation.

Where a feoffment of acres by name of a mannor, and contr. is good, and by feoffment of a thing of one name, another thing of another name paſſes, or not. ſee tit. Feoffment, Deeds, and Miſnaming.

Where a feoffment, grant, releaſe, confirmation, or &c. may be pleaded of a thing demanded, by a name compriſed in the deed, though it be otherwiſe named in truth. ſee tit. Feoffment, Deeds, and Miſnaming.

Trial of a name of dignity, as Baron, Duke, or &c. and where they ſhall be tried by record, and where by the country. ſee tit. Trial.

Where a man ſhall take an eſtate in lands, or &c. by the name which he has gained by reputation. ſee tit. Reputation.

Where the return of the Sheriff or other Miniſter of the King is good, notwithſtanding omiſſion of their names in the indorſement, or not. ſee tit. Return of the Sheriff.

Where action of the caſe lies againſt him that ſues, or does another thing in the name of another, without warranty. ſee tit. Action of the caſe.

Where a remainder granted by the name of a reverſion, and contr. paſſes, or not. ſee tit. Remainder.

Where leaſes made by Commiſſioners, or other Deputies, to make leaſes, are good, and in what name ſuch leaſes ſhall be made. ſee tit. Leaſes and Commiſſions.

Next of blood. ſee tit. *Conſanguinity.*

Non omittas.

Where it ſhall be awarded upon *Venire facias*, &c. b.18.33. b.5.2.p.92.

Nonſuit.

In attaint, and where it is peremptory, and what judgment ſhall enſue upon it. b. 6. 25. b.8.60.

Where nonſuit of one in Attaint, is the nonſuit of all. b.6.25. b.8.61. ſee tit. Attaint.

In *Audita querela*, and where the nonſuit of one, is the nonſuit of all, or not. b.6.25. b.8. ſee tit. *Audita querela.*

In a writ of error, and where the nonſuit of one plaintiff is the nonſuit of all, or not. b.6.25. b.8.61. ſee tit. Error and Severance.

In account, and where the plaintiff in account ſhall be nonſuited after judgment of account, and where not. b. 11. 38. ſee tit. Account.

In *Q. Impedit*, and where peremptory, and the writ to the Biſhop to be awarded. b.7.27. ſee tit. Writ to the Biſhop.

Where the plaintiff or demandant ſhall be nonſuited the ſame term, or day, in which he once appeared. b.8.62. ſee tit. *Retraxit*, and Computation.

Where the plaintiff ſhall be nonſuited after judgment, and proces determined. b.11.38. ſee tit. Account.

Where nonſuit of one executor, is the nonſuit of all, or not. b.8.61. ſee tit. Executors and Severance.

Where eſtoppel is by nonſuit in action, or not. b.6.7,8. ſee tit. Eſtoppel.

Form of entry of nonſuit, and upon what roll the entry ſhall be. b.8.58. ſee tit. Entry of pleas.

Nontenure.

Where a man ſhall have a writ by Journies accounts, after the firſt writ abated for nontenure. b. 6. 10. ſee tit. Journies accounts.

A good plea in *Quid juris clamat.* b. 2. 68. ſee tit. Attornment.

Nomine pœnæ.

Not apportionable. b.8.79. ſee tit. Apportionment.

Where a demand ought to be upon a condition to forfeit a ſum of money in the name of a penalty. ſee tit. Demand.

Notice.

Notice is from *Noſcendo*, knowing. b. 6. 29.

Notice ought not to halt. b.6.29.

Double, one in deed, another in law. b.2. 68. b.6.69.

Where notice ought to be given to the patron by the ordinary, upon avoidance of a Church, and what is good and ſufficient notice, where, and what not. b. 4.76.79. b. 5.2. p.57. b. 6. 29.61.

Where, and of what acts of Parliament the Judges are bound to take notice, and allow the party the benefit of them, without his pleading of them, where, and of what not. b.4.13.75,76.120. b.5.2. p.2. b.8.28.137,138. b.10.57.

Where every man is privy to Acts of Parliament, and ought to take notice of them at his peril, and ſo of other matters of record, or not. b.1.45.50. b.2.26. b 3.71. b.4.75. b.5. 2. p.113. b.6.12.27.68. b.8.8.28.137. ſee tit. Parliament.

Where a man ſhall be excuſed becauſe he had not notice of the death of a ſtranger, by whom he claims an eſtate, or not. b.3. 72. b.4.82.

Where a man ſhall not be puniſhed for wrong, or hurt done by his dog, if he had notice of his condition, &c. b.4.18. ſee tit. Action of the caſe.

Where iſſue ſhall be taken and joined upon notice b.3.64. b.4.18.

Where the obligor, or &c. ſhall be bound to perform a condition without notice given them of the matter of it; and how, and by whom muſt ſuch notice be given. b. 2, 3. 79. 81. b.4.82. b.5.2. p.19,20.103. b.6.30,31. b.8. 82. 92. 98. ſee tit. Arbitrement, and Conditions.

Where convenient and reaſonable time ſhall be allowed him to perform a condition, to the performance of it, after requeſt and notice given, and what time ſhall be ſaid reaſonable and convenient. b.1.22.25. b.2.3. b.3.28.34. b.6.31. ſee tit. Condition.

Where cuſtoms of Courts are to be held for law, and the Judges of other Courts bound to take notice of them, and to direct their judgments accordingly. b.1.3,4.18,19. b.2.16, 17. b.5.2. p.32. b.6.6. ſee tit. Courts and Cuſtoms.

Where the Judges of the civil law are bound to take notice of the common law, and contr. the Judges of the common law to take notice of the civil Law, and to direct their judgments accordingly, or not. b.4.29. b.5.7. b.7.43,44. b.8.68,69.136. ſee tit. Ignorance.

Where notice is material to change an avowry, and ought to be given, and what is good and ſufficient, what not. b.3.23,24.30. 35,36.66. b.5.2. p.57,58. b.6.57,58. ſee tit. Avowry.

Where in avowry notice ought to be given for what thing he diſtreins, and where he may avow for another cauſe then that which was declared upon the diſtreſs taken. b.3.26. ſee tit. Avowry.

Where notice is material upon re-entry for a condition broken upon not-payment of rent reſerved upon a leaſe for years, and ignorance excuſes the leſſor, &c. b.3.54.65. b.5. 2. p.113. ſee tit. Acceptance, Colluſion, and Ignorance.

Where the Inqueſt ought to take notice of a deed in another County. b.5.2. p.56. b. 6.46. b.7.2. ſee tit. Enqueſt.

Where the Inqueſt ſhall find matter of record, and take notice of it upon pain of attaint. b.1.8,9.28.35.41.169. b.2.19,20.25,50. 57.70.91. b.3.7 69. b.4.64,65. b.5.1.2. p.3. 98,99.104. b.8.67. b.9.3.8.b.10.121. ſee tit. Inqueſt and Eſtoppel.

Where the Inqueſt ſhall take notice of a thing over Sea, and find it. b.6.6.46,47. b. 7.3. *Calv.* c.23.26. ſee Enqueſt.

Where the Inqueſt ſhall inquire, and take notice of a thing done before the time of memory. ſee tit. Trial, and Grant of the King.

Where notice is material in executions, and where the Sheriff, Gaolor, or their executors, ſhall not be charged upon eſcape, without notice what priſoners are in the Gaol. b.3.70.72. b.5.2. p.32. ſee tit. Eſcape.

Where notice of the deviſe is not material to the deviſee, to diſadvantage him becauſe he entred not. b.4.82. ſee tit. Deviſe.

Notice not material, but in exchange one party or other may enter upon eviction, &c. b.4.123. ſee tit. Exchange.

Where notice of fraud in the purchaſor by good faith, is not material upon the Statute of fraudulent conveyances. b.5.2. p.6. ſee tit. Statutes. 27 *El.* c.4. and Colluſion.

Where a man is excuſed of a contempt without Notice of, &c. in attachment upon contempt, and what is ſufficient notice. ſee tit. Contempt.

Where intermedling with anothers goods without title is juſtifiable, becauſe no notice to whom they belonged. ſee tit. Juſtification.

Where property of goods is not changed upon contract in Market open, becauſe the buyer had notice that they were ſtoln. ſee tit. Contract.

Where the tenant paravail ſhall not have a writ of mean, before notice given by him to the mean, and requeſt to acquit him, and put his beaſts in the pound, &c. ſee tit. Meſne.

Where the inqueſt is not to take notice of matters in law, and if they do, their finding is void. ſee Enqueſt.

Where notice of uſe is material, and changes the nature of the conveyance, and makes ſeiſin to the firſt uſe. ſee tit. Uſes. Of colluſion.

Where notice makes the party not to be remitted, &c. recovery falſified, &c. ſee tit. Colluſion.

Where notice is to be given to ſtrangers to a judgment by *Sciré facias*, before entry. ſee tit. Entry congeable.

Where Judges may reſpite their judgment, becauſe they know the contrary of what the verdict has found. ſee tit. Judgment.

Where a writ purchaſed by Journies accounts, ſhall be maintained though it was not purchaſed freſhly, becauſe no notice of abating of the writ. ſee tit. Journies accounts.

Where a Town or Hundred ſhall not be charged without Huy and Cry, and notice given of the Robbery. ſee tit. Huy and Cry.

Where notice is material upon arbitrements, and where to be given to the parties by the arbitrators, where not. ſee tit. Arbitrement

Where notice ought to be given to the arbitrator who is discharged, and his authority revoked or no. see tit. Arbitrement.

Nullity.

Where the Kings grant is void, because not in his power to grant. b.4.33,34,35. b.5.2. p. 28.48.50,51. b.7.7.25.36,37. b. 8.16,17.19. 22.55.77.125,126. b.10.113. b.11.4.53.85.89, 90. see Grant of the King.

Exposition of the words void, irrit, and held for null, and the Fine in Law is null in Statutes, or &c. b.1.24. b.3.59,60.82,83.88, 89. b.5.2.p.14. b.9.140. b.10.100. b.11.67. 73. see tit. Exposition.

Where an Act of Parliament shall be void, and held for null. b.1 4. b.6.5,6. b.8.118. b. 10.23.54.57. see tit. Parliament.

Where a recovery is void because before a not-Judge. b.4.147. b.9.66. b.10.76,77. see tit. Falsifying of recovery.

Where a record reversed shall be accounted no record in law. b.8.142,143. see tit. Records.

Where by reversal of a record, another record shall be taken away and void. b.5 2. p.90. b.8.119.142.152. see tit Error.

Where a Market or Fair held, and contracts made upon Sunday, are void and null in law. b.5.2.p.83. b.8.127. b.10.20. see tit. Deeds and Contracts.

Where matters in law found by Jurors are void, and of no effect. b. 2.75. b.4. 42. b. 5.5. b. 6.6. b. 8.115. b. 9.12,13.23.25.30. b. 10. 92. b. 11. 10. see tit. Enquest and Verdict.

Where a writ of error shall be to reverse a void recovery or judgment. b.3.3. b.10.76, 77. see tit. Error.

Where a verdict contrary to what is pleaded, admitted, confessed or affirmed by the parties, is void, or not. b. 2.4. b.4. 30. 53. see tit. Verdict.

Where a verdict of a thing contrary to a record is void, because it appears to be apparently false. b.9.69. see tit. Verdicts.

Where a deed is void and null in law, because of incertainty, and want of intendment. see tit. Deeds and Obligation.

Where if a man has, or does any thing farther then a Statute limits and appoints, all is void, or not. see tit. Statutes.

Where indictments are void for def. of words in them, or defect in the indictors. see tit. Enditements.

Where Letters Patents of the King shall be repealed, and made void. see tit. Repeals.

Where a deed made by duresse is void. see tit. Duresse.

Where a Deed, Feoffment, or &c. made by an Ideot, is void. see tit. Ideot, and Entry congeable.

Where a deed, grant, lease, or &c. made by an infant is void. see tit. Enfant.

Where a deed, feoffment, or &c. made by a woman Covert, shall be void. see tit. Baron and Feme.

Where a lease for years is void by death of the lessor. see tit, Leases, Parson, and Acceptance.

Grant of the Pope to be discharged of tithes in *England*, void. see tit. Pope,

Where grants leases, feoffment, or &c. are void by misnaming, or not. see tit. Misnaming

Where release or confirmation is void for def. of possession in him to whom, &c. and what is sufficient possession, what not. see tit. Releases.

Where release is void because of reservation, &c. see tit. Releases.

Where exception or reservation is void. see tit. Exception and Reservation.

Where Excommunication is void. see tit. Excommunication.

Where exchange is void in def. of due execution. see tit. Exchange.

Where things become void by matter of after fact from the beginning. see tit. *Ex post facto.*

Where a deed becomes void because of rasure, or interlining. see tit. Deeds and Obligation.

Where a deed is void for false Latin, or not. see tit. Obligation and false Latin.

Where a deed is void in part, and stands in another part. see tit. Deeds, and Obligation.

Where a fine levied is void in part, or to one person, and good for another. see tit. Fines.

Where a devise is void in part, and shall stand in another part, or to one person, and good to another, and where void in the whole. see tit. Devise.

Where a warranty made by an Infant, or man of unsound memory, is void. see tit. Warranty.

Where a warranty is void against one, or in part, and shall stand in another part. see tit. Warranty.

Where surplusage in verdict is not material, but void. see tit. Surplusage, and Verdict.

Where warranty shall be avoided by entry or claim. see tit. Warranty, and cont. claim.

Where a void grant, may be good by confirmation after, or not. see tit. Confirmation.

Where the Kings, or a common persons grant, is void by false recital, or &c. or not. see tit. Grant of the King, and Grants of a common person.

Where a grant, lease, or &c. may be avoided for a certain time, and stand for the residue of the time. see tit. Grants and Condition.

Where remainders are void, and by what causes and means. see tit. Remainder.

Where a surrender is void in default of possession of him that surrenders. see tit. Surrender.

Where verdict shall be avoided for eating and drinking of any of the Jurors. see tit. Enquest.

Where error in utlary, or &c. shall be reversed and amended, without a writ of error. see tit. Error and Utlary.

Where Court-leet, or Turn of the Sheriff, are not held at the time, &c. void. see tit. Leet, Turn of the Sheriff, and Statutes, Magna Charta. c. 35.

Where an obligation is void, and for what causes. see tit. Obligation.

Where upon two offices found before the escheator upon *Diem clausit extremum*, or &c. one of them is void, and which, &c. see Office before the Escheator.

Where administration of the goods of the dead intestate, without authority is void, or but voidable. see tit. Administration.

Where rent reserved to a stranger, is void. see tit. Reservation.

Number.

Where number is not material in the Coronors, but one may do, and execute things and acts by himself, where there are two or more, and what acts, where, and what not. b.4.41.45,46,47. b.5.2. p.120,121. b.10.103.

Where number is material in things to be done and executed by an Atturny. b.5.2. p. 94. see tit. Feoffment.

Where number of Auditors is material upon account, and a thing done by one is not good. b.10.103. see tit. Statutes. W.2.c.11.

Where number is material in Jurors of the standers by. b.10.103,104. see tit. Jurors, and Statute. 35 H.8.c.6.

Where number is material in Forraign attachment according to the custom of *London*. b.10.103. see tit. Custom of *London*.

Where number is material in a writ, or not; but the singular shall be put for the plural, and contrarily, or not. b.5.2.p.35. b.8. 48 b.10.103. see tit. Exposition, and Statutes.

Where number is not material upon feoffment to many, at the time of livery made, but by livery to one, all may take an estate. b.3. 26.29. b.5.2.p.94. see tit. Feoffments.

Where number is not material of executors in the probate of Testaments, or refusal before the Ordinary, but the probate of one, is the probate for all. b.9.37,38. see tit. Executors.

Where number is not material in nonsuit in actions, and where, and in what nonsuit of one, is the nonsuit of all; where, and in what not. see tit. Nonsuit and Severance.

Where Statutes shall be expounded, and construed by equity to extend to another number. see tit. Statutes.

Exposition of the words of number, and where the plural shall be taken for the singular, and contr. see tit. Exposition.

Where number is material for Chaplains to be retained by Barons and Peers of the Realm, and where, and how many may be retained. see tit. Dispensations.

Where number is requisite in Riots, and how many must be to make Riots. see tit. Riots.

Who is sufficient to retain servants or prentices, and how many servants or prentices may any man retain. see Labourers.

Where discontinuance of proces against one, is against all. see tit. Discont. of Proces.

Nuper obijt.

Where *Nuper obiit* lies of a Corody. b.9. 51. see tit. Corody.

Where age shall be granted in *Nuper obiit*, or not. b.6.4. see tit. Age.

Nusance.

By whom, of what, and of what estate this writ lies, for whom, and of what estate not. b.5.2. p.101.

Where nusance lies for nusance done in one County to land in another, and where in the confine of a County. b.7.3. see tit. Assise.

Plaint, or Count in assise of nusance, and what is good, what not. b.9. 54.

Where nusance lies for raising an house so near another, that the rain falls upon it, or &c. b. 5. 2. p. 101. b.9.54.58. see Action of the case.

Where assise of nusance lies for *raising* a Tozail, or &c. b.9.57,58. see tit. *Action* of the case.

Where assise of nusance is, why he did divert, obstruct, or straighten his water-course. b.4.86. see tit. Action of the case.

Where a man is chargeable for nusance done in the time of another, and how such nusance is to be redressed. b.5.2. p.101. b.9.55.

Where nusance shall be beaten down, or not, but stand for the Kings advantage, and who may abate nusance, and who not. b.5.2. p.101. b.9.54,55.

Where assise lies for stopping the traverse, or &c. of an high way. see tit. Action of the case.

Where, and what nusances shall be presented in Leets, what not. see tit. Leets, Bar, and Indictment.

Where presentments in Leets, or &c. or nusances shall be traversed, or not. see tit. Bar, and Leets.

Where, and for what nusance action of the case lies, and is maintainable. see tit. Action of the case.

Where a *Quod permittat* lies upon nusance, and for whom, and against whom. see tit. *Quod permittat.*

O.

Oath.

Oath of Supremacy, and who are compellable to take it. b.7.6,7. see tit. Statute 1 *El.* c.1,2.

Of the oath in making Homage and Fealty. see tit. Homage.

Of the tenant in dower, or niefs oath not to marry without the Kings licence. see tit. Fine to the King.

Oath of Jurors, and manner of entring their verdict. See tit. Entry of Pleas.

Oath of the ſummoners, and veiours, in a writ of diſceit, and where the trial is by oath; ſee tit. Diſceit.

Of the Popes Legate ſent into *England*, and in what manner; b.5.27.

Obligation.

What words are ſufficient to make an obligation, what not; b.9.53.

Where, and by what words an obligation made by two or more, ſhall be joint, and where ſeveral, where joint and ſeveral, &c. b. 5.2. p. 19,23.91.103.119. b. 9.53. ſee tit. Expoſition.

Where void in part, or againſt one obligor, and ſhall ſtand good againſt another; b.5.2. p.23.119. ſee tit. Deeds.

Where an obligation is void becauſe of miſnaming in the name of baptiſme, ſurname, or &c. or not; b. 10. 121. to 125. b. 11.21. ſee tit. Miſnaming, and Deeds.

Where an obligation is void by raiſure, interlining, or new writing, or not; b. 5.2. p.23. 119. b.9.92. b.11.27. ſee tit. Deeds.

Where an obligation is void becauſe made, or indorſed, with a condition, to the Sheriff in another form, and manner then is limited by ſtatute; 23 H.6. or not; b. 3.59. b.5.2. p. 119. b.10.101,102. ſee tit. Condition, and ſtatutes, 23 H.6.

Where an obligation is void for falſe, or incongruous Latine. or not; b. 5.2. p. 121. b. 9. 47, 48. b. 10. 133. ſee tit. Deeds, and falſe Latin.

Where void for def. of form, or matter, where it hath not ſenſe, nor intendment; b. 5.2. p.121. ſee tit. Deeds, and Entendments.

Where eſtoppel is by obligation, or not; b. 2.4.33,34. b.5.2. p. 20.69. b. 6.30. ſee tit. Miſnaming.

Where upon obligation to pay mony at ſeveral days, the obligee ſhall have no action till all the days are paſt, and where; b.3.22. b.4.94. b.5.2. p.81. b.8.153. b.10.128. ſee tit. Debt, and Payment.

Where an obligation ſhall take effect by the firſt delivery, and where it may have two deliveries, and not be good till the ſecond delivery; ſee tit. Deeds.

Where a man may be bound to himſelf, or not; ſee tit. Expoſition.

Where an obligation is void becauſe it, or the condition indorſed upon it, is againſt law; ſee tit. Conditions.

Where an obligation indorſed with a condition Impoſſible, is good, or becauſe it is become impoſſible by the act of God; ſee tit. Conditions.

Where an obligation is good, notwithſtanding it want the words, (in Teſtimony of which) ſee tit. Deeds.

Where good, notwithſtanding it have not the words, (His ſeal he has put) ſee tit. Deeds.

Where good without date, or with an inſenſible, and impoſſible date; ſee tit. Deeds.

Where an obligation ſhall remain in the Court, and be delivered again to the party; ſee tit. Deeds.

Where an obligation ſhall be cancelled, and damned; ſee tit. Deeds.

Where the ſurviving obligor ſhall be charged with the whole debt; ſee tit. Join-tenants, and Execution, and Recovery in value, Debt, and Charge.

Where in debt upon obligation, the def. upon ſpecial pleading, may conclude, and ſo not his deed; ſee tit. Debt.

Where a ſucceſſor, and of what corporation ſhall have the obligation made to his predeceſſor, or &c. and of what not; ſee Abbot, &c. Corporation, and Chattels.

Where a contract is gone, and extinguiſhed, by accepting an obligation for the ſame duty, or not; ſee tit. Contract, and Extinguiſhment.

Where an obligation by recovery in debt upon it, has loſt the force of an obligation by the recovery, or nor; ſee tit. Extinguiſhment, Recovery, and Election.

Of conditions upon obligations, and where and when they ſhall be ſaid to be performed, and what acts are breaches of them; ſee tit. Condition.

Where an obligation has loſt its force by intermarriage betwixt the obligor, and obligee, or making him executor; ſee tit. Extinguiſhment, and Releaſe.

Occupant, et Occupanti conceditur.

Where a man ſhall be ſaid Occupant of ſowles, or beaſts ſavage; b. 5.2. p. 104. b. 7. 16,17. ſee tit. Property.

Where a man ſhall be ſaid Occupant of land, and adjudged in of the eſtate as Occupant; b.6.33.

Where he that comes to land, and is in as Occupant, ſhall be puniſhed for waſt done; b 6.37. b.10.98. ſee tit. Waſt.

Where age ſhall be granted to the heir who enters as Occupant; b 10.98. ſee tit. Age.

Odio and Atia.

Of *Odio* and *Atia*; ſee tit. Statutes. W. 1. c.11. Glouc. c.9. W.2. c.29. Mag. Chart. c.16. and the books there.

Office of Court.

Where the Court of office and by their diſcretion may record a thing done two or three terms paſſed, or not; b.4.52. b.8.157.

Where damages in actions ſhall be taxed by diſcretion of the Court, and increaſe and be abridged, and where the writ ſhall be to inquire of damages; b.1.10. b. 2.31. b. 3.71. b. 4.67.104. b.11.6.56. ſee tit. Damages.

Where judgment may be reſpited, by diſcretion of the Court; b.3.52. b.5.2. p. 40. b. 11.56. ſee tit. Judgment, and Damages.

Where another then the common day may be given in a plea of land by diſcretion of the Court, or not; b. 5.2. p. 40. ſee tit. Aſſent, and Day.

Where the Court of office may award the aſſiſe, to inquire of circumſtances; b.6.4. ſee tit. Aſſiſe.

Where the Court in their diſcretion may ſuffer a man to make an Atturny, where out of rigor of law, he ought to appear in perſon, and no error; b. 8. 58, 59. ſee tit. Attorny, and Error.

Where the Court of office ſhall abate a writ; b.3.81.84. ſee tit. Writ.

Where age ſhall be granted in an action by diſcretion or office of Court, though the party prays it not; b.6.5. ſee tit. Age.

Where the Court of office ought to ſtay judgment, if any thing appear to them maught in the Writ, Count, or Proces, and where contr. b.8.120.133.

Where the Court of office ſhall give judgment for the plaint. though it appears to them by verdict, or otherwiſe that he has neither right nor title; b. 3.34.52. b. 8.120.123. and 93. b. 2.4,5. b. 4.44. b. 5.2. p. 78.108. ſee tit. Judgment.

Where the plaintiff ſhall have judgment, though the iſſue is found againſt his ſaying and allegation by office of the Court; b. 2.5. b.4.43,44.46. b.5.2. p. 78,79.108. b. 9.68.81. 112.119. ſee tit. Judgment, and Verdict.

Where the plaintiff ſhall not have judgment, though all be found for him; b. 3.28. 120. ſee tit. Judgment and Enqueſt below.

Where the Court of office ſhall ſtay judgment, though the def. confeſs or yield the action; b.8 120.123. ſee tit. Judgment.

Where the Court of office ſhall try the acceſſories plea before the plea of the principal; b.9.119. ſee tit. Corone.

Where the Court of office ought to examine and ſee upon a writ of error, or falſe judgment, if any error be in the record; though the parties aſſign it not; b. 5.2. p.37. 58. b.11.8. ſee tit. Error.

Office of the Juſtices upon vitious, and defective Inditements, and where they may of office of Court cauſe the party to be a new Indited; b. 4. 45. ſee tit. Inditements.

Where the certificate of a Juſtice of Peace, or &c. of office ſhall be an eſtoppel; b. 7.14. b.8.121. ſee tit. Eſtoppel, and Averments.

Where judgment ſhall be given of office of Court, according to the ſpecial matter found, and where according to the concluſion of the verdict general; b.4.42,53. b.5.5. b. 2.75. b. 6.6. b.8.155. b. 9.12,13.23.25.30. b.10.92. b. 11.10. ſee tit. Enqueſt.

Where judgment of office of Court ſhall be contrary to the verdict, becauſe it appears by matter of record to be falſe, or that they have miſtaken the law; b.2.75. b.4.42.53. b. 5.5. b.6.6. ſee tit. Enqueſt.

Where the Court of office ſhall make proces to inquire of certain points omitted by the inqueſt in their verdict; b. 8.8.66. b.10. 118, 119.

Office of the Court, not of the Jurors, to judge matters in law; ſee tit. Enqueſt.

Where the Judges of the Common Law, of office ought to take notice of the Civil Law, and direct their judgment accordingly; ſee tit. Ignorance, and Notice.

Where the Court of office upon pleading in abatement of a writ, and concluding to the action, ſhall the contrary to the concluſion of the plea; ſee tit. Pleadings.

Where the Court of office ought not to arraign a man upon an inditement, an appeal hanging againſt him, or contr. ſee Appeals.

Where the Court of office ſhall direct proces to the Coronors; ſee tit. Coronors.

Where the Court ſhall direct proces to the Metropolitan or Gardian of the ſpiritualties; ſee tit. Writ to the Biſhop.

Where the Court in caſes ſhall award inqueſt of office; ſee tit. Enqueſt.

Of the Kings Bench, and how it is to demean it ſelf when it comes firſt into any County and Country; ſee tit. Courts, and Bench of the King.

Where the Court of office ought to make inquiry, and take the inqueſt, to inquire of colluſion in caſes; ſee tit. Colluſion.

Where the Court of office ought not to take the inqueſt, till the matter in law be diſcuſſed; ſee tit. Demurrer.

Where the Court of office ſhall not ſtay to do juſtice, neither for the Privy Seal, nor Signet; ſee tit. *Superſedeas*, and Seals.

Where the Court of office ought to take notice of an act of Parliament, or other matter of record without the pleading of the parties; ſee tit. Notice, and Parliament.

Where the Court of office ought to take notice of matter in deed, or cuſtom of the country, or of other Courts, and direct their judgments accordingly; ſee tit. Notice, and Cuſtoms.

Where the Court may reverſe their own judgment; ſee tit. Error.

Where the Court of office in their diſcretion may refuſe the Kings grantee of an office, for inſufficiency, or &c. ſee tit. Office, and Officers.

Where and what points the Court muſt inquire of in a *Q. Impedit*; ſee tit. *Q. Impedit*.

Where the Court of office ought to direct the jurors to find the ſpecial matter, notwithſtanding the parties are eſtopped by their pleading, or admittance; ſee tit. Enqueſt, and Verdict.

Office, and Officers.

Where the Sheriff, or &c. may break a mans houſe, and enter to do execution, or not; b. 5.91,92. ſee tit. Execution.

How a man ſhall be put into poſſeſſion of an office; b.9.97.

Where a man ſhall have an office by diſcent; b.72. b.9.97.

Where, and what officers come to their offices by admittance and allowance of Courts, &c. what not; b. 3.72. b.4.33.41. b.9.98. ſee tit. Coronors.

Of Purveiors, and how they ought to demean themſelves in their office, and what things they may lawfully do in their places; b.8.146. b.10.73.

Of

Of the *Exigent*, and who is to grant it; b. 4.33. b.9.97.

Of the County-Court, who is to grant it; b.4.33. b.9.97.

Of the warden of the writs who is to grant it; b.9.197.

Of the Protonotary of the common Bench, or Kings Bench, who is to grant them.

Of the office of the Marſhal of the Court of the Kings Bench, and priſon of the Marſhalſie, and how, and what eſtate may be granted of it, what not; b.9.97. ſee tit. Marſhalſie.

Where aſſiſe lies of an office, and how title is to be made in the plaint in Aſſiſe of an office, or of parcel; ſee tit. Aſſiſe and Plaint.

Of a Conſtable, and his authority; ſee tit. Authority, and Conſtable.

Of the Admiral, and his authority; ſee tit. Admiral.

Of the Sheriff, and his authority upon writ of Juſticies; ſee tit. Juſticies, and Sheriff.

Of the Sheriff upon executions, and where he ſhall be eſcaped, or not; ſee tit. Authority, and Eſcape.

Of the Sheriff, and what is good juſtification in Treſpaſs of goods taken, an houſe or cloſe broken; ſee tit. Falſe impriſonment, Juſtification, Requeſt, and Execution.

Where the Sheriff doing his office is a diſſeiſor, or not; ſee tit. Diſſeiſin, and Sheriff.

Where the Sheriff delivers lands in execution upon *Elegit*, or Recogniſance, he ought to return the extent, &c. ſee Extent, Execution, and Recogniſance.

Of the Sheriff upon a writ of execution, and how he ſhall demean himſelf upon it; ſee tit. Extent, Execution, Recogniſance, and Sheriff.

Of the Sheriffs authority upon the writ of Rediſſeiſin; ſee tit. Rediſſeiſin, and Sheriff.

Of the Sheriffs authority upon the writ of *Non omittas*; ſee tit. *Non omittas*, and Sheriff.

Of the Sheriffs return upon writs, and which are good, which not; ſee tit. Return of the Sheriff.

Of the Sheriff, and where he ſhall be charged, and anſwer for the act, and negligence of duty of his Under-ſheriff; ſee tit. Charge.

Of the eſcheator, and how he ſhall demean himſelf in his office; ſee tit. Eſcheator, and office before the eſcheator.

Of the Coronor, and his authority and the whole matter concerning the Coronor; ſee tit. Coronor.

Where the Kings grant of an office is good, or not; ſee tit. Grant of the King.

Where a common perſons grant of an office is good, or not; ſee tit. Grant of a common perſon.

Where, and what offices may be aſſigned and executed by a Deputy, where, and what not; ſee tit. Aſſignee, and Deputy.

Where a Demand ſhall be of an office by *Præcipe quod reddat*; ſee tit. Demand.

Where entry of pleas ſhall be by Protonotaries, and other Clerks; ſee Entry of pleas.

Where, and what officers may be impleaded by bill; ſee tit. Bill.

Office of the Ordinary, and to what intents he is an officer to the Kings Courts; ſee tit. Writ to the Biſhop, and Ordinary.

Election of officers, as Sheriff, Coronor, or &c. ſee tit. Election.

Where one office may be appendant to another; ſee tit. Appendant.

Of a Baily, and what things he may do, and execute, by vertue of his general office, what not; ſee tit. Baily.

Of Forreſter, Parker, or Keeper of Warrens, and Chaſes; ſee tit. Forreſts, and Warren.

Where, and what is extortion in officers, what not; ſee tit. Extortion.

Where, and what officers may claim ſee by preſcription, and what fees, what not; ſee tit. Fees.

Of the Marſhal, and high Conſtable of *England*, and their juriſdiction, and authority; ſee tit. Authority.

Where amendment ſhall be of a record, roll, or proces, which is defective in def. of the Clerks, and Officers of the Court; ſee Amendment.

Where the lands of the Kings officers, ſold, and aliened by Covin to defraud the King of his debts, are liable to ſatisfie the Kings debts; ſee tit. Colluſion.

Where an office granted for life, &c. by the Juſtices, who have their places but at the Kings will, is good, and how long the grants ſhall ſtand; ſee tit. Extinguiſhment.

Where a Biſhop ſhall be ſaid an immediate officer of the Kings Courts, and to what intents; ſee tit. Biſhop, and Ordinary, Writ to the Biſhop, Certificate of the Biſhop.

Where the King may apportion an office; b.4.33.

Where it is in the election of the officer who arreſts upon a warranty of the peace, to carry the party arreſted to what Juſtice he pleaſes; ſee tit. Arreſts, and Election.

Where, and what offices may be bargained, and ſold for mony, notwithſtanding the ſtatute to the contrary; ſee tit. Stat. 5 E.6. c.16.

Forfeited, and by what acts, or negligences, or &c. ſee tit. Forfeiture.

Of a watchman, and his authority; ſee tit. Juſtification.

Office before the Eſcheator.

How an eſcheator ſhall demean himſelf upon offices taken by vertue of office, or otherwiſe, and upon return of them; b. 1.42. b.4. 57. ſee tit. Eſcheator.

Where office taken by vertue of office, or otherwiſe which finds matter of record, is good; or not; b.1.28.35.41. ſee tit. Enqueſt.

Where office taken by vertue of office, or of writ, or otherwiſe, ſhall be ſufficient for the King, or party, notwithſtanding the incertainty, or not; b.8.168. b.9.134.

Where, and what office found before an eſcheator, or &c. is good and ſufficient to intitle the King, but not for the heir to have livery, or &c. b.4.54. b. 7. 21. b.10. 114, 115. ſee tit. Traverſe to an office.

Where an office found and taken before Commiſſioners, is equivalent with an office found and taken before the eſcheator, and where an office taken before them, ſhall be without warrant; b.7.16.21. b.10.114,115.

Where upon two offices found before the eſcheator by vertue of writ, or &c. one ſhall be void, and where both ſhall ſtand in force, and to what intent, and what not; b. 8. 169. ſee tit. Statutes, 2 E.6. c.8. and Livery.

Where preſently by office found the King is in poſſeſſion, or not; till he enter and ſeiſe by force of the office; b. 3.11. b.4.58. b.5.2. p.36. b. 9.35.96. b.11.12. ſee tit. Entry congeable.

Where the Kings grant is good before office found, to intitle him, or other matter of record, or not; b.1.42. b. 3.10.29. b. 5.2. p. 55,56. b.6.5. b.8.166. b.11,12. ſee Entry Congeable, and Grant of the King.

In what Courts offices taken, &c. by vertue of writ, or of office ſhall be returned, in what not; b. 1.42. b. 3.80. b. 4.57. b. 7.16. ſee tit. Eſcheator, and Exchequer.

How, and to what time offices found before the eſcheator, ſhall have relation; b.4.59.126, 127. b.5.2. p.55,56. b.8.171.

Where, and upon what office found a *melius inquirendum* ſhall be awarded, where, and upon what not; b.8.168.

Where the Kings entry into lands, or tenements, or ſeiſure by him, and his Miniſters, is good without office found, or not; ſee tit. Entry Congeable.

Where the King cannot enter nor ſeiſe land, or &c. upon office found without *Scire facias*, or contrar. ſee tit. Entry Congeable, Repeal, and *Scire facias*.

Office found by vertue of a Commiſſion, under what ſeal, and the ſeal of what Court is ſufficient to intitle the King, of what not; ſee tit. Seals, and above.

Where office found before the eſcheator, ſhall be traverſed in the Chancery, or common Bench, or elſewhere; ſee tit. Traverſe to an office.

Where an office may be avoided without traverſe, as well for lands as goods; ſee tit. Traverſe to an office.

Where an office cannot be avoided by traverſe, but petition muſt be; ſee tit. Petition.

Where no traverſe is to be to an office, if the King be intitled by double matter of record; ſee tit. Petition.

Where entry upon the Kings poſſeſſion by the heir, or &c. before office found, is not intruſion; ſee Intruſion.

Where, and what office found before the eſcheator, ſhall be ſaid Tenure in chief of the King, what not; ſee tit. Tenure.

Where a man ſhall not traverſe an office, unleſs another office be found for him; ſee tit. Livery and Traverſe to an office, where *Diem clauſit extremum*, or *mandamus*, ſhall iſſue after *Diem clauſit extremum*, and office found, or not; ſee tit. Livery.

Where, and upon what office interpleading is betwixt two found heirs, by ſeveral offices; ſee tit. Livery, and Enterpleader.

Official.

Where adminiſtration committed by the ordinary, or his official; ſee tit. Adminiſtration.

Where the certificate of the official, &c. is good, or not; ſee tit. Certificate of the Biſhop, and Exommunication.

Where a Teſtament proved before the official of, &c. ſee tit. Teſtament.

Where prohibition directed to the official, &c. is good, and ſufficient; ſee tit. Prohibition.

Omiſſion.

Where amendment ſhall be of any thing omitted, in the Count, Writ, or &c. and of what, of what not; b.4.52. b.5.2. p.41,42. b. 8.159,160.162. ſee tit. Amendment.

Where amendment ſhall be of proces upon original, or iſſue joyned, or omiſſion, or miſaward, or not award of it, or not; b. 5.2. p. 42,43. b.8.156,157.160. ſee tit. Amendment.

Where amendment ſhall be of a record, roll, or proceſs, where omiſſion of a word or ſyllable, is in default of the Clerks; b.4.52.b.5. 2. p.43,44. 4 times. 45, 46. b.8.157,158,159. 161. ſee tit. Amendment.

Where the Court of office, and out of diſcretion, may amend a thing in another term, and record a thing two or three times paſſed; b.4.52. b.8.157.161,162. ſee tit. Amendment, and office of Court.

Where the writ ſhall abate for def. of omiſſion of matter; b.8.88. ſee tit. Writ.

Where the Court of office ſhall make proces to inquire of certain points omitted by the Inqueſt in their verdict, or not; b.10. 118,119. ſee tit. Office of Court.

Where a deed is good, notwithſtanding omiſſion of the words (in teſtimony of which) b.2.4,5. ſee tit. Deeds.

Where the writ ſhall abate for omiſſion of any who held the eſtate in the conveiance of the title; b.8.88. ſee tit. Formedon.

Where the plaintiff in *Q. Impedit*, in his Count may make omiſſion of any preſentment to the Church, or not; b.5.2. p.98. ſee tit. *Q. Impedit*.

Where words ſubſequent in deeds, ſhall have relation to a thing mentioned before in the premiſes, and to be ſupplied, though the word (aforeſaid) be omitted; b.8.85. b.4.44. b.8.154. ſee tit. Relation.

Where a feoffment, grant, &c. is good without naming the grantor, or grantee, feoffor, or feoffee, &c. by the name of baptiſm, or of a corporation; b.1.101. b.2.51. ſee tit. Grant, Capacity, and Deviſe.

Where diſcontinuance of proces is by omiſſion of any thing, or of one party; ſee tit. Diſcontinuance.

Where inditements are void for omiſſion, &c. ſee tit. Enditements.

Where

Where return of the Sheriff or other Officer of the King is void, for omiſſion of their name indorſed, or not. ſee tit. Return of the Sheriff.

Ordinary.

Where action ſhall be maintained by the Ordinary, and what action, and what not. b.5.2.p.82,83. b.8.135. b.9.39. ſee tit. Statutes Weſt.2.c.19.

Where an action is maintainable, and lies againſt the Ordinary, or his executors, and what action, and what is a good bar in an action of debt, or &c. againſt him, what not. b.5.2. p.83. b.9.39. ſee tit. Statutes. Weſt.2. c.19.

The Ordinary ſhall be charged upon waſting of his goods proper, and what ſhall be waſting in him, where, and what not. b.8.135. b.9.39.

Where the Ordinary may ſequeſter the goods of the inteſtate, nay where there are executors he may ſequeſter, and how he ſhall demean himſelf in it. b.9.39,40.

Where the executor or adminiſtrator ſhall account to the Ordinary, and of what things they ſhall account, where, and of what not. b.9.40.

Where, and of what things the Ordinary has juriſdiction, and the ſpiritual Court ſhall hold plea, where, and of what not. b.5.6.9. 13.16.23.25.27. 2. p.5.767. b 11.99. ſee tit. Juriſdiction, Prohibition, and Conſultation.

Who ſhall be ſaid the Ordinary, and immediate Miniſter to the Kings Court, and where the Kings Courts ſhall write to another as Ordinary, and not to the Biſhop, or not. b.5.11. 15.23. ſee tit. Writ to the Biſhop, and Excommunication.

The Ordinaries authority in his viſitation, and in what things he may deal, in what not. b.11.99.

Where the Court of office ought to allow Clergy without the challenge of the party, or claim of the Ordinary. b.5.26,27. ſee Clergy.

Where, and what Clerk convict, or he that has his Clergy, ſhall be delivered to the Ordinary. b.11.26. ſee tit. Clergy.

Who ſhall be Judge to allow or diſallow Clergy, the Ordinary, or Judge temporal. b.5.26,27. ſee tit. Clergy.

Where a man ſhall be executor after his refuſal before the Ordinary, and refuſal, not material. b.9.37,38. ſee tit. Executor.

Where the Ordinaries releaſe bars not the Adminiſtrator. b.8.136. ſee tit. Releaſes.

Where, and to what perſon Adminiſtration ſhall be committed by the Ordinary. b.9. 38,39. Statutes. 31 E.3.c.11.

Where adminiſtration committed by the Metropolitan, as ſupream Ordinary, without authority, and where it belongs not to him, is not void, but voidable. b.5.2. p.30. twice. b.8.135,136.

Where adminiſtration committed by the inferiour Ordinary, is void. b.5.2. p.30. ſee tit. Adminiſtration.

Where Adminiſtration once committed by the Ordinary, ſhall be revoked. b. 5. 2. p. 30. b. 6. 18, 19. b. 8. 135. ſee tit. Adminiſtration.

Of proving a Teſtament, and before what Ordinary it ſhall be proved. ſee tit. Teſtament.

Where writ to the Biſhop ſhall be awarded, the Church being full of the collation of Biſhop, Ordinary, as well after ſix months, as within them. ſee tit. Writ to the Biſhop.

Where, and upon what plea of the Ordinary, the writ to the Biſhop ſhall be awarded. ſee tit. Writ to the Biſhop.

Where the Ordinaries temporalties ſhall be ſeiſed into the Kings hands, and for what acts, or contempts. ſee tit. Contempts.

Who is a ſufficient Ordinary to certifie Excommunication, &c. who not. ſee tit. Excommunication.

Where the grant of the Patron and Ordinary, without the Parſon, is ſufficient to charge the Church. ſee tit. Annuity, Parſon, and Patron.

What iſſues ſhall be tried by the Ordinary, what not. ſee tit. Deprivation, Baſtardy, Divorce, and Trial.

Where the Church is void without ſentence of deprivation by the Ordinary, or not. ſee tit. *Q. Impedit.*

Where recovery againſt the Parſon without praying in aid of the Patron and Ordinary ſhall be falſified. ſee tit Falſ. of recovery.

Where the Ordinary upon avoidance of a Church, ſhall give notice to the Patron, &c. or not. ſee tit. Notice.

What are good pleas by the Biſhop Ordinary in a *Q. Impedit* againſt him, where he claims as Ordinary. ſee tit. *Q. Impedit*, and Preſentment to a Church.

Oyer and Terminer.

Juſtices of Oyer and Terminer, and their authority. b.4.46,47. b.6.20. b.7.12. b.9.56. 119. ſee tit. Juſtices.

Orphans.

Cuſtom of *London* for their lands, goods, and portions there. b.4.64,65. b.5.2.p.73.

Orphans in ward for their lands, bodies and goods, and to whom. ſee tit. Ward.

Where prohibition ſhall be granted upon ſuit in Court-Chriſtian, or &c. for the portions of Orphans. ſee tit. Prohibition.

Over-Sea.

Where the inqueſt ſhall try and inquire of a thing done over Sea, or not. b.6.46,47. b. 7.3. *Calv.* caſe. 23.26. ſee tit. Enqueſt.

Where iſſue ſhall not be taken upon the plea of the def. becauſe it riſes upon matter over Sea, but the plaintiff ſhall maintain his action, and upon the replication, iſſue ſhall be joined becauſe of trial. b.6.47. b.7.26,27. ſee tit. Iſſue.

Where a contract made, of which part is to be performed beyond Sea, ſhall be tried. b.6.47.

Where negligence of claim or entry, upon a fine levied of lands, ſhall not be imputed to a man over Sea, and what time he ſhall have to enter or claim, after his return. b.3. 92. b.4.125. b.7.23. b.8.100.

Where entry is lawful, notwithſtanding diſcent during the time he was over Sea. b. 8.100.

Where a man ſhall not inherit land in *England*, becauſe he was born over Sea. ſee tit. Alien born.

Of fugitives over Sea without the Kings licence, and how they ſhall be puniſhed. ſee tit. Contempt, and Fugitives.

Ouſter la main.

Form and order to be obſerved in ſuing *Ouſter la main*, and out of what Court it ſhall be awarded. b.9.98.

Where entry is lawful upon the Kings poſſeſſion, and his poſſeſſion ſhall be voided, without *Ouſter la main*, livery or petition made, or not. b.1.50.133. b.2.53. b.4.55,56. 59.b.7.32. b.8.136.172. b.9.96,98. ſee tit. Ent. congeable, Livery, and Intruſion.

Where interpleades ſhall be betwixt two, where they ſue to have of the Kings hand, or not. b. 7. 45. ſee tit. Livery, and Interpleader.

Where the feoffees of him to whoſe uſe ſhall have *Ouſter la main* of the King. ſee tit. Ward, and Livery.

Where a man may have *Ouſter la main* of the King, together with iſſues, or not. ſee tit. Livery.

Where a man ſhall have *Ouſter la main* of the King, and avoid his title by pleading without petition ſued, where he is intitled by double matter of record. ſee tit. Petition, Entry congeable, Traverſe to an office.

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P.

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The authority and power of an Act of Parliament. b.1.87.137.

The Parliament is the moſt high and Honourable Court within the Realm of *England*. b.8.129. b.9. *Epiſt.* b.11.14.63.

Where a former Act of Parliament ſhall be repealed by a latter, and what is a repeal, what not. b.1.25. b.6.20. b.8.128.137. b.10. 138. ſee tit. Repeals, and Statutes.

To what time the Parliament has relation, if no time be limited when it is to begin. b.6. 14. b.10.55,56. ſee tit. Relation. b.9.119.

Where every man ſhall be ſaid privy to an Act of Parliament, and bound and concluded by it. b.1.47,48. b.4.79. b.6.12.27.68. b.8. 28.137.

Form of pleading an Act of Parliament, and where in Count counting, or plea pleading, all the act, and prorogations ought to be alledged, and where the plea is vitious, if it be miſpleaded, b.1.27,28. 32.54.68.78. 86.107,108.115.133.142. b. 2.7.11.13.46.53. b. 3.27.55. b.4.101. b.6.79. b.8.68.109.

Where the Court of Office ought to take notice of an Act of Parliament, or other matter of record, and where not without pleading of the party who would have advantage by it. b.4.13.76.120. b.8.28.137,138. b.5.2. p.2. b.10.57. ſee tit. Notice.

Where, and what writs founded upon Acts of Parliament, ought to rehearſe the Statute in the Count. b.4.12.76. b.5.2 p.45.75. b.11. 56.83. ſee Action upon Statut.

Where Acts of Parliament made in *England*, bind thoſe of *Scotland* and *Ireland*, or not. ſee tit. *Ireland.*

Where, and what Acts of Parliament extend to ancient demean, what not. ſee tit. Ancient Demean.

Where, and what Acts of Parliament comprehend, and extend to Copyholds. ſee tit. Copyholds.

Where *Exigent* ſhall be awarded againſt a Lord of the Parliament, or not. ſee tit. *Exigent.*

Conſtruction of the words (Saving, or *Salvo*) in Acts of Parliament. ſee tit. Exception and Reſervation.

Where a Baron, and Lord of Parliament, ſhall be by prerogative exempt from Juries. ſee tit. Exemption and Juries.

Where a day of Grace ſhall be given againſt a Peer, and Lord of Parliament. ſee tit. Day.

Where in action by or againſt a Lord of Parliament, and iſſue joyned, there ought to be Knights upon the pannel. ſee tit. Challenge.

Where a Lord of Parliament ſhall have trial by Peers in caſes of Felony or Treaſon. ſee tit. Corone and Trial.

Where a Lord of Parliament in a writ againſt him, ought to be named by his name of dignity. ſee tit. Writ, and Name.

Where a writ of error ſhall be brought in Parliament. ſee tit. Error.

Where, and what things cannot be granted, nor changed, but by the Act of Parliament, and not by the Kings grant. ſee tit. Grant of the King.

Where the Kings void grant, or a common perſons, may be made good by Act of Parliament. ſee tit. Confirmation.

The prerogatives of the Barons and Peers of Parliament. ſee tit. Prerogative.

Where the iſſue in tail ſhall not be remitted againſt an Act of Parliament.

Parſon and Patron.

Where a grant of the Patron and Ordinary without the Parſon, is good to charge the Church. b.1.147. b.5.2. p.81. b.8.145. ſee tit. Annuity.

Where leaſes made by Parſons, Prebends, Vicars, &c. are void by non-reſidence, death, reſignation, or other accident, or not. b. 1. 51.153. b.2.46. b.3 65. b.4.23,24.76. b.5.2. p.6.14. b.6.21.37. b.7.8. b.11.67. ſee tit. Acceptance, and Leaſes, and Confirmation.

Where a releaſe to the Patron is good and ſufficient to extinguiſh an annuity, or rent iſſuing out of a Church or Parſonage. b.1.112. b.5.2. p.71.81.

Where a leaſe made by a Parſon of a Church, Vicar, or Prebend, binds the ſucceſſor by his agreement after. ſee tit. Abbot, Acceptance, Agreement.

Where a grant, leaſe, or &c. made by a Parſon of a Church, Prebend or Vicar, is good, and binds the ſucceſſor by confirmation of the Patron, or &c. and what is ſufficient agreement and confirmation, what not. ſee tit. Confirmation.

Where a grant, leaſe, or &c. by a Parſon before induction, is void. ſee tit. *Encumbent*, and *Q. Impedit*.

Where aſſiſe lies for the Parſon of a Church for tithes, or &c. ſee tit. Aſſiſe.

Where an infant cannot be Parſon of a Church. ſee tit. Enfant and Encumbent.

Where the ſucceſſor of a Parſon, Vicar, or Prebend, ſhall falſifie a recovery had againſt their predeceſſors, or not. ſee tit. Falſ. of recovery.

Where aid ſhall be granted to a Parſon, Vicar, or &c. from the Patron and Ordinary. ſee tit. Aid.

Where, and what are ſufficient cauſes of deprivation of a Parſon, Vicar, or Prebend. ſee tit. Deprivation.

Where diſſeiſin, uſurpation or intruſion by a Biſhop, Parſon, or &c. ſhall be mortmain, or not. ſee Mortmain.

Where, and to what intents and purpoſes a man may be a Parſon by admiſſion and inſtitution, without induction, and to what not. ſee tit. Encumbent, and *Q. Impedit*.

Pleas for the Patron, and which he ſhall have in *Q. Impedit*, which not. ſee tit. *Encumbent*.

Where alienation by a Parſon, Vicar, or Prebend, is diſcontinuance, or not. ſee tit Diſcontinuance.

In whom is the fee-ſimple of the glebe-land and Parſonage, in the Parſon, or another. ſee tit. Right.

Where the franktenement of a Parſonage is in abeiance during the life of the Parſon, or by his death. ſee tit. Abeiance.

Where Copy-hold granted by the Parſon of a Church, Prebend, or &c. Lord for the time, is good againſt the ſucceſſor. ſee Copy-hold.

Where tithes are to be paid to the Parſon, or not. ſee tit. Tithes.

Where tithes are extinguiſhed by unity of poſſeſſion in the Parſon of &c. or not. ſee tit. Tithes.

Where the temporal Court has juriſdiction in treſpaſs, or &c. betwixt two Parſons of a Church, or their ſervants, and Farmors for tithes. ſee tit. Juriſdiction.

Of *juris utrum* by the Parſon, Vicar or Prebend. ſee tit. *Juris utrum*.

Of a Parſon Imparſonee, and the whole matter concerning it. ſee tit. Appropriation.

Of plenarty of a Church by ſix months of an incumbent preſented, or of a Parſon imparſonee, good plea in *Q. Impedit*.

Of a Parſonage or Vicarage, and where the Church is void in deed, and when in law, and what act ſhall be ſaid an avoidance. ſee tit. *Q. Impedit*, and Notice.

Iſſues joined upon admiſſion, inſtitution, or induction of a Parſon of a Church, and how ſuch iſſues ſhall be tried. ſee tit. Trial.

Where prohibition ſhall not be granted upon ſuit in Court-Chriſtian, by the Parſon for dilapidations. ſee tit. Prohibition.

Form of pleading of ſeiſin of a Parſon of a Church, Prebend, or &c. and where he ſhall be ſeiſed in the right of his Church, and where in the right of his Prebend. ſee tit. Corporation.

Who ſhall preſent to a Vicarage, the Parſon of a Church, or Patron. ſee tit. *Q. Impedit*.

Payment.

Where a man ſhall not have an action of debt, or &c. to be paid at ſeveral days, till all the days are paſt, and where contr. b.3. b.4.94. b.5.2. p.85. b.8.153. b.10.128. ſee tit. Debt and Obligation.

Condition to pay monies to a man, his heirs or executors, how to be performed, and to whom the payment is to be made, where to the heir or executor. b.5.2. p.95, 96.114. b.8.95. ſee tit. Conditions.

Where condition to pay monies be performed by retaining, and that ſhall countervail payment in fact, or not. b.5.2.p.117. ſee tit. Condition.

How a condition to pay monies ſhall be performed, and what ſhall be ſaid ſatisfaction, and to countervail payment, what not. ſee tit. Condition.

Where a condition to pay monies ſhall be performed by acceptance of another thing, or acceptance of part, in full ſatisfaction, or not. ſee tit. Condition.

Where payment may be pleaded, without ſhewing a deed or acquittance, teſtifying it, or not. ſee tit. Monſtrance of deeds.

Where payment of monies ſhall be accounted according to the [illegible] of him that tenders and pays. ſee [illegible] acceptance.

Where execution of the body without payment is not ſatisfaction. ſee tit. Execution, and Satisfaction.

Pariſh, and Pariſhioners.

Where the venew ſhall be of a Pariſh, not of a Town. b.1.162. b.11.25. b.6.14. ſee tit. Viſne.

Parole demurre. ſee *Age.*

Part, Parcel, and Moities.

Where attornment for parcel is good, and how it ſhall enure, and where by one tenant, &c. b.2.67,68. ſee tit. Attornment, and *Per quæ ſervitia*.

Where ſeiſin of parcel of the ſervices, or rent, is ſeiſin of all the ſervices or rent, to make avowry, or have an Aſſiſe. b.4.8,9. b.6. 57. b.9.34,35. b.10.127. ſee tit. Avowry and ſeiſin.

Where the writ ſhall abate for parcel, or againſt one party, and ſtand for or againſt another. b.5.2. p.18.97. b.11.5.45. ſee tit. Writ.

Where ſurrender of parcel of a term is good, or not. b.5.2. p.11. ſee tit. Surrender.

Where arbitrement of parcel is good, and where good in part, and void in part. b.5.2. p.78. b.8.98.

Where livery and ſeiſin of parcel in name of all upon a feoffment is good, and all paſſes. b. 1. 75. b. 5. 2. p. 79. ſee tit. Feoffments.

Where a condition upon an obligation, grant, feoffment, or &c. ſhall be diſcharged in part by the act of God, or Law, for that part, and ſtand for the other part, or not. b. 4. 52.120. b.5.2. p.22.56. ſee tit. Condition, and Apportionment.

Where warranty bars in Formedon, or &c. for part, and parcels, or not; but for the intire. ſee tit. Rebutter and Warranty.

Where after demurrer joined for parcel, and iſſue for another parcel, no proces ſhall be awarded againſt the inqueſt, till the demurrer diſcuſſed. b.1.34. b.10.54. ſee Demurrer.

Where writ to the Biſhop ſhall be awarded for parcel, or againſt one def. but execution ſhall ceaſe till iſſue joyned for the other be tried. b.6.49. b.7.25. b.10. 54. ſee tit. Writ to the Biſhop.

Where debt ſhall be maintained for parcel of a ſum upon a contract or obligation, or not. ſee tit. Debt, and Obligation.

Where age ſhall be granted, and the plea demur for parcel, or nonage of one, or not, but for all. ſee tit. Age.

Where a record and judgment ſhall be reverſed for part, or one def. and ſtand for the other part, or def. or not. ſee tit. Error.

Where the whole record ſhall be removed or not; but parcel, &c. ſee tit. Error and Record.

Where diſcontinuance of the parcel of the proces, ſhall be diſcontinuance of the whole, or againſt one, againſt all. ſee tit. Diſcontinuance.

Where a writ of error ſhall be maintained for parcel, or not, till judgment be given, of the whole, or againſt all, or not. ſee tit. Error.

Where a deviſe is void in part, and ſhall ſtand for another part, or void to one, and good for another. ſee tit. Deviſe.

Where the whole land of the Recogniſor ſhall be diſcharged of execution by purchaſe of parcel by the recogniſee, and againſt whom, againſt whom not. ſee tit. Extinguiſhment, and *Audita querela*.

Where rents, ſervices, or a ſeigniory, are extinguiſhed by parcel of the land by the Lord, or not. ſee tit. Apportionment.

Where Aſſiſe lies of parcel of a rent, common, corody, eſtovers, or &c. ſee tit. Aſſiſe.

Where exchange avoided in part, ſhall be avoided in the whole. ſee tit. Exchange.

Where the grant of a reverſion of one tenant, where there are two, or of parcel is good, or not. ſee tit. Grant.

Where a deed ſhall be void in part, and good in part. ſee tit. Deeds.

Where warranty is void againſt one, and ſtands againſt another. ſee tit. Warranty.

Where revocation of uſes by parcels, or in part, is good, whereof parcel at one time, and parcel at another. ſee tit. Recovery.

Where after perition betwixt two leſſees for life, he in reverſion after the death of one, may enter upon his part, or not. ſee Jointenants and Partition.

Where

Where return of beasts shall be awarded of all for parcel of the services behind for which they were taken; see tit. Return of beasts.

Where reservation of parcel of a thing granted of that which otherwise should pass as incident, or appendant is good, or not; see tit. Reservation, and Exception.

Where a Prohibition lies upon a suit in Court-christian for a thing, parcel of which is spiritual, parcel temporal; see tit. Prohibition.

Where consultation shall be granted for part or parcel, or no; see tit. Consultation.

Where, and how rent, and land, &c. may be parcel of a Town, Castle, or Honor; see tit. Appendant.

Where one mannor may be parcel of another mannor; see tit. Mannor.

Where a fine levied of lands, &c. shall be void in part, or to one person, or good for another part, or parcel; see tit. Fine of lands.

Where, and to what intents and purposes, *Scotland*, and *Ireland*, are parcel of the Realm of *England*; see tit. *Irtland*.

Where an act of Parliament is void in part, and where in the whole; see tit. Parliament.

Where a man shall not have judgment for parcel, unless he will release for the other part; see tit. Judgment.

Where the plaintiff may release damages against one def. and pray judgment against the others, and where no judgment shall be against the principal, unless there be a release of damages in the part, or whole; see tit. Damages.

Where a writ, or Count, in right of advowson, or *Q. Impedit*, shall be of a moity, or third part of an advowson, or of the advowson of the third part or moity; see tit. Advowson.

Where a demand shall be of a moity, 3. or 4. part in assise by the plaintiff, or *Præcipe quod reddat*; see tit. Demand.

Of custom, that the wife shall have the moity, or all the land of her husband in Dower; see tit. Custom.

Where the husband and wife shall take an estate in lands, or &c. by moities, or not; but by intireties; see tit. Baron, and Fem.

Where the half of the jurors ought to be of aliens; see tit. Alien born.

Where tenure shall be apportioned for a moity, or particle, upon feoffment of a parol, &c. see tit. Avowry, and Apportionment, and Statutes, 19 *E. 1. Quia emptores terrarum.*

Where the whole record shall be revived by Reattachement, or but parcel; see tit. Record, and Reattachement.

Where a man shall be remitted, and entry is lawful because the other is participant of the crime, and party, or privy to the wrong; b. 3. 78. b. 5. 2. p. 31. 80. b. 6. 58. b. 8. 133. see tit. Collusion, Dower, and False imprisonment.

Where dower of a woman is not good, because participant of the crime and consenting to the wrong; b. 2. 67. b. 3. 78. b. 5. 2. p. 31. b. 6. 58. b. 8. 101. 133. see tit. Dower.

Where a recovery shall be falsified because he that recovers was participant of the crime, and consenting to the wrong, &c. see tit. Collusion, and False recovery.

Where contract of goods shall not be changed in market open because he that bought them was participant of the crime, and &c. see tit. Contract.

Where a man in execution shall not be discharged of execution, though at large, because participant of the crime, and escape by his own wrong; see tit. Escape.

Where the Lord may distrein the tenants beasts, out of his land, because he was participant of the crime, and chased them out of it, &c. see tit. Distress.

Where age shall not be granted to an infant because he came to the land by his own act, and purchase; see tit. Age.

Partition, and Parceners.

Where two Coparcenors, or the Aunt, and Neece shall join in *Cessavit*, or not; b. 8. 118. see tit. Joining in action.

Where two Coparcenors, or their issues, or the Aunt, and Neece, shall join in a writ of Formedon, or not; b. 8. 87. see tit. Formedon.

Where age shall be granted in *Partitione facienda*; b. 6. 4. see Age.

Where one Coparcenor shall have aid of another to recover for the equal portition, and where she shall have aid of a stranger, or a stranger of her; b. 4. 122. b. 8. 85. see tit. Aid.

Where recovery in value shall be by one Coparcenor against another, and of what lands, and what not; b. 4. 112. see tit. Recovery in value.

How partition shall be made by writ, and who are compellable by writ, to make partition by statutes, and who by Common Law; b. 6. 12, 13. see tit. Statutes, 31 H. 8. c. 1.

Where, and how partition is of an advowson, and where without deed; b. 1. 87. b. 3. 22 b. 8. 79.

Where upon partition of a mannor, the advowson remains in common as appendant, and where contr. b. 8. 79. see tit. Appendant.

Where the eldest Coparcenor shall present to a Church, or he that has her estate; b. 3. 22. see tit. Presentment to a Church.

Where entry betwixt Coparcenors shall not be taken away by discent, because of privity of blood; b. 1. 95. 98. 102. 137. b. 3. 61, 62. see tit. Entry, congeable.

Where partition by the husband, and wife, and other Coparcenors binds the wife after her husbands death; b. 9. 85.

Where grant of rent or reservation is good, in allowance of surplusage, upon partition, & how it shall enure, and be good without deed; b. 3. 22. b. 5. 2. p 8.

Where the eldest Coparcenor shall do the suites, and services due to the Lord, and the others contribute, and how it shall be done, and what remedy if it be not done; b. 6. 1, 2. b. 9. 34. see tit. Statutes, Marlb. c. 9.

What partition shall be by judgment in assise, or &c. betwixt join tenants, or &c. without the writ of *Partitione facienda*; see tit. Join-tenants; b. 6. 12.

Where partition for a certain time is good; b. 1. 87.

Where upon partition of an advowson the eldest daughter shall present to the Church, as the eldest daughter should; b. 3. 22.

Where one Coparcenor shall not darrain a warranty without her companion; b. 4. 122. b. 8. 75. see tit. Aid.

Where warranty is lost by partition betwixt Coparcenors and Join-tenants, or not; b. 6. 12.

Where partition betwixt join-tenants, or tenants in common is good with, or without deed; b. 4. 73. b. 6. 12, 13.

Where partition betwixt joint lessees for years or life is good, and after he in the reversion shall enter upon the death of one in his part; b. 4. 73. see tit. Join-tenants.

Where rent, common, way, or &c. are extinguished or suspended by possession in common, join-tenancy, Coparcenory, and where it shall be revived after; see tit. Extinguishment, and Reviving.

Where a stranger to the partition, shall have the same advantage with him, who was privy in blood, and party to it, or not; b. 3. 22. b. 6. 1. b 8. 101. see tit. Aid, and Courtesie.

Of a mannor, and upon what partition every of them shall have a mannor; see tit. Mannor.

Where partition imports a warranty, and who shall take advantage of it, who not; b. 4. 121. see tit. Warranty, and exchange.

Where partition implies a condition, and who shall take avail of it; who not; b. 4. 121.

Where partition avoided in part, shall be avoided in the whole; b. 4. 121.

Where, and how recovery in value shall be by one Coparcenor, shall be against the other for the equal portion; see tit. Aid, and Recovery in value.

Q. Impedit by Coparcenors, and where the release of one, bars not the others; b. 5. 2. p. 97. see tit. Join-tenants.

Betwixt the Bastard, and mulier, and what follows upon it; b 8. 101. see tit. Bastardy.

Judgment in *Partitione facienda*, and what follows upon partition awarded; b. 11. 40. see tit. Judgment.

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Peace.

Justices of Peace, and their authority; b. 4. 46, 47. b. 5. 2. p. 59. 71, 72. b. 7. 12. b 8. 126. b. 9. 118, 119. b. 10. 53, 54. b. 11. 62. see tit. Justices, and False imprisonment.

Where, and who shall have surety of the peace, or good behaviour, and against whom they are grantable; b. 5. 2. p. 59. b. 11. 98.

Where, and what act is breach of the peace, what not; b. 8. 37. b. 9. 51. see tit. Condition.

Where in election of him that arrests a man by warrant of a Justice of Peace, to carry the party arrested to what Justice he pleases; b. 5. 2. p. 59. see tit. Arrest, Election, and False imprisonment.

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Peremptory.

Where non-suit in *Q. Impedit* is peremptory, and writ to the Bishop shall be awarded; b. 7. 27.

Where discontinuance of proces in *Q. Impedit* is peremptory, and writ to the Bishop shall be awarded; b. 7. 17. see tit. Writ to the Bishop.

Perjury.

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Where entry is lawful upon the Kings poſſeſſion without livery ſued, petition or *Ouſter la main, &c.* or not. b.1.50.133. b.2.53.b.4.55, 56.59.b.7.32. b.8.76,77.172. b.9.96.98. ſee tit. Entry congeable.

Where entry ſhall be lawful upon the poſſeſſion of the Kings Patentee. b.1.173. b.4.56. 59. ſee Petition.

Where upon recovery a man ſhall be in poſſeſſion preſently without execution, or ſeiſin delivered by the Sheriff, or not, b. 1. 94. 97. 105. ſee tit. Recovery.

How the Sheriff ſhall make execution upon a recovery, and by what thing, and how a man ſhall be put into execution. b.1.94.97.105. ſee tit. Execution. b.5.2.p.91. b.6.52. and Return of the Sheriff.

Where a releaſe is void, for def. of poſſeſſion in him to whom it was made, and what is ſufficient poſſeſſion, what not. b.1.87.111.b.3. 94. b.4.25. b.5.2. p.71.81.124. b.8.63.151. b.10.48.

How an officer ſhall be put in poſſeſſion of his office. ſee tit. Offices, and Officers.

Of poſſeſſion in law without poſſeſſion in deed, and where it ſhall be ſufficient, and to what intents and purpoſes. ſee tit. Ley, and Releaſes.

Of extinguiſhment of Rent, where, &c. by unity of poſſeſſion. ſee tit. Extinguiſhment.

Where a man ſhall be charged to the King for the iſſues and profits of a felons lands, becauſe of poſſeſſion, and how he ſhall anſwer them to the King. ſee tit. Forfeiture, and Iſſues of lands.

Where he that finds goods ſhall be chargeable to the owner becauſe of poſſeſſion ſee tit. Action of the caſe.

Where a grant, gift, or &c. of a thing which is not, but poſſibly may be in poſſeſſion, is good, or not. ſee tit. Grant and Gift.

Where the King is in poſſeſſion preſently by office found, or not, till he or his Miniſters have ſeized by force of the office. ſee tit. Office before the, &c.

Where the Patron of a Church is put out of poſſeſſion by preſentation to the Church by eſtranger. ſee tit. Preſentation to a Church.

Where damages ſhall be recouped, becauſe the plaint. is ſeiſed of the land, or in poſſeſſion of the goods. ſee tit. Recouper.

What ſhall be poſſeſſion and ſeiſin ſufficient to have aſſiſe, or make avowry, what not. ſee tit. Aſſiſe, Avowry, and Seiſin.

Where ſurrender is not good, without poſſeſſion and ſeiſin in deed. ſee tit. Surrender.

Where the King cannot be diſſeiſed nor put out of poſſeſſion of his land, or Church. ſee tit. Prerogative, Diſſeiſin, and *Q. Impedit.*

Pound.

How a diſtreſs ſhall be demeaned and impounded. b.8.41.146. b.9.11. ſee tit. Diſtreſs.

Where amends for damage feaſant, ought to tendred before the beaſts are impounded. b 5. 2.p.76. b.8.147.

Where the mean by putting his own beaſts in the pound, ſhall diſcharge himſelf againſt the plaint in a writ of mean. b.9.21.110, 111. ſee tit. Meſne.

Præmunire.

Where *Præmunire* lies for ſuing to the Court of *Rome* for ſpiritual cauſes, or advancing the Popes authority. b.5.12.16,17.19, 20.22, 23, 24.26.b.6.*Epiſt.* 10 H.2. there, b.11.34.

Where *Præmunire* lies againſt him who purchaſes the Popes Bulls, and what is a Papal proviſion of the advowſon of a Church, where, and what not. b.5 5.17.24,25. b.7.14.

Judgment in *Præmunire*, and what ſhall be forfeited by him that incurs it. b.5.16.19.23, 24-26. b.9.74. b.11.63.

Where in a *Præmunire* the def. ſhall be attainted upon default, b.11.34.

Where diſability ſhall be alledged becauſe of conviction in *Præmunire.*

Where killing a convict in *Præmunire*, is nor felony, nor homicide. b.5.17. b.7. 13, 14.16. ſee Stat. 5. *Eliz.* c. 1. and *Corone.*

Prerogative.

Where the King ſhall have his Prerogative to have the wardſhip of lands held of other Lords, as well as of thoſe which are held of himſelf. b.9.16.133. ſee tit. Statutes, Prerogatives, c.1.

Of primer ſeiſin, and where he ſhall have it of all the lands of his tenant, as well held of other Lords as of himſelf, or not. b. 8. 165, 166.172,173. b.9.16.132,133. b.10.80.

Where the King ſhall have prerogative to have wardſhip, becauſe of a reverſion diſcended to the heir, and primer ſeiſin, and livery to be ſued, or not, &c. b.2.93. b. 9.126. 129.132. ſee tit. Livery, and Ward, and Statutes, 32 H.8.c.1. 34 H.8.c.5.

Where the King ſhall have Prerogative to have the wardſhip or primer ſeiſin of lands to which an Infant has right or title to enter, or not, b.7.7.b.2.60. ſee tit. Ward, b.3.60.

Where the King ſhall have Prerogative to have the wardſhip of the heir of him, who had an eſtate of inheritance joyntly with another who ſurvives. b.8.163. b.9.126. ſee tit. Ward, and Statutes. 32 H. 8.c.1.

Of the King, that the nief ſhall not marry without his licence. b.4. 55. ſee tit. Fine to the King.

Where the King ſhall have Prerogative in the advowſon of a Church to preſent to it, and where laps prejudices him not, nor is plenarty in a plea againſt him. b.3.78. b.5.2.p.14, 15. b.6.29. b.7.28. b.9.132. ſee tit. Statutes, Prerogative, c.8. and Plenarty, *Q. Impedit*, and Preſentment to a Church.

Where the King by his Prerogative ſhall preſent to a Church, by reaſon of a Biſhops temporalities ſeiſed into his hands, for creation, ceſſion, or &c. b.4.75. ſee tit. Temporalities.

Where, and when the King by his Prerogative may repeal and revoke his preſentment to a Church. b.6.29. ſee tit. Repeal.

Where, and when the King by his Prerogative ſhall have the ward and cuſtody of Ideots, and their lands and goods, and of which, and which not. b.4.56.126, 127. b 8.170. ſee tit. Ideots, and Statutes, Prerogative, c. 8,9.

Where the King has his prerogative in Tenures, and where he may give land to be held of another, and where he ought. b. 6. 6. ſee tit. Tenure, Reſervation, and Reviving.

Of the King in eſcheats, and where he ſhall have the eſcheat of lands held of other Lords, as well as of himſelf. b.7.20.b.10.112. ſee tit. Eſcheat, and Treaſon.

Where the King by his prerogative ſhall have year, day, and waſt of lands upon felony, and how, and from what time, b.4.124.b.8.170. ſee tit. Forfeiture. b.1.124.

Of the King, that no negligence or length of time ſhall prejudice him, or contr. b.4.23. 127. b.6.29. b.7.28. ſee tit. Laches, and Cuſtom.

Of the King, that no Franchiſe ſhall hold againſt him. b.1.18.33. b.5.2.p.91,92. ſee tit. Franchiſe, *Non omittas*, and Cuſtom.

Of the King, that no cuſtom or preſcription ſhall hold place againſt him, nor bind him. b.4. 23.30. ſee tit. Cuſtom.

Of the King, to have an action of Account againſt Executors. b.10.114. b.11.89, 90, 91. ſee tit. Account.

Of the King to diſtrain for rent ſee. b.5.2. p.56. ſee tit. Diſtreſs.

Of the King in obtaining his debts, and perſonal duties accrued to him by outlary, or other means, and how he ſhall come to them by his prerogative. b.3.12.b 52.88.90.92. b.7.19, 20,21,22.b.8.171.

Of the King, to have an action of debt upon ſimple contract, and the def. ſhall not have his law. b.4.95. ſee tit. Ley.

Of the King, to have the goods and chattels of his predeceſſor, and not the executors. b.9. 97.b.11.91. ſee tit. Chattels, Executors, and Heir.

Of the King, to enter for a condition broken without demand of the rent. b.4. 73. b. 5.2. p.56.

Of the King, that he cannot be diſſeiſed of his lands, nor outed out of poſſeſſion, and where contr. b.6. 29, 30. 49. 50. b.9. 26.28. ſee tit. Preſentation to a Church, Plenarty, and *Q. Impedit.*

Of the King, that he cannot be a diſſeiſor, nor impleaded by *Præcipe quod reddat*, but ſuit ſhall be to him by petition, and when this prerogative began. b.4.55. b.6.51. b.7.26.32. ſee tit. Petition, and King.

Where the King or Queen ſhall have no prerogative in their writs, but they ſhall abate in def. of form, falſe Latin, or &c. b.7.30,31. b.8.26.156. ſee tit. Writ, and Amendment.

Of the King and Queen, not to find pledges of proſecution. b.8.62. ſee tit. Pledges.

Of the King and Queen, not to be amerced upon non-ſuit, or &c. b.8.61. ſee tit. Amercement.

Of the King, to joyn in demurrer or iſſue, or to waive the demurrer and iſſue, and take new iſſue or demurrer. b.5.2.p.104.

Where the Kings prerogative is to take double or treble iſſue. b.1.18.32. b.9.99. ſee tit. Double plea, and Iſſues joyned.

Of the King, that no man ſhall be joyntenant, or tenant in common with him, but that he ſhall have the whole land, debt, or &c. b.5.2. p.56.b.19.129.

Of the King, to ſue in what Court he pleaſes. b.2.44. ſee tit. Juriſdiction. b.5.16. *Calvins* caſe.

Of the King, that his Grants, &c. ſhall be taken by intendment, and the beſt ſhall be taken for him. b.9.123. ſee tit. Tenure.

Of the King, that the eldeſt daughter ſhall inherit alone and be heir, notwithſtanding the half-blood. b.7.12. ſee tit. Diſcent.

Where the King ſhall not have prerogative in his age, but his nonage ſhall prejudice him. b.5.2.p.27. b.7.10.12. ſee tit. Age, Corporation, Enfant, and King.

Of the King, that a villein ſhall not be ſeiſed in his preſence, nor if he has continued in the Kings ancient demean a year and day. b.5.2. p. 107. ſee tit. Villenage.

Of the King, that he cannot hold of another, nor of himſelf. b.1.47. b.2.15. b.6.5.b.6. 9.129. ſee tit. Tenure.

Of the King in his free Chappels. b.5.15. twice. ſee Ordinary.

Of the King, to give land in fee upon condition not to alien. b.5.2. p.56. ſee tit. Condition.

Of the King, that aid ſhall be granted from him in aſſiſe. b. 8.50. ſee tit. Aid of the King.

Of the King, to make force in coins currant within the Realm by Proclamation. b.5.2. p. 114. ſee tit. Proclamation.

Of the King, to make Denizens. b.7.25. ſee tit. Denizen.

Of the King, in Whales and Sturgeons. b.7. 16. ſee tit. Statutes there Prerogative, c.36.

Of the King, in Swans and Cignets. b.7.16, 17. ſee tit. Swans.

Of the King, that his title ſhall be preferred where it concurs with the title of a common perſon. b.4.55.

Of the King, to have Eccleſiaſtical Juriſdiction, and grant Commiſſions in cauſes Eccleſiaſtical

Eccleſiaſtical, and exempt from the ordinary juriſdiction. b 5.8,9,10.14. ſee tit.Exemption.

Of the King, that his tenant cannot alien without licence, and where it holds, and he cannot alien,or contr. ſee tit.Licence.

Where the King ſhall have election of his tenant, upon alienation in fee or fee tail by his prerogative, and have the wardſhip of the heir of one, or the other. b.2.80.81. ſee tit.Ward.

Of the King, to have wreck of the Sea. ſee tit.Wreck.

Of the King, to have Treaſure found, and where he ſhall have it. ſee tit.Treaſure found.

Of intruſions upon his poſſeſſion, and what is intruſion,what not. ſee tit.Intruſion, and Entry congeable.

To have forfeiture of lands and goods, upon attainder of felony or treaſon. ſee tit. Forfeiture, Thing in action, and Treaſon.

To have a Corody. ſee tit.Corody.

Of the King, upon tenure by priority and poſteriority, he ſhall have the wardſhip notwithſtanding it. ſee tit.Ward, and Priority.

Of the King in diſtreſs, and in what place, and lands, he or his Officers may diſtrain. ſee tit.Diſtreſs.

Of the King to grant a thing in action, and what thing in action he may grant; what not. ſee tit.Grant of the King,and Thing in Action.

Of the King, that upon a feoffment,grant,or &c. things appendants, or &c. paſs not by the general words with the appurtenances,without ſpecial words. ſee tit.Grant of the King.

Of the King, that he cannot be ſeiſed to anothers uſe. ſee tit. Uſes.

Of the King,that by his ſeiſin and poſſeſſion, cuſtoms and franchiſes are gone and extinguiſhed. ſee tit. Extinguiſh.

Of the King, to ſeiſe the lands of Aliens, and Priors Aliens. ſee tit.Alien born.

Of the King, that no man may alien in mortmain without his licence. ſee tit. Licence.

Of the King, that an appropriation of a Church cannot be without his licence. ſee Appropriation.

Of the King, that he cannot grant land, or &c. before office found. ſee tit. Office before, &c.

Of the King, that he may make a Sheriff without election, and grant the office in fee. ſee tit. Election.

Of the King, to diſpenſe with a Statute, and grant a thing prohibited by Statute. ſee tit. Charter, and Grant of the King.

Of the King, not to give notice to the Patron upon the avoidance of a Church, &c. ſee Notice.

Of the King, that no man may enter upon his poſſeſſion without livery, petition, or &c. and where this prorogation ſhall take place, where not. ſee Entry congeable, Intruſion,and Livery.

Of the King, that he may grant a thing not in him at the time, but which poſſibly may accrue to him. ſee tit.Grant of the King.

Of the King, to grant exemptions, &c. and in what caſes ſuch grants are good. ſee tit. Exemption.

Of the King, not to be bound by Statutes, and which bind him, which not; and of which he ſhall take advantage, though not named in them. ſee tit.Statutes.

Where the Kings Patentee, or Grantee,ſhall have avail of his Prerogative, or not. b.2.44. b.4.55,56.73. b.5.2.p.56. ſee tit. Grant of the King, and Petition.

Where the Common law has the prerogative, and ſhall be preferred,where that and Statute law, or cuſtom concur. ſee tit. Common Law.

Where the Queen ſhall have prerogative, and in what caſes, as well as the King, or not. b.4.23. b.7.30,31. b.8.61. ſee Aid of the King.

Of the King and Queen, the King may give land unto the Queen, and ſhe diſpoſe of them without the King. b.4.23. b.9.97. b.6. *Epiſt.* there.

Of the Queen. ſee tit.Pledges, and Amercement, and above.

Of Peers of the Realm, and what they ſhall have, what not. ſee tit.Baron, and Baroneſs,and Name.

Preſcription, ſee Cuſtom.

What eſtate in lands, &c. he muſt have that will preſcribe, and who may preſcribe, who not. b.4.23.31,32 b.6.2.43.b.5.2.p.78.b.6.60. b.8.64.66. b.9 58.111.113.

Where inhabitants may preſcribe. b 4.32. b.6.60,61.

In what perſons, and of what eſtate preſcription may be alledged, in what not.b.5.2.p.72, 73.

Several forms of preſcriptions, and where they are general, and where ſpecial. b.2.43. b.4. 32.38.87 b.6.60.66.b 8.64.79.b.11.14,15.

Difference betwixt preſcription and cuſtom. b.4.32.b 6.60,61. b 7.16.18.

Where preſcription by reaſon of an office, is good,b.4.23 b 6.60,61.

Where preſcription by a *Que eſtate* is not good without ſhewing the deed of aſſignment, and where contr. b.2.45. b.4.36. b. 52. p.72. b.10.59. ſee tit. *Que eſtate.*

Where preſcription to have franchiſes or liberties, is good without allowance, or not; and what allowance is good and ſufficient. b.9. 29. ſee tit.Grant of the King, and Trial.

Where preſcription in the negative, or in the affirmative, with a negative is good, or not. b. 2.44.b 8.125. ſee tit. Tithes.

Where preſcription againſt the King is good, and cuſtom ſhall bind him, or not.b.1.18.33.50. b.3.32,33. b.4.23.30.b.5.2.2.p.92,93.109. b.9. 20.30.and below. ſee tit.Prerogative, Cuſtom, and Franchiſe.

Form of pleading preſcription, or cuſtom. b.2.43.45. b.4.32.38. b.5.2. p.78. b.6.60.65. b.8.64.78. b.11.14,15.

Againſt a Statute, and the form of pleading it. b.5,2.p.108.b.8.129.

Where preſcription in a thing, or to do, or have a thing, which of common right, or law of the Realm, he may have or do, is not good. b.4.37,38. b.9.75. b.11.85. ſee tit.Cuſtom.

Where preſcription to have cognizance of a plea, or hold pleas, is good, or not, b.8.133. b.9.29.

Annuity by preſcription, and barr in it, and what is good, what not. b.8.137, 138. ſee tit. Annuity.

To have a Warren, or Chaſe, and where good, or not.b.11.86. ſee tit.Forreſt.

To have a Fair, or Market, and where good. b.5.2.p.83. b.8.117. ſee tit.Fair,and Market.

Where, and to what intents and purpoſes a Corporation may be by preſcription, to what not. b.4.65.77.b.10.29,30.ſee tit.Corporation

To have common of paſture, or to uſe it,and what is good, what not.b.4.32.37. b 6.60. b.5. 2.p.78.b.8.79. ſee tit. Cuſtom, Common, and Append.

To have common of eſtovers, and where, and what is good, what not. b.4.32.87. b.5.2. p.17.24. b.10.112. ſee tit.Common,and Aſſiſe.

To have common of piſcary and where,and what is good.b.8.84.48.ſee tit.Aſſiſe,and Common.

To have common Turbary.b.8.48,50.ſee tit. Aſſiſe, and Common.

To have Leet, and view of Frank-pledge. b.8.38 b.11.14. ſee tit.Leet, and Amercement.

To have Hariot, and what ſhall be ſaid Hariot,Cuſtom,&c. ſee tit.Hariots.

Where a man cannot have chattels of felons and fugitives by preſcription. ſee tit.Franchiſe.

To have treaſure found.ſee tit.Treaſure found.

To have wreck of the Sea. ſee tit. Wreck of the Sea.

To have waiſe and eſtray. ſee tit.Waiſe, and Eſtray.

Where a ſanctuary cannot be claimed by preſcription. ſee tit.Sanctuary.

To have Tithes, and who may claim them by preſcription, who not. ſee Tithes.

To be diſcharged of Tithes,and where good or not. ſee tit.Tithes.

Of waſt without being impeached for it. ſee tit. Copy-hold.

Touching Copy-holds. ſee tit.Copy-holds.

To have Foldage of a ſtrangers beaſts,where, or not. b.8.129. ſee tit.Cuſtoms.

To have the cigners of Swans airing in his land, and what is good. ſee tit. Swans.

To have fees appurtenant to an office, and what is good, what not. ſee tit. Fees, and Extortion.

To make by-laws, and what is good, what not. ſee tit.By-laws.

To have Deodands not good. ſee tit.Corone, and Deodands.

To have goods of a felon of himſelf, not good. b.5.2.p.110 ſee tit.Corone,Forfeiture.

Where the heir ſhall not be charged in a writ of Annuity by preſcription. ſee tit. Annuity.

To amerce for not appearance, or in def. of ſuit to the Court. ſee tit.Amercement.

To diſtrain for amercements, and where good and needful. ſee tit. Amercements, Diſtreſs, and Leets.

To have a Bake-houſe only in a Town or place, and where good. b.8 125.

Of Monopolies,and where,and what is good, what not. ſee tit.Monopolies.

Where preſcriptions gone, loſt,and deſtroyed by the Kings grant, or by recovery and judgment. b.6.45. ſee tit.Annuity.

Where it ſhall be gone, and extinguiſhed by the change and alteration of the name of a thing, to which, or not. ſee tit. Cuſtom, Extinguiſhment, Corporation.

Where it is extinguiſhed, gone, and loſt, by the Kings ſeiſin. ſee tit.Extinguiſhment.

Where preſcription ſhall be traverſed, and iſſue joyned upon it. b.11.10.13. ſee tit. Iſſues joyned.

What is good evidence upon iſſue taken upon preſcription. b.11.10. 13, 14. ſee tit. Evidence.

Preſentation to a Church.

Where the King ſhall preſent to a Church for laps, and where he ſhall loſe the preſentation by his negligence. b.5.14,15. b.6.29. b.7. 28. ſee tit.Prerogative.

Where the eldeſt daughter ſhall have the firſt preſentment to a Church, and where he that has her eſtate, as her husband tenant by the curteſie, or &c. b.3.22.

Where preſentment to a Church ſhall be by turns. b.3.22.b.5.2.p.102.

What preſentment to a Church, and in what perſon alledged, is ſufficient ſeiſin to maintain a *Q.Impedit*, what not. b.5.2.p.57.98.b.6.57. ſee tit. *Q.Impedit.*

Where preſentment to a Church by the King, leſſee for years, for life, tenant in dower or courteſie, makes no title to him in the reverſion.ſee b.5.2.p.57.98.b.6.57. ſee tit. *Q.Imp.*

Where the King ſhall preſent to a Church, becauſe the temporalties of a Biſhop are in his hands. b.4.75. ſee tit. Prerogative.

Where the Count in a *Q.Impedit*, is not double by alledging two preſentations to a Church. b.5.2.p.98. ſee tit.Darrein preſentment, and *Q. Impedit.*

Where the Biſhops collation puts not a man out of poſſeſſion of his Church.b.6.29,30.50. ſee tit. *Q.Impedit.*

Where preſentation by the King puts not a man out of poſſeſſion of a Church.b.6.51.

Where uſurpation and preſentment to a Church puts an Infant out of poſſeſſion. b 6. 49,50.b.11.33. ſee tit.Enfant,and *Q.Impedit.*

Where uſurpation and preſentment to a Church upon tenant in tail, leſſee for years, or &c. puts not him in reverſion out of poſſeſſion of a Church, b.6.50,51. ſee tit. *Q.Impedit*, and Statutes. W.2 c.5.

Where preſentment to a Church in time of vacation of the ſee of a Biſhop,&c puts not the Biſhop, or &c.out of poſſeſſion. b.6.50. ſee tit *Q.Imp.*

Where.

Where Uſurpation upon the King, and preſentment to a Church puts him out of poſſeſſion, or not. b.6.29,30.49. b.7.26.28. ſee tit. Diſſeiſin, and Prerogative.

Where uſurpation or preſentment to a Church in time of war, puts not a man out of poſſeſſion of a Church. b.1.99.b.2.93.b.6.30.

Where the King ſhall have preſentment to a Church becauſe of alienation in mortmain.b.7. 26. ſee tit.Mortmain.

Where preſentment to a Church puts not out of poſſeſſion of the Church, but is void becauſe by colluſion. b.3.78. ſee tit. Colluſion in the like.

Where, and what are ſufficient cauſes for a Biſhop to refuſe the preſentee to a Church. ſee b.4.17.b.5.28.2.p.57,58.102. ſee tit.*Q.Impedit.*

Where a man ſhall preſent to a Church by grant of the next advowſon, and how, &c. ſee tit.Expoſition, and *Q.Impedit.*

Where the Brother of the half-blood ſhall preſent to a Church, and have the advowſon of it, and not the ſiſter of the whole blood. ſee tit. Diſcent.

To whom the advowſon of a Vicarage belongs, and who ſhall preſent to it. ſee tit. Append. and *Q.Impedit.*

Where a man ſhall not preſent to a Church, till he has recontinued the manner, to which, &c. ſee tit. Remitter.

Where a Biſhop ſhall not preſent or collate to a Church by laps, unleſs he gives notice to the Patron, and where he muſt give notice to him, where not. ſee tit.Notice.

Where a Patron ſhall preſent to a Church, and have the writ to the Biſhop, after ſix months, or not. ſee tit.Writ to the Biſhop, and *Q.Impedit.*

Where preſentation to a Church by Prior and Covent; &c. gains the Patronage, and puts the Patron out of poſſeſſion of the Church, or not. ſee tit.*Q.Impedit*, and Appropriation.

Where the King ſhall preſent to a Church for the alien born. ſee tit.*Q.Impedit.*

Preſentment in Courts.

In Court-Leets, and what things are inquirable and preſentable in them, or not. b.5.2. p 73.104.112. b.9.113,113. ſee tit. Leets.

What things are preſentable, and to be inquired of in the Sheriffs turn, what not.b.6.20. ſee tit.Turn of the Sheriff.

Of preſentments,or indictments of treſpaſſes, and other perſonal miſdeeds, and bar in them. b 9.113.118. ſee tit. Indictments.

To make or repair waies, ſcour ditches, or &c. and traverſe to them, or not.b.8.46,47.b.9. 112,113. and Indictments.

Preſence, and Abſence.

Where a gift to a man abſent, at the time of a gift, is good. b.3.27. ſee Gift, and Property.

Where feoffment to many, and livery to one who is preſent,all ſhall take though abſent.b. 3. 26.29.b.5.2.94. ſee tit. Feoffments.

Where feoffment, and livery and ſeiſin are void, by preſence of others upon the land, at the time of the livery and ſeiſin,or not.b.3.23. 32,33. b.5.2.p.113,124.b.6 96. ſee tit. Feoffments.

Where a man is principal in caſe of homicide,and death of a man by his preſence, and where acceſſory by being abſent. b.4.42.44,45, 46.b.9.67.b.11.5. ſee tit.Corone.

Where a villen is infranchiſed by being in the Kings preſence. b.5.2. p.107. ſee tit. Villenage.

Where power and authority of a Court is ſuſpended, and ceaſes by preſence of another of more high power and juriſdiction. b.9. 118. ſee tit.Courts, and Commiſſioners.

Where the Court in abſence of the Ordinary, may allow or diſallow Clergy. b. 5.26,27.

Where protection ſhall be allowed to a man abſent. ſee Protection.

Preſidents.

Where the Courts and Judges of the King, ought to be guided by Preſidents, and muſt direct their Judgments by, and according to them, or not. b.2 16,17.61. b.4.32,33.41.53, 54.57.74.93,94. b.5 32.b.2.p.35.39.68.85.41, 42.44.73.122,123. b.1.42. b.6.6 62.75.twice. b.7.30,31.33,34. 11.23.24. b.8.18,19.82.129. b.9. 11.34.74.118. b 10.70.75. b.11.35.90.b.3, 12.

Primer ſeiſin. ſee Prerogative.

Principal and acceſſory.

Where a Woman may have and maintain appeal of the death of her husband againſt the principal only, or againſt the principal and acceſſory together.b.4.42,43.47,48.b.7.13.ſee tit. Appeals.

Who ſhall be ſaid principal in the death of a man, or other felonies, who not. b.4.42.46. b.9.67.b.11.5, ſee tit.Corone.

Who ſhall be ſaid acceſſory before, or at the time,&c. who not. b.4.44,45. ſee tit.Corone.

Where, and when the acceſſory ſhall be arraigned, and put to anſwer, and when not. b4. 43,44.46,47. b.9.68.117,118,119. ſee tit. Corone.

Where acquittal, or other diſcharge of the principal, is a diſcharge of the acceſſory. b.4. 43,44. ſee tit.Corone.

Where of office the Court ſhall try the plea of the acceſſory before the plea of the principal. b 9. 119. ſee tit. Office of Court, and Corone.

Priority, and Poſteriority.

Where the Lord, of whom the tenant holds by Priority, ſhall have the wardſhip of his heir, and what is Priority. b.5.2. p.56. ſee Ward.

Where the King ſhall have prerogative to have the wardſhip of his tenant, who holds of him by poſteriority,and he ſhall have the priority by prerogative. b.5.2.p.56. ſee tit. Ward, and Prerogative.

Where the Kings grantee ſhall have the Kings Prerogative in priority and poſteriority. ſee tit.Prerogative.

Priviledge, ſee Corpus cum cauſa.

For the Kings debtors to ſue by *Quo minus.* ſee tit. *Quo minus.*

By *Corpus cum cauſa.* ſee tit. *Corpus cum cauſa.*

Privies, Privities.

How many privies and privities there are, and the dependants upon them. b.3.13.b.4.123, 124.b.5.p.17.b.8.42.b.8.17,18.106.

Of privies in blood, and the whole matter concerning it.

Of privies in eſtate as the Aſſignee,and how they ſhall have an action of Debt, and debt ſhall be maintained againſt them. ſee tit. Aſſignee, Arrearages, and Extinguiſhment.

Where tenant in tail, after poſſibility of iſſue extinct, ſhall not attorn, but his Aſſignee ſhall, becauſe privy in eſtate. ſee Tail after, &c.

Privies, and privity for attornment, and where needed, and what is ſufficient.

Where action of Waſt lies for privy in eſtate by aſſignment, and that without attornment. ſee tit.Waſt, and Attornment.

Of privies in law by repreſentation,and who are ſaid privies in law, and what actions they ſhall have, and what ſhall be maintained againſt them, and what not. ſee tit. Aſſignee and Executors, Adminiſtrators, and Ordinary.

Of privies in tenure, as the Lord by eſcheat, and where he ſhall not take avail of the nonage or Ideocy of his tenant, or other weakneſs. ſee tit.Enfant,Entry congeable, and Ideocy.

Where, and when privity ſhall be betwixt the Lord and his tenant, to make avowry upon him. ſee tit.Avowry.

Where waſt lies againſt tenant in dower, or courteſie, becauſe of privity. ſee tit. Waſt.

Where a releaſe is void for def. of privity, &c. ſee tit. Releaſe.

Where ſurrender is void for default of privity,becauſe of a mean eſtate. ſee Surrender.

Of privity in feoffees to uſes,and where a uſe ſhall be changed and altered, for default of privity. ſee tit.Uſes,and *Subpœna.*

Where a writ of Covenant lies,and is maintainable, by or againſt an Aſſignee, becauſe privy in eſtate, or no. ſee tit. Aſſignee, and Covenant.

Where every man is privy to an Act of Parliament, and ought to take notice of it. ſee tit. Parliament, and Notice.

Where entry of one coparcenor avails another, and veſts the eſtate in her, by reaſon of privity,&c. ſee tit.Entry congeable.

Probate of Teſtaments.

Where probate of Teſtament is material, and before what Ordinary to be proved, and where it ſhall be proved by another than the Ordinary. ſee tit Teſtament.

Where an Executors releaſe before probate of the Teſtament is good, and bars,&c. or not. ſee tit.Releaſes.

Where probate of Teſtament is not eſtoppel, but the party may traverſe it, and how it ſhall be tried, ſee tit. Teſtament.

Procedendo.

Where *Procedendo* ſhall be granted after aid prayed of the King,&c. and where the Judges will not proceed,unleſs it be directed to them. b.8.23.b.9.16. ſee tit. Aid of the King.

What the Juſtices may do upon *Procedendo* in a plea, and how long they may proceed upon it. b.4.57.

Where, after *Procedendo* in the plea, the party muſt ſue a *Procedendo* to judgment, or not; but they will proceed to judgment without it. b.4.57.b.8.23.

Where, and when it ſhall be granted upon a plea removed by *Corpus cum cauſa.*b.4 18.b.5.2. p.63.b.11.99. ſee tit.*Corpus cum cauſa.*

Proces.

What proceſs ſhall iſſue in an action of the Caſe. b.10.72. ſee tit. Action of the Caſe. ſee Stat.19 H.7.c.9.

What proces iſſues in a writ of Account. b.3.12. ſee tit.Stat.Weſt.2.c.11.

What proces iſſues in debt. b.3.12. b.5.2. p.88. ſee tit.Statutes, 25 E.3.c.17.

What proces iſſues in raviſhment of ward. b.9.72. ſee tit. Statutes, Merton.c.6.

What proces iſſues in aſſiſe of Novel diſſeiſin with force. b.5.2.p.88.

What proces iſſues in a writ of Rediſſeiſin, or *Poſt* diſſeiſin. b.5.2.p.88. ſee tit. Stat. Merton, c.3.

What proces iſſues in a writ of Treſpaſs. b.3.12.b.5.2.p.8.b.10.172.

Where one proces or other may be had at election of the party, and where proces and action at the Common law, or given by Statutes. b.5.2 p.59. b.9.72.74. b.11.64. ſee tit. Election.

What proces iſſues, or is to be awarded upon office, or preſentment traverſed, what and how, when they are found. b.1.162. b.5.2. p.4.92.

Of outlary, and in what actions,and againſt whom it lies, in what, and againſt whom not. ſee tit. Exigent.

Where to be awarded with a *Non omittas.* ſee tit.*Non omittas.*

Where a man may appear freely without proces, and anſwer. ſee tit. Reſpond. Joyning in Aid, and Voucher.

Of *Venire facias* againſt the inqueſts, &c. ſee tit. Enqueſt, and *Venire facias.*

What proces ſhall iſſue againſt an Earl, Baron, Duke, Peer of the Parliament, or Knight. ſee tit.Exigent,Contempt,Execution, and Parliament.

Where,

Where, and when proces ſhall be directed to the Coroners. ſee tit. Coroners.

Of proces of executions. ſee tit. Executions.

Of proces awarded upon ſuggeſtion. ſee tit. Suggeſtion.

Where the writ to the Biſhop, or other proces, ſhall be directed to the Biſhop of the Dioceſs, or not; but to the Metropolitan, or Vicar general. ſee tit. Writ to the Biſhop and Ordinary.

Where proces ſhall be awarded to cauſe an infant to be brought into the Court, and viewed. ſee tit. Age, Enfant, and Iſſue joyned.

Where a record ſhall be removed, and certified to another Court without writ or proces, by the hands of the Juſtice. ſee tit. Records.

Where proces ſhall ceaſe againſt the iſſue, upon Iſſue joyned for part, or one def. till the demurrer diſcuſſed for the other part, or def. ſee tit. Demurrer.

Difference betwixt the common Bench and Exchequer in awarding proces. ſee tit. Courts.

Where no error to grant proces, where it is not grantable. ſee tit. Error.

Where, and what proces ſhall be awarded for the Recogniſor againſt the Recogniſee, to have his land again. ſee tit. Recogniſance, Extent, and Entry congeable.

Where proces ſhall be awarded againſt mainpernors. ſee tit. Execution.

Where the Court of office ſhall award proces, to enquire of points omitted in the verdict. ſee tit. Office of Court.

What proces ſhall ceaſe againſt the acceſſory till the principal be convict and attainted. ſee tit. Corone.

Where the Juſtices will ſurceaſe to make proces, directed to them by the King, or not. ſee tit. Seals and *Superſedeas*, Office of the Court, and Judgment, and Statutes. 2 E. 3. 20 E. 3. there.

Where the trial ſhall be by veyors and pernors, and proces awarded againſt them to come in and make trial, or not. ſee tit. Trial.

Of amendment of proces in def. of Clerks, and where. ſee tit. Amendment.

Of diſcontinuance of proces. ſee tit. Diſcontinuance of proces.

Of proces of *Superſedeas*. ſee tit. *Superſedeas*.

Proclamation.

Where Proclamation is to be made upon Statutes of recuſants, or not. b. 11. 62, 63. 65. b. 10. 53, 54.

Of coins, and where they are currant upon the Kings Proclamation only. b. 5. 2. p. 114. ſee tit. Prerogative, and Coins.

Upon waif and eſtray, how made. ſee tit. Waif, and Eſtray.

Upon iſſues, how, and in what manner made. ſee tit. Fines of lands, continual claim, and Stat. 4 H. 7. c. 24.

Where made upon the Statute of Bankrupts. ſee tit. Commiſſioners.

Where the Kings Proclamation binds as law, and where by his Proclamation he may repeal a Statute, or not. ſee tit. Coins, and Prerogative.

Profeſſion.

Profeſſion, and the parts of which it conſiſts. b. 2. 48.

Where land upon profeſſion, and entring into Religion, ſhall diſcend to the next of blood as heir, and the goods come to his executors, as if he were naturally dead. b. 2. 48. ſee tit. Diſcent, and Heir, and Mordanceſtor.

Where profeſſion, or time of profeſſion, ſhall be tried by the country, where by the Ordinary. b. 4. 71. b. 9. 31. ſee tit. Trial, and Deprivation.

Prohibition.

To whom Prohibition ſhall be directed, and where as well to the Judge of the Court, as the party. b. 2. 38. 43. 45. b. 4. 124.

Where prohibition lies upon a ſuit in the Court-chriſtian for defamation and ſlander, or not. b. 4. 17. 20. b. 5. 2. p. 51. b. 6. 23. ſee tit. Action of the caſe.

Where prohibition lies upon a ſuit in the Court-chriſtian for a legacy, or for ſuing execution upon a deviſe. b. 5. 2. p. 11. 73. b. 6. 23. ſee tit. Deviſe, and Conſultation.

Where prohibition ſhall be granted upon ſuit in Court-chriſtian by the parſon of the Church, or for dilapidations, &c. b. 11. 49. ſee tit. Stat. 13. c. 10.

Where prohibition lies, and ſhall be granted upon ſuit in Court-chriſtian for breach of faith, or not. b. 5. 11. 23.

Upon promiſe and faith not kept, or in other caſes where is no remedy at the common law. b. 5. 22.

Where prohibition ſhall not be granted upon ſuit in Court-chriſtian, for monies to be paid upon redemption of penance. b. 4. 20. b. 5. 9. 14. ſee tit. Conſultation.

Out of Court prohibition is grantable, and where out of the Common pleas. b. 5. 2. p. 48. 51.

Where prohibition ſhall be granted before any ſuit begun in Court-chriſtian, and attachment upon it, though the ſuit is never begun. b. 5. 2. p. 48.

Where prohibition lies upon ſuit in Court-chriſtian, part of which is ſpiritual, and parcel temporal, or not. b. 4. 20. ſee tit. Attachment upon Prohibition, and Conſultation.

Where prohibition ſhall be granted for part or parcel, or not. b. 6. 23. ſee tit. Conſultation.

Where prohibition ſhall be granted upon a ſuit in the Court of requeſts. b. 4. 123. b. 5. 2. p. 73.

Where prohibition lies upon a ſuit in Court-chriſtian for divorce, or not. b. 7. 44, 45. ſee tit. Divorce, and Conſultation.

Where prohibition ſhall be granted upon a ſuit in Court-chriſtian, or &c. for the portion of Orphans, &c. b. 5. 2. p. 73. ſee tit. Cuſtom, Ward, and Orphans.

Where prohibition lies upon a ſuit in Court-chriſtian baſtardy. b. 7. 44, 45. ſee tit. Baſtardy, and Conſultation.

Where prohibition ſhall be granted upon ſuit in Court-chriſtian for a tax aſſeſſed to the repair of a Church, or not. b. 5. 9. 2. p. 67, 68. ſee tit. Conſultation.

Where prohibition lies, and ſhall be maintained upon ſuit in Court-chriſtian for tithes, or not. b. 2. 38. 43. 45, 46, 47, 48. b. 4. 75. b. 5. 9. 14. b. 6. 29. b. 7. 44. b. 11. 8, 9. 11. 16. ſee tit. Conſultation.

Where prohibition lies, and ſhall be granted upon ſuit in Court-chriſtian for laying violent hands upon a Prieſt. b. 4. 20. b. 5. 13, 14. 2. p. 51. ſee tit. Attachment upon prohibition. b. 7. 44.

Upon not allowing a plea in the Spirit. Court, where it ought to be allowed. b. 5. 2. p. 65, 66, 67, 68.

Where prohibition lies, and ſhall be granted upon ſuit in Court-chriſtian for monies, or other things concerning matrimony, or not. ſee Conſultation.

Where prohibition ſhall be granted upon ſuit in Court-chriſtian, or not. ſee tit. Appeals.

Where prohibition ſhall not be granted upon ſuit in Court-chriſtian for a mortuary. ſee tit. Conſultation.

Where prohibition lies, and ſhall be granted upon ſuit in Court-chriſtian for tithes of great trees. ſee tit. Attachment upon Prohibiton.

Where Prohibition lies, and ſhall be granted upon ſuit in Court-chriſtian for a deviſe, or &c where iſſue joyned there is upon a thing temporal, ſee tit. *Præmunire*.

Of prohibition of waſt at the common law. ſee tit. Waſt.

Of prohibition of *Ne injuſte vexes*. ſee tit. *Ne injuſte vexes*.

Of prohibition by *Superſedeas*. ſee tit. *Superſedeas*.

Where Statutes are in themſelves prohibitions, and where action may be upon a Statute without proces of prohibition. ſee tit. Statutes in the end.

Promiſe.

Where action of the caſe lies upon promiſe and agreement to do a thing, which he miſdoes, or does not. b. 4. 86. b. 5. 2. p. 72, 73. b. 9. 87. to 90. 112. b. 10. 77. ſee tit. Action of the caſe.

Where Action of the caſe lies upon *aſſumpſit* againſt the party himſelf, or his executors, and what is good and ſufficient conſideration, what not. ſee tit. Action of the caſe, and Executors.

Where prohibition ſhall be granted upon promiſe of monies in marriage, and ſuit in Court-chriſtian for it. ſee tit. Prohibition, and Conſultation.

Proof.

How proof ſhall be made upon a condition of an obligation, to make proof, &c. ſee tit. Condition, and Witneſſes.

Where trial in caſes ſhall be by proofs and witneſſes. ſee tit. Witneſſes.

Property.

Where the def. in replevy, upon property claimed and found againſt him, ſhall fine to the King. b. 8. 60.

In whom ſhall the property of trees be upon a leaſe abſolute, or with exception of the wood, or to the leſſor or leſſee, and where to the leſſee, and where to the diſſeiſor or diſſeiſee. b. 4. 62, 63. b. 5. 2. p. 76, 77. b. 11. 48. 81. 51.

Where property of goods given to a man abſent, veſts in him till he diſagrees. b. 3. 27. ſee tit. Gift, Agreement, and Preſence.

Where property of goods is changed by bargain and ſale in a Market open, or out of it. or not. b. 3. 78. 83. b. 5. 2. p. 83. ſee tit. Contract.

Where property of goods ſtoln is loſt by def. of freſh ſuit. b. 5. 2. p. 109. 111. b. 6. 80. ſee tit. Appeals, and Freſh ſuit.

Where, and when property of goods waived and eſtrayed, is changed. b. 5. 2. p. 109. b. 7. 16. ſee Waif, and Eſtray.

VVhere, and when the property of goods waived and eſtrayed, ſhall be adjudged in him who has the franchiſe to have them, and where without claim, or before ſeiſure. b. 5. 2. p. 107.

VVhere property is in birds and beaſts, which are of ſavage nature, and when, and where not. b. 5. 2. p. 104. b. 16, 17. ſee tit. *Occupant*.

VVhere, and when property of the goods of the villein ſhall be adjudged in the Lord. ſee tit. Continual claim.

VVhere, and when property of goods wrecked, ſhall be in the King by his prerogative, or in another Lord, who hath the franchiſe to have them. ſee tit. Wreck.

VVhere property of embleaments ſhall be changed, and gained from one to another, as from the diſſeiſor to the diſſeiſee, or &c. ſee tit. Embleaments.

VVhere property upon a grant, gift, or &c. in the disjunctive, ſhall be veſted in the donee, grantee, &c. before election, or not. ſee tit. Election, Gift, Demand, and Plaints.

Protection.

Form of protections (*Quia moratur, vel proſecturus*,) and what words are neceſſary to be in them. b. 7. 8, 9. 21. 23.

Quia moratur, and what ſhall be allowed, what not. b. 7. 8, 9.

Quia proſecturus, and what ſhall be allowed, what not. b. 7. 8, 9.

In *Quare Impedit*, not to be allowed. b. 4. 35.

In aſſiſe of Novel diſſeiſin lies not, nor to be allowed. b. 4. 35. b. 8. 56.

Under which of the Kings ſeals good and ſufficient, under which not. b. 2. 17. ſee tit. Seals.

How long protection ſhall endure. b. 5. 2. p 107.

Where protection ſhall be amended, or not. ſee tit. Amendment.

Where protection ſhall be allowed in a voyage royal, not otherwiſe allowable, and what is a voyage royal. b. 7. 8, 9.

Where protection becauſe he is abroad, or to paſs over, &c. is not to be allowed for him that is abſent, unleſs he be out of the Realm. b. 7. 8, 9. 21.

Where protection directed to one Court will not ſerve, nor will be allowed in another. b. 8. 68.

Proteſtation.

Of Proteſtations in pleadings, and what ſhall be taken for a proteſtation, where two or three matters are to be pleaded to ſave the advantage of concluſion againſt the party himſelf, or ſtrangers after. b. 1. 17, 18. 27. 33. 161. b. 2. 7. b. 3. 52, 53. b. 4. 6.

Where proteſtation ſhall be taken, and entred to ſave advantage of law. b. 1. 17, 18. 27. 33.

Where proteſtation ſhall be taken, and entred to ſave advantage, and prevent concluſion in the quantity of the land. b. 1. 27.

Where proteſtation ſhall be taken, and entred to ſave advantage, and prevent concluſion in the tenure of the land. b. 1. 161. b. 4. 6.

Where proteſtation ſhall be taken and entred to ſave advantage, and prevent concluſion in the manner of the conveyance. b. 1. 161. b. 2. 7. b. 3. 53.

The order of proteſtation to be made, and where it ſhall be after defence made, or not. b. 1. 17, 18. 33. 37. 161. b. 2. 7. b. 3. 53. b. 4. 6.

Where proteſtation ſhall be taken and entred, to ſave a man the advantages of, &c. upon attornment in *Quid juris clamat*, or *Per quæ ſervitia*, otherwiſe he ſhall not be compelled to attorn. b. 6. 68. ſee tit. Attornment, and *Quid juris clamat*.

Where proteſtation ſhall be taken and entred, to ſave a man advantages of, &c. upon entry into warranty. b. 2. 73, 74. ſee tit. Voucher.

Purgation.

Where, and what Clerk ſhall make purgation, what not. b. 5. 2. p. 50. 110. b. 6. 68. b. 11. 29, 30. ſee tit. Clergy.

Where a Clerk ſhall go quit without making his juriſdiction. b. 5. 2. p. 50. 110. b. 6. 68. ſee tit. Clergy, and Statutes. 18 *El.* c. 7.

Purveyors, ſee tit. Officers.

Quantity.

Where the plaintiff ſhall recover more damages than he counted. b. 5. 2. p. 115. b. 10. 116, ſee tit. Damages.

Where the Juſtices may abridge or enlarge damages, or not. b. 1. 10. b. 2. 31. b. 3. 71. b. 4. 67. 104. ſee tit. Damages.

Where a man ſhall fail of his record for variance in the quantity of the trees, or not. b. 5. 2. p. 46. ſee tit. Failing of a record.

Where in a writ of Waſt the plaintiff ſhall recover more than the place waſted, and what ſhall be ſaid the place waſted. b. 11. 50. ſee tit. Waſt.

Where apportionment ſhall be of the tenure for the particle upon the Statute *Quia emptores terrarum*, according to the quantity, not quality. ſee Stat. 18 E. 1. *Quia emptores terrarum*.

Where the quantity is material in the recital in the Kings grant, to make his grant good, or not. ſee tit. Grant of the King.

Where quantity is material in a common perſons grant, to make the grant good, or not. ſee tit. Grant.

Where proteſtation ſhall be taken in pleading, to ſave the advantage of the concluſion in the quantity of the ſervices, or land. b. 9. 35, 36. ſee tit. Proteſtation.

Form of pleading in avowry, when he pleads in abatement of avowry for variance in quantity of land, or ſervices. b. 9. 35, 36. ſee tit. Avowry.

Where uſes of land ſhall be declared, and directed by an Indenture bearing date before, though the aſſurance ſubſequent vary in the quantity of the land, time, or perſons. ſee tit. Uſes.

Where quantity of Jurors is material upon the Statute 35 H. 8. c. 6. *De circumſtantib.* ſee tit. Statutes, and that Statute there.

Quare Impedit.

Form of the writ of *Quare Impedit*, and what matter is ſufficient to abate it, what not. b. 5. 2. p. 97, 98. 102. b. 6. 49. b. 7. 25, 26, 27. 31. b. 4. 75. ſee below. b. 6. 66.

Of the moity of an advowſon of a Church, or advowſon of a moity, and where one form of the writ lies, where another. b. 4. 75. b. 5. 2. p. 102. b. 10. 136. ſee tit. Advowſon.

Of an Abby or Priory, and the form of the writ. b. 3. 74. b. 6. 65, 66.

Where husband and wife ſhall joyn in a *Q. Impedit*. b. 5. 2. p. 57. 97. ſee tit. Joying in Action.

Where *Q. Impedit* lies againſt the Incumbent alone. b. 7. 25, 26.

Where it is a good plea to abate the *Q. Impedit*, to ſay no ſuch Church, or two Churches, and none without addition. b. 6. 65, 66. ſee tit. Writ, and maint. of writ.

Where the *Q. Impedit* ſhall be maintained by Known by the one name of other againſt miſnaming pleaded. b. 6. 66. ſee tit. Miſnaming, and Reputation.

Count in *Q. Impedit*, and where not good without alledging preſentment, and in whom it ſhall be ſufficient, in whom not. b. 5. 2. p. 57. twice, and 98. b. 3. 78. b. 4. 9. b. 6. 57.

Where the Count in *Q. Impedit* ſhall not be double by alledging two preſentments. b. 5. 2. p. 98. ſee tit. Count.

Count in *Q. Impedit*, and where it ſhall be *De medietate advocat.* and where *De advocat. medietatis.* b. 4. 75. b. 5. 2. p. 102. ſee tit. Advowſon.

Count in *Q. Impedit* by the King, where he claims by an alien born. b. 7. 19. ſee tit. Alien born.

Count in *Q. Impedit* upon the voidance of a Church by taking two Benefices. b. 4. 89. 117. ſee tit. Pluralities.

Count in *Q. Impedit* by the King, where he claims the preſentation to a Church by reaſon of the temporalties of a Biſhop come into his hands. b. 4. 75. ſee tit. Preſentment to a Church, Prerogative, and Temporalties.

Count in *Q. Impedit* by the King, where he claims the preſentment by alienation of his tenant in mortmain. b. 7. 26. ſee tit. Preſentment to a Church, and Mortmain.

Where Induction is material for a *Q. Impedit*, and where it muſt be alledged in the Count, or not; but admiſſion and inſtitution will be ſufficient. b. 4. 74, 75. 79. b. 6. 29. 49. b. 7. 26, 28. b. 9. 132. twice.

Bar againſt the King in *Q. Impedit*, and what is good, what not. b. 6. 29, 49. b. 7. 19. 27. b. 4. 79. 117.

Bar in *Q. Impedit* by accord, or not. b. 6. 43. ſee tit. Accord.

Bar in *Q. Impedit* by releaſe, and where releaſe by one plaintiff bars not another. b. 5. 2. p. 79. 98.

Bar in *Q. Impedit* upon grant of the next advowſon by lapſe, or &c. as well againſt the King as a common perſon. b. 7. 28. b. 8. 144.

Where plenarty by ſix months bars in *Q. Impedit*, and what ſhall be ſaid plenarty, what not. b. 4. 76. b. 6. 29, 30. 49, 50. ſee Writ to the Biſhop, and above of Induction.

Form of pleading plenarty. b. 7. 26. ſee above in Action.

Where, and what pleas in bar the Incumbent ſhall have in *Quare Impedit*. b. 6. 48. b. 7. 26. b. 10. 54. ſee tit. Incumbent, and Statutes, 25 E. 3. c. 7. b. 4. 117.

Pleas for the Biſhop, or in bar, or as Ordinary, and claiming nothing but as Ordinary, and what is good, and the ſequel and conſequence of it. b. 4. 17. 117. b. 5. 2. p. 57, 58. b. 6. 49, 50. 61, 62. b. 7. 25, 26. b. 9. 49. b. 10. 54. ſee tit. Notice, and writ to the Biſhop.

Bar in *Q. Impedit* againſt a Biſhop for refuſal of a Clerk, &c. and for what cauſes he may refuſe, and the conſequence of it. b. 4. 17. b. 5. 2. p. 57, 58. b. 8. 4. b. 10. 54. ſee Notice.

Bar in *Q. Impedit* upon nonſuit, and where it is peremptory. b. 7. 27. ſee Writ to the Biſhop.

Bar by uſurpation and preſentment, which puts out of poſſeſ. of the Church, or not. b. 1. 99. b. 2. 93. b. 3. 78. b. 6. 29, 30. 49, 50. b. 7. 28. b. 11. 33. ſee below, and Stat. W. c. 5.

Where uſurpation and preſentment by the King, puts a man out of poſſeſſion of his Church, or not. b. 6. 51. ſee tit. Petition.

Where uſurpation and preſentment upon the King, puts him out of the poſſeſſion of a Church, or not. b. 6. 29, 30. twice, and 49. b. 7. 26. 28. ſee tit. Prerogative, and Diſſeiſin.

Where uſurpation and preſent. upon an infant, puts him out of poſſeſſion, and bars him in a *Q. Impedit*, b. 6. 49, 50. b. 11. 33. ſee tit. Enfant, and Stat. W. 2. c. 5.

Where uſurpation and preſentment upon a woman Covert, puts her out of poſſeſſion, and bars her in a *Q. Impedit*, or not. b. 6. 49, 50.

Where uſurpation and preſentment upon tenant in tail, leſſee for years, or &c. putteth not him in reverſion out of poſſeſſion of a Church. b. 6. 50, 52. ſee tit. Stat. W. 2. c. 5. there.

Where uſurpation and preſent. to a Church in time of vacation, puts not the patron out of poſſeſſion. b. 6. 50.

Where uſurpation and preſent. to a Church in time of war, puts not a man out of poſſeſſion, &c. b. 1. 99. b. 2. 93. b. 6. 30.

Where collation of the Biſhop Ordinary, puts not out of poſſeſſion of a Church, nor gains the Patronage. b. 6. 29, 30, 50. ſee tit. Writ to the Biſhop, and Notice.

Where preſentment to a Church gains not the Patronage, nor puts out of poſſeſſion, becauſe obtained by colluſion. B. 3. 78. ſee tit. Preſent. to a Church.

Of a Vicarage, and to whom the advowſon of it belongs, or to the Parſon, or to the Patron. b. 8. 144. ſee tit. Append. and Preſent. to a Church.

Bar in *Q. Impedit* by diſpenſat. where the plaint. counts and entitles himſelf becauſe of plurality. b. 4. 75, 76. 79. 80. 117, 118. ſee tit. Diſpenſat.

Where, and when a Church ſhall be ſaid void in deed, and when in law, and by what act and means, voidance of a Church ſhall be b. 4. 75, 76. 79. 90. 117, 118. b. 6. 21. 29. 40. 61. ſee tit. Deprivat. & Plural.

What iſſue ſhall be good in *Q. Impedit*, what not, and what matter ſhall be traverſed and traverſable, what not. b. 5. 2. p. 57, 58. b. 9. 9, 10. b. 10. 54.

Where iſſue ſhall be taken and joyned upon appendance of a Church in *Q. Impedit*. b. 9. 9, 10. b. 10. 54.

What points and parts are inquirable in *Q. Impedit*, and of which the Jury is bound to inquire. b. 5. 2. p. 58, 59. b. 6. 48, 49. 51.

What damages are recoverable in *Q. Impedit*, and whether the King ſhall recover damages, b. 5. 2. 58, 59. b. 6. 49. 51. ſee tit. Damages.

Judgment in *Q. Impedit*, and where ſeveral judgments are in it. b. 5. 2. p. 58. b. 6. 49. ſee tit. Judgment.

Where the Biſhop Ordinary ought to give the Patron notice of the avoidance of the Church, &c. or not. ſee tit. Notice.

Where, and upon what plea of the Biſhops in a *Q. Impedit*, the writ to the Biſhop ſhall be awarded. ſee tit. Writ to the Biſhop.

Where

Where Judgment ſhall be given in a *Q. Impedit*, but execution ſhall ceaſe. ſee tit. Judgments.
Where, and what eſſoin ſhall be allowed in a *Q. Impedit*, what not. ſee tit. Eſſoin.
Where Protection lies not in *Q. Impedit*. ſee tit. Protection.
What day ſhall be given in *Q. Impedit*. ſee tit. Day.
Where the incumbent upon a *Q. Impedit* ſhall be removed, or not. ſee tit. Writ to the Biſhop, and Incumb.
Pleas for the Patron, and which he ſhall have in *Q. Impedit*, which not. ſee tit. Incumbent.
Where a Church is void without ſentence of deprivation. ſee above, and tit. Deprivation.

Quare non admiſit.

For the King. b. 5. 12, 13.
Where it lies, againſt whom, and the bar in it. b. 5. 12. b. 8. 142, 143.
Where the temporalties of a Biſhop ſhall be ſeiſed into the Kings hands, upon contempt in *Quare non admiſit*. b. 5. 12, 13. ſee tit. Contempt and Judgment, and where the plaint. in it ſhall recover damages.

Quem reddítum reddit.

Where in *quem reddítum reddit*, one tenant ſhall attorn alone, or for parcel and part, or not. b. 2. 67. ſee tit. Attornment, *Per quæ ſervitia*, and *Quid juris clamat*.
Where age ſhall be granted in *quem reddítum reddit*. ſee tit. Age.

Que eſtate.

Where the plaint. ſhall plead a *Que eſtate* of the part of the tenant, without ſhewing how, and contr. b. 8. 99.
Where a *que eſtate* ſhall be pleaded of the tenant in tail, or for life, without averment of their lives, or not. b. 1. 32. 44. 46. 55. 69. b. 5. 2. p. 9. ſee tit. Averment, and Pleadings.
Where, and in what actions the plaint. in his count, or replication, ſhall convey to himſelf a title by a *que eſtate*, without ſhewing how, or in what not. b. 9. 51. 53. ſee tit. Preſcription.
Where a *que eſtate* ſhall be traverſed, and iſſue joyned upon it. b. 6. 24, 25. ſee tit. Iſſue joyned.
Where he that rebates by warranty may convey to himſelf a *que eſtate*, without ſhewing how. b. 3. 62. ſee tit. Rebutter.
Where, and by what means a man may have anothers eſtate, and by what means, where and by what not. b. 1. 125. b. 3. 62. ſee tit. Rebutter.
Where a man ſhall vouch and convey to himſelf by a *que eſtate*, without ſhewing how. ſee tit. Aſſignee.
Where preſcription by *que eſtate* is good, and where not without ſhewing the deed of aſſignment. ſee tit. Preſcription.

Quid juris clamat.

Where attornment of one tenant alone ſhall be accepted, or not. b. 2. 67. ſee tit. Attornment, and *Quem reddítum reddit*.
Where attornment of the tenant in *Quid juris clamat* ſhall be accepted for part or parcel, or not. b. 2. 67. ſee tit. Attornment, and *Quem reddítum reddit*.
Where a *Quid juris clamat* ought to be brought before the fine ingroſſed. b. 3. 86. twice. b. 5. 2. p. 39. b. 6. 68. ſee tit. Fines of lands.
A good plea in attornment where, to out the plaint, to have attornment for a certain time. b. 2. 68. b. 3. 86. b. 5. 2. p. 39. ſee tit. Attornment.
What is a good plea to out the plaint, to have attornment for ever. b. 2. 68. b. 3. 86. b. 5. 2. p. 39. b. 6. 68. b. 11. 80. ſee tit. Attornment.
Where no *Quid juris clamat* ſhall be, if the note of the fine mentions not the tenant. b. 6. 68. ſee tit. Fines of lands.
Where it is a good plea to out the plaintiff of attornment in *Quid juris clamat*, to ſay the conuſor had nothing but in tail. b. 3. 86. ſee tit. Attornment.
Where non-renure ſhall be pleaded in *quid juris clamat*, and attornment ought to be made by the tenant of the land. ſee tit. Attornment, and Non-tenure.
Where a man ſhall not be compelled to attorn in *quid juris clamat*, without ſaving to him his advantages of, &c. ſee tit. Proteſtation, and Attornment.
Where age ſhall be granted in *quid juris clamat* ſee tit. Age, and Attornment.
Where, and who are not compelled by a *quid juris clamat* to attorn, yet is their voluntary attornment good. ſee tit. Attornment.

Quod ei deforceat.

Where, and for whom *Quod ei deforceat* lies, where and for whom not. b. 3. 9. b. 5. 2. p. 85. b. 6. 8. ſee tit. Weſt. 2. c. 4.
Upon recovery by def. and where, or not, b. 3. 9. b. 5. 2. p. 40. 85, 86. b. 6. 8. ſee tit. Stat. W. 2. c. 4 there.
In nature of a writ of Right, and where. b. 3. 9. b. 5. 2. p. 85, 86.
Of recovery of a copy-hold. b. 3. 9. ſee tit. Copy-hold.
What ſhall be a good bar in a *Quod ei deforceat*. b. 6. 8. b. 5. 2. p. 85.
Counterplea of voucher in *quod ei deforceat*, where the demand. or tenant vouches, and what is good. b. 11. 62. W. 2. c. 4.

Quo minus.

Form of the writ of *quo minus*, and what is ſufficient to abate it. b. 1 3. b. 6. 38.
Who ſhall have priviledge of the Court of Exchequer, to ſue there by *quo minus* who not. b. 1 3, b. 5. 16. 2. p. 62. b. 6. 38. b. 8. 58. 68.
Where wager of law lies not in a *quo minus*, b. 4. 95. ſee tit. Ley.

Quod permittat.

Form of the writ of *Quod permittat*, and what matter is good and ſufficient to abate it, what not. b. 8. 46, 47.
For, and againſt whom *quod permittat* lies, and ſhall be maintained, againſt whom not. b. 5. 2. p. 101. b. 8. 46, 47. b. 9. 55.
Count in *quod permittat*, and what is good, what not. b. 9. 54.
Where it lies for wrong, or nuſance done in anothers time than his who complains and brings the action, or his againſt whom it is brought. b. 5. 2. p. 101. b. 9. 54, 55.
Bar in *quod permittat*, and what is good, what not. b. 5. 2. p. 101. b. 9. 54, 55.
Judgment in *quod permittat*, and where damages ſhall be recovered in it, and what, or not. b. 5. 2. p. 101. b. 9. 54, 55.
Where *quod permittat* lies not, but an action of the caſe, or aſſiſe of nuſance. b. 8. 46.
Where battel ſhall be waged in *quod permittat*. b. 8. 46. ſee tit. Battel.

Quo warranto.

Where title may be made to a Franchiſe or Liberties, without ſhewing allowance in *quo warranto*, and what allowance is ſufficient. b. 9. 25, 26, 27. 28. ſee tit. Grant of the King, and Preſcription.
Where, and what is a good bar againſt the King in *quo warranto*. b. 8. 119.
Judgment in a *quo warranto*. b. 9. 28, 29.
Where a franchiſe ſhall be ſeiſed into the Kings hands upon a *quo warranto*, as forfeited. ſee tit. Forfeiture.
Where fine ſhall be made to the King in a *quo warranto*, and the party reſtored to his Franchiſe. ſee tit. Fine to the King.

Rape.

Forfeiture of land by aſſent to rape, and he that is next of blood may enter; who ſhall be ſaid next of blood to have benefit of the entry and forfeiture. b 1. 95. 98. 137. b. 3. 39, 40. 61, 62. ſee tit. Statutes, 6 R. 2. c. 6. and 4 & 5 P. and M. c. 8.

Raviſhment of Ward.

Form of the writ of Raviſhment of ward, and what matter is good and ſufficient to abate it, what not. b. 9. 73. ſee tit. Ward.
Where a woman Covert ſhall be bound by the Statute of Weſt. 2. c. 35. of Raviſhment of ward. b. 9. 73.
Who ſhall be ſaid a raviſher or deforceor of ward, againſt whom a writ of Raviſhment of ward lies, who not. b. 9. 72, 73. ſee tit. Ward.
Where treſpaſs may be at the Common law, or a writ of Raviſhment of ward given by Statute at election for raviſhing a ward. b. 9. 72. ſee tit. Election.
What verdict is good in a writ of Raviſhment of ward. ſee tit. Ward, and Verdict.

Reattachment.

Form of reattachment, and where the writ ſhall be general, where ſpecial. b. 7. 19.
Where it ſhall be awarded upon the Kings demiſe. b. 7. 30, 31.
Where it ſhall be awarded upon a writ never returned. b. 7. 30.
Where upon a writ or bill which comes in by *Certiorari*. b. 7. 30.
Where reattachment muſt be ſued within the year and day, or at another time at election, &c. b. 7. 30.
Where upon reattachment the parties ſhall plead anew, or not. b. 7. 30. ſee tit. Record, and Reſummons.
Where reattachment lies not for the def. in an action. b. 7. 30.

Rebutter.

Of rebutter in pleading. b. 4. 4, & 5.
Where he that is not heir to the warr. ſhall be rebutted by it, or not. b. 8. 53, 54. ſee tit. Voucher.
Where a ſtranger to the deed and warranty ſhall rebut, and he that is in of another eſtate, as aſſignee, or aſſignee of aſſignee, or not. b. 1. 122. 125. 136. b. 3. 62, 63. b. 10. 96, 97. ſee tit. Aſſignee, and Warranty.
Where he that rebuts by warranty, conveys to himſelf by a *Que eſtate*, without ſhewing how. ſee tit. *Que eſtate*.
Where a ſtranger to the exchange ſhall not rebut by warranty. b. 4. 121, 122. ſee tit. Exchange, and Voucher.
Where a ſtranger to the deed in avowry, ſhall rebut the avowant to claim other rents or ſervices. b. 5. 2. p. 101. b. 9. 33, 34. ſee tit. Avowry, and Eſtoppel.
Of rebutter by warr. collateral without aſſets, or by warranty lineal with aſſets in Formedon. ſee tit. Aſſets, and warranty.
Where a man may rebut by warr. made to him and another, or not. ſee tit. Counterplea of warranty.

Recaption.

Form of the writ of Recaption, and what matter is ſufficient to abate it. b. 9. 50.
Where the def. in Recaption ſhall fine to the King, or not. b. 8. 41. 60. twice, and 120. b. 11. 43. ſee tit. Fine to the King.
Where impriſonment ſhall be of the def. in recaption, or not. ſee tit. Fine to the King, Impriſonment, and above.

Recital.

Where relation by recital of a thing that is not, nor ever was, makes the whole grant, feoffment, or &c. meerly void. b. 2. 33. 67. b. 3. 10. b. 4. 35. 50. 74. ſee beneath.
Where recital of two tenants, there being but one, or contr. and grant of the reverſion is void by falſe recital, or not. b. 2. 67. b. 3. 28. b. 8. 79. ſee tit. Grants.
Where recital in grants is material, and makes the grant good where it is void, for want of recital, or for falſe recital. ſee tit. Grants.
Where the Kings grant is void becauſe of falſe recital, nor recital, or &c. and where recital makes it good. ſee tit. Grant of the King.

Where

Where the Kings grant is void, becauſe the value of the thing is not truly recited in the letters patents. ſee tit. Grant of the King.

Where eſtoppel is by recital or not. ſee tit. Eſtoppel.

Where an act of Parliament is good notwithſtanding miſtaking, and falſe recital, &c. ſee tit. Parliament.

Where in count counting, or in plea pleading all the prerogativee of an act are to be alledged, or the whole act pleaded, and the plea is vicious if miſpleaded. ſee tit. Parliament.

Where, and in what writs founded upon Statutes, a man ought to rehearſe or mention them in the writ; where, and in what not. ſee tit. Action upon Statutes.

Recogniſance.

Form of recogniſance, ſtatute merchant, or ſtaple. b 3.12.67.b.4.65. ſee tit. Statute, 23 H.8. c.6. there.

Who may take Recogniſances by authority, who not. b.3.64.b.7.38. ſee tit. Statute 23 H.8. c. 6.

How the certificate of a ſtatute ſhall be made, and what is good, what not. b.3.67. b.7.38. ſee tit. Statute 23 H.8.

Where execution upon recogniſance by *Capias* lies not. b.3.12. ſee tit. Execution.

Of lands, or &c. and what lands, or &c. ſhall be in execution upon a ſtatute or recogniſance; lands becauſe of uſe ſhall be in execution. b.2. 59.b.3.12,13.b 4 31,32. b.5,2.p.86.b.7.19,20. 22.39,40. ſee tit. *Audita querela*, Extinguiſhment, and Contribution.

Where the Sheriff ſhall deliver the recogniſors lands to the recogniſee, upon extent by him made, and where not; but upon extent returned the writ ſhall be awarded to deliver the lands, and what return is good. b.4.67.74.

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Where a releaſe extinguiſhmes, and bars right accrued of latter time, after the releaſe made, or not. b.1.99.111,112. b.5.2. p.29.70, 71.b.8.153. b.10.45. 48.51. ſee tit. Confirmation, Entry congeable, Feoffments, Day.

Where a releaſe ſhall enure by way of inlarging, or not. b.2.92. b.3.85. b.6.76. ſee tit. Confirmation, Joyn-tenants, and below.

Where a releaſe to a man of all debts and actions, which he has againſt him and another, extends to a ſole debt. b. 5.2.p. 7.56. ſee Charter, and Joyn-tenants.

Where a releaſe inlarges not an eſtate, though it hath words of inlargement in the deed, and where it inlarges according to the words of inlargement. b.2.24.b.3.85. b.9.139. ſee tit. Confirmation.

Where a releaſe to one enures to another, and he ſhall have benefit of it, and how, or not. b.1.112.b.2.24.b.5.2.p.71.81.117. b.3.53. b.8. 54.b 10 93. ſee tit. Parſon.

Where a releaſe is void, becauſe of want of poſſeſſion in him to whom it is made, and what is ſufficient poſſeſſion, what not. b.1.87. b.3.29. b.4.25. b.5.2.p.71.81.124. b.8.63.151, 152. b.10.48.

Where a releaſe to the vouchee, and by whom is good, by whom not. b.2.29. b 5.2.p. 71.b.8.151,152. b.10.48.

Where a releaſe to the tenant in law, by ſuppoſal of a writ, is good, though he want poſſeſſion at the time of the releaſe made. b.1.111. b.3.29.b.8.151,152.b.10.48.

Where a releaſe to him in reverſion or remainder is good, or not. b.1.112. b.5.2. p.71. b.8.63.131.b.10.48.

Where a releaſe of a remainder or reverſion is good, and enures according to the words of the releaſe, or not. b.3.85.

Where a releaſe to a Patron in the time of vacation is good, and extinguiſhes an annuity iſſuing out of the Church, and the Parſon ſhall take avail of it. b.1.112.b.2.5.p.71.81.

Where a releaſe makes a degree, and he to whom it is made, ſhall be ſuppoſed in the *Per* by him that releaſed, or not. b.6.79. ſee Entry.

Where a releaſe by one joyntenant to his companion, is good. b.8.63. ſee tit. Joyntenants.

Where a releaſe to him that has but a term of years, is good without privity, &c. or not. b.10.48.

Where a releaſe to the husband alone ſhall enure to the wife b.2.24.b.8.54. ſee tit. Baron, and Feme.

Where a releaſe upon condition is good, going in extinguiſhment of rent, right, or &c. b.4. 9. ſee tit. Condition.

Where releaſe of a thing incident to a Seigniory, reſerved and ſaved by the deed of releaſe, is good, or not. b.8.154. b.9.123. ſee tit. Appendant.

Where a releaſe is void, becauſe of reſervation, or not. b.2.73.b.9.123.

Where a releaſe or confirmation extinguiſhes a condition, or not. b.1.147.b.9.140.142. ſee tit. Confirmation.

Where a rent ſhall be inlarged by confirmation or releaſe. b.1. 147 b.5.2.p.15. ſee tit. Confirmation, and Grant.

Where releaſe of right in land extinguiſhes rents, ſervices, &c. or not. b.3.29. b.6.1 b.7.39. b.8.151.154.b.10 48.

Where a releaſe extinguiſhes a right for a certain time, or not. b.5.1.p.81.b.8.151,152.

Where a releaſe of actions real and perſonal, extinguiſhes an action mixt ſuch, where it may be doubted whether it be real or perſonal, or not. b.2.68 b.8.151.

Where a releaſe of actions real and perſonal, or of all actions, extinguiſhes not, nor bars in a writ of Error. b.1.13.16. b.6.25. b.8.152. 154. ſee below, and Error.

Where execution may be releaſed and diſcharged, and by what words in a deed, and where a releaſe of actions extinguiſhes execution, and bars, &c. b.6.13.25.b.8.152,153.b.10. 48,to 53. ſee tit. *Scire facias.*

Where releaſe of all actions extinguiſhes not right of entry, nor ſeiſure of goods. b.8. 151,152. b.10 51.b.11.2.

Of all demands, how to be taken, and what things are diſcharged and extinguiſhed by it. b.1.112.b.5.2.p.56.71. b.8.150,153,154. b.10. 47. 50,51.b.11.82.

Where a releaſe of the husband extinguiſhes, &c. the right and action of the wife for ever, or not. b. 5.2.p.27.b.9.85.b.10.48,to 53. ſee tit. Baron, and Feme.

Where a releaſe of all advantages bars in account before auditors, or debt upon account. b.8.152. ſee tit. Account.

Where a releaſe of all errors bars in a writ of error. b.1.13. 16. b.6.25.b.8.152.above, and ſee tit. Error.

Of all quarrels, what is releaſed, what not. b.8.153,154.

Of ſuits, what is releaſed, what not. b.8.153, 154.

Of all duties, what is releaſed. b.8.153.

Of all warranties, exting. warranty. b.8.154. ſee tit. Warranty.

Of all actions, what is extinguiſhed and releaſed, what not. b.1.112.b 4.63. b.5.2.p.7.28. 56.71.b.8.151,152,153. ſee Above.

Where, and what releaſe by tenant in dower to him in reverſion is good, and bars her of dower, what not. b.1.112. b.5.2. p.71.b.8.151, to 154.

Where the executors releaſe before proof of the Teſtament is good, or not. b.5.2.28. twice. b.9.38,39. twiee. b.10.52.

Where debt is extinguiſhed and releaſed, becauſe the obligee makes the obligor his executor, and contr. or not. b.8.136, 137. ſee tit. Executor the like, and Extinguiſhment.

Where debt is extinguiſhed and releaſed by intermarriage betwixt the obligor and obligee, b.8.136,137. ſee tit. Extinguiſhment, and Baron and Feme.

Where releaſe of one executor bars all. ſee tit. Executors.

Where by releaſe of the Lord Paramount to the tenant paravail, the meſnalry is extinguiſhed. ſee tit. Confirmation, and Extinguiſhment.

Where releaſe of one Joyntenant or tenant in comon, bars his companion. ſee Joyntenants.

Where releaſe ſhall be void, and avoided becauſe of colluſion. ſee tit. Colluſion.

Where releaſe or acquittance ſhall be in a writ of Annuity. ſee tit. Annuity.

Where one Joyntenant grants a rent-charge, and after releaſes to his companion, it ſhall be held recharged after the death of the leſſor. ſee tit. Charge, and Joyntenant.

Where the Kings Charter of pardon of all debts, extinguiſhes as well joynt debts, as debts ſeveral. ſee tit. Charter.

Where releaſe of a woman Covert is not good for any thing in her own right, nor as ſhe is executrix. ſee tit. Baron, and Feme, and Acquittance.

Where a releaſe by an infant is good, or not. ſee tit. Acquittance, and Enfant.

Where a deed or releaſe bearing date after the delivery of it, is good. ſee tit. Deeds.

Where a deed of releaſe is good, notwithſtanding miſnaming, &c. ſee tit. Grants, Deeds, Miſnaming, and Recital.

Where the Kings tenant may releaſe, &c. without licence. ſee tit. Licence.

Where releaſe of one not executor ſhall extinguiſh the action or debt of another, who is executor. ſee tit. Baron and Feme, and Acquittance.

Where the plaintiff in action may releaſe damages, and pray judgment of the principal, or to one def. and pray judgment againſt the other, and where no judgment ſhall be of the principal without releaſe of the damages. ſee tit. Damages, and Judgment.

The form of pleading a releaſe, or confirmation. ſee tit. Pleadings.

Where a releaſe may be pleaded without ſhewing the deed of it. ſee tit. Monſtr. of deeds.

Where a man ſhall have avail of a deed in pleading it as a releaſe, or confirmation, &c. at his election. ſee tit. Election.

Where a deed of releaſe ſhall be void in part, or againſt one, and good for another part, or to another. ſee tit. Deeds.

Where a debt ſhall be releaſed by an Adminiſtrator as Executor, or by an Adminiſtrator where he is made executor, or not. ſee tit. Executors, and Extinguiſhment.

Where the Ordinaries releaſe bars not the adminiſtration. ſee tit. Ordinary.

Good, of the right of a Copy-hold. ſee tit. Copy-hold.

Where a defeaſance ſhall avail as a deed of releaſe to avoid circuit of action, or not. ſee tit. Circuit of action, and Defeaſance.

Where releaſe of the anceſtor collateral bars. ſee tit. Warranty, Enfant, &c.

Where a releaſe by the head of a corporation ſolely, bars the ſucceſſor and the whole corporation for ever, or not. ſee tit. Corporation.

Relief

Relief.

What ſum of mony ſhall be paid for relief, for land held by Knight ſervice, by Socage tenure, and Grand ſerjeanty. b.7.33,34.b.9.124.

What ſum of mony ſhall be paid for relief of a Knight, Baron, Earl, or Duke.b.7.33,34.

Where debt lies, and ſhall be maintained for relief, and by and againſt whom.b.4.45.b.3.66. ſee tit.Debt.

Where Relief ſhall be for diſcent of a remainder, and when. ſee tit.Ward.

Where relief ſhall be paid by the heir, who is in, and comes to the land by his own purchaſe. ſee tit. Ward,and Colluſion.

Where relief ſhall be paid by the heir in tail, after diſcontinuance of the tail. ſee tit. Ward.

VVhere the King ſhall have relief upon primer ſeiſin,&c and how.ſee tit.Prerogative, and Livery.

VVhere acceptance of rent or ſervices by the Lord from the feoffee or heirs,bars to have relief. ſee tit. Acceptance.

VVhere acceptance of relief bars the Lord to have forfeit of marriage. ſee tit. of Marriage. ſee tit.Acceptance.

VVhere relief is not taken within the ſtatute of Marlb. of feoff. by colluſion. ſee tit. Colluſion, and Statutes,Marlb.c.6.

VVhere relief is due, and to be paid by the Statutes 32 and 34 H. 8. ſee tit. Statutes, and Ward.

Remainder, and Reverſion.

Where a remainder is good upon condition or contingency, and where it paſſes preſently by the livery; where not till the condition be performed, or the contingency happen.b.1.84, 85.99.130.133.137.144,155,156.b.3.25.twice. b.6.55,36. b.7.10. b.8.75.b.10.85,86. ſee tit. Condition twice.

VVhere a remainder ſhall be good without a particular eſtate precedent, and though that be void in law, or otherwiſe defeated and gone, and when the remainder ſhall begin. b.1. 101.135.154. b.2.51,52.b.3.20.b.8.75.b.9.20.

Where a remainder in fee,or &c. dependant and limited upon an eſtate for years, or at will, precedent, is good, or not.b.1.130.135.b.3.29. b.5.2.p.94.b.8. 75. ſee tit.Condition,and Abeyance.

Where a remainder not taking effect, nor executed in due time, is void,and what is good and due time to execute it, what not. b. 1. 66. 127,128,129,130.134,135. 138. 154. b.2.51. b.3.20,21.b.8.75.b.10.85, 86.

Where a remainder is void becauſe repugnant to the eſtate particular, and what is a remainder repugnant, what not. b.1. 84, 85,86. b.10.86,87.

Where a remainder of rent newly created out of land, is good. b.2.70.76.78.

Where an eſtate limited by name of a remainder, ſhall be taken as a reverſion. b.1.54. 61.78.83.95.120.175.b.2.10.50.91.b.3.25.51. 83.b.6.17,18.b.10.78.95.

Where a remainder ſhall be of a chattel, &c. b.4.66.b.8.95,96. b.10.47.52.87. ſee tit.Chattels.

Where a remainder limited to the right heirs, right heirs of the body, or iſſue in his mothers belly, or to a perſon not in being, nor known at the time,&c. ſhall be good; and they ſhall take an eſtate,and when.b.1.67.95.98,103, 104.130.134,135.b.2.51.91.b.3.61. b.5.2.p.8. b.10.50,51. ſee tit.Capacity,and Enfant.

Where a remainder limited to the right heirs, veſts in the party himſelf, and not in the heir as purchaſor. and where contr.b.1.83.120. b.2.50.61.91. b.9.129.131.b.10.51.78,79. ſee tit. Capacity.

Where a remainder granted by the name of a reverſion, or contr.ſhall be good,and paſs, or not. b.5.2.p.10.124.

Where a remainder is limited to L. S. there being two of the name, which of them ſhall have it. b.5.2.p.68.

Where a grant of a fee-ſimple by the name of a reverſion, or remainder, is not good, and where the grant of a reverſion is not good. b.2.61.67.91. b.3.4,5.84.b.4.66. b.5.2.p.124. ſee tit.Grants,Name,and Miſnaming.

Where a remainder in fee, or tail, upon another particular eſtate to the ſame perſon, is good, and when it ſhall be ſaid executed. b. 1. 76.95.104.128.130.41.45.49.b.2.17.60,61.92. b.3.5.b.5.2.p.13.40. b.6.72. b.8.74,75.90. b.9. 132.134. b.10.52.twice. b.11.80,81. ſee tit. Eſtates, and Mortdanceſt.

Where a remainder limited to himſelf ſhall be good, or not. b.1.127. ſee tit. Reſervation, and Fines.

Where he in remainder or reverſion may falſifie a recovery had againſt the tenant for life. ſee tit.Fall.of recovery. b.1.16,62.b.3.61. b.6.8.b.10.39.44,45. ſee tit.Falſ.of recovery.

Where after recovery had, or re-entry by the leſſee for life, or &c. after feoffment made by him in reverſion, the reverſion and the remain. in the feoffee.b.2.56.68.b.5.2.p.113.b.6. 69, 70. ſee tit. Attornment, and Feoffment twice.

Where a remainder for years after an eſtate for life, or &c. to the ſame perſon, ſhall be good. b.1.20. ſee tit. Eſtates.

Where a remainder ſhall be void for def. of capacity in the perſon to whom,&c.b.2.51. ſee tit.Capacity.

Where a grant, leaſe, or &c. made by him in reverſion or remainder, is good, and when it ſhall begin,and how,and where not.b.1.62.127, 128.154,155. b.2.35,52.55.91.b.3.7,8.81.84, 85.b.4.53. b.5.2.p 2.7.81.94.123, 124. b.6.35, 36.b.10.85.106.b.8.70.73.93,94. b.11.98. ſee tit.Grant,Leaſes,and Charge.

Where the Kings grant by the name of a reverſion is good, and where his reverſion paſſes by another name as land, or &c. b. 1. 45. 51.b.4.35. b.6.55,56. b.8.55.57.167. b.10.63. ſee tit.Grant of the King.

Where a remainder limited to the Son, veſts in the baſtard as the reputed Son, or not. b. 6. 65.ſee tit.Baſtardy,Capacity,Name,and Reput.

Where the act of the particular tenant of a ſtranger deſtroys a remainder for ever, and what act or means, what not. b.1.15.38.62,63. 66,67.120,121.127.130.134,135,136.b.2.52. b.3.5,6.b.5.2.p.94,b.6.8.42.b.8.75.95,96.145. b.10.43,44.47.52. ſee above,Chattels, Contingency,and Condition.

Where,and by what act and means the Kings reverſion or remainder may be deveſted and diſcontinued.b.1.16.76.b.2.53.b.6.8. ſee tit.Diſcontinuance,and Statutes 34 H.8.c.20.

Where a remainder of an eſtate limited to take effect in time future,as in abeyance.ſee tit. Abeyance.

Where he in reverſion or remainder ſhall hold charged upon the tenant for lifes grant after his ſurrender. ſee tit.Charge.

Where,and when the heir of him in remainder ſhall be in ward. ſee tit.Ward.

Where feoffment of the tenant in remainder by himſelf, or joyntly with the particular tenant for life, is a forfeiture,or not.ſee tit.Forfeiture,and Expoſition.

Where, and what ſhall be diſcontinuance of an eſtate tail in reverſion or remainder. ſee tit. Diſcontin.

Where the rent paſſes by grant of the reverſion. ſee tit.Grant.

Where he in reverſion or remainder ſhall be received upon def. or &c. of the tenant for life, or &c. ſee tit.Reſceit.

Where tenant in tail, the remainder to his right heirs, may grant the fee-ſimple to another. ſee tit.Grant.

Where the donor may grant the reverſion of the tenant in tail. ſee tit.Grant.

Where waſt lies, and ſhall be maintained by him in remainder, or by tenant in tail or fee, upon a leaſe made by them for their own lives. ſee tit.Waſt.

Of Formedon in remainder and reverter, and Counts and bars in them.ſee tit.Formedon.

Where remainder in fee cannot be upon another eſtate in fee, ſee tit.Eſtates.

Where warranty ſhall be becauſe of a reverſion,and voucher for it. ſee tit. Counterplea of warranty.

Where relief ſhall be paid for diſcent of a remainder,and when. ſee tit.Relief.

Deviſe in remainder, where good, and to whom, and when it ſhall take effect. ſee tit. Deviſe.

Where a releaſe to him in reverſ.or remaind. is good.ſee tit. Releaſe.

Where recovery in value by tenant for life, or tenant in tail, ſhall go to him in reverſion or remainder, and veſt an eſtate in them. ſee tit. Recovery in value.

VVhere a feoffment by him in reverſion or remainder is good, or not. ſee tit.Feoffments.

VVhere aſſiſe lies for him in reverſion, upon the outing of his leſſee for years. ſee tit.Aſſiſe.

VVhere,and when attaint lies for him in the reverſion. ſee Attaint.

VVhere, and when a writ of error lies for him in reverſion or remainder. ſee tit.Error.

VVhere grantee or aſſignee of a reverſion ſhall enter for a condition broken. ſee tit.Condition.

VVhere a confirmation ſhall inlarge an eſtate in rent, of which there was no reverſion at the time of it.ſee Confirmation,and Grant.

VVhere eſplees ſhall be alledged in the Donee only, or in the tenant for life, where the remainder is limited over in fee tail, or in fee. ſee tit.Eſplees.

VVhere uſurpation made upon the tenant for life, years, or in tail of Church, ſhall not put him in reverſion out of poſſ. ſee tit. *Q. Imped.*

VVhere preſentation to a Church, by tenant for life, years, or guardian,&c. ſhall be ſeiſin to him in reverſion. ſee tit. *Q. Impedit.*

VVhere writ of Covenant lies, and ſhall be maintained againſt him in reverſion, or his grantee. ſee tit.Covenant,and Aſſignee.

How by grant, or fine levied of lands or tenements, the reverſion paſſes. ſee tit. Grants, Fines, and Expoſition.

VVhere *Scire facias* lies not for him in reverſion or remaind.to execute a Fine. ſee tit.*Scire facias*.

VVhere reſervation of rent upon a grant, or leaſe of a reverſion, ſhall be good, and when it ſhall begin. ſee tit.Reſervation,and Grant.

VVhere livery ſhall be ſued by the heir for a reverſion diſcended to him,and when. ſee tit. Livery,and Prerogative.

VVhere he in reverſion or remainder of an uſe, ſhall have a *Sub pœna* againſt the feoffees to uſe. ſee tit.*Sub pœna*.

VVhere aid ſhall be granted to the tenant for life, or &c. of him in reverſion, or remainder. ſee tit.Aid.

Certain rules and principles to be obſerved, for the creation and eſſence of remainders. b.1.66.129,130.134.138.b.2.51.b 3.20.

Remitter.

VVhere iſſue in tail ſhall be remitted againſt an act of Parliament, or not. b.2.46.48. b.7.9 ſee tit.Parliament.

VVhere remitter ſhall not be to the iſſue in tail, or wife, becauſe of colluſion.b.3.78.b.5.2. p.80.b.8.133. ſee tit. Falſ.of recovery,Colluſion,and Dower.

VVhere a man ſhall be remitted by a deviſe made to him,or not.b.3.25.

VVhere remitter ſhall not be to the acceſſory, or part append. before the principal be recontinued. b.1.122.b.3.3.

VVhere remitter ſhall be againſt a claim below, or no. b.3.26. ſee tit.Cont.claim.

VVhere iſſue in tail ſhall be remitted by diſcent againſt a fine levied by his anceſtor, or not.ſee tit.Entry congeable.

VVhere iſſue in tail ſhall be remitted againſt recovery made againſt his anceſtor, or not. ſee tit. Falſ.of recovery, Entry congeable, Title, and Aſſurance.

VVhere

Where remitter is to a woman, though ſhe takes an eſtate by feoffment, or &c. and that becauſe of Coverture-ſee tit. Baron and Feme.

Where entry or claim of the husband veſts an eſtate in the wife, and remits her, or not. ſee tit. Baron and Feme.

Where a man ſhall be remitted, though he takes an eſtate by feoffment, &c. and that becauſe of nonage. b.4 50.

Maxims touching remitters. b.3.26.b.6.58.

Removing, and Remanding.

How a ſtatute Merchant or Staple ſhall be removed, and what certificate of it is good, what not.b.3.67.b.7.38. ſee tit.Recogniſance.

Where a record ſhall be removed and certified into another Court, without writ or proces, *viz.* by the hands of a Juſtice or other. b.1.157.b.8.23.b.9.99. ſee tit.Record.

Where a record removed by *Certiorari* ſhall not be ſaid removed, becauſe of default in the writ of *Certiorari,&c.* b.9.118. ſee tit.Record.

Where the intire record or original, and all the proces ſhall be removed, and where the Juſtices will hold plea upon parcel of a record, or not.b.11.39.41. ſee tit. Record, Error, and Monſt.of deeds.

Where the record it ſelf ſhall not be removed, but the tenor and tranſcript of it, where the Juſtices will hold plea upon the tenor, or upon the tenor of the tenor of a record.b.5.2. p.39.43.53. ſee tit. Record, Exemplification, and Monſt.of deeds.

Where a record ſhall be removed out of the Chancery to the Kings Bench, to try the iſſue joyned there, and after remanded. b.9.99. ſee tit.Courts.

Where a record ſhall be remanded after judgment reverſed or affirmed, upon a writ of error to award execution,or not. b.1.11.40. ſee tit.Error.

Where a cauſe removed by *Corpus cum cauſa* ſhall be remanded, and *Procedendo* awarded. ſee tit.*Corpus cum cauſa.*

Rents.

Derivation of the word *redditus.* b.10.128.

Where rent ſhall enſue the nature of the land,out of which,&c. b.1.100. b.3.22. b.5.2. p.8. ſee tit. Partition.

Where a grant to diſtrain for rent, is a good grant of rent,and what words are ſufficient to make a grant of a rent charge. ſee tit. Charge.

Where by grant of a reverſion the rent and ſervices paſs. ſee tit.Grant.

Where grant of rent out of a reverſion, or other thing not manurable,is good, and when it ſhall begin.ſee tit Grant,and Reſervat.

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Magna chart. c.2.of relief,and the expoſition of it, and the ſeveral ſums of mony to be paid for relief of an Earl,Baron, or &c. holding by Knights ſervice in chief, or grand ſerjeanty.b.7. 33,34.b.9.124.ſee tit.Knights, Baron, and Baroneſs,and grand Serjeanty.

Magna charta,c.3. of Wards, and the expoſition of it, b.6. 73, 74, 75. b. 8. 173. ſee tit. Ward.

Magna charta, c. 8. of the Kings debt, and pledges for the payment of it, and diſtreſs for it. ſee tit. Diſtreſs, and Prerogative, and below the ſtatute of the Exchequer, and Marlb.c.15. and *Art. ſuper chart.*c.12.W.1.c.19.

Magna charta, c. 9. of Franchiſes, and the confirmation of them.b.122.127,128.129. ſee below,c.38.Marlb.c. 5.Art.upon chart. c.1, & 2. and Franchiſes.

Magna charta,c.10. of Tenure, and incrochment of rents and ſervices, and the expoſition of it.b.4.11.b.5.2.p.100.b.6.58.b.8.65.b.9.33, 34.b.10.107,108. ſee tit. *Ne injuſte vexes*, and Seiſin.

Magna charta, c.11.of Common pleas. b. 2. 44.b.8.19 b.11.68. ſee tit. Bench of the King, common Bench, Prerogative,and Juſtices.

Of Aſſiſe to be taken in the own Shires, and the expoſition of it.b.7.3.b.8.57. ſee tit. Adjournment, Writ,Mordancestor, Aſſiſe. b.4.4. ſee W.2.c.30.38.

Magna charta, c.14. of Amercements, affermment of them, and expoſition of the ſtatute. b.5.2.p.58. b.6.45.54. b.8.39, 40.61. ſee tit. Amercement, and *Moder.miſericord.*b.11.44.and Marlb.c.1.9.

Magna charta,c.20.of Caſtle ward, and the expoſition of it. b.4.88. ſee tit. Caſtles, Eſcuage, Extinguiſh. and Tenure.

Magna charta, c. 22. of forfeiture of year, day, and waſt, for felony. b.4.124. and below, Prerogative,c.16.

Magna charta,c.27. of the Kings Prerogative to have wardſhip of lands held in Burgage,and Fee-farm. ſee tit. Prerogative twice, and below,c.1.19. Livery, and Tenure.

Magna charta, c.29. of accuſation, and trial by Peers, &c. and the expoſition of it. b.5.2. p.64.b.6.52.b.9.30,31.b.10.74. ſee tit.Corone.

Magna ch.c.31. of Tenures of Honours, &c. and the expoſition of it. ſee below Prerogative,c.1.

Mag.ch.c.32. ſee below 18 E.1. *Quia emptores terrarum.*

Mag.ch.c.34. of appeals for women of the death of their husbands. b.4.42.45.47. 48. 76. b.7.13.ſee tit.Appeal.

Mag.ch.c.35.of Leets,and the Sheriffs Torn, and the expoſition of it. b.11.44.45. ſee tit. Leets, and below Marlb. c.10. and 31 E. 3. c. 14.

Mag.ch.c.36. of Mortmain, and the expoſition of it.b.1.24.123.b.4.105. b.11.71. ſee tit. Mortmain, and below W.2. c.32, and 33. and 7 E.1. of the Religious,and the books there.

9 H. 3.

Charter of the Forreſt, and the expoſition of it.b.2.80.b8.137,138. b.9.49,50.72. ſee tit. Forreſt.

20 H. 3.

Merton, c.1. of Dower, and damages in it, and the expoſition of it.b.4.30.ſee tit.Damages.

Mert.c.3. of Redisſeiſin, and the authority of the Sheriff and Coroners, and the expoſition of it.b. 4.4.41.45, 46,47. b.5.2. p.88.121. b.6.9. 12.b.8.152.b.9.72.ſee tit. Redisſeiſin and Coroners. ſee below Marlb.8.and W.2.c.26.

Mert. c.4. of Common, and improvement of it,and the expoſition of the ſtatute. b.4.37.b.6. 57.b.8.48.b.9.122.ſee tit.Aſſi and below W. 2. 25 and 46.b.2.25.

Mert.c.6. of wards, and their marriage and Intruſ. marriage unſatisfied. b.1.88. b.4. 76. 82. b.5.2.p.58.and 127.b.6.70.75.b.9.72,73. b.10. 119.ſee tit.Action upon ſtatute, Tender,Refuſal, and Retainer.

Mert.c.8. of limitation,and expoſition of it, and of other ſtatutes touching limitations. ſee below W.1.c.38. W.2.c.36. and 32 H.8. c.2. and the books there.

Mert. c.9. of Baſtardy, and trial of it upon pleading, and the expoſition of it. b.4.29. b.5. 9.11,12. b.6.65. b.7.43. b.8.101. ſee tit. Baſtardy.

Mert.c.10.of Attornies to be made in ſuits, &c. and the expoſition of it. b.8.58.82. ſee tit. Attorny,and below W.2.c.10.

Mert. c. 11. concerning impriſonment of thoſe who hunt in Parks, or &c. ſee W.1.c.10. below.

21 H. 3.

Of the ſtatute of the Biſſextile, the expoſition, and compntation of it. b.8.19. ſee tit. Computation.

51 H. 3.

Statute of the Exchequer, and the expoſition of it. ſee above Mag. chart. c. 8. and 18. Art.upon the chart.c.12.W.1.19.and the books there.

53 H. 3.

Marlb. c. 1. of diſtreſs to open in the Kings High-way. ſee below c. 15.

Marlbridge, c. 2. of diſtreſs for ſuit to the Court,and expoſition of the ſtatute. ſee above Magna chart.c.14.and below,c 9. Amercement, Hundred, and Leet.

Marlb.c.1, and 3. of diſtreſs for rent or ſervices not due,and the expoſition of it. b.4.11. 76.b.9.76. ſee tit. Writ,and Treſpaſs.

Marlb. c.4. of diſtreſs taken in one County and driven into another, and of diſtreſs exceſſive and unreaſonable.b.4.8.b.11.44. ſee tit. Action upon the ſtatute, and diſtreſs, and below,W.1,c.16.

Marlb.c.6. of colluſion upon feoffments, or &c. to out the Lord of his wardſhip, and the expoſition of it.b.1.122.b.2.94.b.3.66.81.b.4. 4.83.b.6.76. b.7.40.b.8.164. b.9.73. b.11.77. ſee tit.Colluſion,and 32 H. 8.c.1.

Marlb.c.7. of proces in the writ of ward,and the expoſition of it. ſee below W.2.c.35.

Marlb.c.8. of redisſeiſin. ſee above Mert.c.3. and the books there.

Marlb.c.9. of ſuits and contribution therefore betwixt parcenors, or &c. and the expoſition of the ſtatute. b.4.121.b.6.1,2.b.8.105, 106.b.9. 34. ſee tit. *Contra formam feoffamenti*, Apportionment, Partition, above Mag. ch. 14. here,c.2.

Marlb.c.10.of Leets,County-courts, and the Sheriffs Turn. ſee above Mag.ch.c.35. and the books there.

Marlb.c.12. of days in *Q.Impedit.*b.5.2.p.40. ſee tit. Aſſent.

Marlb. c. 14. of exemption of Jurors, and the expoſition of the ſtatute. b.6.53. b.8.18. 108.ſee tit.Exemption.

Marlb.c.1. of diſtreſs taken in the high-way, and out of the fee and expoſition of it. b.80. 60. ſee tit. Action upon the ſtatute, above, c.1. and below W.1.c.16. and Art.cleri,c.9.

Marlb.c.23. of proces in account. b.13. 12. ſee tit. Account,and below, W.2.c.11.and Outlary.

Marlb. c. 24. of Juſtices in eyre, and their authority.b 2.80.b.5.5.b.8.37.39.b.10.71. ſee tit. Juſtices, and below W.1.c.18.

Marlb.c.25.of murder, and what is murder. b.1.99.b.4.40.42.44.b.9.66.68.81.112. ſee tit. Corone,and below 3.H.7.1.

Marlb.c.27.of amercement of mainpernors. b.8.39.ſee tit.Amercement.

Marlb.c.29. of a writ of entry, and the expoſition of it.b.6.9.ſee tit. Writ of entry.

3 E. Weſt.1.

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W.1.c.3. of eſcape, and how it ſhall be tried and diſcuſſed. b.11.64,65. ſee tit. Eſcape.

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W.1.6. of amercements, affermments of them to be reaſonable. ſee above Mag. ch. c. 14. the books there,and tit. *Moderat.miſericord.*

W.1.c.7.and 31. of Purveyors,and how they are to demean themſelves in their office. b.8. 146.b.10.73. ſee tit. Officers.

W.1.10. of Coroners, how to be choſen, what perſons they muſt be, the credit the law gives them, and how, and when they ſhall be diſcharged.

discharged. b.4.41.45. b.5.2.p.57. b.8.39.41. b.9.21.see tit.Coroners.

W.1.c.11. of *Odio*, and *Atia*, and the exposition of it.b.9.56.

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W.1.c.14. of the principal and accessory, and when the accessory shall be arraigned, and the exposition of the statute. b.4. 43, 44. 47. b.9.68.117,118,119. see tit.Corone.

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W.1.c.19.of the Kings debts,and manner of levying them. see tit. Mag. ch. c. 8. & 18. and 51 H.3. statute of the Exchequer above, and Art.upon the Chart c.13. and the books there.

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W. 1. c. 22. of wards, and intrusion by the heir,the marriage not satisfied. see above Mert. c.6. and the books there, and b.6. 22. 71. 74. b.7.43. b.9.72,73.132. b.5.2. p.102. and tit. Ward,Action upon statute, Judgment, and Retainer.

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W.1.c.32.of Barretors. b. 8.36, 37. see tit. Barretor.

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W.1.c.38.of limitations,&c. b.4.10,11. b.7. 40. b.8.65.126. b. 9.36.b. 11.68. see tit. Limitation,and W.2.c.46.

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W.1. c.41. of Essoins in novel disseisin, attaints,&c. b.4.35.b.8.50.

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W.1.c.47. of the next friend and Guardian to appear, and sue for the Infant,&c. b.4.53,54. 124.b.7.1. *Cal.* case 2. b.8.58. b.9.30. see tit. Attorny, and W.2.c.15.below.

4 *E.* 1.

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Of Bigamy,c.3.of the Kings aid to his committee, or &c. b.9.16. see tit. Aid of the King.

Of Bigamy,c.5. of Clergy. b.5.13. see tit. Clergy.

Of Bigamy, c. 6. of Warranty by *Dedi* and *Concessi* in deeds, and the exposition of it. b.1. 2.b.4.81. see tit.Counterplea of warranty, and exposition.

6 *E.* 1. *of Glouceſter.*

Glouceſter, c. 1. of damages and cost in actions,and the exposition of them. statute,b.7.29. b.8.50. b.10.116.b.11.51. see tit. Aiel, Mortdancestor, and Damages.

Glouceſt. c.2. of age upon the deed of the ancestor, and pleaded in bar, and the exposition of the stat. b.6.1,2,3,4.b. 9.85.

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Glouceſt.c.4. of *Cessavit*, and exposition of it.b.2.93.b.5.2.p.8. b.4.11. b.6.3,4.b.8.44.86. 118.b.9.85.see tit.*Cessavit*,and Arrearages, and W.2.c 21.below.

Glouceſt. c.5. of waſt against the tenant for life,years,or &c. and the exposition of it. b.1. 46.b.2.35.52.68.92.b.3.23.28.84. b.4.63. 68, 69,70. b.5.2 p.12.43.17.77.115.119. b.6.37. 41.44.68. b.8.87.152. b 9.139.142. b.10.116. 139,140. b.11.40.44,45.48,49, 50.80,81,82. 84.see Waſt.

Glouceſt. c. 7. of the writ of Entry in *casu proviso*, and the exposition of it.see W.2.c.24. and the books there.

Glouceſt.c.8. of the County Court, and of what matters and actions it shall have plea. b.8. 60.County Court.

Glouceſt.c.8.touching warrant of Essoin,and what is sufficient, what not.b.2.17. see tit. Essoin.

Glouceſt. c.9. of *Odio* and *Atia*, and Pardon. see W.1.c.11.above,and for Pardon b.5.2. p.91. see tit. Corone, and exposition in his own defence.

Glouceſt.c.11.of receit by lessor for years, or &c. b.6.57. see tit.Receit.

Glouceſt.c.13.of Estrepement, and exposition of the stat. b.5.2. p.115. see tit. Estrepement.

7 *E.* 1.

Of Religious men,and Mortmain, and exposition of the stat.see Mag.ch.c.36.and the books there,b.1.123.b.3.31. b.7.26.39. and W.2.32. below, and the books there,and 15 R.2.c.5.

11 *E.* 1.

Acton Burnel of Recognisance, and &c. and the exposition of it. b.2.59. b.3.12,13,14.67. b.4.31.64,65,66,67,74.83. b.5.2. p.85,86.90. b.7.19,20.22.48,49.b.8.153.171.see tit.Recognisance,Extent, Execution, and below 13 E.1. of Merchants, and 23 H.8.c.6.

13 *E.*1.*Westl.*2.

W.2.c.1.of tail, and the exposition of it.

1. What things may be given in tail by the words and equity of the stat.what not. b.3.8,9. b.4.22,23. b.1.88.96,97. b.7.13,14.33,34,35. b.9.105.

2. What gifts, and by what words, shall be estates tailed within the stat. what not. b.1.46. 66.84.103.120.140.b.3.37. b.6.16,17. b.7.41, 42.b.8.21,22.27.b.9.128.b.10.50.

3. Where estates in tail created by condition and provision upon contingency, to have continuance and perpetuity, be good by this stat. or not. b.1.84.88.130,131.138. b.6.40. to 43. b.10.37. to 43,and 52. see tit. Conditions, and Perpetuities.

4. Of power of the Donee in tail to alien the land after issue, before this stat. and what estate he had, and what heir shall inherit this land.b.2.103.b.3.8.85.b.4.4.b 6.41.b.8.35.72. b.9.132.b.11.72. see tit. Formedon in tail.

5. Where the 2 husband shall not be tenant by courtesie, nor the 2 wife endowed after this stat.b.8.35.

6. Formedon in discender given by this statute instead of mortdancestor. b.4.4. and *supra* sect.4.

7. Upon the words of the stat.not extended to gifts before made.b.9.26.

8. Of the words, (the fine in law shall be void) b.3.88,89.b.7.32.b.9.140.b.10.38.see tit. Exposition, and Nullity.

9. Upon the words (nor shall such heirs seem to claim). see tit.Claim.

10. Of the words of the statute(so that they to whom such land was given shall have no power to alien) and yet they may alien, and it shall be discontinuance and put the issue to a formedon. b. 3. 85. see tit. Discontinuance of lands.

11. And the estate tail shall be barred for ever by common recovery with voucher, notwithstanding the words aforesaid. b.1. 62, 63. 106.94.96.131.b.3.5.593.b.6.32.40,41.b.2.15, 16.b.10.37. see tit.Fals.of recovery,and below 34 H.8.c.20.

12. And by warranty with, or without assets see stat.Glouc.c.3. above, and the books there, and tit.Assets, Warranty, *Scire facias*, and Formedon.

13. Where, and in what cases Formedon in discender was at the common law, &c. see tit. Formedon.

13 Where this statute binds the King, as well as a common person. see below near the end.

W.2.c.3. of *Cui in vita*, and the exposition of it. 1.Of the *Cui in vita*.b.6.8.b.8.72.see tit. *Cui in vita*.

2. Of Receit, and exposition of the statute touching it. b.1.84. b.3.4.9.61. b.10.44,45. b.11.39.80. see tit.Receit. b.6.8. Falsifying of recovery.

W.2. c. 4. of Dower, and *Quod ei deforceat*, and the exposition of the stat. 1. Dower, b.6. 57.b.9.16. see tit. Dower.

2.Of *Quod ei deforceat*.b.3.9.b.5.2.p.85.b.6. 8.40.b.11.62. see tit.*Quod ei deforceat*.

W.2.c.5. of *Q. Impedit*, and Darrein presentment,and the exposition of it.1. Of the words (whose presentee is admitted) and in what cases admission is a sufficient title, and gains the advowson of a Church, or not. b.4.79, b.6. 29,30.49.b.7.28.b.9.132.see tit.*Q. Impedit* twice, Induction,and Plenarty.

2. Where usurpation and presentation to a Church, during minority and wardship, or upon tenant in courtesie, for life, or years,or upon tenant in tail, gains not the advowson against them in reversion,or &c. b 6.29,30.49,50. b.7. 28.b.11.33.see tit. *Q.Impedit*.

Upon the words (he shall have such action as his last ancestor should have had) to be intended of an advowson which discends, and not of an advowson which he purchased.b.3 3. b.6.50.b.11.33.and Enfant.

4 Upon the words (nor shall this statute be so largely understood, &c. but the Judgment given in the Kings Court shall stand in force until,) &c.b. 6.50.see above, sect.3.

5. Upon the words (The plea shall not fail for plenarty, so that the writ be purchased within six months.) b.6.29.49,50. see Writ to the Bishop,and *Q.Impedit*,of the collation of a Bishop.

6. Upon the words (it is provided,that from henceforth it be in the election of the party disturbed,)&c. b.5.2.p.5 7.97,58.b.6.57 see tit. *Q.Impedit*.,and Seisin.

7. Of damages in *Q. Impedit*, where the last presentation is to be recovered. b.5.2.p.58,59. b.6.48,49.51.see tit.*Q.Impedit*.

8.Of the words (Half years time) the exposition,and computation of it.see tit.Exposition, and Computation.

9. Of the words (and from henceforth writs shall be granted for Chappels,)&c.see tit.*Q.Imp.*

10.Upon the words (concerning the *Indicavit*, and writ of Right of advowson of tithes, or of the third part of an advowson, or &c. see tit. *Indicavit*,and below 9 E.2. Artic. cler. see Advowson.

West.2.c.9. of the writ of Mesne, &c. b.4. 93.b.6 58. b.8.54.86.134. b 9.21,22.110,111. see tit.Mesne,W.2.c.54.

W.2.c.10. of making atturnies in suits, and what was the law before.b.8.58.

W.2.c.11. of Account, and Auditors, and their authority. b.3.12.44.b.8.82.119. b.11.38. 40.89. see Marlb.c.23. above, and tit. Account, and Exposition.

W.2.c.12. of appeal, and abettors, and damages to be recovered against them, and the exposition of the statute. b.4.45.47. b.5.2.p. 112. b 8.66.b.11.33. 77. see tit. Abettors, and Appeals.

W.2.c 14. of waſt, and the exposition of it. 1.Of prohibition at the common law, and waſt against tenant in dower, and by courtesie, &c. b.3.23.b.8.87.b.9.142. b. 10.116. b.11.49, 50. 81.83. see tit. Waſt, and Action upon the stat.

2. Form of the writ of waſt, and againſt whom the ſtatute ought to be recited, againſt whom not b.4.68. b.5.2.p.12.15.75.77. b.6.44. ſee tit. ſtat. Glouc.c.5. above, and Action upon the ſtatute.

3. Upon the words (ſhall go to the place waſted,) and the expoſition of them. b. 4.65 b.8.152.ſee tit.Waſt,Glouc.c.5.

W.2.c.16. of tenure by priority and poſteriority,and who ſhall have the wardſhip of the heir.b.5.2.p.56. ſee tit.Ward, and Prerogative, c.2. below,and Prerogative 28 E.1.below.

W.2.c.18. of *Elegit*,and Execution,and how the Sheriff ſhall demean himſelf upon it.b.3.9. 12.14.b.4.65.67.74.82. b.5.2.p.90.b.6.78. b.7. 30.b.8.171.ſee tit. *Elegit*, Execution, and Extent.

2. Upon the words (he ſhall recover by a writ of Novel diſſeiſin) b.5.2. p.105. ſee tit. Aſſiſe,and ſtat.Merchant, 13 E.1.below.

W.2.19. of the Ordinary,andthe expoſition of it.b.5.2.p.82,83.b.8.135.b.9.39. ſee tit.Ordinary.

W.2.c.21.of *Ceſſavit*, and the expoſition of it. ſee tit. Glouc.c.4. and the books there.

W.2.c.22. of waſt by one joyn-tenant, or tenant in common againſt another, and the expoſition of it.b.11.49.82. ſee tit.Waſt.

W.2.c.23.of account by an executor. b.11. 89.90,91.ſee tit.Account.

W.2.c.24. of nuſance, and the expoſition of it.b.5.2.p.101.b.8.48,49. ſee tit. Nuſance.

There of *Quod permittat*, and againſt whom it lies,b.5 2.p.101.b.8.48,49.ſee tit.Nuſance.

W.2 c.24. of the writ of entry in *Conſimili caſu*,and expoſition of it.b.6.8. b.8.48,49. ſee tit.Entry,and writ of Entry, and *Conſimili caſu*. b.11.80.

W.2.c.25.of aſſiſe,and the expoſition of it. 1.That it was a ſpeedy remedy,and at the common law,b.4.35.b.8.50.66. ſee ſtat. Glouc. c.1. above.

2. Aſſiſe of eſtovers, or of parcel of them, b.5.2.p.25. b.8.47,48. b.9.112. ſee tit. Aſſiſe, Common, and Eſtovers.

3.Of aſſiſe of wood, and of profits to be taken in woods,b.4.87.b.11.49. ſee above ſect. 2. and tit.Aſſiſe,Wood,and Demand.

4. Of aſſiſe of a Corody, or of parcel of it, b.8.46.ſee tit.Aſſiſe,Corody,and Demand.

5.Of Toll, ſee b.8.46.ſee tit.Toll.

6.Of offices, and profits belonging to them, and of what,and what eſtate,b.8.45,46,47,49, 55. ſee tit.Aſſiſe,Demand,and Plaint.

7. Upon the words (the writ ſhall be *De libero tenemento*,) ſee b.8.47,48,49. b.5.2. p.61. ſee tit. Writ where it ſhall be general, and the Count ſpecial.

8. Of common of paſture, turbary,and fiſhing, ſee b.2.23.b.4.37.b.7.4.b.6. 57. b.8,48,50. ſee tit.Aſſiſe, and Common.

9. Upon the words (they ſhall be had for diſſeiſors,as well the feoffor as the feoffee,)b.3. 77,78.b.5.2.p 79,80. ſee tit.Diſſeiſin.

10. Upon the words (where one feedeth in the ſeveral of another,b.8.50.ſee tit.Aſſiſe.

11.Upon the words(let them that are named diſſeiſors beware) what pleas the diſſeiſor ſhall have,what not,b.7.26.ſee tit. Diſſeiſin,and Encumbent.

12. Of certificate of aſſiſe upon a Baylies plea, or &c. and where it lies, b.4.4.b.6.8. b.8. 65,66. ſee tit.Certificate of Aſſiſe.

13.Of damages to be recovered in Aſſiſe of novel diſſeiſin, ſee tit.Damages.

14.Of impriſonment for diſſeiſin in fact,with or without force, or upon pleading, and failing of the record, ſee tit.Impriſonment, and Fine to the King,and Aſſiſe above,ſect.12.

Weſt.2.26. of Rediſſeiſin, and the expoſition of it, ſee ſtat. Merton c. 3. above, and the books there,and Marlb.c.8.

W.2.c.28. of eſſoin in Aſſiſe, and the expoſition of it,b.4.35. b.8.50. ſee tit.Eſſoin, and W.2.c.26.ſect.1.above.

W. 2: c. 29. of oyer and terminer, and to whom commiſſion ſhall be directed, to whom not,and their authority in cauſes, b. 4. 46, 47. b.6.20.b.7.12.b.9.56.118. ſee tit. Juſtices, and *Odio* and *Atia*.

W.2 c.30.of *Niſi prius*,and Juſtices of Aſſiſe, and their authority, and the expoſition of the ſtatute, b.10.54 103. b.11.62. ſee tit. Juſtice 27 E.1.of Fines, and 12 E.2.

1. Of Aſſiſes mentioned in the ſtatute to be taken in the proper Counties. ſee above Mag. chart.c.12.

2.Of adjournment, b.4.4.b.8.57.ſee tit.Adjournment.

3. Upon the words (That the Juſtices ſhall not compel the Jurors, to ſay preciſely whether it be diſſeiſin, or not,) &c. b.1.18.22.64.126. 174. b.2.4,5.8,9.28.56. b.3.37.43. b.4.7,8.24. b.5.2.p.11.30.78.84.89. b.6.46.67.77. b.8.94. b.9.12,13,14.83,84.99. b.10.122,123. b.11.9. ſee tit.Verdict.

4. Upon the words (the Juſtices of the Benches) ſhall have in their circuits Clerks to inroll all pleas,&c. ſee b.9.12,13.

5. Upon the words(Henceforth the Juſt.ſhall not put in aſſiſes, or Juries, any other Jurors than thoſe who were ſummoned at the firſt,) b.9.13.

W.2.c.31. of a bill of exception, and error upon it. ſee tit. Error,b.9.13.

W. 2. c. 32. of mortmain by recovery by default, and inquiry of colluſion, and the expoſition of it, b. 9. 13. ſee tit. Colluſion, and Mortmain.

W.2.c.35. of raviſhment of ward, and marriage of him, and expoſition of the ſtatute. b.6.22.43.b.2.93.b.5.2.p.102. b.9.72,73.132. ſee tit.Ward,Election, Judgment,and Proces.

W.2.c.38.of Jurors,and the expoſition of it. b.8.118. ſee tit. Action upon ſtat. Jurors, and Panel,and below Artic.upon chart.c.9.

W.2.c.40.of age in *Cui in vita*, b.1.15. b.4. 50. ſee tit.Age.

W.2.c.41. of *Contra formam collationis*, and expoſition of the ſtatute, b.2.41. b.4.76. 108. b.6.68. b.11.11.

W.2.c.45. of execution by *Scire facias* after the year,and the expoſition of the ſtatute, b.2. 37.b.3.12.14.b.4.65,66.b.5.2.p.38.88 b.8.153. ſee tit.Execution,Recogniſance, *Scire facias*,and Voucher.

W.2.c.46. of approvement of Common,and expoſition of it. ſee ſtat. Mert.c.4. above, and the books there,and tit. Approvement.

There,of aſſiſe of common of paſture, and limitation upon uſurpation upon tenant in dower for life, years, &c. ſee above W.1.c.38. and the books there; and for the other part, W.2.c.5. above, ſect.2.

13 *E.* 1. *Of Merchants.*

13 of E. 1. of Merchants,and expoſition of it,b. 3.12,14. b.4.67.82. b.7.38,39. ſee tit. Recogniſance, b.11.64,and 32 H.8.b.6.below.

13 *E.* 1. *Of Circumſpect.*

13 E.1. of *Circumſpectè agatis*, expoſition of it, b.4.20.b.5.2.p.67.b.7.44.ſee tit.Conſultation and Prohibition,b.5.14.ſee below Art. cler.c.1.

13 *E.* 1. *Of Winchester.*

13 of E. 1. of Wincheſter,of Robbery,and Huy and Cry, b.7.6,7. ſee Huy and Cry.

18 *E.* 1. *Quia emptores.*

18 E. 1. of *Quia emptores terrarum*, and the expoſition of it, b.6.1,2. b.8.79.105. b.3.22. b.4 120.b.5.2.p.5,6.55.b.7.23.b.10.128.ſee tit. Apportionment.

18 *E.* 1. *Of Fines.*

18 E.1. Of the manner of levying fines, and claim to be made upon them, and expoſition of it.

1. Who may take cogniſance of fines, and before whom they ſhall be levied, b.8.118. ſee tit.Fines of lands, and Cogniſance of pleas.

2. Upon the words (no fine to be levied without an original,) b.3.b.5.2.p.38,39.ſee tit. Error,and Falſifying of recovery.

3.Upon what original writ a fine is to be levied,b.5.2.p.38,39. ſee tit.Fines of lands.

4.Upon the words, if a woman covert be one of the parties, ſhe muſt be firſt examined, ſee b.10.43. ſee tit.Examination.

5. Touching claim to be made, and where negligence of claim prejudices, and whom not. ſee tit. Cont. claim,and 4 H.7.c.24.below.

25 *E.* 1. *Stat. of Carliſle.*

25 E.1. Of *Carliſle* touching Benefices in *England* given and provided by the Pope, and the expoſition of it. b.5.13.b.11.73.

21 *E.* 1. *Of Malefactors, &c.*

21 E.1.Of offenders in Parks,and the expoſition of it,b.9.72. ſee tit. Forreſts, and above W.1.c.20.

27 *E.* 1. *Of Fines.*

27 E. 1. Of fines, and averments againſt them,and Proclamations,&c.and the expoſition of it. 1.Upon the words (where after waging of battel,and the great aſſiſe,in their caſes ever they hold the laſt and final place,) b.1.96, 67. b.8.100.ſee tit.Computation.

2. Of averments againſt fines levied, That before the fine levied,and at the time of levying thereof, and ſince the demandants, or plaintiffs, or their anceſtors,were alwaies ſeiſed of the lands in the fine contained, or of ſome part of them,&c.The ſaid exceptions,&c.henceforth, by no means ſhall be admitted againſt ſuch fines and recogniſances, b.3.88,89. ſee tit. Averments, and Fines.

3.Of the words concerning Proclamations to be made upon them, and the manner thereof below, 4 H.7.c.24.and the books there. ſee tit. Error.

27 *E.* 1. *Articles upon the Charters.*

Artic. upon Chart. of the Kings confirmation of the franchiſes, and the expoſition of it. b.1.51.b.8.122,to 127,128,129. b.9.68. b.11. 69.ſee tit.Confirmation,and Franchiſe.

There,c.2 of Purveyors,and their authority, and the expoſition of it, b.8.146. b.10.73. ſee tit.Officers.

There, c.3. of the Court of the Marſhalſie, and the expoſition of it, b.6.20,21. b.4.46,47 b.7.15.b.10.73.75. ſee tit. Authority, Action upon ſtatute, and Marſhalſie.

There, c. 4. of common pleas in the Exchequer, they ſhall not be held there, b.5.2. p.62. ſee Magna charta, c.11.above,and Exchequer.

There,c.6. of the ſeals: To what purpoſes the pety ſeal, privy ſeal, or ſignet royal are ſufficient,or not. b.2.17.b.6.53. b.8.18.b.10.112, 115.b.11.89,90,91,92. ſee tit.Seal.

There, c.9. of Jurors, and the expoſition of it. ſee b.5.2.p.36.b.8.118. ſee W.2.c.38. above, and tit.Damages.

There, c.10.of conſpiracy. ſee below 33 E. 1. of Conſpiracy,and the books there.

There,c.12. of the Kings debt, and diſtreſs for it,and expoſition of the ſtatute, b.5.2. p.4. 56.92.b.7.19,20.b.11.44. ſee tit. Diſtreſs, and and Prerogative, above Magna charta c. 8. 51. H.3.ſtat.of the Exchequer,and W.1.c.19.

There,c.15. of attachment and ſummons in Aſſiſe, and other writs, and expoſition of the ſtatute, b.9.31. ſee tit.Attachment.

There, c.19. of removing the Kings hand with reſtitution of iſſues,&c. and expoſition of it, b.2.53.b.4.55,57.b.9.9,10 103.ſee tit.Livery, and *Ouſter la main*.

28 *E.* 1. *Of Wards, and Relief.*

11 E.1. of Relief,and Wards,and expoſition of the ſtatute.

1. Of relief, and who ſhall pay it, who not. ſee Magna charta c.2.above,and Relief.

2. Of relief, and wardſhip of the heir in ſocage, b.9.73. and W.2. c.35. above, and tit. Socage.

3. Of the three ſorts of writs there mentioned,b.5.2.p.18.b.8.86.b.9.72.b.10.130.b.11.45, 46. ſee tit.Ward.

4. Of wardſhip by Priority. ſee W.2. c.16. above,and Waſt.

28 E.1. of appeals, and approvements, b.9. 119. ſee above W.1. c.14. and tit. Appeals below, Artic.cler.c.10,and 15.

29 E.1. *Of Eſcheators.*

29 E.1. of reſeiſing, and *Scire facias*,&c.and the expoſition of the ſtatute, b.8.169. ſee tit. Reſeiſer, and Entry congeable.

33 E.1. *Of Conſpirat.*

33 E.1. of writ of Conſpiracy, and where it lies,or not, b.9.26,56. ſee tit.Conſpiracy,and above art.upon the Charter, c.10.

33 E.1. *Of meaſuring Lands.*

33 E.1. of meaſuring lands ; and the expoſition of it, b.6.67.twice.

33 E.1. *Ordinatio Foreſtæ.*

33 E. 1. Ordinance of the Forreſt, and the expoſition of it. ſee above Charter of the Forreſt, and the books there.

34 E.1. *Of Mortmain.*

34 E.1. Licence to alien in mortmain, and the expoſition of it; ſee below 18 E.3. *pro Cler.* c.3. and *Ad quod damnum*,and Licence.

1 E.2. *Of Knights.*

1 E.2. of making Knights, and who ſhall be compelled to accept the degree and dignity of a Knight, b.6.10. b.7.27,33. ſee tit. Knights, writ, and fine to the King.

9 E.2. *Art.Cleri.*

Art. of the Clergy, c.1.1. of tithes, obventions, and oblations, b.2.44,45,47,48. b.4.75. b.5.9.13,14 2.p.51.b 7.44.b.11.8,9.16. ſee tit. Conſultation, Juriſdiction, and above 13 E. 1. Circumſpect.

2. Of mortuaries, b.5. 19.13. ſee Conſultation and Mortuary.

3. Of redemption of penance, b.4.20. b.5. 13,14. ſee tit.Prohibition.

4. Of laying violent hands,&c. b.4.20. b 5. 13,14. b.5.2.p.51.b 7.44. ſee tit. Attachment upon Prohibition.

5. Of defamation, b.4.17,20.b.5.2.p.51. ſee tit. Prohibition,c.4.

Art.cl.c.2. and the expoſition of it.

1. If debate be of the right of tithes, and the quantity of them come to the fourth part, &c. b.5.2.p.10,52. b.10 136. ſee tit. Advowſon, and *Indicavit*, and above,Weſt.2.c.ſect.10.

2.Of penance, and redemption of it, above c.1. and the books there.

Art. cl. c. 3. of laying violent hands , and penance for it,and redemption of penance. ſee above.

Art.cl.c.4. of defamat. penance, and redemption of penance,above c.1. ſect.3,5.the books there.

Art.cl.c.4. of damages, and coſts recovered in Court Chriſtian, b.4.20. b.5.13,14. ſee tit. Conſultation.

Art. cl. c. 9. of diſtreſs taken in the fees of the Church, or the Kings high-way; ſee above Marlb. c. 15. and W. 1. c. 16. and the books there.

Art. cl. c. 10. of appeals, and approver, ſee ſee above W. 1. c. 14. 28 E. 1. of appeals, &c. and the books there.

Art.cl.c.13. of examination of a Clerk preſented to a Church , and the expoſition of it. b.5.2.p.57. b.6.49. ſee tit. *Quare Impedit* , and there pleas for the Biſhop.

Art.cl. c.14. of election of an Abbot, Biſhop, &c. and the expoſition of it. ſee above W.1.c.5. and the books there.

Art.cl. c.15, 16. of Clergy, and abjuration, and expoſition of the ſtatute, b.5. 14. 26,27. ſee tit.Clergy.

Art.cl. c.16. of approving in appeals, and who ſhall become an approver, b.10.76. b.9. 119. ſee tit.Appeals.

12 E. 2. *Of York.*

12 E.2.c.2. of witneſſes, b.9 32.ſee tit.Witneſſes.

12 E.2.c.3. of *Niſi prius*. ſee tit. W.2. c.30. above, and the books there,27 E.1.c. of Fines.

12 E.2.c 4. of *Niſi prius*,and the expoſition of it. ſee above W.2.c.30. and the books there, and ſtat.27 E.1.c.4. of Fines, or rather of *Niſi prius*. ſee tit.Juſtices of *Niſi prius*.

12 E.2. c. 5. of returns of Sheriffs , they ought to put their names to them, and the expoſition of the ſtat. b.2.p.5.41. ſee tit. Return of the Sheriff, b.8.162.

12 E. 2. of challenging of eſſoins, where, and what eſſoins lies in a writ of Dower, what not, b.9.15.ſee tit.Eſſoin.

17 E. 2. *Prerogative.*

17 E.2. prerogative, c. 1. of wards, and the expoſition of it.

Of the words (who hold of him in chief) what is tenure in chief, what not, b.2 81. b.7. 8,12. b.9. 123, 131, 133. ſee tit. Tenure, and above Magna charta, c.27.31.

17 E.2. prerogative, c. 2. of tenure of the King by poſteriority, and the expoſition of it, b.5.2.p.56. ſee tit.Ward, Priority, and Poſteriority.

There, c. 3. of primer ſeiſin, and the expoſition of the ſtat. b.8.163,166,172,173. b.9. 16.132.b.10.80.

Where the King ſhall have primer ſeiſin of a reverſion or remainder, b.2.93. b.6.3.b.9.126, 129,132. ſee Livery, and Ward.

Where the King ſhall not have primer ſeiſin of lands, to which the tenant has but right or title to enter. ſee tit. Ward twice.

Where the King ſhall have prerogative to have primer ſeiſin of the dying ſeiſed of one, who had a joynt eſtate with another for life. b.8.163.b.9.126.ſee tit. Ward, and 32 H.8.c.1. below.

Where the King ſhall have prerogative to have wardſhip, and primer ſeiſin of the heir of him to whoſe uſe; below, 4 H.7.c.17.

Where the King ſhall not have prerogative of primer ſeiſin of lands aliened by colluſion. ſee tit.Ward, and Colluſion.

There, c.4. of women, and aſſignment of dower in Chancery, b.9.16,17. ſee tit. Dower, and fine to the King, and Magna charta, c.7.

17 E. 2. prerogative of parcenors, and ſuit and tenure by them after partition, and the expoſition of it, b 6.1,2. ſee above, Marlb.c.9.

There,c.6. of wardſhip of the heir married by the father within age of conſent, and the expoſition of the ſtat. b.6.22,71. b.5.2.p. 102. b.9.132.ſee tit.Ward.

There,6 and 7.of alienation without licence, b.2.80,81. b.3.31. b.6.28. b.8.85,106.twice, b.10.25. ſee tit. Licence.

There, c. 8. of advowſons, and the Kings prerogative, that no time ſhall prejudice him in them, and the expoſition of the ſtat.b.3.78. b.5.1.p.14,15. b.6.29. b.7.28. b.9.32. ſee tit. Prerogative.

There, c.9 and 10.Of the Kings Prerogative to have the cuſtody of Ideots, and their lands, and expoſition of the ſtat. b.4.56. 126, 127. b.8.170. ſee tit.Ideots.

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There, c. 12. of the Kings prerogative of eſcheats and forfeitures of lands held of other Lords,b 6.6. ſee tit.Tenure,and Treaſon, b.7. 20. *Calv.*caſe.

There, c.13. of intruſions, and entry upon the Kings poſſeſſion before livery, and office found, and expoſition of the ſtat. b 2 53. b.4. 58.b.8.172.b.9.139. ſee tit. Intruſion, Dower, and Entry congeable.

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There, c. 16. of forfeiture, and prerogative of the King, to have year, day and waſt, b. 4. 124. ſee tit.Forfeiture.

17 E.2. manner of doing homage.

17 E.2. of homage, b.4.8.b.7.5. ſee tit. Homage.

17 E.2. *Of Templers.*

17 E.2. of Templers, and the expoſition of it, b 3.3.b.7.13.b.11.21.

18 E 2. *Of Leets.*

18 E.2. of Leets, and what things are inquirable and preſentable there, what not, b.5. 2. p.73.104,112.b.6.77,78. b.9.111,113. ſee tit. Leets, Bar, and Turn of the Sheriff.

1 E. 3.

1 E.3.c.6. of attaints in perſonal actions, or aſſeſſing of damages, b.6.44.b.10.119. b.11 6. ſee tit.Attaints.

1 E.3.c.4. ſtat.2. of the Kings debts,and the expoſition of it.ſee above Art.upon the Chart. c.12. and the books there.

1 E.3. c.9. ſtat.2. of confirmation of Franchiſes. ſee Magna charta above, c. 9. of Franchiſes, and their confirmation, and tit. Confirmation, and Franchiſes.

1 E. 3.c. 11. of prohibition upon a ſuit in Court-chriſtian for defamation.ſee above *Artic. cler.* c.1. ſect.5. and *Circumſpect. agatis*, and the books there. ſee tit. Prohibition.

1 E.3. c.12. ſtat.2. of alienation without licence. ſee above Prerogative, c.7. the books there, and tit.Licence.

1 E.3.c.13. of Tenures of an Honour, and the expoſition of it. ſee above Magna charta, c.31. and Prerogative,c.1.ſect.1. and the books there.

1 E.3. c.16. ſtat.2. of Indictments taken in Leets, or Sheriffs turns. ſee above Magna chart. c.35. and 31 E.3.c.14. the books there.

2 E. 3.

2 E. 3. c.8. of juſtice, and that the Juſtices ſhall not forbear to do it, neither for the great nor little ſeal, expoſition of the ſtatute, b.5.2. p.40. ſee tit. *Superſedeas*, and Seals, 20 E.3. below.

2 E.3.c.15. of Fairs,how they ſhall be held, and what days and places, b.5.2.p. 83. b.8.20. 127. ſee tit.Deeds, and 5 E.3.c.5.

4 E.3.

4 E.3.c.2. of Juſtices of Gaol delivery, and their authority, b.4.46,47. twice, b16.20. b.7. 12. b.9.188. b.10.54. b.11.62.ſee tit.Juſtices.

4 E.3.c.3. of Purveyors.ſee above Art.upon the Chart.c.2. the books there, and tit.Officers.

4 E.3.c.7. of treſpaſs by executors, for treſpaſs done in the time of their teſtator, b.9.78.

4 E.3.c.11. of Juſtices of Aſſiſes. ſee W.2. c.30. above, the books there, and below 14 E. 3.c.16.

5 E.3.

5 E.3. c.2. of Purveyors. ſee Art. upon the Chart.c.2.the books there,and 4 E.3.c.3.above, and tit. Officers.

5 E.3.c.5. of Fairs,&c. ſee 2 E.3. c.15. and the books there.

5 E.3. c.3. of the Marſhalſie, b.10.69. and 10 E.3. ſee below.

5 E.3.c.9. of accuſation,&c. ſee above Mag. charta, c. 29. and tit. Impleader, and below, 42 E.3.

5 E.3.c.12. touching Charters,and allowance of them,b.5.2.p.88. b.6.80. ſee tit.Charter,and Utlary.

5 E.3.c.14. of night-walkers, b.9.68. ſee tit. Falſe impriſonment.

9 E.2.

9 E.2.c.1,2. of Merchants, and merchandiſe, b.8.128. ſee 25 E.3. and 27 E.3.below.

10 E.3.

10 E.3.c.2,and 3. of Charters, &c. ſee above 5 E.3.c.12. the books there, and below 27 E.3. c.2.

10 E.3. c. 1, and 4. of Purveyors. ſee above Art.upon the charter c.2. the books there, and 4 E.3.c.3. above,5 E.3.c.2 tit.Office, and below 14 E.3.c.17.

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11 *E.* 3.

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14 *E.*3.

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18 *E.* 3.

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20 *E.* 3.

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25 E.3.c.7. of the incumbent, and what pleas he ſhall have, what not, b.4.117.b.6.48.b.7.26. b.10.54. ſee tit. Encumbent, 25 E.3.c.4. of accuſation. ſee Magna ch.c.29. above.

25 E 3.c.17. of exigent in debt, or detinue, b.3.12.b.5.1.p.88. ſee tit. Proces, and Execution, and Uſury.

25 E.3.c.19. of protections, b.7.8,9.21,23. b.8.68. ſee Protection.

25 E.3. c.22. of Proviſors, b.5.5.24,25.71. b.7.14. b.11.63. ſee 6 H.4.c.1. and 7 H.4. c.6. below.

27 *E.*3.

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27 E.3.c.2. of charter of pardon. ſee 5 E.3 c.12. above, and the books there.

27 E.3. c.8. of the moity of the Jurors to be aliens, b 9.11.b.10.104. ſee tit. Alien born.

27 E.3.c.9. of ſtatute ſtaple, and what lands ſhall be in execution, b.2.59. b.3.12. b.4.64, 67,82.b.5.2.p.86. b.7.19,21,22,38,39. ſee tit. Recogniſ. 13 E. 1. of ſtatute merchant, and 28 H.8.c.6.

27 E.3. c.11. of merchants, b. 8. 128. ſee above 9 E.3. and 25 E.3.c.2.

28 *E.*3.

28 E. 3. c. 6. of election of Coroners, &c. W.1.c.10. above, and the books there.

28 E.3.c.13. of aliens, and trial by the half tongue. 27 E.3. above, and the books ther.

31 *E.*3.

31 E. 3 c.11. of adminiſtration committed by the Ordinary, b.1.150. b.3.40. b.5.2.p.30. twice, and 28.b.8 135,143. b.9.38,39. ſee tit. Adminiſtration, and Ordinary, b.5.11.16.

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31 E.3.c.14. how, and at what time of the year the Sheriffs turn, and Court Leets ſhall be held. ſee Mag. ch. 35. the books there, and tit Leets, and Turn of the Sheriff.

34 *E.*3.

34 E.3. c.1. of Juſtices of Peace, and their authority, b.4.46.47.b.5.2.p.59.71,72.b.8.120. b.9.118,119.b.10.76,77. and *Epiſt.* there, 9 and 10.b.11.62. ſee tit. Juſtices of Peace.

34 E.3.c.14. of traverſe to an office, and the expoſition of it. ſee 36 E.3. c.13. below, and the books there.

34 E.3.c.13. of the eſcheator, and how he ſhall demean himſelf in taking an inqueſt, &c. b.1.42.b.4.57. ſee tit. Eſcheator.

34 E.3.c.15. of alienation without licence. ſee 17 E. 2. Prerogative c. 7. the books there, and tit. Licence.

34 E.3.c.16. of non-claim, b.8.100. ſee tit. Non-claim.

36 *E.*3.

36 E.3. c.13. of traverſe to an office found before the eſcheator, and the expoſition of it, b.4.56,59. b.7. 44,45. ſee tit. Traverſe to an office.

36 E.3. c.15. of Count, it abates not for want of form, and entry of pleas, b.8.161.b.10. 132. ſee tit. Counr, and entry of pleas.

37 *E.*3.

37 E.3.c.7. of artificers, b.11,54. ſee tit. Acts, and 5 *Eliz.* c.4. below, and 22 H.8.c.13.

38 *E.*3.

38 E.3.c.3. of Proviſors. ſee 25 E.3. c. 22. 27 E.3.c.1. the books there, b.5.20. *Cawdry* his caſe.

42 *E.*3.

42 E.3.c.3. of accuſation. ſee Magna charta c.29. the books there, and tit. Impleader.

42 E.3. c.10. of thoſe that be born beyond Sea, above 25 E.3. and the books there, and tit. Alien born.

45 *E.*3.

45 E.3.c.3. of tithes of great wood, and the expoſition of it, b.2.38,40,41,44. b.11.48,49. ſee tit. Attachment upon prohibition, and conſultation.

50 *E.*3.

50 E.3.c.7. of fraudulent gifts of goods to defraud creditors, and the expoſition of it, b.2. 25,26. b.3.81,82,83.b.5.2.p. 60. b.6.18. b.10. 56. ſee tit. Colluſion.

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1 R.2.c.8. of Protections. ſee 25 E.3. c.19. the books there.

1 R.2.c.9. of a writ againſt Pernor of the profits, and the expoſition of it. b.1.123, 131. b.5.2.p.77.b.11.62. ſee tit. Maint. of writs, 4 H.4, and 1 H.7.

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2 *R.*2.

2 R.2.c.3. of fraudulent gifts of goods to defraud creditors, and flying into ſanctuary; above 50 E.3.c.6. and the books there.

2 R.2.c.5. of news and ſlanders of the great men, and the expoſition of it. b 4.14. b.5.2. p.125.b.9.56,59.

5 *R* 2.

5 R.2.c.2. of a paſſage over Sea without the Kings leave, b.2. 17. ſee tit. Contempt, and Seals.

5 R.2. c.7. of entry into lands where entry is not given by law. ſee below 8 H.6.c.9. Of forcible entry, and the books there.

6 *R.* 2.

6 R.2.c.2. of writ to be brought into the County where the contract was made, &c. b.7. 1,2. ſee tit. Writ.

6 R. 2. c.4. of inrollments and exemplifications, and their force, b.5.2.p.53.74. ſee tit. Inrollments, and Exemplifications.

6 R.2. c.6. of Rapes, of rape and conſent to the raviſher, &c. and the expoſition of it, b.1. 95,98,137. b.3.39,40.61,62. ſee tit. Rape and Diſcent, Veſting and Deveſting, and Heir.

7 *R.*2.

7 R. 2. c.10. of aſſiſe in the confine of the counties, of rents iſſuing out of lands in ſeveral Counties, b.4.4.b.7.3. ſee tit. Aſſiſe.

9 *R.*2.

9 R.2.c.3. of error, or attaint by him in remainder, and expoſition of the ſtatute, b.3.4. and 61.b.9.141.b.10.44. ſee tit. Attainder, and Error.

13 *R.* 2.

13 R.2. c.1. of the Incumbent. ſee 25 E. 3. above.

13 R.2.c.5. of the Admiralty, &c. b.2.93.b.5. 2. p. 106,108. b.10.115, 117. ſee tit. Admiralty.

15 *R.* 2.

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15 R.2.c.2. of forcible entry. ſee below, 8 H. 6.c.9. and the books there.

15 R.2. c.5. of mortmain. ſee above Magna ch. c. 36. and 7 E.1. of perſons religious, the books there.

16 *R.*2.

16 R.2.c.5. of *Præmunire*, and the judgment againſt thoſe who incur it, b.5.5.17.21, 23,24, 25.b.7.14.b.9.74.b.11.63. ſee 25 E.3. c.22. above, and the books there.

1 *H.* 4.

1 H.4. c.6. of the Kings patents, the value of the thing granted is to be expreſſed in them. b.3.33. b.10.81. ſee tit. Grants of the King twice.

2 *H.*4.

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2 H.4. c 3. of *Præmunire*, b.5.23. ſee 5 E.3. c.22. 16 R.2.c.5. above, and the books there.

2 H.4. c.14. of the admiralty, and its juriſdiction. ſee 13 and 15 of R.2. above, and the books there.

2 H.4.c.15. of Hereſie, b.5.23. ſee Hereſie.

4 *H.* 4.

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4 H.4.c.7. of writs againſt the pernor of the profits, and the expoſition of it, b.1.123, 131. ſee above 1 R.2.c.9. and Maintenance of writs, and below 1 H.7.c.1.

4 H.4. c. 22. of the Incumbent, what pleas he ſhall have not to be outed without proces. ſee 25 E.3.c.7. above, and the books there.

5 *H.*4.c.8.

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5 H.4.c.14. touching the Inrolment of writs upon which fines are levied in the office of the *Cuſtos brevium*, &c. b.5.2. p.39. ſee tit. Fines of lands.

5 H.4.c.10. of Gaols, none ſhall be impriſoned but in the common Gaols, b.9.119.

6 *H.* 4.

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7 *H.*4.

7 H.4.c.6. of proviſions, and *Præmunire*, b.5. 24. ſee above 24 E.3.c.22.

7 H.4.c.9. of Merchants, &c. b.8.128.

9 *H.* 4.

9 H.4. not printed, touching the liberties and franchiſes of *London*, b.8.128.

1 *H.* 5.

1 H.3. c.3. of forgery, and how puniſhable, b.4.18.b.5.2.p.50. ſee tit. Forgery.

1 H.5.c.5. of Additions, b.6.67. ſee tit. Addition.

2 *H.* 5.

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2 H.5.c.2. of *Corpus cum cauſa*, for him that is condemned in execution,&c.b.8.143. ſee tit. Priviledge, and *Corpus cum cauſa*.

2 H.5.c.3. of a libel to be delivered, b 10. 75.ſee tit.Action upon ſtatute,and Prohibition.

2 H.5.c.7. of hereſie, &c. b.5. 9.25. ſee tit. Hereſie.

4 *H.* 5.

4 H.5.c.8.of lands,&c. of Priors aliens given to the King, b.7.12.*Calv.*caſe.

9 *H.* 5.

9 H.5.c.5. of amendments. ſee 14 E.3. c.6. above,and the books there.

6 *H.* 6.

6 H.6.c.5.of ſewers,&c. b.5.2.p.100. b.6.20. b 10.138,139,143. ſee tit. Commiſſions, and Sewers.

8 *H.* 6.

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8 H.6.c.10. of exigents to be awarded in another County, &c. and expoſition of it, b.3. 50. ſee tit.Exigent,and Expoſition.

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11 *H.* 6.

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11 H.6.c.5. of waſt againſt pernors of profits,and the expoſition of it,b.5.2.p.77. ſee tit. Waſt,and Maint.of writs.

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20 *H.* 6.

20 H.6.c.9. of trial by Peers, b.6.52.b.9.30. 117. ſee tit.Corone,and Expoſition, and above Magna charta, c.29.

23 *H.* 6.

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23 H.6. c.17. of eſcheators, and how they are to demean themſelves in taking of inqueſts, and returning of offices, b.1.42. b.4.57. ſee above 34 E.3.c.13.ſee tit.Eſcheator, and office before,&c.

27 *H.* 6.

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39 *H.* 6.

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1 *E.* 4.

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12 *E.* 4.

12 E.4.c.6. of ſewers. ſee 6 H.6.c.5. above, and the books there.

22 *E.* 4.

22 E.4.c.6. of Swans, and the expoſition of it.b.7.17.ſee tit. Swans.

22 E.4.c.7. of woods, and the expoſition of it, b.8.137,138. ſee tit. Woods,and 25 H.8. below,c.17.

1 *R.* 3.

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1 R.3.c.7. of Fines,and the expoſition of it. ſee below 4 H.7.c. 24. the books there, and 27 E.1.of Fines.

1 *H.* 7.

1 H.7. c.1. of uſes, writ, againſt pernor of profits. b.1.123,131. b.4.131. b.5.77. b.11.92. ſee tit.Maintenance of writs,and above 4 H. 4. c.17.

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3 *H.* 7.

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3 H.7.c.4. of fraudulent gifts of goods and chattels to defraud creditors, and expoſition of the ſtatute, b.2.25,26. b.3.81,82,83. b.6.18. b.10.56. ſee tit. Colluſion.

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4 *H.* 7.

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4 H.4. c.13. of Clergy, and burning in the hand, b.5.2.p.50. ſee tit. Grant of the King.

4 H.7.c.17. of wardſhip of the heir of him to whoſe uſe, b.88.123.b.4.4. 76.b.6.76. ſee tit. Ward.

4 H.7.c.19. of husbandry and tillage,b.4.36.

4 H. 7.c.20.of actions popular, b.11. 57.66. ſee tit.Action upon ſtatute,and Action popular.

4 H.7.c.24. of fine levied of lands, and the the expoſition of it.

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8. Of five years for the iſſue in tail to claim upon a fine levied by his anceſtor,or &c.where he ſhall have them, and how they ſhall be accounted, or not. b.3.86,87,88,91. b.9.139. ſee tit.Continual claim.

9. Of five years for an infant to claim upon a fine levied, and how, and from what time they ſhall be accounted. b.3.91. b.8.100. b.9. 104.ſee tit.Continual claim.

10. Of five years for a priſoner to claim upon a fine, and from what time they ſhall be accounted, b.3 91.b.9.87.104.ſee tit.Continual claim.

11.Of five years for a man over Sea to claim upon a fine, and how, and from what time they ſhall be accounted.b.3.91.b.4.129. b.7.23. b.8. 100. ſee tit. Continual claim.

12. Of five years for a man of unſound memory to claim upon a fine levied, and how, and from what time they ſhall be accounted.b.3.91. b.4.125.b.8.100.b.9.87.104. ſee tit. Continual claim.

13.Upon the word (intereſt) whether leſſee for years be intended, and within the ſtatute, and how the five years upon a fine ſhall be accounted for him to claim. b.5.2. p. 124. b.9. 105.

14. How the words of a ſtatute (that a fine levied,and five years paſt,&c. ſhall bar)ſhall be intended, and where he that has a profit, as rent, common,or &c.ſhall not be bound though he claims not, &c. b.3.90.b.5.2.p.124. b.10.96, 97.

15. Of averment, or exception mentioned in the ſtatute (That the parties to the fine had nothing) and who ſhall have it, who not. b. 3. 88,89,90. ſee tit. Averment, and 27 E. 1. of fines above, b.9.141.

16. What corporations are within this ſtatute, and bound to claim within five years, &c. whet not. ſee b.11.69,71,78. ſee tit. Corporations.

17. Of election of the party to levy a fine according to ſtatute,or common law.b.3.51.86. 88.b.8.7.72.

7 *H.* 7.

7 H.7.c.1. of Captains, and Souldiers. b.6. 27.

11 *H.* 7.

11 H.7.c.18. of Captains and Souldiers, and the expoſition, b.6.27. ſee 18 H.6. c.19. and 7 H.7.c.1.

11 H.7.c.17.of Swans eggs deſtroyed, or &c b.7.18. ſee tit.Swans.

11 H.7.c.20. of women, and diſcent of the right of Joyntures,and the expoſition of it.

1. For the joynture of a woman, and what eſtate is a joynture within this ſtatute, what not. b.1.176. b.2.76. b.4.3.59. b.5.2. p.25,26. b.7.40. ſee tit.Dower.

2. Of forfeiture, and what is forfeiture within this ſtatute. b.3. 51. 59, 60, 61, 62. b.5.2. p.80.b 10.39. ſee tit.Forfeiture.

3. Of warranty mentioned in this ſtatute, and of it. ſee ſtat. Glouc. c. 3. above, and the books there,and tit.Warranty.

4.Upon the words(void and of none effect,) ſee 3.59,69. and tit.Expoſition.

5. Who ſhall enter for forfeiture upon this ſtatute.b.3.51.59,60.

6. Upon the words (And enjoy the ſame in ſuch manner, and form, as he or they ſhould have done, is no ſuch diſcontinuance, &c. had been had or made.) b.1.101.b.3.61.63. ſee tit. Chattels, Entry congeable, Veſting, and Deveſting.

7. Of the proviſo touching the aſſent and agreement of the perſon next inheritable to the woman,or &c. where the ſaid aſſent and agreement is of record, and inrolled. ſee b. 3. 51,61,62.

19 *H.* 7.

19 H.c.7.of Corporation, b.11.54.

19 H.7.c.9. of proces in actions of the caſe, b.10.72. ſee tit. Action of the caſe.

19 H.7.not printed,of Treaſon, b.1.27, 28. 30,35,40. ſee tit.Treaſon.

19 H.7.c.15.of uſes, &c. b.1.83.123. ſee tit. Uſes above, 4 H.7.c.17.and the books there.

1 *H.* 8.

1 H.8. c. 10. of lands to be leaſed to farm upon traverſe tender. b.11.64.ſee tit. Traverſe above, 36 E.c.13.

3 *H.* 8.

3 H.8.c.5. of Captains and Souldiers, b.6.27.

3 H 8.c.11. of Phyſick, and Phyſicians. b.8. 116. ſee tit.Phyſicians, and below, 14 H.8. c.5.

6 *H.*8.

6 H.8.c.4. of exigents to be awarded into another County than where the original was brought. ſee 8 H.6. c.10. above, and the books there.

6 H.8.c.10. of ſewers. ſee 6 H.6.c.5. above, the books there, and tit. Commiſſions, and Sewers.

6 H. 8. c. 9. of recital of the King letters Parents. ſee 34 H.8. c.21. and 18 El. c.28. the books there.

14 *H.*8.

14 H.8.c.5. of Phyſicians, b.8.116,120. ſee tit. Phyſicians,and above 3 H.8.c.11. and 1 Ma. c.9.

21 *H.*8.

21 H.8. c.4. of ſale of lands by executors, and the expoſition of it, b.1.111,173. b.4.55. b.8.76.b.9.76,77. ſee tit.Deviſe.

21 H.8. c.5. of adminiſtration, &c. and the expoſition of it, b.1.150. b.3.40. b.5.2. p.30. twice, and 82. b.8.135,143. b.9.38,39. ſee tit. Adminiſtration.

28 H.8.c.11. of reſtitution of goods ſtollen, &c. b.5.2. p.111.6.80. ſee tit. Appeal 21 H.8. c.13. of pluralities, and non-reſidence,&c. and expoſition of the Statutes.

1. Touching the words (of two, or more Benefices,) b.4.75,79,90,117,118. ſee tit. Pluralities.

2. Upon the words (That then, and immediately after ſuch poſſeſſions thereof had, the firſt benefice ſhall be adjudged in law to be void,) b.4.75,79.b.6.29,40.

3. Upon the words, (and that it ſhall be lawful for every Patron to preſent another,&c.) ſee for notice to be given by the Ordinary to the Patron, b.4.75,79.b.6.29.ſee tit.Notice,and *Q.Impedit* twice.

4.Touching diſpenſations, &c. b.4.75,79,89, 90,117,118.b.5.28.31. ſee tit Diſpenſations.

5.Touching non-reſidence, ſee b.6.21.6. of the proviſo touching a Dutcheſs, Marqueſs, Counteſs, and Baroneſs, Widows, b.4.89, 90, 117,118.ſee tit. Diſpenſations.

21 H.8.c.15. of falſe recovery by the leſſee for years,or &c. b.6.57.b.9.135.b.11.33. ſee tit. Falſe of recovery.

21 H.8.c.19. of avowries, and the expoſition of it, b.9.22, 36, 136. ſee tit. Avowry four times.

22 *H.*8.

22 H.8. c.13. of Artificers, and what trades or myſteries ſhall be conſtrained to be within this ſtatute, what not, b.8.129. ſee 5 El.c.4.

23 *H.*8.

23 H 8.c.1. of Clergy,and expoſition of the ſtatute,b.11.30,to 37.ſee tit.Clergy.

23 H.8.c.5. of Sewers, b.10.138,139, 143. ſee above 6 H. 6.c. the books there, and tit. Commiſſions, and Sewers.

23 H.8.c.3. of Attaints,b.4.76. b.6.80.b.11. 64.ſee tit. Notice.

23 H 8 c.6. of recogniſance, and ſtatute ſtaple, &c. and the expoſition of it.

1. Who have authority to take recogniz. b.4.64 b.7.38.b.3.67.ſee tit. Recogniſance.

2. Form of Recogniſance, or ſtatute ſtaple, b.3.12,and 67. b.4.65.

3.Touching certification of a ſtatute, b.3.67. b.7.38.

4. For execution of land, &c. upon this ſtatute. ſee 13 E.3.of Merchants, and 27 E.3. c.9. above, and the books there,and b.2.59. b.3.12, and 13.b.4.31.b.5.2.p.86.b 7.19,20,22,38,39. ſee tit.Recogniſance.

5. Upon the words (If they be put out or diſſeiſed, they ſhall have like remedy, as perſons having execution in or upon any caſe of the ſtaple, &c.) b.5.2.p.105. above W.2.c.18. ſee, and 13 E.1. of Merchants, 27 E.3.c.9. of the Staple, b.11.64.and tit.Aſſiſe.

23 H.8.c.9.of citations,b.5.9.

23 H 8.c.10. of Mortmain, and the expoſition of it,b.1.23,24.b.11.71. ſee tit. Mortmain twice.

24 *H.* 8.

24 H.8. c.12: of appeal upon ſuits in the ſpiritual Court,b.5.9.28.2.p.51. b.2.71.45.b.6. 18,19.b.8.143. ſee tit.Appeal.

25 *H.*8.

25 H.8.c.3. of Clergy, b.11.32,to 37.

25 H.8.c.14.of Hereſie.ſee above 2 H.4.c.15. and the books there.

25 H.8.c.19,and 21. of the Clergies ſubmiſſion to the King, and exoneration of the Papal exactions, and expoſition of them, b.1.24. b.3. 74.b.5.30.

26 *H.*8.

Of Treaſon beyond Sea, trial,and forfeiture of lands for it,&c. and the expoſition.

1.Touching the trial. ſee below 33 H.8.c.23.

2. For the forfeiture, ſee what lands ſhall be forfeitd to the King for treaſon. b.1.103. b.3. 10.35.b.7.33,34. b.8.72.166. b.9.140. ſee tit. Treaſon,and 33 H.8.c.20.below.

3. Upon the words (forfeit and loſs to the King, his heirs and ſucceſſors, all ſuch lands, &c.) yet cannot the King enter, and ſeiſe without office.b.1.42.b.3.10. ſee tit.Ent.Congeable, and 33 H.8.c.20.below.

4. Touchiug the ſaving, b.8.72. b.9.140.

5.This ſtatute ſpeaking of treaſon, and the forfeiture, but ſetting down no treaſon in certain : ſee for that 25 E.3. c.2. and the books there.

27 *H.*8.

27 H.8.c.10. of uſes and joyntures, and the expoſition of it, with the inconveniences which happened by uſes before this ſtatute.

1. For deviſes of uſes. ſee 1 R. 3. c.1. the books there,and tit.Deviſes.

2.Touching wards,&c. ſee 4 H.7.c.17.above, and the books there.

3. Touching executions, and relief to be had of lands in uſe. ſee 19 H.7.c.15.above,and the books there.

4. Upon the words (againſt whom to have their actions for their right.) ſee 4 H.4. c.7. of aſſiſe againſt pernour of the profits and books there,and 11 H.6.c.4. above, of actions againſt Pernor of profits, and the books there, and 1 H.7.c.1.above,of Formedon againſt the Pernor of the profits,and the books there.

5. Upon the words (men married have loſt their tenure by courteſie.) ſee b.123,124. and tit. Courteſie.

6. Upon the words (and women their dowers,) b.1.123,124. and tit.Dower.

7.Upon the words (the King highneſs hath loſt the advantage, and profits of lands put in ſeoffment to the uſes of aliens born.) ſee tit. Alien born, and b.1.123.

8. Upon the words and alſo the profits of waſt for a year and day.) b.1.1.123.above Prerogative, c.16.

9.Upon the words(the Lords their eſcheats.) ſee b.1.124. and tit. Eſcheat.

10. Upon the words of the preamble, and words of the purview of the ſtatute, (Inconveniences have hapned, and daily do increaſe among the Kings ſubjects, to their great trouble and unquietneſs, and to the utter ſubverſion of the ancient common laws of the Realm; for the extirpating and extinguiſhment of all ſuch ſubtle practiſed feoffments, &c.) b.1.123,124, 125,129,131,132,138,139.b.6.34,43.

11. Upon the words of the purview of the ſtatutes, (That where any perſon or perſons ſtand and be ſeiſed of, and in any mannors, lands, &c. to the uſe, confidence, or truſt of any other perſon, &c. That all and every ſuch perſon and perſons, and bodies politick, ſhall ſtand and be ſeiſed, deemed and adjudged in lawful ſeiſin, eſtate, and poſſeſſion of, and in ſuch like eſtate as they had, or ſhould have in uſe, truſt, or confidence of any in the ſame.) b.1.54,68, 86,101,124,125,126,127,129, 130, 131,132, 133,134,135,136,137,138. b.2.35,36,53,54, 71,78. b.3.27,62. b.5.2.p.112,113.b.6.27,28, 34,43,68,69. b.7.9.13, 40. b.8.94. b.10.85. ſee tit.Diſcent.

12. Upon the words (where divers perſons ſtand, and be ſeiſed of and in lands, &c. to the uſe and intent, that ſome other perſon or perſons, ſhall have and perceive one annual rent, &c.) b.2.78.

13. Touching the ſavings of ancient rights, and the expoſition of them,&c. b.1.125. b.7. 19,39.

14. Touching joynture of women, and the expoſition of it.b.1.32. b.3.27,28,30. b.4.1,2. b.5.2.p.25,26. b.8.173.b.9.26.ſee tit.Dower.

15. Of the proviſo mentioned in the ſtatute, For the King to have ward, livery, or primer ſeiſin.b.1.125.b.6.27,28.

16. Upon the words (that actions now depending, &c. ſhall not abate, or be diſcharged for, or by reaſon of executing any authority by this Act.) b.1.125.

17. Touching the proviſo, concerning perſons born in *Wales*,&c. b.1.125.

27 H.8. of Monaſteries not printed, b. 1.24. b.3.2.

27 H. 8. of private aſſurances, not printed, b.5.2.p.4,5,6.

27 H.8.c.16. of inrollments of bargains and ſales, and the expoſition of it. b.2.36,45. b.4. 50,71.b.7.40.b.8.6.93,94. b.9.106.b.11.24.48. ſee tit. Inrollments,and expoſition.

27 H.8.c.20. of tithes, and the ſubſtraction of them, b.5.9.

27 H.8. c.24. of reſumption of Franchiſes into the Kings hands, b.7.25. *Calv.* caſe. ſee tit. Reſumption,and grant to the King.

27 H.8.27. of the Court of Augmentations, and leaſes made of lands within the ſurvey of it.b.11,12.59. ſee tit.Seals.

28 *H.*8.

28 H.8.c.10. for aboliſhing the Popes authority, b.1.24.

28 H.8. of treaſon, not printed, b.3.2. b.7. 11.15.

28 H.8. of aſſurance of lands, not printed, b.1.30.41,47,50,51,52.b.7.12,15.

31 *H.*8.

31 H.8.c.1. of partition, b.6.12,13.

31 H.8. c.13. of Monaſteries and religious houſes, and the diſſolution of them, and expoſition of the ſeveral branches of it.

1. Touching the ſurrender, giving up and ſuppreſſing of them, and what are to be accounted religious houſes within this ſtatute, what not. b.1.24. b.2.19.46,47,48. b.3.73. b.5 2.p 544.b.11,12. ſee below 1 E.6.c.14.

2.Upon the words (ſuppreſſed, diſſolved, renounced, forfeited, or by any other means come to the King,&c.) b.2.46.

3. Upon the words (All lands, &c. annuities, rights,intereſts, conditions entries, &c.) b.3.2. ſee below 33 H.8.c.20.

4. Upon the words (veſted, deemed, and judged in the very actual and real poſſeſſion and ſeiſin of it,&c. in the ſtate and condition as they now be.) b.1.47.b.2.46,49.b.10.35.

5. Touching the ſaving in the act, and the expoſition of it, b.1.47.b.2.49.b.10.55.ſee tit. Exception, and 1 E.6.c.14. below, and Parliament.

6. Upon the words (that if any Abbot, &c. within one year next before the firſt day of this preſent Parliament, hath made, or hereafter ſhall make any leaſe or grant for life, or term of years, or &c. and in which any eſtate or intereſt for life, year, or years, at the time of making of ſuch grant or leaſe, then had his being or continuance,or &c.) ſee b.3.7.

7.Touching

7. Touching that part of the ſtatute, which concerns and ſpeaks of miſrecital, &c. and the expoſition of it ſee 34 H.8.c.11. below, and tit. Grants of the King.

8. Upon the words (That as well the King, &c. as all and every ſuch perſon or perſons, &c. ſhall hold, retain, keep, and enjoy, &c. diſcharged, and acquitted of payment of tithes, as freely, and in as large and ample manner; as b.2.46,47,48,49. b.11.9,10,11,14,16. ſee tit. Tithes.

32 & 34 H.8.

32 & 34 H. 8. c.1, & 5. of wills and deviſes, wards, primer ſeiſin, and relief, with the expoſition of the ſeveral parts of it.

1. Note, that where by the common law no lands were deviſable, but by cuſtom, wirhin the ancient cities and boroughs, and where by ſtat.1 R. 3. (above) before uſe of lands was deviſable; after by ſtat. 27 H. 8. c. 10. (above) no land, nor uſe was deviſable; now by theſe ſtatutes lands are deviſable, according to the purview of them, b.6.16.76.

2. Upon the words (All and every perſon and perſons, having, or which hereafter ſhall have, any mannors, lands, &c. may deviſe them,) b.3.30,31.b.10.82,83,84 ſee tit. Deviſes.

3. Upon the words (By his laſt will and teſtament in writing,) ſee b.1.25. b.2.31. b.4.4. b.5.2.p.68. b.6.76,77. b.8.84,85. ſee tit. Deviſes.

4. (Or otherwiſe by act lawfully executed in his life) &c. b.3.34.b.6.76,77.b.10.80,81,83. b.11.24. ſee tit. Deviſes.

5. Upon the words (To any perſons, except bodies politick, or corporate,) b.1.25.

6. Upon the words (Holden in ſocage, and not having, &c.) b.3.30,31,34,35. b.10.30,81, 82,83.b.11.24.

7. Upon the words (Holden of the King in ſocage, or Knights ſervice in chief, &c.) b 3.30, 31,34,35. b.6.18. b.8.84,85. b.10,80,81,82, 83,84. ſee tit. Deviſe

8. Upon the clauſe and words concernig tenure by Knights ſervice of other Lords. b.2. 25. b.3.32,34. b.8.84, b.9.133. ſee tit. Deviſes.

9. Upon the words (To and for the advancement of his wife, preferment of his children, and payment of his debts, or otherwiſe,) b.2.76,77.94. b.3.31. b.6.76,77. b.8.164.173. b.9.133.b.10.81,83,84,85. ſee tit. Deviſes.

10. Upon the words (preferment of his children) and how, and to which of the blood theſe words ſhall refer and be intended, to which not. b.6. 77. b. 10. 83. ſee tit. Deviſes.

11. Upon the proviſo, and words of the ſtatutes, for the full ſupply of the full third part, which ſhall be to the King or other Lord, if the ſame be not, or do not amount to the clear yearly value of the full third part, &c. b.3.27, 31.b.9.33. b.10.83.

12. Though the ſtatute 32 H.8. gives power to all and every perſon to deviſe, or &c. yet ſtat.34 H.8. adds theſe words (That wills and teſtaments made of, &c. by any woman covert, or perſon within the age of 21 years, Ideot, or of *non ſane* memory, ſhall not be taken to be good or effectual in the law, &c.) b.6.23.b.4.61.b.8.144. ſee tit. Teſtament.

13. Upon the words (which ſhall immediately diſcend, revert, remain, or come, &c.) b.3. 27,28.34. ſee tit. Expoſition.

14. Upon the words of the ſtatute 34 H. 8. for any rents, commons, or other profits or commodities, out of, or to be perceived of two parts, or any parcel thereof, in three parts to be divided, &c.) b.3 33 b.8.84.

15. Upon the ſavings, reſervings, and proviſions for ward, marriage, relief, primer ſeiſin, and fine for alienation. b.2.93,94. b.3.31,34. 66. b.6.76. b 8.164,165.173. b. 9. 126. 132, 133. b.10.80, 81, 82. ſee tit. Ward, Relief, Prerogative, and Alienation without Licenſe.

16. Touching conveyance by fraud and covin, to the intent to defraud or deceive the King of his prerogative, primer ſeiſin, livery, relief, wardſhip, marriages, or other rights, &c. b.2.94.b 6.76,77. b.8.164.ſee tit. Marlb.c.6. above, and Colluſion.

17. Upon the words (Where two or more now hold, or hereafter ſhall hold any mannors, lands, &c. joyntly to them, and to the heirs of one of them, and he that hath the inheritance thereof dieth his heir within age, &c. b.8.163. b.9.126.ſee tit. Ward.

33 H.8. c. 2. of limitation in writs, or &c. and the expoſition of it. b.4. 10,11. b.7. 40. b.8.65.126.b.9.36.b.11.68. ſee tit. Limitation, and Copyhold.

32 H.8 c.5. of extents, and execution, and the expoſition of it. b.4.66,67. b.5.2.p.87. ſee tit. Exigent, and Recogniſance.

32 H.8. c.7. of tithes, and Aſſiſe for them, and the expoſition of it. b.2.44.b.5.9.b.11.25. ſee tit. Aſſiſe, and Tithes.

32 H.8.c.6. of maintenance, and buying and ſelling titles. b.4.26. ſee tit. Maintenance.

32 H.8.c.12. of Sanctuaries, b.5.26. ſee tit. Sanctuaries.

32 H.8. c.20. of franchiſes extinct, and revived, which came to the King by diſſolution of Monaſteries, and expoſition of it, b.9.25, 26,27.b.10.64,65.ſee tit. Franchiſes.

32 H.3. c. 28. of leaſes by tenant in tail, Churchmen, husband and wife, and of diſcontinuance by the husband of his wives right, and expoſition of the ſeveral parts of it.

1. Upon the words concerning leaſes made by tenant in tail, and which are good and warranted by this ſtatute, which not. b.3.50,51. b.5 2.p.6.b.6 37.b.7.7.b.8.34.b.9.140.b.10.51. ſee tit. Acceptance, and leaſes.

2. Upon the words which concern Churchmen, as Biſhops, Deans, &c. b.5.2.p.2.6.b.3.85. b.15.60. ſee below 1 Eliz. not printed, and 13 Eliz.c.10, and 20.

3. Upon the words which concern the diſcontin. of the husband, &c. ſee tit. Diſcontin. and above 11 H.7.c.20. the books there.

32 H.8.c.30. of Jeofails, and repleader, b.5. 2.p.35,36,37.41,42,43,45. b.8.162,163. b.11. 6,7,8.

32 H.8. c.31. of recovery againſt tenant for life, and the expoſition of it, b.1.15. b.3.61. ſee tit. Falſe recovery, Entry congeable, Forfeiture, and below 14 Eliz.c.8.

32 H.8. c.32. of partition, b.6. 12, 13. ſee 31 H.8.c.1.above.

32 H.8. c.33. of entry upon diſcent after diſſeiſin with force, and the expoſition of it, b.11.33. ſee tit. Entry congeable.

32 H.8.c.34. of conditions, and the expoſition of it, and who ſhall enter for a condition within the meaning of this ſtat. who not. b.3. 63. b.4.120. b.5.2.p.16,17,112, 113. ſee tit. Conditions, and Apportionment.

32 H.8.c.36. of fines, and the expoſition of it. b.1.96. b.2.15,16. b.3.51.87,88,91. b.7.32. b.9.140, 141. b.10.50. 96. ſee tit. Averment, and above 4 H.7.c.24.

32 H.8.c.37. of arrearages of rent, and debt given to Executors for them, and the expoſition of it, b.4.50,51. b.5.2.p.118. b.7.3. b.8. 64,65. ſee tit. Arrearages, Expoſition, and Execution.

32 H.8.c.46. of wards, and erection of the Court of wards, &c. b.11.3,4.64. above 1 H.8. c.10.b.9.31.

33 H.8.

33 H.8.c.6. of Guns, and the expoſition of it, b.5.2.p.72.

33 H.8.c.12. of the marſhalſie. ſee Artic. upon the Chart.c.3. and the books there.

33 H.8. c. 3. of *Wales*, the County Court there where to be kept, b.4.33.

33 H.8. c.20. of Treaſons, and veſting the poſſeſſion in the King without office, and the expoſition of it; and what things are given to the King by it, what not. b.1.42.48. b.3. 3. 10. b.5.2.p.52.b.7.12,13,14 ſee tit. Entry cong.

33 H.8.c.23. of trial of treaſon, b.7.23.b.11 63. ſee tit. Corone.

33 H. 8. c. 29. of ability of perſons Eccleſiaſtical, b.3.74.

33 H.8. c.39. of the Kings debts, and how they ſhall be levied and ſatisfied, and the expoſition of the ſtatute, b.3.12.b.7.21, 22. ſee tit. Diſtreſs.

34 H.8.

34 H.8.c.5. of wills and wards, and the expoſition of it. ſee 32 H.8.c.1. and books there above.

34 H.8.c.4. of bankrupts, ſee below 13 El. c.7. and books there.

34 H. 8. c. 8. of Phyſicians. ſee 3 H. 8. and 14 H.8. and the books there.

34 H.8. c.20. of recovery againſt tenant in tail, the reverſion, or remainder in tail, and the expoſition of it, b.1.49. b.2.16,17.52. b.6.55. b.8 74.78. ſee tit. Diſcontinuance.

34 H.8.c.21. of confirmations of the King, of his grants, and letters Patents, notwithſtanding miſrecital, &c. b.2.33,34. b.3.76. b 9. 47. ſee tit. Grants of the King, 18 Eliz. c 2. books there.

35 H.8.

35 H.8 c.1 for the eſtabliſhing of the Crown, b1.24.

35 H.8. c.6. of the Jurors *De circumſtantibus* of thoſe that are preſent, and the expoſition of it. b.1.4.19.114. b.2.19.29.32. b.3.18.45. 68.b.9.43. b.10.103, 104, 105. ſee tit. Jurors, and 14 Eliz.c 9.below, and 4 & 5 P.M.c.7.

35 H.8.c.17. of woods, and the expoſition of it. b.8.137,138.

37 H.8.

37 H. 8. c. 4. of Monaſteries, b.1.24. b.2. 49.

37 H.8.c.6. of felonies in burning of houſes, &c. and the expoſition of it, b.4.20. b.11.29, to 35. ſee tit. Corone.

37 H. 8. c.8. of Indictments, &c. b.11.29. ſee tit. Indictments.

37 H.8. c.9. of uſury, and the expoſition of it. b.3.80,81 b.5.2.p.69,70.b.9.26.ſee tit. Uſury, and 13 Eliz.c.8.below.

37 H.8.c.12. of tithes, and where, and who ſhall pay them, and how, b.1.111.b.2.49. b.11. 10.14,16. ſee tit. Tithes, and 2 E.6.c.13.

37 H.8.c.16. of leaſes made of lands in the County Palatine, and under what ſeal, &c. b.8. 63. b.9.122. b.11.11, and 67. ſee tit. County Palatine.

37 H.8. c.22. of Jurors of thoſe that are preſent. ſee 35 H.8.above, and the books there.

1 E.6.

1 E.6.c.2. of election of a Biſhop, b.5.9. ſee tit. Election.

1 E.6.c.7. of the Kings demiſe, and diſcontinuance of proces. b.4.4. b.7. 30, 31. ſee tit. Diſcontinuance of proces.

1 E. 6. c. 8. of confirmation of the Kings letters Patents; notwithſtanding miſnaming. ſee above 34 H.8.c.21. the books there, and tit. Grant of the King, and 15 El.c.2.

1 E.6. c.14. of Chauntries, and expoſition of the ſeveral parts of it.

1. Upon the words (All manner of Colleges. free Chappels, and Chauntries, &c.) b.1.24, b.2.46.b.3.2.b.4.106,107,108,109,114. b.7.8. b.10.83.b.11.13.

2. (All mannors, lands, tenements, &c. belonging to any of them,) b. 4. 107, 108, 111, 112,113,114,115,116.

3. Upon the words (By any mean, aſſurance, conveyance, will, deviſe, or otherwiſe had, made, knowledged, &c. to the finding of any Prieſt, to have continuance for ever; and wherewith, or whereby any Prieſt was ſuſtained, maintained, and found within five years, &c.) b.4.107,108,109,110,111,113,114,115,116.

4. Upon the words (or for term of years yet continuing, and that any Prieſt hath been maintained and ſuſtained with the ſame, or with the revenues or profits thereof within five years, &c.) b.4.106,107.

5. Upon the words, (and alſo all annual rents, profits, and emoluments at any time within five years, &c. employed, payed, or beſtowed towards, or for the maintenance, ſupportation, or finding any ſtipendiary Prieſt, &c. b.4.109,110, 111,112,113,114,115,116.

6. Touching good and charitable uſe, approved by this Statute, b.1.24. b.4.109, 111, 113,114,116.

7. Upon the words (ſhall by the authority of this preſent Parliament, be adjudged and deemed, and alſo be in very actual and real poſſeſſion and ſeiſin of the King, &c, without any office or other inquiſition thereof to be had, or found, (ſee 31 H.8.c.13. above, and 33 H.8. c.20.) in as large and ample manner and form, as the Prieſts, Wardens, Maſters, &c. had occupied or enjoyed the ſame,) b. 1.51. b.2.4. b.4.107,109,112. b.7,8.

8. Upon the words of (ſaving) in the act to the Lords, their rents, fines, &c. b.1. 47. b.8. 118. ſee tit. Exception.

9. Upon the words (That all and every gift, and grant heretofore made to the late King &c. or to our Sovereign Lord the King that now is, by any Archbiſhop, Biſhop, Dean, Archdeacon, Treaſurer, Prebendary, &c. ſhall be good and effectual, &c.) b.11.7,8.

1 E.6.c.1. of Clergy, b.11.32, 33, 35, 36. ſee tit. Clergy, and 23 H.8.c.1. above, and 25 H.8.c 3. and 5 E.6. below.

2 E.6.

2 E.6.c.22. of Souldiers, b.6.27. ſee 18 H.6. 19. above.

2 E.6.c.8. of Tenures and offices, and traverſe to offices, and the expoſition of the ſeveral parts of it, b.4.56.60. b.7.4,5. b.8.168, 169, ſee tit. Livery, Traverſe, Office before the eſcheator, and Tenures.

2 E.6.c.13. of tithes, and payment and ſubtraction. ſee 37 H.8.c.12. and the books there, b.1.111. b.2.44, to 49. b.11.10.14.16. b.5.9. ſee tit. Tithes.

2 E.6. c.24. Trial of murder in ſeveral Counties, b.7.223. b.9.117,118. ſee tit. Appeals, and Corone.

3 E. 6.

3 E.6.c.3. of approvement of commons, and the expoſition of it. ſee Mert.c.4. above, the books there.

3 E.6.c.4. of *Conſtats*, and exemplifications for the Kings Patentees, b.5.2.p.52,53. ſee tit. Exemplifications.

5 E. 6.

5 E.6.c.9,10. of Clergy, and the expoſition of them, b.11.32,33,35,36,37. ſee tit. Clergy, and above 23 H.8. and 1 E.6.c.12.

5 E.6.c.16. of buying and ſelling of offices, and the expoſition of it, b.1.24. b.3.83.

5 E.6.c.20. of uſury. ſee 37 H.8.c.9. and the books there, 13 El.c.8. below.

6 E.6.

6 E.6. of *Wales*, b.11.64.

1 *Mar.*

1 M.c.3. againſt divine ſervice, b.5.9.

1 M.c.5. of limitations ſee 32 H.8.c.2. above, the books there, and tit. Limitation.

1 M.c.9. of Phyſicians, b 8.109, 114, to 120. ſee above 3 H.8.c.11. and 14 H.8.c.5.

1 M.c.12. of Riots, and the expoſition of it, b.11.82. ſee tit. Riots.

1 & 2 P. & M.

1 & 2 P.& M.c.6. of Hereſie. ſee 2 H.4.c.14. the books there,

1 & 2 P.& M. c.8. of deviſes made to ſpiritual perſons, b.1.25.

2 & 3 P. & M.

2 & 3 P.& M. c.2. of tillage and husbandry. ſee 4 H.7 above, and the books there.

2 & 3 P. & M. c.6. of Purveyors, and their authority; above Art. upon the charter, c. 2. the books there. ſee tit. Officers.

2 & 3 P & M. c. 7. of Fairs, and the order how they ſhall be kept, &c. ſee 27 H. 6.c.5. the books there, and tit. Contracts and Faits.

4 & 5 P. & M.

4 & 5 P.& M.c.1. of confirmation of letters Patents, notwithſtanding miſnaming falſe, or miſrecital, &c. ſee 34 H.8.c.21. above, and the books there, and 18 El.c.2. below, and the books there, and tit. Grant of the King

4 & 5 P.& M.c.5. of Drapery, and the expoſition of it, b.6.20.

4 & 5 P. & M. of Clergy, b.11.37.

4 & 5 P. & M. c.7. of Jurors *De circumſtantibus*. ſee above 35 H.8.c.6. and the books there.

4 & 5 P.& M. c.8. of Rape, and Raviſhment of, &c. ſee above, 6 R. 2. c. 6. and the books there.

1 *Eliz.*

1 Eliz. not printed; of leaſes made by Biſhops, and the expoſition of it, b.3.59.twice, b.4.76. b.5.2.p.2.3.6.14. b.10.60,61. b.11.71, 72. ſee tit. Leaſes.

1 El.c.2. of Eccleſiaſtical Juriſdiction, and Divine Service, &c. and the expoſition of it, b.4.4. b.5.1, to 10, and 33. b.11.61.

5 *Eliz.*

5 El.c.4. of Labourers, &c. and the expoſition of it, b.6.19. b.8.129. b.11.54. ſee tit. Labourers, and 22 H.8.c.13. above.

5 El. c. 1. of the death of him that is convict in *Præmunire*, b. 7. 14. ſee above 25 E.3. c.22. of proviſ. and tit. Corone.

5 El.c.9. of perjury, and the expoſition of it, b.5.2.p.99. twice, b.11.13.98. ſee tit. Perjury.

5 El.c.23. *De excommunicato capiendo*, b.5.9. ſee tit. Excommunication.

13 *Eliz.*

13 El.c.2. againſt the Popes Bulls, b.5.36.

13 El.c.4. of Receivers, Tellors, &c. to make their lands liable to ſatisfie the Kings debts, b.10.55,56. b.11.93.

13 El.c.5. of fraudulent gifts of goods to defraud, &c. and the expoſition of it, b.3.80, 81,82,83. b.5.2.p.60. b.6.18. b.10.56. ſee 3 H. 7.c.4. above, the books there, and tit. Colluſion.

13 El.c.6. of *Conſtats*, and exemplifications, &c. ſee above 3 E.6.c.4. the books there, and tit. Exemplifications.

13 El.c.7. of bankrupts; and the expoſition of it, b.2.25,26. b.8.98,121. ſee tit. Bankrupt.

13 El.c.8. of uſury, and the expoſition of it, b.3.80. b.5.2.p.69,70. b.8.63. b.9.26. ſee above 37 H.8.c.9. the books there.

13 El.c.9. of Sewers, and their authority. ſee 6 H.6.c.5. the books there, and tit. Commiſſions.

13 El. of the general pardon, and the expoſition of it, b.6.13.28.

13 El.c.10. of leaſes made by Churchmen, for avoiding dilapidations, b.2.46. b 4.76,120. b.5.9.2.p.6.14. b.6,37. b.3.60. b.7,8. b.11.67. ſee tit. Leaſes, and Parſon.

13 El.c.12. of Eccleſiaſtical matters, and the book of Articles, and other things concerning Miniſters, b.2.45. b.5.2.p.102. b.6.29. ſee tit. Notice.

14 *Eliz.*

14 El.c.8. of recovery againſt tenant for life by colluſion, and the expoſition of it, b 1.15. b.3.60. ſee 32 H.8.c.31. and tit. Entry congeable, and Forfeiture.

18 *Eliz.*

18 El.c.2. of confirmations of the King, notwithſtanding miſnaming, miſrecital, falſe recital, &c. and the expoſition of it, b.4.36. b.5.2. p.15. b.9.47. b.11.67,76. ſee 34 H.8.c.21. ſee tit. Grant of the King.

18 El. c.5. of Informers, and Informations, b.6.19. ſee tit. Information.

18 El.c.7. of purgation to be made, and the expoſition of it, b 5.p.50. 110. b.6.68 b.11.29, 30. ſee tit. Clergy.

18 El.c. 11. of leaſes made by perſons ſpiritual, b.4.76.120. ſee above 13 El.c.10.

18 El.c.14. of Jeofails, &c. and the expoſition of it, b.5.2.p.35,36. twice, 37, 41, 42. twice, 43,45. b.8.58.120,133,162,163. b.11.6,7,8. above, 32 H.8. c.30. and tit. Repleader, and amendment.

23 *Eliz.*

23 El.c.1. & 2. againſt the Pope and Recuſants, b.5.38. b.11.59. ſee tit. Recuſants, and 35 El. c. 1. below.

23 El. c. 3. of errors upon fines and recoveries, and what ſhall be amended in them, what not, b.5.2. p. 38,39, 44,45. ſee tit. Fines, and error, and below 27 El. c.8. and the books there.

27 *Eliz.*

27 El. c.1 & 2. againſt the Pope, and Jeſuites, &c. b.5.9.

27 El. c.4. againſt fraudulent aſſurances of lands, and expoſition of the ſtatute, b.3. 80, 82,83. b.5.2.p.60. b.6.72. b.11.74,93. ſee tit. Colluſion, and 13 El.c.5. above.

27 El.c.5. of demurrers, and the expoſition of it, b.3.57. b.5.2.p.74. b.7.9. b.10.88,92,94, 98. ſee tit. Demurrer.

27 El.c.8. of errors, &c. and the expoſition of it, b.3.70. b.4.53,85,86.18,27,28,43,89,97. b.6. 13,80. ſee tit. Errors, and 23 El. c. 3. the books there, and 27 El. General pardon, and tit. Statutes.

29 *Eliz.*

29 El.c.6. againſt recuſants, and the expoſition of it, b.11.57, to 66. ſee tit. Recuſants, and 35 El.c.1. below.

35 *Eliz.*

35 El. c.1. againſt recuſants, and the expoſition of it, b.11.57,58,59,60, to 65. ſee above 23 El.c.1. 29 El.c.6.

35 El.c.3. of confirmation of letters Patent, and grants of the King.

H. 8. of Priory lands, &c. and expoſition of it, b.3.76. b.11.11. ſee 34 H.8.c.21. above.

43 *Eliz.*

43 El. of general pardon, and the expoſition of it, b.6.79. ſee tit. Statutes.

43 El. c. 1. of confirmations of the Queens letters patents granted by her, and the expoſition of it, b.8.28,29. b.10.110. b.11.75.

3 *Jac.*

3 Jac.c.4. againſt recuſants, b.11.59,61, 64, 65. ſee tit. Recuſants, and 23 El. 29 El. 35 El. above.

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Where, and what ſtatutes extend by equity and conſtruction to other actions, or writ original, than thoſe mentioned within the ſtatute, where, and what not, b.1.57,123, 131, b.2.74, b.3.3,4,67.b.4.4,10,40,43,44,46,93,95. b.5.2 p.40,50,89,99.b.6.4,20. b 7.30,31. b.8.52,53. b.9.12,40,78.b.10. 74. 105. b.11.29, 30,62.

Where, and what ſtatutes extend by equity and conſtruction to another proces or form of writ, than that mentioned within the ſtatute, where, and what not, b.3.14.b.4.57,67. b. 5.2. p.12.75,88,89.b.7.4.31.b.8.161,

Where, and what ſtatutes extend by equity and conſtruction to another manner and form of pleading, than that mentioned within the ſtatute, where, and what not, b.1.15.131,133. b.3.11.62,87,88.89. b.4.43,44,45,46, 47,50, 79,118. b.5.4.8.2. p.35,36.twice, 37,41,42. twice, 46,50,99,110. b.6.8.12,30,50,68. b.7. 19,20,31. b.8.162,163. b.11. 29,30,34, 58, 60,65.

Where, and what ſtatutes extend by equity and conſtruction to another manner of title, aſſurance or conveyance, than are mentioned within the ſtatute; where, and what not, b.1. 15,83,84,103,123,131, 133, 147. b.2.15,25, 26,33,34,46,52,58,92. b.3 4,5,10,22,23, 33, 34,51,60,61,66,81,82,85. b.4.3,4,35,36, 50, 58,59,60,65,71,74,79,81,106,107,115, 116, 118,124,126. b.5.2. p.1. 5,6,14,16,18,55,56, 60,69,70,75,77,80,90, 109,113, 118. b.6.12, 18,28,30,37,50,72,76,77. b.7.14,20,21, 22, 40,41,42. b.8.28,84,94,137,163. b.9.126. b. 100, 101.

Where,and what ſtatutes extend by equity and conſtruction, to another manner of tenure than is mentioned within the ſtatute, where, and what not, b.3.8. b.4. 65. 126. ſee ſect following.

Where, and what ſtatutes extend by equity and conſtruction to lands in ancient demean, and bind the lands and perſons in ancient demean, what not, b.4.65.b.5.2.p.105.ſee tit.Ancient demean.

Where, and what ſtatutes extend by equity and conſtruction to Copyhold lands, not mentioned in the ſtatute; where, and what not, b 3.9. b.4.22,30. b.6.37.b.7.39. ſee tit. Copyhold.

Where, and what ſtatutes extend by equity and conſtruction to another number, &c. than that mentioned within the ſtatute; where, and what not, b.4.46,47,48,77,90,118. b.7.7. b.9. 72. b.10. 100,101,103.

Where, and what ſtatutes extend by equity and conſtruction to other treſpaſſes, and offences, and miſdeeds; where, and what not, b. 4. 11.

Where, and in what ſtatutes the generality of words ſhall be reſtrained by equity, and conſtruction made againſt the letter of the ſtatute, b.1.15,24,25,42,47,94,99, 100,102, 123,to 126,132.b.2.25,26,93. b.3.2,3,5,6,10, 13,28,30,to 35, 44,51,56,59,60,72,79,80, to 83,85,87,89,90,91. b.11.14,35,42,44,45,46, 47,48,50,58,65,79,106,107, 116. thrice, 118, 124,125. b.5.4,5,6.2.p.2,3,5,6,16, 18, 40,45, 46,47, 50,52,53,72,76,82,91,93,99,100,106, 110,112,118,119,124,127. b.6.1.10, 19, 20, 21,27,29,40,41,50,51,53,60,67,68,71,74,75, 76,77. b.7.6,9,12,13,15,28,40,45. b.8.32,40, 47,65,72,84,85,94,118,126,128. b.10.74,76, 81.b.11.30,to 37.

Where ſtatutes made of late time, ſhall be taken to be within the equity of another ſtatute made long before,b.3.46,47.b.4.4.47. b.5. 4.1,2.p.17.49.124.b.6.50.b.8.52,53.

Where, and what actions founded upon ſtatutes, ought to rehearſe the ſtat. where, and what not, b.4.12.45,48,75,76.b.11.56.83. ſee tit.Action upon ſtat. an Indictment.

Where, and what ſtatutes repeal another ſtatute by general words, without expreſs repeal, where, and what not, b.1.25. b.3.88,89. b.6.16.b.8.116. b.11.59,60,61,62,63,64. ſee tit. Parliament.

Where ſtatutes made in *England* bind thoſe of *Scotland* or *Ireland*, for their bodies, lands, and goods,where not, b.7.23,36.ſee tit.*Ireland*, and *Scotland*.

Where, and what ſtatutes bind a woman Covert, or infant, and where they ſhall be included in the words of a ſtatute, or not, b 3.3. 91. b. 50. b.8.44.100. b.9.72. b.11.33.61,63, 65. ſee tit. Enfant, Baron and Feme, Ceſſavit, Recuſants;and Waſt.

Where, and what ſtatutes extend to Corporations, and bind them, and to what manner of corporations, what not. b.11.69.71.78. ſee tit.Corporation,and Cont.claim.

Where if a man adds to a ſtatute, or overdoes what it limits or appoints, all ſhall be void, or not, b.3.33. b 8.84. b.10.62, and 100.

Common law ſhall be preferred before Statute law,where they concur, &c. ſee tit. Common law.

Where preſcription ſhall be good againſt a ſtatute, or not. ſee tit. Preſcription.

Where the Kings grant binds againſt a ſtatute with the clauſe *Non obſtante*,or not. ſee tit. Charter,and Grant of the King.

Where the iſſue in tail ſhall be remitted againſt a ſtatute.ſee tit.Remitter,and Parliament.

Where action may be, or proces prayed at the Common law, or that which is given by ſtat. ſee tit.Election.

Where judgment may be prayed, which was at the common law, or given by ſtat. in action brought,or not. ſee tit.Common law, Election, and Forreſts.

To what time a ſtatute ſhall have relation, if none be limited, &c. ſee tit. Parliament.

Where every man is to be privy to the making of ſtatutes, and bound and concluded by them. ſee tit.Parliament,and Notice.

Where a ſtatute ſhall be erroneous, and void in part, or the whole. ſee tit.Parliament.

Where in Count counting, or Plea pleading a ſtatute, the whole act and prorogations ought to be alledged, or not. ſee tit. Parliament, and Plead.

Where no advantage ſhall be of a ſtatute without pleading it, where contr. and the Judges of duty muſt take notice of it. ſee tit. Notice.

Where ſtatutes are prohibitions of themſelves, and where action upon ſtatute may be without ſuing prohibition.b 10.75.

Certain rules to be obſerved for the expoſition and conſtruction of Acts of Parliament, b.1.23,24.b.3.7,8,13,27,59,77,78,82,83. b.4. 46,50,58.b 5.5.2. p.4.60,77,112,118. b.6.34, 75. b.7.6. b.8.117. b.10.55,57,73,75,83,101, 103,104,105,138.b.11 34,61,63,70.

Steward, and Stewardſhip.

Deſcription of a ſteward.b.9.48.

Authority of the ſteward in the Court-Leet, to aſſeſs fines, or &c. b.7.6,7. b.8.38,to 40. b.11.42,43,44,45. ſee tit.Leet.

Where, and in what Courts the ſteward is Judge, in what not, b.6.12. b. 8. 36. ſee tit. Suitors.

Where ſurrender of a Copyhold, and admittance by the ſteward is good, notwithſtanding defect and imperfection in him. ſee tit. Copyhold.

Where Homage or Fealty ſhall be received by the ſteward. ſee tit.Homage.

Steward of the Court of the Admiralty, and his authority. ſee tit. Admiralty.

Steward of the Court of Marſhalſie, and his authority ſee tit.Authority, and Marſhalſie.

High ſteward of *England*, and his authority. ſee tit.Authority.

How, and in what Court judgment erroneous given before the ſteward of the Kings Hoſtel, ſhall be redreſſed. ſee tit. Error.

Where the ſteward may make leaſes of the Lords land, or not. ſee tit. Leaſes.

Stranger. ſee Eſtranger.

Suggeſtion.

Where *Scire facias* ſhall not be awarded upon ſuggeſtion ſolely; but upon a record, and ſuggeſtion upon that. b.4.67.

Subpena.

Where a *Subpœna* lies, and ſhall be maintained againſt feoffees to uſe, or their heirs, or againſt the feoffee of the feoffee.b.1.101,142, 126,127. ſee tit.Notice,and Uſes.

Where the feoffees to uſe,&c. ought to make an eſtate to whom the feoffor gives it by will, or, &c. and where he ſhall have a *Subpœna* to execute the eſtate accordingly &c. b.4.23. b.6. 18. ſee tit. Deviſes, and Statutes, 1 R. 3. c.1. there.

Where the uſe of the land ſhall enſue the nature of the land, and diſcend as the lands ſhould diſcend at the common law, b. 1. 100, 101,121,122,127.b.2.57.b.4.22.b.6.34,43 b.3. 2. ſee tit. Uſes,and Diſcent.

Where the brothers poſſeſſion of uſe of land makes the ſiſter heir, ſo that ſhe ſhall have a *Subpœna*,&c. b.1.88.121 b.3 2.ſee tit.Diſcent, and Uſes.

Where the younger ſon ſhall have the uſe of land of the nature of Borough Engliſh, and a *Subpœna*,&c.b.1.88. ſee tit.Uſes, Cuſtom, and Deviſe.

Where all the ſons ſhall have the uſe of the land of the nature of Gavelkind, and ſhall have a *Subpœna*,&c. ſee tit.Uſes, Deviſe,and Cuſtom.

Where the heir of the part of the mother, ſhall have uſe of the land diſcended of the part of the mother, and ſhall have a *Subpœna*, &c. b.1.88.100,128.b.2.58.ſee tit. Diſcent, and Uſes.

Where the husbands feoffee of the wives lands, ſhall be ſeiſed to the uſe of the wife,and he ſhall have a *Subpœna*,&c.b.1.122.b.2.57,58.

Where notice of uſe in the feoffee of the feoffee, is material to give a *Subpœna*,&c.ſee tit. Uſes.

Where uſe veſted in the heir, ſhall after be deveſted by another more near heir, and he have a *Subpœna*,&c. ſee tit. Chattel, Heir, Veſt, and Deveſt.

Suit,

Suit, and Suitors.

Where, and in what Courts the ſuitors are Judges, and in what not. b.4.26.32.b.6.11. b.8. 60. ſee tit. Leet.

Where aſſiſe of Toll lies, or of ſuit to mill, or not. b.8.46. ſee W.2. c.25. and ſuit to the Mill.

Where avowry ſhall be made for ſuit to a mill, and how. b.4.88. ſee tit. Suit to a Mill.

Where *Secta ad molendinum* lies for ſuit in a mill, and form of the Count. b.8.46. ſee tit. Suit to the mill.

To the mill, and where, and of what tenants due, of what not. b.4.88.

Where contribution ſhall be for ſuits to Courts, or &c. and avowry for it, and how, and who ſhall contribute. b.6.1,2. b.9.34. ſee tit. Statute Marlb. c.9. there, and Partition.

Where ſuit to Courts, or &c. ſhall be apportioned, or not. b.6.1,2. b.8.105,106. ſee tit. Apportionment.

Where ſuit to the Court is extinct by unity of the land, or of parcel of it, for which ſuit is to be made. ſee b.6.1,2. b.8.105,106. ſee tit. Extinguiſhment.

Of avowry for ſuits to Courts, or amercements. ſee Hundreds, Leets, and ſtat. Marlb. c. 9.

Where, and how ſuit real may be to a Court Hundred, &c. ſee tit. Hundred.

Where amercement ſhall be of ſuitors, or not. ſee tit. Amercement.

What ſhall be ſufficient to make avowry for ſuit to the Court, and where ſeiſin of ſuit ſhall be ſeiſin of other ſervices, and of which. ſee tit. Avowry, and Seiſin.

By releaſe of all ſuits, what is releaſed. ſee tit. Releaſes.

Suit to a Mill.

Suit to a mill by reaſon of tenure, and of what inhabitants a man may have ſuit to the mill, becauſe of tenure, of what not. b 4.88. b.8.46.

Writ for ſuit to the mill, and Count, and where it lies. b.4.88. b 8.46.

Suit to a mill by preſcription, and where, and how to be claimed. b.4.87,88. ſee tit. Preſcription, and Extinguiſhment.

Superſedeas.

Where *Superſedeas* ſhall be granted upon *Audita querela*, and for whom. b.3.13. ſee tit. *Audita querela*.

Where neither the privy ſeal, nor great ſeal ſhall be a *Superſedeas* to the Juſtices to do right and juſtice. b.5.2. p.40. ſee tit. Statutes, and 2 E. 3. and 20 E. 3. Judgment, and office of Court.

Where *Superſedeas* ſhall be awarded for the King, an Ideot being impleaded upon an obligation, or &c. and how, and when, b.4. 126. ſee tit. Ideot. It is in nature of a prohibition. b.10.75.

The ſeveral forms of *Superſedeas*. b.4.126. b.10 75.

Surpluſage.

Where ſurpluſage in a writ abates it, or not. b.5.2.p.127. b.7.40. b. 8.20. ſee tit. Writ.

Where ſurpluſage in Indictment makes it vicious, or not. b.4.42. b.5.2.p.121.

Where ſurpluſage in a plea makes it not vicious, nor is material. b.1.42. b.4.37.

Where ſurpluſage alledged in pleading ſhall be traverſed. b.5.2.p.127.

Where ſurpluſage in verdict is not material, but void. b.3.42. b.40.46. b.5.2.p.30. b.6.47. b.9.12.34. ſee tit. Verdict.

Where ſurpluſage in grants, deeds, or, &c. is not material, &c. b.1.104. b.4.73. b.5.2.p.9.11. 112.

Where preſcription to have common append. is void, becauſe of ſurpluſage. b.4.37,38. ſee tit. Common, Preſcription, and Cuſtom, ſee tit. Act of Parliament.

Where cuſtom alledged to have a thing which is of common right, is ſurpluſage. ſee tit. Cuſtom.

Surrender.

What words make a ſurrender, what not. b.2. 66.

Where a feoffment, leaſe or grant, made by tenant for life or years, to him in reverſion or remainder, is a ſurrender, and for how much, or not. b.1.76.137,140. b.2.61. ſee tit. Expoſition.

Where a feoffment, grant, or &c. made by tenant for life, or &c. to him in reverſion or remainder, and a ſtranger, is a ſurrender, and for how much, or not. b.2.61.

Where acceptance of a new eſtate of the leſſor, or him in reverſion, is a ſurrender of the firſt intereſt, or not. b.2.17,20, 24,61. b.5.2. p.11.54. b.6.69. b.7.39. b.8.74. b.10.53.67. b.11.81.

Where ſurrender upon a condition is good. b.4.21.82. b.5.2.p.2.21.114.

Where ſurrender is void for def. of poſſeſſion, and what ſhall be ſufficient poſſeſſion, what not. b.4.53. b.6.99 b.10.58.67.

Where ſurrender is good, notwithſtanding a mean eſtate in being. b.5.2.p. 7.21.

Where ſurrender of parcel of an eſtate or term, is good, or not. b.5.2.p.11.

Where tenant for life leaſes for years, reſerving rent, and ſurrenders, the leſſor ſhall not have the rent b.1.96.

Form of pleading a ſurrender, and what agreement is requiſite to make it good. b.8.144.

Where ſurrender by tenant for life to the tenant for life, is good. b.11.81.

Where ſurrender of an eſtate for years or life, ſhall be by joyning in feoffment, leaſe, or &c. with him who has the reverſion. ſee tit. Expoſition.

Of the Kings letters Patents, and where, and how, and what is a good ſurrender of them, what not b.1.29.43. b,6.55,66. b.10.67.

Where he in reverſion ſhall hold, charged upon a grant made by tenant for life or years, after ſurrender. ſee tit. Charge, and Extinguiſhment.

Where the particular eſtate ſhall be drowned by acceſſion of a greater eſtate, or not. ſee tit. Eſtate.

Of a Copyhold, and what is good, or not. ſee tit. Copyhold.

Where rent or arrearages are loſt, and extinct by or after ſurrender, or not. ſee Arrearages.

Where cuſtom of the land of franktenure at the common law paſſes not, but by ſurrender in the Lords Court, is good. ſee tit. Cuſtom.

Suſpence.

Where franktenement of lands, or &c. cannot be in ſuſpence. b.1.130,134,137. b.3.2.10. 20. b.4.58. ſee tit. Abeyance.

Where a common perſons ſeigniory is ſuſpended by feoffment, or &c. to the King. b.1. 37. b.2.17. b.6.5. ſee tit. Grant, and Extinguiſhment.

Where rent in fee-ſimple ſhall be in ſuſpence by unity of poſſeſſion and ſeiſin of the land, &c. or not. b.2.47.68. b 3.26. b.6.39. b.7. 23. ſee tit. Extinguiſhment.

Where rent reſerved upon a leaſe for years, or &c. ſhall be ſuſpended by entring into the whole, or parcel of the land. b.3.22.65. b.4.52, 53,73. b.7.23. ſee tit. Apportionment.

Where tithes are ſuſpended during the poſſeſſion of the land is in the Parſon of the Church, or &c. b.1.111. b.2.47,48. b.11.10,14, 15. ſee tit. Tithes.

Where debt is ſuſpended by intermarriage betwixt the debtor and debtee. ſee tit. Baton and Feme, Extinguiſhment, and Releaſes.

Where debt is ſuſpended by adminiſtration as executor to the debtor, &c. or not. ſee tit. Extinguiſhment, and Executor.

Where a condition upon an eſtate in lands, ſhall be ſuſpended by matter of after fact. ſee tit. Condition.

Suſpenſion of ſuit in the ſpiritual Court by ſuing an Appeal. ſee tit. Appeals.

Where a warren ſhall not be ſuſpended by accepting a leaſe of the land, b.7.23.

Swans.

The Kings prerogative to have Swans, and which he ſhall have by it, which not. b.7.17.

Treſpaſs of cygnets taken, form of the writ, and juſtification in it, and what is good. b 7.17. ſee tit. Occupant.

The ſtat. 22 E.4.c.6. of Swans, and expoſition of it. ſee tit. Swans.

Cuſtom to have one of the cygnets of Swans airing in his grounds, where good. ſee tit. Cuſtom, and Preſcription.

Tail.

Where, and what grant of the King makes an eſtate tail; where, and what not. b.1.43,46, 49. b.3.1.b.7.33,34.

Where, and what grant of a common perſon makes an eſtate tail, and by what words; where, and what not. b.1.43,46,49.103,104, 114,140,157,175. b.3.1 b 17. b.7.41. b.8.154. b.10.51. ſee W.2.c.1.b.8. *Epiſt.* f.5. there.

Where an eſtate ſhall be in tail for certain years. b.1.175.

Where a gift to a married man, and the wife of another, and the heirs of their two bodies, is a good eſtate in tail, or not. b.1.114,120,140. b.10.50. ſee tit. Eſtates.

Where an eſtate in tail ſhall be to a woman, and her heirs begotten by the donor, or not. b.2.101,120,134,136.

Where a gift made to two husbands and their wives, and the heirs of their bodies, ſhall make ſeveral entails, and how, and when. b.10. 50. ſee tit Eſtates.

Where a gift to a man and his ſiſter, or to two brothers and their ſiſters, or to two brothers and the heirs of their two bodies, ſhall make an eſtate tail, and how, and when. b.1.84. b.3.37. ſee tit. Eſtates.

Where a gift to the husband and heirs of the body of E.B. his wife, or lately his wife engendred, ſhall be an eſtate tail, or not. b.1.120, 140.

Where a gift to a man and the wife, which he ſhall firſt eſpouſe, &c. ſhall be an eſtate tail to him, and the woman which he eſpouſes, or not, &c. b.1.101,120,130,134,136. ſee tit. Capacity.

Where a gift made to the iſſue in his mothers belly, is a good entail, or not. b.2.152. ſee tit. Capacity.

Where a man may give lands to himſelf in tail, or reſerve land or rent in tail to himſelf, or not, b.1.120,127. ſee tit. Remainder, Reverſion, and Uſes.

Where a gift to a man and his heirs, males, or females, makes an eſtate in tail, or not. b.1. 46. b.8.21,22,27.

What eſtate the donee in tail had after iſſue, before the ſtat. W.2.c.1. of gifts conditional, and what eſtate ſince. b.8.72. b.9.132. ſee tit. Formedon, and ſtat. W.2.c.1. there.

What things may be entailed within the words, or equity of the ſtat. W.2.c.1. b.1.88. 96,97. b.3.8,9. b.4.22,23. b.7.13,14.33,34,35. b.9.105. ſee tit. ſtat. W.2.c.1. there.

Where the King ſhall be donee in tail of a common perſons gift, and how, &c. b.1.27.40, 44. b.2.53. ſee tit. Statutes at the end.

Where by act of the anceſtor, or trial againſt him, the iſſue in tail is eſtopped, or not. b.3.5. ſee below.

Where lands in tail ſhall be forfeited for treaſons. ſee tit. Treaſons, and ſtat. 26 H.8.c.13. there.

Where the iſſue in tail ſhall be bound by the fine levied by his anceſtor, or by a ſtranger and non-claim of his anceſtor, or himſelf. ſee tit. Averment, and Cont. claim.

Where the iſſue in tail ſhall falſifie a recovery had againſt his anceſtor, or not. ſee tit. Falſ. recovery, and ſtat. W.2.c.1. there, and Remitter.

Where tail is by deviſe, and what words in a Teſtament make a deviſe, what not. ſee tit. Deviſe.

Where an eſtate tail created by condition, or proviſion to have continuance in perpetuity is good, or not. ſee tit. Statutes. W. 2. c. 1. there, and tit. Perpetuity.

By gift in Frank-marriage. ſee tit. Frank-marriage.

Where formedon in diſcender, was at the common Law, and lay upon a gift in tail before the ſtatute of W. 2. c. 1. ſee tit. Formedon.

Where exchange by tenant in tail is good, and binds the iſſue, or not. ſee tit. Exchange.

Of diſcontinuance of tail in poſſeſſion, reverſion, or of a rent, what is it, what not. ſee Diſcontinuance.

Where the iſſue in tail is barred by aſſets diſcended to him, and what are aſſets ſee tit. Aſſets, and ſtatute, W. 2. c. 1. there.

Where the donor may avow upon the donee, notwithſtanding diſcontinuance. ſee tit. Avowry.

Where iſſue in tail once barred ſhall be reſtored to the 1. action, by eviction, or alienation of aſſets deſcended to him, or not. ſee tit. Reſtore to the 1. action.

Where *Scire facias* lies againſt the iſſue in tail to have in value lands deſcended to him of late time. ſee tit. *Scire facias*.

Where uſurpation upon tenant in tail by preſentation to a Church, puts not the patron out of poſſeſſion. ſee tit. *Q. Impedit*.

Where, and how an Eſtate tail, and fee, may ſtand together at one time in one perſon. ſee tit. Eſtates.

How the fee may be conveyed by tenant in tail, where he is tenant in tail, the remainder in fee to himſelf. ſee tit. Remainder.

Where the baſtards dying ſeiſed of land in tail, binds the iſſue in tail, or not. ſee tit. Baſtardy.

Where grant of the reverſion by tenant in tail, or the reverſion of the tenant in tail is good, or not. ſee tit. Grand Attornment.

Where the heir in tail ſhall be in ward, and to whom, and where he ſhall be in ward, notwithſtanding diſcont. made by the anceſtor. ſee tit. Ward.

Where a gift, or ſale of trees growing upon the land, by tenant in tail binds the iſſue after his death or not. ſee tit Gift, and Wood.

Where reſceit ſhall be granted upon def. of the tenant in tail, or not. ſee tit. Reſceit.

Where attornment by tenant in tail is good. ſee tit. Attornment.

Where, and what deeds belong to the iſſue in tail, and for which he ſhall have detinue. ſee tit. Detinue, and Charters.

Where acceptance of rent by the heir in tail, reſerved upon his anceſtors leaſe makes it good, or not. ſee tit. Acceptance, and Leaſes.

Tenure by the donee, and of whom he ſhall hold, and by what ſervices, where no tenure is expreſſed. ſee tit. Tenure.

Where an eſtate tail ſhall be by the gift of lands, or, &c. without the word heirs, ſee tit. Eſtates.

Of Copy-hold. ſee tit. Copy-hold, and Statutes. W. 2. c. 1.

Where a *Que eſtate* may be pleaded of an eſtate tail, without averment of life, &c. or not. ſee tit. *Que eſtate*, and Pleadings.

Tail after poſſibility.

Not puniſhable for waſt. b. 6. 41. b. 9. 139. b. 11. 80, 81, ſee tit. Waſt.

Shall not have aid. b. 11. 80. ſee Aid.

Shall not be compelled to attorn. ſee tit. Attornment. b. 11. 80.

Writ of *Conſimili caſu*, lies not upon his alienation. b. 11. 80. ſee tit. Entry, Writ, and *Conſimili caſu*.

Writ of intruſion lies not after his death ſee tit. Intruſion.

He may joyn the miſe in a writ of right ſee tit. Right.

His aſſignee muſt attorn. b. 11. 83.

He ſhall not be named tenant for life in a writ, or pleading, for an eſtate for life ſhall not include his eſtate. b. 11. 80.

Where alienation in fee forfeits his eſtate, and he in reverſion ſhall enter for forfeiture. b. 11. 80. ſee tit. Forfeiture.

Extinct and drowned upon diſcent or acceſſion of the fee. b. 11, 80. ſee tit. Eſtates.

Where he in reverſion ſhall be received upon his default. ſee tit. Reſceit. and ſtat. W. 2. c. 3 there.

Exchange by him and tenant for life, is good ſee Exchange. b. 11. 81.

Tales.

How the *Venire facias* of the *Tales* ſhall be awarded, and how many ſhall be of them. b. 10. 104, 105. ſee tit. Enqueſt.

The inqueſt ſhall be taken of the *Tales*, where the *Venire facias*, and principal pannel upon it are quaſhed. ſee b. 10. 104, 105. ſee Enqueſt.

Where a *Tales* ſhall be, *De circumſtant.* or not. ſee tit. Jurors, and ſtat. 35 H. c. 6. there.

How the trial ſhall be of challenges to the Array, or Poles returned upon the *Tales*. ſee tit. Jurors.

Where *Venire facias* of *Tales* ſhall be directed to the Coroners. ſee tit. Coroners.

Temps.

VVhere damages ſhall be recovered in a writ of entry upon diſſeiſin, and from what time every tenant ſhall anſwer for his time. b. 10. 117. ſee tit. Damages, and ſtatutes, there Glouceſter. c. 1.

VVhere damages ſhall be recovered to the time of Judgment, and in what actions. b. 10. 117. ſee tit. Damages. b. 7. 29.

From, and for what time ſhall the plaintiff in a writ of annuity recover his arrearages. b. 7. 11. ſee tit. Arrearages.

VVhere the Plaintiff ſhall recover the iſſues, and profits of his lands, and arrearages incurred hanging the writ. b. 7. 29. b. 117. ſee tit. Arrerages.

From what time damages ſhall be recovered in a writ purchaſed by Journies accounts. b. 6. 10. ſee tit. Damages, and Journies accounts.

VVithin what time the writ by Journies accounts ought to be brought. b. 6. 11. ſee Jour. accounts.

VVhat damages ſhall be recovered in Aſſiſe of Mortdanceſt. and from what time. b. 10. 117. ſee tit. Damages, and ſtat. Glouc. c. 1.

VVhere, and from what time damages ſhall be, &c. in replevie, or detinue, for detaining a diſtreſs after amends tendred. b. 5. 2. p. 76. b. 8. 147. ſee tit. Damages, Diſtreſs, Tender, and Refuſal.

VVhere the Plaintiff in *Q. Impedit* ſhall recover damages, and from what time. b. 5. 2. p. 58, 59. b. 6. 48, 49. 51. b. 10. 116. ſee tit. *Q. Impedit*.

VVhat damages ſhall be recovered in a writ of Aiel, Beſaiel, and couſinage, and from what time. b. 11. 5. ſee tit. Aiel, ſtatutes, Glouc. c. 1. there.

VVhat damages ſhall be recovered in a writ of raviſhment of ward, and for what time. b. 9. 72, 73. ſee tit. VVard, and ſtat. VV. 2. c. 35. expoſition of the words (ſix months time) b. 6. 50. 62. ſee tit. Expoſition, ſtatutes, and VV. 2. c. 5. there.

VVhere uſes of lands ſhall be declared and directed by indentures bearing date before, though the aſſurance ſubſequent vary in time, or &c. b. 1. 99. 100. 105. b. 2. 71. 74. to 78. b. 3. 83. b. 5. 2. p. 26. b. 9. 9. to 11. and 15. ſee tit. Uſes.

VVhere bar in Formedon ſhall be for a certain time, b. 10. 38. ſee tit. Reſtored to 1. action.

VVhere a man ſhall have two ſeveral writs hanging at the ſame time, and for the ſame matter, where not. b. 5. 2. p. 47, 48. 51. ſee tit. Writ.

Where an inditement taken in the time of one King, ſhall ſtand in the time of another K. and the party be arrained upon it. b. 7. 31. ſee tit. Inditement, VVrit, and Corone.

VVhere the heir ſhall have the wardſhip fallen in the time of the Anceſt. and not the Executor, or cont. b. 2. 33. ſee tit. VVard.

Expoſition of the words (*ad præſens*,) and where the preſent time, preterperfect, and future time, ſhall be taken one for another. b. 10. 67. ſee tit. Expoſition.

VVhere a grant by him who has two eſtates in him at the time, &c. is good, and how it ſhall take effect. b. 1. 42. 45, 46. b. 2. 51, 52, 53. b. 3. 84. ſee tit. Grants, and Eſtates.

VVhere a grant, leaſe, or, &c. ſhall be avoided for a certain time, and after ſtand in force. b. 1. 85, 86. b. 6. 40. b. 8. 17. 72. b. 2. 52. b. 9. 140. b. 10. 41.

VVhere a condition reſerving a re-entry for a certain time ſhall be good, &c. b. 2. 52. b. 10. 41. ſee tit. Condition.

VVhere the heir ſhall not have *Ceſſavit* of the ceſſing in time of his anceſtor. b. 118. ſee tit. *Ceſſavit*.

VVhere Judgment ſhall be good, and ſtand, notwithſtanding the tenant or def. was dead at the time of it. b. 1. 103. 106. ſee tit. Judgment, and falſ. of recovery.

VVhere a leaſe for years, or, &c. for a certain time upon contingency is good. b. 4. 30. 82. ſee tit. Eſtates.

How a condition upon a bond, or, &c. ſhall be performed, no time being expreſſed for the performance of it, and when it ſhall be performed. b. 1. 25. b. 2, 3. 79. b. 6. 30, 31. b. 7. 15. b. 3. 91. ſee Condit.

VVhere a fit time ſhall be allowed for the performance of a condition, after notice given, and requeſt made, and what time ſhall be ſaid time fit, and reaſonable. b. 1. 22. 25. b. 2, 3. 28. 34, b. 6. 31. ſee tit. Condition.

VVithin what time appeals are to begin. b. 4. 42. b. 5. 2. p. 107. b. 7. 30. ſee Appeals, and ſtat. 3 H. 7. c. 1.

VVhere one ſhall be charged for nuſance done in the time of another, and nuſance done in the time of one ſhall be redreſſed by another, and how. b. 5. 2. p. 101. b. 9. 55. ſee tit. Nuſance.

VVhere by the Kings prerogative no negligence ſhall be imputed to him, and no time ſhall prejudice him, and where cont. b. 4. 23. 127. b. 6. 29. b. 7. 30. ſee tit. Prerogative.

VVhere feoffment of land, and livery and ſeiſin upon it is void, by preſence of others at the time of the livery, or not. b. 2. 23. 31, 32. b. 5. 2. p. 113. 124. b. 6. 69. ſee Feoffments.

VVhere a *Quod permittat* ſhall be maintainable for wrong, or nuſance done in another time, than in the time of him who brings the action, or him againſt whom the action was brought. b. 5. 2. p. 101. b. 9. 54. 5. ſee tit. Nuſance, and *Q. permittat*.

VVithin what time Reattachement muſt be ſued. b. 7. 30. ſee tit. Reattachment.

How theſe words (*Quondam, nuper, tunc, nunc, adtunc, extunc*) ſhall have relation, and the expoſition of thoſe, and other words of relation. ſee tit. Relation.

Of computation of time in caſes. ſee tit. Computation.

Of forfeiture of iſſues, and profits of lands, and from what time they ſhall be anſwered to the King. ſee tit. Iſſues of lands.

Of the time of the vacation of a Vicarage, Parſonage, Biſhoprick, or &c. ſee tit. Vacation.

Of time of limitation. ſee tit. Limitation.

Of time of freſh ſuit. ſee tit. Freſh-ſuit.

Of forfeiture of land to the King for felony, or &c. for year, day, and waſt, and where he ſhall have it, and how the year ſhall be accounted, ſee tit. Forfeiture.

Time, and age of the heir male or female to be in ward, ſee tit. VVard.

Of time to make claim, &c. ſee tit. Cont. claim.

VVhere, and from what time, lands ſhall be liable to recovery in value, ſee tit. Recovery in value.

Of things ſuſpended for a certain time, and after revived. ſee tit. Suſpenſion, and Revivor.

VVhere may be avoided becauſe beyond Sea at the time, &c. ſee tit. Utlary.

Where upon *Audita querela* the Plaintiff ſhall be reſtored to iſſues, and profits taken in the mean time, &c. ſee tit. *Audita querela*, iſſues and profits of lands.

Of reſtitution by Act of Parliament and how, and to what time ſuch reſtitution ſhall have relation. ſee tit. Parliament and Repeal.

Of reſtitution to him who reverſes a Judgment by writ of Error, and from what time, &c. ſee tit. Error.

Of the time for inrolment of bargain and ſales for lands. ſee tit. Inrolment and Computation.

Of the time to hold Leets, or the Sheriffs Turn, and within what time they muſt be held. ſee tit. Leets, and Turn of the Sheriff.

Of reputation, and what time is ſufficient to make it. ſee tit. Reputation.

To pray Clergy, and when it muſt be prayed, when not. ſee tit. Clergy.

Where, and what ſtatutes by equity extend to another time, &c. ſee tit. Stat.

Where tenure ſhall be for a certain time by one manner of ſervice, another time by another, ſee tit. Reſervation.

Where infranchiſement of a villein or nief is for a certain time by intermarriage, and where for ever. ſee tit. Enfranchiſement.

Capacity of a man not in being at the time of the Eſtate in uſe or, &c. limited, &c. and when he ſhall take an Eſtate. ſee tit. Capacity.

Where an Eſtate in Fee-ſimple may be limited upon another Eſtate in fee, and ſo two fees be at a time or not. ſee tit. Eſtate.

Where an eſtoppel is but for a certain time, ſee tit. Eſtoppel.

Where a recovery ſhall be falſified becauſe he againſt whom it was had, was not Tenant of the franktenant at the time of recovery. ſee tit. Falſ. of recovery.

Where, and what bars in *Quid juris clamat* to ouſt the Plaintiff of atturnment for a certain time. ſee tit. *Quid juris clamat*. and Atturnment.

How execution ſhall be upon a ſtat. Merchant or, &c. where the lands are in execution upon a late ſtat. or recovery of late time.

Where judgment ſhall be of parcel at one time, and of the reſidue at another, or double judgments in one action. ſee tit. Judgment.

Where the Lord ſhall have the wardſhip of the heir of his Tenant, notwithſtanding the Lordſhip was ſuſpended at the time of the death of his Tenant, or not ſee tit. Ward.

Temporalties.

Who ſhall be ſaid founder of an Abbey, or Priory, and the Temporalties in time of vacation. ſee tit. Abbot and Prior.

Where the King ſhall have the Temporalties of a Biſhop, during the vacation of the Biſhoprick, his Prerogative becauſe of it. ſee tit. Prerogative and Preſentment to a Church.

Where a Biſhops Temporalties ſhall be ſeiſed into the Kings hands becauſe of Contempt, &c. ſee tit. Contempt.

Tenants in Common. ſee tit. Joint-tenants.

Tenant at will, and ſufferance.

VVhere a man ſhall be Tenant at will, and what is a Leaſe at will, where and what not. b. 2. 24. 55. 59. b. 6. 26. 35. b. 17. 21.

Where a man ſhall be Tenant at ſufferance. b 4.24.

Where a Tenant at will, or a Copiholder ſhall have Aid. b.4.21.

Where Tenant at will or Copiholder ſhall have Aid. b 4.21,22. ſee tit. Aid.

VVhat remedy, or action the leſſor ſhall have againſt the leſſee at will, if he cuts wood or does waſt in houſes. b. 5. 2. p 13.14. ſee Action of the Caſe.

Where a leaſe at will ſhall determine by what Act, what not. b. 5. 2. p. 10. 13, 116. b. 10. 59. b. 8. 75.

Where leſſee at will, or ſufferance ſhall have the Embleaments ſee tit. Embleament.

Where the leſſor ſhall have action of treſpaſs general againſt his leſſee at will, ſee tit. Treſpaſs.

VVhere ſeiſin of ſervices, or rent, &c. from the Tenant at will, or by his hands, ſhall be a ſufficient ſeiſin to the leſſor, or &c. ſee tit. Seiſin.

VVhere he that has but an eſtate at will, may grant for life, or years, and good. ſee tit. Exting. Eſtates, Offices and Copihold.

Where preſentation to a Church by Tenant at will ſerves for the leſſor, and veſts the poſſeſſion in him. ſee tit. *Q. impedit*.

VVhere action of the Caſe lies upon menace of the Tenants at will, upon which they depart, &c. ſee tit. Action of the Caſe.

Bar in debt againſt the leſſee at will, and what is good. ſee tit. Debt.

For fealty. ſee tit. Homage and Fealty.

By Copy of Court Roll, ſee tit. Copihold.

VVhere a Tenant at will is a diſſeiſor, and by what act. ſee tit. Diſſeiſin.

VVhere a leaſe at will is not ſufficient for a fee upon contingency to grow upon it. ſee tit. Condition.

Tender, and Refuſal.

VVhere notice to the Lord to make him change his avowry, is not ſufficient without tender of the arerages. ſee b. 3. 23, 24. 30. 35. 66. b. 5. 2. p. 57, 58. b. 6. 57, 58. ſee tit. Avowry.

Of arerages in *Ceſſavit*, how, when, and to whom they ſhall be tendred, &c b. 8, 118. ſee tit. Arerages, and ſtat. Glouc. c. 4. there.

VVhere tender and refuſal of marriage is material in a writ of value of marriage, or forfeiture of marriage. b. 4. 82. b. 5. 2. p. 58. 127. b. 8. 70. 75. b. 7. 3. 119. ſee Action upon ſtat. and ſtat. Merr. c. 7.

VVhere a condition is performed by Tenant and refuſal, &c. and what ſhall be good and ſufficient tender, what not. b. 5. 2. p. 114. b. 9. 79. ſee tit. Condition.

VVherere tender of amends bars in replevy, and what is good and ſufficient tender. b. 5. 2. p. 76. b. 8. 147. ſee tit. Damages and Replevy.

VVhere the meſne by tender, and putting his beaſts in the pound, ſhall diſcharge himſelf againſt the Plaintiff in a writ of meſne. b. 9. 21, 22. 110, 111. ſee tit. Meſne.

VVhere the King ſhall have Prerogative that he need not demand rent reſerved upon a condition of re-entry for not paying, but the leſſor muſt tender it. b. 4. 73. b. 7. 2. p. 56. ſee Prerog. and Demand.

VVhere refuſal, and denying to pay rent is diſſeiſin. b. 7. 29. ſee tit. Diſſeiſin.

VVhere iſſue ſhall be joyned upon tender, and where upon refuſal, and the one, or other be traverſed at election. b. 2. 45. b. 5. 2. p. 57, 58. 114. 127. & 25. b. 6. 70. b. 7. 28.

VVhere a condition or covenant ſhall be performed by agreement, notwithſtanding refuſal before or not. b. 2. 69. ſee tit. Cond. and Agree.

VVhere upon pleading tender and refuſal the party ought to plead at all times ready, or not. *Tout s temps priſt.*

Of Homage, and where the Lord ſhall not have it, after tender and refuſal without a new requeſt. ſee tit. Homage.

VVhere damages are recoverable for deteining beaſts, after tender of amends, &c. ſee tit. Dam.

VVhere a Biſhop ſhall be a diſturber upon refuſal of a Clerk preſented to him by the Patron, or not. ſee tit. *Q. impedit*, and *Q. non admiſit*.

To whom tender or payment of moneys ſhall be made, upon condition of redemption of lands to pay moneys to him, his Heirs, Executors, or aſſigns, ſee tit. Condition.

VVhere tender and payment of moneys ſhall be always directed, and accounted, according to the intent of him that pays them, not of him that receives them.

VVhere if one party offers to demur, the other cannot refuſe to joyn. ſee tit. Demurrer.

VVhere refuſal by an Executor to prove the Teſtament before the Ordinary is not material, but he may Adminiſter, or bring an action after. ſee tit. Executors.

Where it is in the Courts diſcretion to admit an Officer, upon the Kings grant of an Office, or refuſe him. ſee tit. Office, and Officers.

Where tender of amends for damage feaſant, made to a Baily, is not ſufficient. ſee tit. Baily.

Where tender of arearages to the Baily is not ſufficient notice to the Lord to make him change his Avowry. ſee tit. Baily.

Tenure.

VVhat ſhall be ſaid tenure of the King in Chief, what not. b. 2. 81. b. 6. 6, 7. b. 7. 8. 12. b. 9. 123. 131. ſee tit. Stat. Magna Charta c. 31. 1 E. 3. c. 13. there, and 2 E. 6.

VVhat ſhall be ſaid tenure of the King in Chief by Knights ſervice, and what by ſocage. b. 6. 6, 7. b. 9. 123, 130, 131. ſee tit. Stat. and there, 2 E. 6. c. 8. the books there.

VVhat is tenure by grand ſerjeanty. b. 2. 8. ſee tit. Grand ſerjeanty. b. 6. 74.

VVhere the King cannot hold of any other, nor of himſelf. b. 1, 47. b. 2. 15 b 6. 5, 6.

VVhere the King may, and where he ought to give land to be held of another than himſelf. b 6. 6. ſee tit. Stat. Prerogative, c. 2.

Expoſition of the words in the Kings grant (to be held of us, &c. and of other the Lords of that fee by the ſervices therefore due, and accuſtomed.) b. 6. 5. and 6. ſee tit. Expoſition.

VVhere the King gives land to be held without reſerving any thing, how it ſhall be conſtrued, and how the Tenant ſhall hold. b. 6. 6. b. 9. 123.

Upon feoffment in fee before the ſtatute of *weſt.* the 2. c. 1. or upon a gift in tail after the ſtatute, how, and by what ſervices the Tenant ſhall hold. b. 2. 92. b. 6. 6. b. 6. 3. 8.

Expoſition of the words (rendring certain rent, for all ſervices, &c. and doing to the chief Lords the ſervices due, and of right accuſtomed, or to be held of the chief Lords) how the tenure ſhall be. b. 6. 6. twice. b. 9. 123. 131.

VVhere a man ſhall be Tenant of land, and hold it of no one, b 9. 123. above, and Extinguiſhment. b. 2. 93.

VVhere iſſue ſhall be taken upon the tenure, and that be traverſable, or not; and in what actions, what not. b. 4. 11. b. 9. 20. 33. 35. b. 10. 119. ſee tit. Avowry, Reſcous, Traverſe, and Traverſable, Ceſſavit, and Eſcheat.

By Eſcuage. ſee tit. Eſcuage.

VVhere a man ſhall hold by Knights ſervice, and yet not pay Eſcuage. ſee tit. Eſcuage.

By Homage, and Fealty. ſee tit, Homage, and Fealty.

VVhere tenures of other Lords ſhall be extinguiſhed by the Kings ſeiſin, and where their tenures, ſhall be after revived or not. ſee tit. Extinguiſhment, Diſtreſs, and Reviver.

VVhere a common perſon cannot make another to hold of a ſtranger, nor of any but himſelf. ſee tit. Reſervations.

VVhere tenure ſhall be by Caſtle-guard, &c. ſee tit. Eſcuage.

In Frank-almoigne. ſee tit. Frank-almoigne.

In Frank-marriage. ſee tit. Frank-marriage.

VVhere lands in two Counties may be held by one Joynt ſervice. ſee tit. Aſſiſe, and Rent.

VVhere tenure ſhall be according to the ſpecial reſervation of the party, and not according to the general intendment of the law. ſee tit. Reſervation.

Where tenure ſhall be in the diſjunctive, upon ſuch tenure, or for one rent, or other. ſee tit. Reſervation.

Where Tenant for term of life ſhall hold by Knights ſervice. ſee tit. Eſcuage.

Where tenure ſhall be for a certain time by one kind of ſervice, and for another time by another. ſee tit. Reſervation.

Of Tenant by dower, of whom ſhe holds, and by what ſervices. ſee tit. Dower.

Of

Of tenant by courteſie, and of whom he holds. ſee tit. Courteſie.

By Caſtle-guard, and what manner of tenure it is. b. 4.86,87. ſee tit Eſcuage.

Where the tenures are ſeveral notwithſtanding a joynt demiſe. b.4.27.b.6.6.

For ſuit to a mill. b.4.88. ſee tit. ſuit.

By covering the Lords Hall. b.4.86.b.6.2. ſee tit. Reſervations and below.

Where one and the ſame land ſhall be held by ſeveral tenures. b.3.34. ſee tit. Reſervations.

Where tenure ſhall be for a parcel. ſee tit. Statutes W. 3. there, and Apportionment, and Extinguiſhment.

Of Gavilkind, and what tenure it is, and where by Knights ſervice, where by ſoccage. ſee tit. Gavilkind.

Form of pleading tenure by Knights ſervice, or in Socage. ſee tit. Pleadings.

Where proteſtation ſhall be taken of the tenure. ſee tit. Proteſtation.

Where the Lord by his confirmation may abridge the tenure, not create a new tenure. ſee tit. Confirmation.

What ſervices, works, or things may be reſerved to make a tenure, what not. b. 486. b.6. 2.

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Where a man ſhall not traverſe an office, nor avoid it by traverſe, but ſhall be put to his petition.b,4.56.59. ſee tit.Petition.

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Where upon traverſe tendred, *Scire facias* ought to be awarded againſt the Pat. Committee, or Grantee, or not; but entry may be upon him. ſee tit. *Scire facias*. Repeal, and Entry congeable.

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Where the def. in action of the caſe ſhall take traverſe to the point of the writ,where he ſhall plead in bar or not;and what is a good traverſe, and iſſue in this action, what not.b.4.18. ſee tit. Action of the caſe.

Where in action of account, the def. upon plea in bar ought to take traverſe to the ſuppoſal of the writ, and what kind of traverſe is good, or not.b.11.91. ſee Account.

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Where of his own wrong without such cause shall be good replication in trespass,without answering the special matter. see tit. Issues joyned.

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Of summons upon a writ of Disceit, and where it shall be by the summoners and veyours, and where by the country. see tit. Disceit.

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Of age of any person, and where it shall be by inspection, where by the country, where by proofs. see tit. Age, Issue joyned, and Procés.

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Who shall be said founder of an Abby, or &c. and have the temporalties during the vacation.b.3.74. see tit. Abbot, and Prior.

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Where the Ordinaries and Patrons grant during the vacation, is good,and binds the Parson after.b.1.147. b.5.2.p.81. b.8.145. see tit. Annuity, and Parson.

Where a release to the Patron in the vacation, extinguishes an annuity or rent issuing out of the Church of the Parson. b.1.112. b.5. 2.p.71.81. see tit.Parson.

Of vacation of the Church by deprivation of the Incumbent, and the consequence of it. see tit. Deprivation, and Notice.

Of vacation of the Church by resignation, and the consequence of it. see tit. Deprivation, and Notice.

Of vacation of a Church by death, cession, or &c. and the consequence of it. see tit. Notice, and *Q.Impedit*.

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Where a Church is void in deed, and where in law, and by what acts, by what not. see tit. *Q.Impedit*, and *Ipso facto*.

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Where the Kings grant is void, because the value is not expressed in the Letters patents. see tit. Grant of the King, and stat. 1 H.4.c.6. there.

Where the fine to the King shall be to the value of the land, or goods of the delinquent. b.8.41. see tit.Fine to the King.

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Of lands upon execution by *Elegit*, how it ſhall be done, and how the Sheriff ſhall demean himſelf upon it. ſee tit. Execution.

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Of lands upon the writ of *Extendi fac*, upon ſtatute merchant or ſtaple, and how the Sheriff ſhall demean himſelf upon it. ſee tit. Extent.

Of land upon apportionment of Tenure, for a particle, and how the valuation ſhall be made. ſee tit. Statutes, and 18 E.1. of *Quia emptores terrarum* there, and Apportionment.

Of marriage, and where the Lord ſhall recover but the ſingle value of marriage. ſee tit. VVard.

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VVhat value ſhall be paid to the King upon livery ſued by the heir, or for the Kings primer ſeiſin. ſee tit. Livery.

Challenge to Jurors for inſufficiency, and of what value in lands he ſhall be who is ſworn upon an inqueſt. ſee tit. Challenge.

VVhere the Kings grant is void by miſtake of the value in the recital of it, or &c. ſee tit. Grant of the King.

Of the value of aſſets to charge the heir, or barr him in an Action. ſee tit. Aſſets.

Of relief, and what ſum ſhall be paid for land held by Knight ſervice, and what for ſocage tenure. ſee tit. Relief.

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Where variance betwixt the writ, and record upon which it is founded, abates the writ, or not; and what writs. b.3.6.10.b.7.4.b.8.157.b. 10.133. ſee tit. Amendment.

Where variance betwixt the plaint in aſſiſe, and the deed, and betwixt the writ of aſſiſe and the plaint abates the writ, or not. b.2.37.b.5.2. p.40.b.6.36.b.10.126,127. ſee tit. Demand, Annuity, and Plaint.

Where variance betwixt the writ and the Count, abates the writ or not. b.1.2.47.b.5.2. p. 35.37.61.107. b.6.75.b.8.33.48,49.b.10.37. 136.b.11. 80. ſee Writ, general, and Count ſpecial.

Where a man may vary from the cauſe declared upon the diſtreſs taken, and avow in Court for another cauſe. b.3.26. ſee tit. Avowry.

Where failing ſhall be of a record for variance, and for what, ſee tit: Failing of a Record.

Where amendment ſhall be of variance, &c. ſee tit. Amendment.

Where a writ ſhall be by journies account, the 1. writ abating for variance. ſee tit. Journies Accounts.

Where uſes of land ſhall be declared, and directed by indenture bearing date before, though the aſſurance ſubſequent vary in time, quantity of land, or in the perſons. ſee tit. Uſes.

Where in *Q. juris clamat*, the tenant ſhall be compelled to attourn, notwithſtanding variance of the eſtate, or &c. ſee tit: *Quid juris clamat*.

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Where view ſhall be granted in a writ of right of advowſon, or not. b.11. 22.

What thing ſhall be put in view, and how. b. 7.3.23,24.

Where Jurors, or Recogniſors ſhall have view in Aſſiſe, and what ſhall be put in view, what not b. 7. 3. 23, 24. ſee tit. Charge, and Aſſiſe.

Where Jurors ſhall have view in waſt. b. 5.2. p. 119.

Veſt, and Deveſt.

Where a hatte, or eſtate in land lawfully veſted, ſhall after be deveſted, and defeated, or not. b.1.95.9.102.137.55.b.3.61,62.b.6.74.b.8. 142, 143.b.9. 129.b.10.55,56. ſee tit. Chattels and entry congeable.

Where an eſtate, and poſſeſſion of land, or &c. ſhall be veſted, or deveſted in the leſſor, feoffor, or &c. without entry, or actual ſeiſure, or ſee tit. Condition, Entry congeable, and leaſes.

VVhere an eſtate veſts preſently in a man by recovery without ſeiſin delivered by the Sheriff. ſee tit. Recovery.

Where a remainder limited to right heirs, veſts in the party himſelf, and not in his heirs, as purchaſers. ſee tit. Remainder.

Where entry, or recovery by one ſhall avail another, and veſt the eſtate in him. ſee tit. Entry congeable, and Recovery in value.

Where a remainder ſhall veſt in a Baſtard by the name of Son. ſee tit. Baſtard, and Reputation.

Where after re-entry, or recovery by tenant for life, or &c. the reverſion ſhall veſt in the feoffee of him in reverſion. ſee tit. Remainder.

VVhere the Kings reverſion or remainder ſhall be diſcontinued, or not. ſee tit. Diſcontinuance, and ſtatutes, 34 H.c.20. there.

Where the remainder of a common perſon ſhall be deveſted, and deſtroyed for ever by the act of the particular tenant, or of a ſtranger. ſee tit. Remainder.

Venire facias. ſee tit. **Enqueſt.**

Verdict.

In action of the caſe, and what is good, what not; and where verdict at large ſhall and may be given in it, or not. b.2.25.b.4.92.b.5,2.p.24. 89.b.9.112.b.10.56,57. ſee tit. Action of the caſe.

In a writ of annuity, what is good, and where verdict at large, may be given in it, or not. b. 11.56.

In appeals, or upon inditement of felony, murder, or &c. and what are good, and where verdict at large may be given in them, or not. b. 4. 40.43.46.b.9.12.63.67.81.83.112.119. ſee tit. Corone.

Where in Aſſiſe of Novel diſſeiſin, and what ſhall be good, and where verdict at large may be given in it, where not. b.8.65.b.9.12,13, 14.

In attaint, and what is good, and where it may be at large in it, and where not. b.9.12. ſee tit. Attaint.

In *Ceſſavit*, and what is good, what not. b.8. 66. ſee tit. *Ceſſavit*.

In *Decies tantum*, and what is good, and what not. b.10.116. ſee tit. *Decies tantum*.

In debt, and what is good, and where verdict at large may be given in it, where not. b.2. 4,5.b.3.68,69.b.5.2.p.30.119.b.6.46,47.b.8.94. b.9.12.74.

In *Ejectione firmæ*, what ſhall be good, and where verdict at large may be given in it. b.1. 4.149.153.b.2.59,60.91.b.3. 17.19.37. b.4.52. 60.64.78.96.b.6.14.17.67.

In writ of ward; and what ſhall be good, what not: b.9.71.74. ſee tit. Ward.

In Formedon what is good, and where verdict at large may be given in it. b.9.13,14.

In information of intruſion, and what is good, and where verdict at large may be given in it. b.1.17,18.b.3.7.9.

In *Q. impedit*, what is good, and of what points the Jurors ought to inquire in it: b.5.2.p. 58,59.b.9.48.49.51. ſee tit. *Q. impedit*.

Upon information, or in action upon the ſtatute of uſury, and what is good, what not; and b.8.65.

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In reſcous what is good, what not: b.9.12. ſee tit. Reſcous.

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In the writ of value of marriage, and what is good, what not. b.10. 119. ſee tit. Action upon ſtat. and ſtatutes Mert 6. and 7. there.

In treſpaſs, and what is good, and where to be at large, and where the def. ſhall have benefit of the ſpecial matter found without pleading it where he claims nothing in his own right. b.5.2. p.85.106.b.2.50.b.6.29,32.40.b.3.25.b.9.11. to 14.

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Upon what iſſues joyned verdict at large may be given, and where upon iſſue joyned by *abſque hoc*, or ſpecial iſſue, or not. b. 1.16.18.22.64. 173.b.2.4,5.8,9.28.56.b.3.28.37.43.b.5.2.p.11. 30.78.84.89.b.6.46.67.77.b.7.26.b.8.94.b.9.12, 13,14.83,84.99.b.4.7.8.24.b.10.122,123 b.11. 9.91.

Where the verdict which finds more than is put in the iſſue, ſhall be good and the ſurpluſage rejected, or not. b.3.42.b.4.43.46.b.5.2.p.30.b. 6,47.b.9.12.34.b.11.11.13.80. ſee tit. Surpluſage.

Where verdict ſhall be good by intendment, or not. b.3.9.b.4.65. b.5.5.7.2.p.35.96. 97.108. 122.b.9.51.68,69.74.b.10.57. ſee tit. Inditement.

Where the verdict which finds the point of the writ, and ſpecial matter contrary to it, which of them ſhall be taken, and judgment given accordingly. b.4.42. ſee tit. Judgment.

Where judgment ſhall be given contrary to the verdict, becauſe it appears to be falſe by matter of record, or that they have miſtaken the law. b.2.75.b.4.42.53.b.5.5.b.6.6.b.7.1.b,8.155. b.9.12; 13.23.25.30.69.b.10.92.b.11.10. ſee tit. Enqueſt.

VVhere verdict ought to be of more than what is put in the iſſue, otherwiſe not good. b. 10.119.

VVhere verdict contrary to what is admitted, confeſſed, and affirmed by the parties in pleading is good, or not. b.2.4.b.4.53.

VVhere verdict not finding all that is put in iſſue is not good, and how it ſhall be ſupplied. b. 10.119.b.11.56 b.65,66.

VVhere verdict incertain ſhall be good, or not. b.9.67,68,69.74:

VVhere verdict is good without evidence given. b.4.53.

Where a verdict finding matter in deed, or of record, not given in evidence, is good. b.4. 52.

VVhere the verdict ought to ſever the damages the plaintiff is to recover. ſee tit. Apportionment.

Where the verdict ought to ſever the damages againſt the def. ſee tit. Appor.

Where the verdict ought to ſever the damages and coſts. ſee tit. Damages.

Where, verdict finding a matter of record is good. ſee tit: Enqueſt.

Where verdict finding a matter in a foreign County is good or not. ſee tit. Enqueſt:

Where verdict finding a matter ſpiritual as a divorce, &c. ſhall be good. ſee tit. Enqueſt, and Divorce.

VVhere verdict finding matter of eſtoppel is good. ſee tit. Enq.

VVhere verdict finding matter before time of memory is good, or not. ſee tit. Trial & Enq.

Where verdict which finds matter done beyond Sea is good. ſee tit. Enqueſt, and Overſea.

Where the verdict is good notwithſtanding ſome of the Jurors have eat, and drunk: ſee tit. Enqueſt.

Of triors upon challenge, and how, ſee tit. Jurors.

VVhat witneſſes, and where, &c. ſee tit; Wit.

Where the writ ſhall abate by the verdict. ſee tit. VVrit.

Where the verdict ſhall make.

Where a verdict ſhall be void, and a new *Venire facias* awarded or not, but ſhall be otherwiſe ſupplied. ſee tit. Enqueſt, and *Niſi prius*, and above.

Ville, or Town and City.

VVhere a Town ſhall be amerced upon eſcape of a Felon, or for other cauſes. b.7.7.b.8.39. ſee tit. Amercement.

Where and from what place the venue ſhall be upon iſſue no ſuch Town. b.16.14. ſee tit. Viſne.

Where the venew ſhall be from two Towns, or Hundreds. b.5.2.p.36.b.14.b.1.162. ſee tit. Viſne.

Where the venew ſhall be of a Pariſh not of a Town. b.1.162. b.6.14.b.11.25.ſee tit.Venew.

Where a mannor may be out of a Town,and a Precipe brought of it without naming the Town. b.8.119. ſee tit. Manor.

Of disfranchiſement of a Citizen of a Town, City or borough, ſee tit. Disfranchiſement.

Where and how rent, land, or &c. may be parcel of a town-caſtle or honour, ſee tit. Appendant.

What Towns and Boroughs, afford Burgeſſes to the Parliament, what not. b. 9. Epiſt. b,10.123,124.

Villein and Villeinage.

Who ſhall plead Villenage in diſability of the perſon of the plaintiff, who not. b.6.80.

Trial of villenage in pleas real, or perſonal, and from what County or place the venew ſhall come. b,5.2.p,40.ſee tit. Viſne.

Where the Lord may ſeiſe his villein and in what place, where, and in what not. b.5.2.107. ſee tit. London.

How, and in what manner the Lord, or another by his Commandement may chaſtiſe his villein, &c. b.9.76.

Whether a villein be a chattel,or inheritance. b.5.2. p.87.

Where a Lord ſhall have advantage of a warranty made to his villein, and how.b.1.136.b.3.62.ſee tit. Aſſignee.

Where a reverſion granted to the villein veſts in the Lord without attournment. b.6.68.ſee tit. Attournment.

Where a villein ſhall be delivered in execution upon Judgment, or &c. ſee b. 5.2.p. 58. ſee tit. *Quare Impedit, & Quare non admiſit.*

Where, and what thing of a villein the Lord ſhall have by his claim, and what not without ſeiſure, or entry. b. 2.54.b.6.68. b.9.73. ſee tit. Cont.Claim.

Of infranchiſement of a villein what is it,what not. ſee tit. Enfranchiſement.

Viſne.

Where, and from what County, or place the venew ſhall come when iſſue is taken upon a deed, or the circumſtances of it. b.4.71.b.6.15. 48.b.10.92.

Where and from what County or place the venew ſhall come, upon iſſue joyned (no ſuch Town, Hamlet, or place) b.6.14.

Where the venew ſhall be of the body of the County.b.6.14.

Where the venew ſhall be of two Towns, or Hundred: b.1.162.b. 5.2.p,36 b.6.14.

Where the venew ſhall be of a Pariſh. b.6.14. b.11.25. ſee tit.Pariſh, and Pariſhioners.

Where the venew ſhall be of a Manor.b 6.14. b.1.162. b.9.47.b.11.17,18. ſee tit. Manor and Town.

From what place the venew ſhall be upon iſſue taken, upon miſnaming of a perſon, Town, or &c. b.6.4.65.

Where the venew ſhall be of the County where the action was brought.b.6.47.65.

Where the place ſhall be alledged after iſſue joyned, to have the venue thence,and is not material to the iſſue. b.6.47.65.b.7.26,27.b.5 2.p. 60.ſee tit. Trial.

Where the venew ſhall be of a Caſtle.b.5.2. p.18,19.

From what place, and County the venew ſhall be upon iſſue frank, or villein. ſee tit. Trial Aſſnet, and Villenage.

From what place,and County the venew ſhall be upon trial in caſes of Felony or Treaſon. ſee tit. Corone.

From what County or place the venew ſhall be, where iſſue is taken whether he be heir, or ſon and heir, or &c. ſee tit. Heir.

Voucher.

Where voucher lies in Aſſiſe of Novel diſſeiſin, and of whom were, and of whom not. b.8. 50.

Where voucher lies in *Scire facias*, or not.b. 11.62. ſee tit. Counterplea of Voucher.

VVhere voucher lies in *Quod ei deforceat*, and what ſhall be a good counterplea of voucher, where the tenant or demandant vouches. b. 11. 62.

VVhere voucher ſhall be in a writ of Entry, and out of the lien, and by whom not. b.1.15. ſee tit. Count of Voucher, and Statutes. W.1.c. 39. there.

VVhere a man ſhall vouch of another thing not in demand, as rent iſſuing out of land. b.2. 47,48.b.10.97.ſee tit. Count. of Voucher.

VVhere a man ſhall vouch as heir becauſe of poſſeſſion though he is not heir. b.8.101.ſee tit. Baſtard.

VVhere a voucher ſhall be of a Baſtard. b.8. 101. ſee tit. Baſtard,

VVhere two, or none ſhall be vouched at election upon a joynt warranty,or not. b. 3.14.b.8. 52.ſee tit. Recovery in Value.

VVhere if the tenant fail of his lien againſt the vouchee, or of part, he fails of all,&c. or not.b.8. 51,52.

VVhere one ſhall vouch alone upon a warranty made to him, and another, or not. b.5.2. p,7.819.b.6.12.b.8.51. ſee tit. Counterplea of of Warranty, and Warranty, Partition, Aid, from one to another.

Where voucher ſhall be of one not in being, as a Biſhop which ſhall be, or infant in the Mothers belly. b.7,8.b.6.10.32.ſee tit. Infant.

Where the tenant ſhall vouch himſelf or not. b.1.98.b.6.69.

Where a man ſhall be in courſe in tail to vouch, or brought in courſe to vouch, by aid prayed. b.8.75.b.11.81.

Where the vouchee may enter into warranty freely, and where he may counterplead the lien, though he enters freely, b.1.8.57.81.b.5.2.p. 41.

VVhere the vouchee may enter into the warranty, ſpecially, ſaving to him his action, rent, or entry, where, &c. b.2.73,74.ſee tit. Proteſtation.

Of the heir in ward of divers Lords,and how, and in what manner execution ſhall be made upon recovery in value. b.2.25.b.3.13. ſee tit. Recovery in Value.

VVhere a man ſhall vouch as heir yet is in by purchaſe.b.98.b.6.69 ſee tit. Heir.

VVhere voucher is becauſe of a reverſion or not. ſee tit. Counterplea of warranty.

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VVhere he that is in of another eſtate, &c. or comes in, in the Poſt, ſhall not vouch, and contr. ſee tit. Aſſignee.

VVhere, and how the Lord ſhall vouch,or rebut, by warranty made to his villein. ſee tit. Villenage.

VVhere a man ſhall vouch without ſhewing a deed, or not. ſee tit. Monſtrance of deeds.

VVhere tenant by reſceit ſhall vouch, and what ſhall be a good counterplea to the voucher. ſee tit. Count. of Voucher.

VVhere a man vouching as coſin and heir, ought to ſhow his coſinage. ſee tit. Coſinage.

Count againſt the vouchee, how and where. ſee tit.Count.

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Uſe, and Uſes.

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What are good conſiderations to raiſe an uſe and change it,and transfer it out of one perſon to another, where and what not. b.1.15.24. 26.41.55.78.83.154,155.161.175,176. b 2.11. 15.75,76. b.3.81.83.b.4.3,4. b.5.2. p.8.25.b.7. 13.40.b.8.94.

VVhere and who cannot be ſeiſed to the uſe of another, but only to the uſe of themſelves. b. 1.15. 122.126,127.133.136,137.13.b,2.78.

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Where the feoffees may alter, and change the uſe in preiudice of him to whoſe uſe, and by what acts, and means, and what not. b. 1.101. 116.120. to 127.130.139,140,141.

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VVhere the ancient uſes ſhall not be revived without re-entry of the feoffees,and where their regreſs is neceſſary to revive them, and where they may enter to revive the firſt uſes or not. b. 1.101.112.126.128,129,130.134.b.7.9.

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Where lands in use, or use of lands shall be put in execution. see tit. Extent, Recognisance, and stat. 19 H, 7. c. 15. there.

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Where Infants, women Covert, or &c. shall be bound, if they claim not within a year and day. see tit. Enfants, Claim, and Baron and Feme, above.

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Where the Courts at West. shall have jurisdiction, and hold plea of land, or for trespass there, or not. b. 7. 21.

Exposition of statutes made concerning *Wales*. b. 4. 33. b. 5. 2. p. 85, 86. b. 7. 21.

Waiving of things.

Where the King by his Prerogative may waive the issue or demurrer, or take a new issue or demurrer, or not. b. 5. 2. p. 104. see tit. Prerogative of the King.

Where a devise or legacy may be waived, and what shall be said waiving, what not. b. 3. 26. b. 4. h. 9. 140. see tit. Devise.

Where waiving a thing below binds as strongly, as disclaim in a Court of record, or not. b. 3. 26. b. 4. 34.

Where judgment may be waived, and a new original taken, or not. see tit. Extinguishment, and Trespas.

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Where a man may waive a gift of goods to himself made in his absence, &c. see tit. Gift.

Where discent of land may be waived, or not. see tit. Demand, and Disclaim.

Where a man may plead a plea in bar, and conclude his plea with (so) &c. and the precedent matter shall not be waived by it, or contr. see tit. Bar, Bastardy, Debt, and Right.

Where a woman may waive her dower or joynture, and be anew endowed. see tit. Dower twice.

Where the benefit of a general, or particular pardon, may be waived, or not. see tit. Charter.

Where the benefit of an action given by statute may be waived, and an action at the common law before taken. see tit. Election.

Where proces given by statute may be waived, and proces at the common law before taken. see tit. Proces.

Where judgment given by statute may be waived, and judgment at the common law prayed, and contr. or not. see tit. Election.

Where upon plea to the writ, and conclusion to the action, or cont. the premises of the plea are waived. see tit. Pleadings.

Where matter of estoppel shall be waived, if it be not relyed upon; but issue taken upon another point. see tit. Estoppel.

Where issue in tail may waive the assets discending to him, and take his writ of Formedon, or not. see tit. Acceptance, and Exchange.

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Where a Franchise by prescription shall be lost, and extinguish by accept. of the Kings Charter of grant of late time, and the advantage of prescript. by such grant waived. see tit Extinguishment.

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Count in the writ of intrusion, &c. the marriage not satisfied. b. 10. 119. see Action upon statute.

Count in forfeiture of marriage, or *Valore maritagii*. b. 6. 70. 75. b. 10. 110. see tit. Action upon stat.

VVhere the Lord shall have a writ of ward for the body of the ward, where he may seise him before he has the land in possession, or not. b. 9. 129.

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VVhere the Lord ſhall not have the wardſhip of the ſon and heir, or daughter and heir, in the life of the father or mother. b.3.38, 39.

Where the Lord ſhall have the wardſhip of the heir, and lands of his Tenant, notwithſtanding the feoffment, or &c. of his tenant by colluſion, in ſuch caſe; where not.b.1.122. b.2.94. b.3.66.81.b.4.83.b.4.40. b.9.73.129. b.8.163. ſee tit. Colluſion, and ſtatutes Marlb. c. 6. there.

Where an infant and his lands ſhall be in ward, to which he has right or title to enter, and to which he comes, by his own act or purchaſe, as by recovery or entry, or not; b.1.98, 99.106.156.b.2.80.b.3.35.b.4.125 b.6.3.

Where the King ſhall have wardſhip by reaſon of ſuch lands, to which an infant has right or title to enter, and ſhall have ſuch lands in ward, or not. b.2.60.b.7.7. ſee tit. King, and Prerogative.

Where the King ſhall have the wardſhip, and cuſtody of Idcots, and of their lands, and goods, and of what, what not. b.4.126,127.56.b.9 170. ſee tit. Ideots, and Prerogative.

Where the King ſhall have the wardſhip of lands held of other Lords, as well as of thoſe held of him. b. 9. 16. 133. ſee tit. Prerogative.

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Where the body ſhall not be in ward, but the lands ſhall, and where none of them ſhall be in ward, notwithſtanding the tenant holds by Knights ſervice. b.3.92,93. b.9.125.129.131. 133. ſee tit. Statutes, 32H.8.c.1.34 H.c.5.

Where the heir, and his land ſhall be in ward, notwithſtanding he is Knighted during his nonage or not.b.6.73.b.8.173.

Where the Executors ſhall have the wardſhip fallen in the time of the Lord, Teſtator, or not; but the heir. b. 2. 93. ſee tit. Chattels.

The ages of the heir, male, or female, to be in ward, and which are their marriageable years, and where the heir female ſhall be in ward after 14 years of age, till ſixteen or not. b.6.22.71, 72.74.b.7.43.b.9.72. ſee tit.Statutes Merton. c. 6, 7. and VVeſt.1.c.23. there.

Where the ward ſhall be twice married by the Lord, and where he ſhall be married by the Lord, where he was married by the Father before, or by the raviſher, or not.b.5.2.p.102.b.6. 22.b.9.132.

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Where the Lord ſhall recover but ſingle damages againſt the raviſher, or in a writ of raviſhment, and where the double value. b.9.72,73. ſee tit. Statutes, VVeſt. 2.c.35. and Judgments, and damages.

Barr in writ of ward by releaſe, where, where not. b.2.68.b.5.2.p.97. ſee tit. Releaſe.

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VVhat Judgment ſhall be given in raviſhment of ward.9.72.74 ſee tit.Fine to the King, Impriſonment, and ſtat. VVeſt. c.35.

VVhat iſſue ſhall be taken in writs of ward, and good, what not. b.2.92. b.5,2,p.58.127.b.6.70 b.10.119.ſee tit. Iſſues joyned, and Tend.Refuſal, and action upon ſtat.

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Where, a writ of ward ſhall be general, and the Count ſpecial.ſee tit. VVrit.

Where the writ of ward ſhall abate by death of the heir, or his coming to full age, or by death of the parties, Plaintiff or def. or not. b. 5.2.p.18.b.9.72.ſee tit. Reſummons.

Where a grant by the gardian in ſocage, or becauſe of nurture, is good, or not. b. 3.38,39. ſee tit. Grant.

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Where it is in the Election of the Lord, to have the wardſhip of the heir of his tenant, or his ſervices. ſee tit. Election.

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Of land and body by the ſtatutes, 32.and 34 H. 8. and where, how, and when the King, or other Lord, ſhall have the wardſhip by theſe ſtatutes. ſee tit. Statutes 32 H. 8. c. 1. there.

Where tender of marriage, is material by the gardian, and what is good, and ſufficient tender, what not. ſee tit. Action upon ſtatute, and Tender.

VVhere the Lord ſhall have the value of the marriage againſt the heir, and where the double value, and where, and when, he ſhall retain the land for it. ſee tit. Action, and ſtat. Merton. c 6,7 there.

VVhat proces ſhall be awarded in a writ of ward, upon the return of the Sheriff, or &c. ſee tit. Proces.

VVhere, and in what actions, an infant ſhall anſwer, or ſue actions by his gardian. ſee tit. Atturny.

VVhere writ of dower lies againſt a Gardian, and Dower aſſigned him is good. ſee tit. Dower.

VVhat damages ſhall be recovered in a writ of raviſhment of ward, or &c. and where coſts ſhall be recovered alſo. ſee tit. Damages.

VVhere the Lord ſhall have the wardſhip of the heir of his tenant, who holds by Caſtleguard, though not by Eſcuage. ſee tit. Eſcuage.

VVhere the Lord ſhall have the wardſhip of the heir of his tenant who holds by Grand ſerjeanty. ſee Grand ſerjeanty.

VVhere husband and wife ſhall be joyntly ſued in a writ of raviſhment of ward, or &c. ſee tit. Joyning in action.

VVhere a man may have an action of treſpaſs, at the common law, or a writ of Raviſhment of ward at his election.ſee tit. Election.

VVhere ancient demean is a plea in a writ of ward.ſee tit. Ancient demean,

VVhere wardſhip ſhall be in caſe of priority, and what ſhall be ſaid priority, and where it holds not againſt the King. b.5.2.p.56. ſee tit. Stat.28E.1. of wards, &c.

Warranty.

By the words *Dedi* and *conceſſi*, and who are bound to warranty by them, and vouch, &c. by them, who not. b.1.2.b.4.81.b.5.2.p17,18.ſee tit. Counterplea of warranty.

Warranty in law, and which are warranties in law, and who ſhall vouch, &c. or be vouched, &c by them, who not.b.1.1,2.96.b.3.b.14. 81.121,122.b.5.2.p.17,18.

By homage anceſtrel, and where it is deſtroyed, and loſt. b.3.14.b.6.12,13.b.7.12.b.8.75.ſee Counterplea of warranty, and Implyed.

By exchange, and who ſhall vouch by it, who not. b.1.96 b.4.121. ſee tit. Exchange and Aſſignee, and Counterplea of warranty.

Becauſe of the reverſion, and who ſhall be bound to warrant by it b.4.81. ſee tit. Counterplea of warranty.

General againſt all men, and which is it, and by what words. b.1.1,2 b.4.81.

What is ſineal, and where it bars not in Formedon without aſſets. b.4.4.b.8.52.b.10.37, 38.

What is collateral, and where ſuch warranty bars in Formedon without aſſets, or not.b.166, 67.76.140.b.3.59.62.b.5.2.p.47.79,80. b.8.51, 52,53,54.b.9,11.26.126.b.10.96,97 ſee tit.Stat. Glouc. c. 3&11H.7.c.29.

What ſhall be ſaid warranty, which begins by diſſeiſin, what not. b. 3.78.b.5.2.p.79, 80.b. 8.37.

VVhere warranty by an infant or man of unſound memory, binds them not, but is void in law. b.4.125.

VVhere warranty ſhall be void againſt one perſon, and ſtand in force againſt another, and where it ſhall be defeated and avoided in part, and ſtand in another part or not. b.8.51,52. ſee tit. Voucher.

VVhere warranty ſhall not inlarge nor amend an eſtate, but ceaſe when the eſtate determines; &c. b.1.85.b.10.96,97.

VVhere warranty in law is extinguiſhed, and of no effect, by warranty in deed, or not. b.4.82.

VVhere warranty of land, extends to Rent, Common, or &c. to vouch or rebutt by ſuch warranty.b.2.47.b.10 97.

Where warranty collateral binds the right for ever, ſo that a man may make title to land by it. b.10.97.b.8.53.

Where warranty to two joyntly, ſhall be taken, and conſtrued at ſeveral. b.5.2. p.8.19. ſee tit. Voucher, and Expoſition.

VVhere he that is in of another eſtate then, &c. ſhall not have avail of warranty. b.1.122. 136. b.3.62,63. ſee tit. Counterplea of warranty.

VVhere he that comes in the poſt, by act of law, ſhall take avail of warranty by voucher, or rebutter, or not. b.1.2.122.125.128.135,136. b.3.62,63 b.5.2.p.18. ſee tit. Aſſignee.

VVhere warranty is extinguiſhed, and loſt by act of law.b,1.98.b.6.69.

Where warranty is extinguiſhed by act of the parties, as feoffment, releaſe or partition.b. 1. 112. 128. b.6.12.b.8. 75. 154. ſee Releaſe.

VVhere warranty is extinguiſhed or ſuſpended by act of a ſtranger as diſſeiſin. b. 1. 128.

Where warranty diſcending upon a woman covert ſhall bind her for ever, or not. b.1. 67. 140.ſee tit. Baron and Feme.

Where an infant is bound by warranty collateral diſcended upon him during his nonage.b.1. 67.140.ſee tit. Enfant.

Where, and in what actions perſonals or mixt, warranty collateral of the anceſt. of the plaint ſhall not bar to rebutt the plaint. b.10. 97.

How a warranty ſhall run upon a fine levied by two or more, or to two, or more.ſee tit.Fines of lands.

Of a chattel real, and where the leſſee ſhall have a writ of Covenant, againſt his leſſor, upon being outed upon ſuch a warranty. ſee tit. Covenant.

VVhere heirs are not bound to warranty without expreſs mention made of them in the clauſe of warranty. ſee tit. Heir.

VVhere upon warranty by two or more, the ſurvivor only ſhall be charged, and render in value or not. ſee tit. Recovery in value.

Where a man or woman ſhall not be rebutted by warranty, unleſs he or ſhe be heir at the common law. ſee Rebutter and Voucher.

Where, and who ſhall rebut by warranty, as aſſignee, or as aſſignee of aſſignee, or as heir of the aſſignee, where, and who not. ſee tit. Aſſignee.

Where the Aſſignee ſhall vouch or rebut upon warranty, without ſhewing the deed, or not. ſee tit. Aſſignee, and Monſt. of deeds.

Where he that rebuts by warranty, may convey by *que eſtate*, without ſhewing how, or not. ſee *Que eſtate*.

Where a condition annexed to warranty, that he ſhall not vouch, or not rebut by warranty, is good, or not. ſee tit. Condition repugnant there.

Where warranty made to many, may be darrained by one alone, or not. ſee tit. Counterplea of warranty.

Where warranty is extinguiſhed and loſt, by retaking as high an eſtate of the feoffee as he gave. ſee tit. Voucher.

Where a coparcenor ſhall have aid of his companion, to darrain the warranty, or not. ſee tit. Aid.

Where warranty collateral ſhall be avoided by entry, or continual claim. ſee tit. Continual claim.

Where the Lord ſhall have benefit of the warranty, made to his villein by voucher or rebutter. ſee tit. villenage.

Where a man enters into warranty freely without proces. ſee tit. Voucher.

Where a man may vouch one or two by a joynt warranty made at his election, or not. ſee tit. Voucher.

Where the voucher may enter in the warranty, ſpecially ſaving to himſelf his action, rent, right, or &c. ſee tit. Voucher.

Of warranty with aſſets, and all the matter concerning aſſets by diſcent. ſee tit. Aſſets.

Of recovery in value upon warranty, and the whole matter concerning it. ſee tit. Recovery in value.

Of voucher by warranty in deed, or in law, and all the matter concerning voucher. ſee tit. Voucher, Counterplea of voucher, and Counterplea of warranty.

Warranty of Attourny.

Form of entry of warrant of Attourny in *Præcipe quod reddat*, of a meſſuage, mill, wood, or &c. b.4.87.

Warranty of Charters.

Form of the writ, and what matter is ſufficient to abate it, what not. b.8.48.159.

In what County the writ of warranty of Charters ſhall be brought. b.7.3. ſee tit. Writ.

Where the writ of warranty of Charter lies, and ſhall be maintained by an aſſignee. b.5.2.p.16,17. ſee tit. Aſſignee.

Where it lies for the heir of the aſſignee, or aſſignee of the aſſignee. b.5.2.p.16,17. ſee tit. Aſſignee.

Where the writ of warranty of Charters lies before a man be impleaded, and the judgment upon it. b. 8. 134. ſee tit. Recovery in value.

Where he who is in of another eſtate, than that to which the warranty was made, ſhall have, and maintain a writ of warranty of Charters, or not. ſee tit. Warranty, Aſſignee, Counterplea of warranty.

Where the writ of warranty of Charters ſhall be general, and the Count ſpecial. ſee tit. Writ.

Where the writ of warranty of Charters lies, and is maintainable becauſe of homage anceſtrel. ſee tit. Counterplea of warranty.

Where warranty of Charters lies, and ſhall be maintained becauſe of homage anceſtrel. ſee tit. Counterplea of Warranty, and Exchange.

Where, and when lands ſhall be bound to render in value, by uſing the writ of warranty of Charters. ſee above, and tit. Recovery in value.

Where upon a writ of warranty of Charters a fine may be levied. ſee tit. Fines.

Waſte.

Form of the writ of waſte, and where in the *tenet*, where in the *tenuit*. b.4.6.8. b.5.2. p.12. 45.75.115. b.6.44.

Where one writ of waſte lies, and ſhall be maintained upon ſeveral leaſes. b.8.87. ſee tit. Writ twice.

Where a tenant in common, or joyntenant, may have an action of waſte againſt his companion, &c. b.11.49.82. ſee tit. ſtat. W.2.c.22.

Where, and upon what leaſe the writ ſhall be general, and count ſpecial. ſee tit. Writ, and Leaſes twice.

Where, and againſt whom in a writ of waſte the ſtatute ought to be rehearſed, &c. againſt whom not. ſee tit. Action upon the ſtat. and below.

Againſt the Pernor of profits. ſee tit. ſtat. 11 H.6.c.5. and the expoſition of it there.

Where the husband and wife ſhall joyn in action of waſte, and be ſued joyntly. b. 5. 2. p. 57. and 115. ſee tit. Baron and Feme, and joyning in action. b.9.72.

Count in the writ of waſte, and what is good, what not. b 5.2.p.12.77. b.6.68. ſee tit. Writ general, and Count ſpecial.

Againſt tenant by courteſie, or dower, and the bar in it. b.3.23.b.4.62.b.5.2.p.13. b.6.37. 41.43.b.9.142.b.11.83. ſee below.

Bar in waſte againſt the tenant for years, or life, &c. where good for the mean eſtate for life, or years, or not. b.2.92.b.5.2.p.76.b.6.37. b.10.44.47.

Bar in waſte by accord. b.4.1.b.6.43,44. ſee tit. Accord. b.9.78.

Where the wife ſhall be puniſhed for waſte done by the husband during the coverture, or not. b.8.44. ſee tit. Baron and Feme. b.9.72. and tit. Joyning in action.

Bar in waſte, becauſe it became ruinous by the act of God, and where, or not. b. 4. 63. b.10.139,140. b.11.80.84.

Bar in waſte by ſale, or grant of the reverſion to another. b.4.63.

Bar in waſte by releaſe, or confirmation, or &c. or not. b.9.140,141.

Bar in waſte by the clauſe in the deed (without impeachment of waſte,) and where, and how to be conſtrued. b.2.23. b.4.63. b.9.9. b.11.83. ſee tit. Expoſition.

Bar in waſte by the grantee of the reverſion for default of attournment. ſee tit. Attournment. b. 2. 35.68. b.4.70. b.5.2. p.113. b.6.37.68.b.8.94.

Bar in waſte for reparation made before the action brought. b.5.2.p.119.

What ſhall be ſaid waſte in houſes, walls, or other things about the houſes, what not. b.4. 63,64. b. 5.2.p.119. b.2.92 b.6.43.

Where, and what act or thing ſhall be ſaid waſte in lands, where, and what not. b. 4.67 68.70.b.5.2.p.12.

Where, and what act or thing done ſhall be ſaid waſte in trees, or woods; where, and what not. b.2.92. b.4.63.69. b.11.45.48.82. Juſtifiable for amending, repairing, or building anew, and where, or not. b.11.82.

Where Action of waſte lies not againſt tenant by Elegit, ſtatute Merchant, or Staple. b.6.37.

Where waſte lies againſt Executors. b.5. 2. p.12.

Where it lies not againſt tenant in tail, after poſſibility of iſſue extinct. b.6.41. b.9.139. b. 11.80,81. ſee Tail after poſſibility.

Where waſte lies againſt an occupant. b.6.37. b.10.98. ſee tit. Occupant.

Where tenant by copyhold may commit waſte, and ſhall not be puniſhed for it. b.4.25. 27. twice. b. 5.2.p. 13. b.8. 36. ſee tit. Copyhold.

Tenant at will waſts in houſes, woods, &c. what remedy for the leſſor. b.5.2. p.13. and tit. Action upon the caſe, and tenant at will.

Where it lies not by tenant in tail againſt his leſſee for his own life, or his grantee of his whole eſtate. b.2.52.b.3.84. ſee tit. Abeyance.

Where it lies by the feoffee of the leſſor, after reentry of the leſſee. b.2.68. b.5.2.p.113. ſee tit. Attournment.

Where action of waſte lies againſt tenant in dower, or courteſie, after they have granted their eſtate over, and for whom, for whom not. b.3.23.b.9.142.

Where waſte once diſpuniſhable, ſhall after become puniſhable by accidents, and by what. b.2.92.b.5.2.p.76.b.8 76. b.11.83. ſee tit. Confirmation.

How the Sheriff ſhall demean himſelf upon a writ to enquire of waſte. b.4.65.b.8.152. ſee tit. Sheriff.

Where an infant ſhall be charged and puniſhed for waſte, or eſtrepement. ſee tit. Enfant. b.8.44.

What return of the Sheriff is good in a writ of waſte, what not. b.8.152. ſee tit. Return.

What iſſue is good in a writ of waſte. b.3.28. b.5.2.p.119.

What is a good evidence in a writ of waſte upon iſſue joyned, what not. b.5.2.p.119. ſee tit. Evidence.

Replication in waſte, what is good, what not. b.5.2.b.77.

Verdict in waſte, what is good, what not. b. 5. 2.p.11.

Judgment in waſte, what ſhall be ſaid the place waſted, and where more ſhall be recovered than the place waſted. b.11.50.

At the common law, and the judgment, againſt whom it lies, againſt whom not. b.4.62. b.8.87.b.10.116. b.11.49,50.81,82. ſee above twice.

Where coſts of ſuit ſhall not be recovered in a writ of waſte. ſee tit. Damages.

Where Jurors in a writ of waſte ſhall have the view, and how. ſee tit. View.

Where eſtrepement lies upon a writ of waſte ſued, and when. ſee tit. Eſtrepement.

Where a condition annext to an eſtate, &c. that the leſſee, or &c. ſhall not waſte, is good; where, and to what eſtate not. ſee tit. Condition.

Where ancient demean is a good plea in a writ of waſte. ſee tit. Ancient demean.

Water.

Where action of the caſe lies for not repairing of banks, or &c. by cauſe of which, the land of the plaintiff is ſurrounded with water. b.10.139,140. ſee tit. Action of the caſe.

Where action of the caſe or nuſance lies, for diverting or ſtopping water to his mills, or &c. b. 4. 86. ſee tit. Action of the caſe, and Nuſance.

Where aſſiſe lies of a piſcary, and the form of the plaint. b.8.48. ſee tit. Demand.

Where aſſiſe lies of a paſſage over the water by ferry. b.8.46. ſee tit. Aſſiſe.

Form of the writ of treſpaſs and count, for fiſhing in his ſeveral piſcary. b.5.2.p.35. ſee tit. Treſpaſs.

Way.

Where aſſiſe lies of a way, or not. b.8.46, 47.

Where action upon the caſe lies for ſtopping, traverſing, or &c. of a way. b.5.2.p.73.

Witneſſes.

Where witneſſes ſhall be joyned to an inqueſt, and the conſequence of it. b.9.32.

Where trial ſhall be by inqueſt with witneſſes. b.9.32.

Where trial in caſes ſhall be by proofs and witneſſes ſufficient, or not. b.4.74. b 5.2.p.108. b.6.20. b.11.39. ſee tit. Condition.

Perjury in witneſſes, and how to be puniſhed. ſee tit. Perjury.

Where a man ſhall have averment without, to make proof by witneſſes of another uſe, than that contained within the deed, or not. Averment.

VVhere uſes may be averred, and proved by witneſſes as well upon recoveries or fines, as aſſurances below. ſee tit. Aſſurances.

VVhere the intent of the deviſor may be averred and proved by witneſſes, by matter out of the teſtament, or not. ſee tit. Deviſe.

VVhere demurrer ſhall be upon evidence by witneſſes. ſee tit. Demurrer.

Woods, trees, timber.

Where a gift or ſale of trees growing by tenant in tail, ſhall bind the iſſue, and the vendee may take the trees, and where, and when not. b. 11. 50.

Where a gift or ſale of trees, or &c. by the leſſor, during the term of leſſee for years, or &c. ſhall be good, or not. b. 4. 62, 63. b. 11. 48.

In whom ſhall the property of the trees be during a leaſe for years, or &c. in the leſſor or leſſee. b. 4. 62, 63. b. 5. 2. p. 76. b. 11. 48. 51. 81. ſee tit. Property.

Exception of trees, wood, or underwood, by leſſor, upon a leaſe for years, or &c. what ſhall the exception leave to the leſſee, what to the leſſor. b. 4. 62, 63. b. 5. 2. p. 25. 11, 12. b. 8. 63, 64. b. 11. 48, 49, 50. ſee tit. Exception, and Reſervation.

In whom ſhall the property of the trees be during the term, upon a leaſe made without impeachment of waſte. ſee tit. Waſte, and Expoſition.

What ſhall be waſte in trees by leſſee for years, and what bores the leſſee ſhall have as incidents to his leaſe. ſee tit. Waſte.

Which, or leſſor or leſſee, ſhall have the windfalls, &c. during the term. ſee tit. Leaſes.

How a condition or covenant upon a leaſe, &c. to leave houſes or woods in as good plight as he received them, ſhall be performed or broken. ſee tit. Conditions.

Grant of ſo many loads of wood to be taken by aſſignment of the grantor, how to be conſtrued. b. 5. 2. p. 25.

Where, and of what trees tithes ſhall be paid, and of what not. ſee tit. Attachment upon Prohibition, and Tithes.

What remedy for the leſſor againſt the leſſee at will, who cuts the trees, and waſtes the woods. ſee Tenant at will, and Action upon the caſe.

Concerning the preſervation and conſervation of woods, copſes, and ſprings. ſee 22 E. 4. c. 7. 35 H. 8. c. 17. tit. Statutes, and the Expoſition of theſe ſtatutes there.

How a condition, or grant, to have 20 loads of wood out of a wood, ſhall be performed. ſee tit. Conditions.

Where a demand in *Præcipe quod reddat*, or plaintiff in aſſiſe, ſhall be of a wood. ſee tit. Demand.

How, and in what manner men reſiding within the Kings foreſts, may uſe and occupy their lands; how, and in what manner not. ſee tit. Foreſts.

Where a grant, gift, deviſe, or &c. by him to whoſe uſe, &c. by ſtat. 1 R. 3. of trees, ſhall bee good, or not. ſee tit. Uſes, and Statutes, the ſtatute there.

Where trees ſhall be accounted chattels, or not. ſee tit. Chattels.

Where cuſtom of copyhold land ſhall be good, and extend to woods, &c. ſee tit. Copyhold.

Wreck.

Where, and what goods ſhall be ſaid wreck, what not. b. 5. 2. p. 106, 107. ſee tit. ſtat. W. 1. c. 4. there.

Where preſcription to have wreck of the ſea ſhall be good, and wreck claimed by preſcription. b. 5. 2. p. 106, 109. ſee tit. Preſcription.

Claim by grant of the King. b. 5. 2. p. 106.

Where the King ſhall have it by his prerogative, and whales and ſturgeons. ſee tit. Statutes, and their prerogative, c. 11. and the books there.

Where, and in what time the owner ought to claim, and whoſe nonclaim ſhall not hurt them, whoſe ſhall. ſee tit. Cont. claim, Enfant, Baron and Feme, and Lacheſſe.

How the year and day for the owner to make his claim upon wreck, ſhall be accounted. ſee tit. Computation.

Writ to the Biſhop.

Where the writ to the Biſhop ſhall be awarded for the defendant upon the plaintiffs writ abating, or not. b. 7. 27.

Where the writ to the Biſhop ſhall be awarded for the defendant upon nonſuit of the plaintiff, or not.

Where the writ to the Biſhop ſhall be awarded, where the Church is full of the collation of the Ordinary, or &c. and that as well after the ſix months as before. b. 6. 29 49, 50. ſee tit. Preſentment to a Church, and Encumbent.

Where the writ to the Biſhop againſt the plaintiffs or defendants, ſhall be awarded, and though it be awarded, execution ceaſe until iſſue joyned by the other be tried, or not. b. 6. 49. b. 7. 25. b. 10. 54. ſee tit. Judgment.

Where upon the writ to the Biſhop, the incumbent ſhall be removed, or not. b. 6. 29, 30. 49, 50, 51, 52. ſee tit. Encumbent.

Where, and upon what plea of the Ordinary or incumbent, the writ to the Biſhop ſhall be awarded, or not. b. 6. 49. b. 7. 25. b. 10. 54.

Where the writ to the Biſhop ſhall be awarded to the Biſhop of the dioceſe, &c. or not; but to the Metropolitan, or Vicar general of the Biſhop, or warden of the Spiritualties, the ſeat being vacant, or not. b. 6. 49. 58.

Where the writ or proces awarded to the Biſhop be returnable, and are to be returned by him, and what ſhall be good return. b. 6. 52.

Where the writ to the Biſhop ſhall be awarded upon iſſue never accoupled in lawful matrimony, and what certificate to the Biſhop upon this ſhall be good, what not. ſee tit. Certificate of the Biſhop.

Where to be awarded to the Biſhop upon baſtardy to be tried, or not. ſee tit. Baſtardy.

Upon refuſal of a clerk preſented, and to whom, &c. b. 5. 9. 11.

Where to be awarded upon trial of iſſue joyned upon admiſſion and inſtitution, or not. ſee Trial.

Where to be awarded upon iſſue joyned upon inſtalling, or not. ſee tit. Trial.

Where to be awarded upon iſſue full, or not full, or not. ſee tit. Trial.

Where to be awarded to try the iſſue upon profeſſion or deprivation. ſee tit. Deprivation, and Trial.

Where to be awarded to try the iſſue able, or not able. ſee tit. Trial.

Where to be awarded to certifie excommunication, and what certificate of the Biſhop of excommunication ſhall be good and allowable, what not. ſee tit. Excommunication.

Where the writ to the Biſhop ſhall not be awarded till colluſion be enquired in *Quare Impedit.* ſee Execution, Judgment, and Colluſion.

Where the writ to the Biſhop ſhall not be awarded for the defendant without title made. ſee tit. Title.

Writ.

Whence called a Brief. b. 3. 44. b. 5. 2. p. 127. b. 10. Epiſtle.

Where the King or Queens writ ſhall abate for fault of form, falſe Latin, or matter, or not. b. 7. 30, 31. b. 8. 26. 156. ſee tit. Amendment.

Where a writ ſhall be with force and arms, or againſt the peace, without with force and arms. b. 4. 11. b. 9. 11. 50. 76.

What name ſhall be accounted a name of dignity, and where a man or woman ſhall be named in a writ by ſuch name, or not. b. 4. 118. b. 6. 53, 54. b. 7. 15. 34. b. 8. 16, 17. b. 9. 117. ſee tit. Name.

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Writ of *Scire facias*, and what matter is ſufficient to abate it, what not. ſee tit. *Scire facias*.

Of Mortd'anceſt. and the form of it, and what matter ſhall be ſufficient to abate it, what not ſee tit. Mortd'anceſt.

Another Catalogue of ſuch Books of the Common Law, and Authours of them, as are recited in the Preface to the tenth Book of the Reports of Sir *ED. COKE* Knight, &c.

Firſt the Regiſter of the writs Original of the Common Law, which is the moſt ancient, and the beginning of it before the memory of men, and much before the Conqueſt of this Country, and containing much matter in few words. ſee *Procem.* b. 3.

The mirrour of Juſtices, moſt of which was writ before the Conqueſt, but learned Mr. *Horn* added many things to it in the time of *E.* 1.

Glanvil wrote in the time of *H.*2. ſee Preface, b.8 & 10.

The treatiſe called the old Tenures, writ about the ſame time of *H.* 2.

Bracton writ about the end of the reign of *H.*2.

John Briton, another *Juſtinian*, compoſed and publiſhed his learned Work the 5th year of *E.*1. This *John* was Biſhop of *Hereford*.

The Book called *Fleta* was compoſed by a man experienced in our Law. Whence called *Fleta*, ſee *Epiſt.* to the 10. b. the Authour lived in the time of the Kings, *E.*1. & *E.*2.

The Book intitled *Novel Tales*, or narrations was publiſhed about the beginning of the reign of *E.*3.

The old *Natura Brevium* after the new *Tales* was publiſhed in the reign of the ſame King, *E.*3.

Sir *John Fortteſcue* Knight, and Chancellor of *England*, made the commendable Book of the praiſes of the Laws of *England* in the time of *H.*6.

The abridgment of *Statham* a learned and ſage man in the common law, was firſt publiſhed in the reign of King *H.*6.

The abridgment of the Book of Aſſiſes publiſhed about the ſame time of *H.*6. the Authour unknown.

Littletons Tenures compoſed by *Thomas Littleton*, of the Inner Temple, in the time of the ſaid King *H.*6.

The Abridgment of Mr *Anthony Fitz-Herbet*, publiſhed when he was Serjeant at law, the 11 year of *H.*8.

He publiſhed alſo that excellent Book called *Natura Brevium*, when he was one of the Judges of the Common Law, and dignified with the title of Knight, the 26 year of the ſaid King *H.*8.

The Doctor, and Student had for Authour of it a diſcreet man called *S. Germin*, the year 23 of *H.*8.

A Treatiſe of the power of the Clergy, and the laws of the Realm publiſhed before the 26 year of the ſame King.

The little Treatiſe of the manner of holding Court Baron, and Leet, &c. and Hundred, &c. Return of Writs, Charter of Fee, &c. and Ordinances for the Fees in the Exchequer, were all publiſhed in the end of the reign of King *H.*8.

The Book called The diverſity of Courts, was compiled after the year 21 of *H.*8.

Stamford: This Book is divided into two parts, one of the Pleas of the Crown, the other of the Kings Prerogative, but the Second Part was firſt publiſhed by Sir *William Stamford* Knight, one of the Juſtices of the Court of Common-Pleas, ſometimes of *Graies-Inn*.

Alſo *Perkins* upon the title of the Common Laws learnedly compoſed by *J. Perkins* utter Barriſter of the Inner Temple in the time of K. *Ed.*6.

The Abridgment of the Statutes, the Table to *Fitz-Herbets* Abridgment and the Book of Entries, were collected by *William Raſtall* a reverend Judge of the Common-Pleas in the time of Queen *Mary*.

The Judge *Raſtal* was the Author of the Book called the Terms of Law, or Expoſition of Words.

FINIS.